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COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

APPEAL FROM:

Trial Court: District Court, Denver County
Trial Judge: Hon. Brian R. Whitney
Trial Court Case No.: 17CV33699

Plaintiff-Appellant: AMIR MASSIHZADEH,

vs.

Defendant-Appellees: LAURA SOLANO, in her official capacity as Colorado Lottery Director, and; COLORADO STATE LOTTERY DIVISION, an agency of the State of Colorado.

▲ COURT USE ONLY ▲

Case Number: 2018CA578

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APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28.1(g).

☒ It contains 7,406 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

☒ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/Thomas M. Rogers III
Thomas M. Rogers III, Atty. Reg. #28809

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Plaintiff-Appellant Amir Massihzadeh ("Mr. Massihzadeh"), through undersigned counsel, submits his Opening Brief and states:

STATEMENT OF ISSUES PRESENTED

1. Under Colorado law, Defendant Colorado State Lottery Division (the "Lottery" or "State") must distribute the LOTTO jackpot prize to those who hold a ticket with a matching combination of the winning numbers drawn at random for the drawing at issue. Mr. Massihzadeh holds the only valid ticket with the matching combination of the winning numbers; the other two tickets with matching combinations for the same drawing were void *ab initio* or were voided by the State. Did the District Court err in dismissing Mr. Massihzadeh's claim for breach of contract for State's failure to distribute to him the full jackpot prize?

2. C.R.S. § 24-35-212(3) bars claims by third parties against the State after it has paid the prize due on a winning ticket. The statute does not apply to claims by the prize winners, especially where, as here, the winner has not been paid his prize. Did the District Court err in ruling that C.R.S. § 24-35-212(3) bars Mr. Massihzadeh's claim against the State, effectively holding that the statute immunizes the State against breach of contract claims?

3. Did the District Court err in finding that Mr. Massihzadeh waived his claims by accepting one-third of the prize due to him on his winning ticket where that finding is unsupported by the factual allegations in the Complaint?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This case presents an issue of first impression in Colorado: what happens when a lottery jackpot is split among three tickets, two of which were procured by fraud? Mr. Massihzadeh respectfully submits that, upon the invalidation of the two fraudulent tickets, the sole legitimate winner must be paid the entire jackpot prize. The District Court disagreed.

In November 2005, Mr. Massihzadeh purchased a LOTTO ticket for a chance to win the jackpot. Like thousands of Coloradans who purchase lottery tickets every day, Mr. Massihzadeh entered into a contract with the State: in the extraordinary circumstance that his ticket matched all of the numbers randomly selected in the drawing, he would win the jackpot. If, by chance, other tickets were purchased with the same matching combination, the jackpot prize would be split among them.

On November 23, 2005, however, something unusual happened. Out of the three tickets that contained the matching combination of all six numbers, including

Mr. Massihzadeh's, two were not procured by chance. The numbers on those two tickets were specifically chosen by individuals who knew that those numbers were likely winners, because of a fraudulent scheme perpetrated by a lottery insider with access to the lottery's drawing software. This fraudulent scheme narrowed the set of potential winning numbers and allowed the criminals to forecast a range of numbers that might be winners.

These criminals knew what no one else did: what the potential winning combination of numbers would be. They were not playing a game of chance like all the honest players. For the honest players, like Mr. Massihzadeh, the drawing was still a fair and random game of chance because they had the same opportunity to win when competing against the other honest players.

There is no dispute that, had those two tickets not been procured by the criminals, Mr. Massihzadeh would receive the full jackpot prize (the "Jackpot") as the sole winner of the November 23, 2005 drawing. There is also no dispute that Mr. Massihzadeh was a legitimate winner of that drawing. Further, the State agrees that the other two tickets should not have been paid. Indeed, the State rescinded those tickets and sought and obtained a restitution agreement in the exact amount of the winnings paid on those tickets.

Yet, the State has taken the position that Mr. Massihzadeh is not entitled to the Jackpot. Other than relying on a statute that does not apply to these facts, the State has articulated no legal authority for its position, forcing Mr. Massihzadeh to sue for breach of contract. The State moved to dismiss Mr. Massihzadeh's Complaint under C.R.C.P. 12(b)(5). The District Court granted the State's motion and dismissed the case.

Mr. Massihzadeh respectfully submits the District Court erred in granting the State's motion to dismiss. First, the District Court erroneously held the State's rescission of the two fraudulent tickets had no effect on Mr. Massihzadeh's contract with the State to be paid the Jackpot absent other winners. Second, the District Court's interpretation of the statute, C.R.S. § 24-35-212(3), was wrong as a matter of law. Third, the District Court failed to accept all factual allegations in Mr. Massihzadeh's Complaint as true, and instead made findings of fact inappropriate on a Rule 12(b)(5) motion to dismiss.

II. Statement of Relevant Facts

A. The November 23, 2005 Colorado LOTTO Drawing

In November 2005, Mr. Massihzadeh purchased a computer-generated "quick pick" ticket for the November 23, 2005 lottery drawing for an approximately $4.8 million LOTTO Jackpot (the "Drawing"). (R. CF. p. 11, ¶¶ 54,

60). Under Lottery regulations, the Lottery Director certified the results of the Drawing. (R. CF. p. 11, ¶ 57). Shortly thereafter, it was revealed that three tickets contained all six digits of the winning number for the Jackpot. (R. CF. p. 11, ¶ 58). Mr. Massihzadeh's ticket was one of those three tickets (the "Winning Ticket"). (R. CF. p. 11, ¶ 61).

The two remaining tickets were purchased by Tommy Tipton, of Flatonia, Texas, and by an unknown individual (together, the "Target Tickets"). (R. CF. pp. 10-12, ¶¶ 50, 52-53, 65, 69). Unlike Mr. Massihzadeh's Winning Ticket, the Target Tickets were "manual play" tickets, meaning the numbers on the Target Tickets had been selected by the purchasers. (R. CF. p. 12, ¶¶ 66, 69). In contrast, Mr. Massihzadeh's ticket was a "quick pick" meaning the numbers were chosen at random by the Lottery terminal. (R. CF. pp. 8, ¶ 23-25; R. CF pp. 11, ¶ 60).

Mr. Massihzadeh redeemed the Winning Ticket on or about November 28, 2005 at the Lottery's Denver office, and received a lump-sum amount, which was $568,990 after tax withholdings, a third of the Jackpot. (R. CF. p. 11, ¶ 63). Tommy Tipton did not redeem the first Target Ticket himself. (R. CF. p. 12, ¶ 67). Instead, he gave it to his friend, Alexander Hicks, who then redeemed it with the Lottery, also choosing to receive a lump-sum amount, which was $568,990 after tax withholdings. (R. CF. p. 12, ¶¶ 67-68). Shortly thereafter, the second Target

Ticket was redeemed by Cuestion de Suerte, LLC, a newly-formed limited liability company based in Las Vegas, Nevada, also for a lump-sum amount of $568,990. (R. CF. p. 12, ¶¶ 70-71).

B. The Lottery Software

To administer its lottery drawings, the Lottery uses software developed and maintained by the Multi-State Lottery Association ("MUSL"). (R. CF. p. 9, ¶¶ 33-35; R. CF. p. 11, ¶ 55). MUSL is an Iowa unincorporated non-profit association owned and operated by agreement of its 33-member state lottery departments, including the Colorado Lottery. (R. CF. p. 9, ¶¶ 33-34).

One of MUSL's many functions is to provide its member state lottery departments with the computer software (the "Lottery Software"). (R. CF. p. 9, ¶ 35). The Lottery Software contains two distinct mechanisms for generating random numbers: first, the Software monitors ambient radiation levels, and once the required amount of unique "hits" are observed, it generates a random number known as the "Seed Number." (R. CF. p. 9, ¶¶ 37-39). The Lottery Software then utilizes a second mechanism to select the winning combination for a given lottery drawing based on a complex algorithm utilizing the Seed Number. (R. CF. p. 10, ¶ 40). The State used MUSL's Lottery Software to administer the Drawing in November 2005. (R. CF. p. 11, ¶ 55).

C. Eddie Tipton's Scheme to Forecast the Lottery

At all times relevant to this action, Eddie Tipton served as MUSL's Director of Information Security. (R. CF. p. 10, ¶ 41). In this role, Eddie Tipton was one of only a handful of individuals with access to the Lottery Software's source code. (R. CF. p. 10, ¶ 42).

In or about 2005, Eddie Tipton installed additional source code onto the Lottery Software that included an "extra routine" (the "Additional Code"). (R. CF. p. 10, ¶ 43). The Additional Code worked by replacing the Lottery Software's first mechanism with a different algorithm to generate a Seed Number based on a number of factors Eddie Tipton had programmed into the Additional Code. (R. CF. p. 10, ¶¶ 44-46). It was designed to operate only on certain specific dates, lying dormant all other times, thereby avoiding detection and allowing the Lottery Software to function as normal. (R. CF. p. 10, ¶ 45).

Because Eddie Tipton knew the factors used by the Additional Code to generate a Seed Number, as well as the specific dates on which the Additional Code would activate, Eddie Tipton could forecast the Seed Number generated by the Additional Code on those dates. (R. CF. p. 10, ¶ 47). With knowledge of the Seed Number, Eddie Tipton was then able to forecast the likely winning combinations for drawings performed on those dates. (R. CF. p. 10, ¶ 48).

The Lottery Software used by the State to administer the 2005 Drawing contained this Additional Code. (R. CF. p. 11, ¶¶ 55-56). There is no dispute that although the Seed Number generated by the Additional Code was knowable to Eddie Tipton, it was unpredictable and unknowable to all honest lottery players, including Mr. Massihzadeh. (R. CF. p. 11, ¶ 57).

D. Eddie Tipton's Scheme Revealed

On or about October 12, 2015, Mr. Massihzadeh was contacted by two Colorado Bureau of Investigation ("CBI") agents, Agent-In-Charge Ralph Gagliardi and Agent Jeff Schierkolk. (R. CF. p. 13, ¶ 75). The CBI agents interviewed Mr. Massihzadeh regarding the Drawing and his Winning Ticket, told Mr. Massihzadeh that he was a victim of a criminal scheme to "rig" the lottery, and stated that he may be a witness going forward. (R. CF. p. 13, ¶ 76).

Unbeknownst to Mr. Massihzadeh at the time, in or about 2011-2012, the Iowa Lottery began investigating Eddie Tipton in relation to suspicious circumstances surrounding an Iowa Lottery $16.5 million winning Hot Lotto ticket purchased in December 2010. (R. CF. p. 12, ¶ 72). The Iowa Lottery's investigation ultimately revealed that Eddie Tipton's Additional Code was involved in several lottery drawings nationwide, including the November 23, 2005 Drawing in Colorado. (R. CF. pp. 12-14, ¶¶ 72-84).

On October 7, 2015, charges were filed against Eddie Tipton in an Iowa District Court by the Iowa Attorney General's Office. (R. CF. p. 12, ¶ 74). The Complaint alleged that Eddie Tipton was involved in an on-going criminal enterprise to influence the winning of lottery prizes in various other lotteries, including the Drawing, by tampering with MUSL's Lottery Software. (R. CF. p. 12, ¶ 74).

Regarding Colorado's 2005 Drawing specifically, the investigation revealed that in or about late 2005, Eddie Tipton accessed the Lottery Software and ran the Additional Code for the Drawing on November 23, 2005. (R. CF. p. 10, ¶ 49). Because Mr. Tipton knew the factors the Additional Code would use to generate the Seed Number, he used that information to forecast the potential winning combinations. (R. CF. p. 10, ¶¶ 47-48). Eddie Tipton recorded those combinations on a notepad. (R. CF. p. 10, ¶ 49). He then gave this notepad to his brother, Tommy Tipton, and told Tommy to play the combinations in the Drawing, which Tommy did. (R. CF. p. 10, ¶¶ 50-52). Tommy Tipton also supplied those combinations to a third party who also used those combinations to purchase manual play tickets for the Drawing. (R. CF. p. 11, ¶ 53).

Following discovery of Tommy Tipton's role in Eddie Tipton's scheme, on March 30, 2016, a complaint and affidavit were filed against Tommy Tipton in the

Iowa District Court for Polk County, Iowa, by the Iowa Attorney General's Office. (R. CF. p. 13, ¶ 77). The complaint and affidavit alleged that Tommy Tipton committed unlawful acts by aiding and abetting thefts for financial gain with respect to various lotteries, including the Drawing. (R. CF. p. 13, ¶ 77).

E. The Tiptons Plead Guilty

On June 12, 2017, the Tipton brothers pleaded guilty to the charges against them in Iowa. (R. CF. p. 13, ¶ 78). Pursuant to the guilty plea, the State of Colorado agreed not to pursue criminal charges against Eddie Tipton and Tommy Tipton for violations of Colorado law stemming from the Drawing in return for a restitution agreement from Eddie Tipton to pay the State restitution $568,990 individually, and an additional $568,990 jointly and severally with Tommy Tipton, totaling $1,137,980: the exact combined amount paid out by the State for the two Target Tickets. (R. CF. p. 13, ¶¶ 79-81).

On June 22, 2017, the Colorado Attorney General's Office issued a press release entitled: "AG Coffman Announces Guilty Plea of Man Who Stole Millions in Multi-State Lottery Fraud Case" (the "Colorado Press Release"). (R. CF. p. 13, ¶ 82). According to the Colorado Press Release: "[i]n 2015 the Colorado Lottery was informed by officials from Iowa that a 2005 Colorado winning lottery drawing involving Tommy Tipton, the brother of Eddie Tipton, and another man,

Alexander Hicks, may have been part of a larger multi-state lottery fraud scheme" which included "rigging the system to steal from Colorado." (R. CF. pp. 13-14, ¶¶ 83-84).

F. Mr. Massihzadeh's Lawsuit

On October 4, 2017, Mr. Massihzadeh filed his Complaint against the State and Laura Solano, in her official capacity as Lottery Director at the time of the Drawing, alleging one claim for breach of contract. (R. CF. p. 4). On November 9, 2017, the State moved to dismiss the Complaint. (R. CF. p. 82). On February 13, 2018, the Court granted the motion. (R. CF. p. 261). This appeal timely followed.

SUMMARY OF ARGUMENT

By purchasing the Winning Ticket, Mr. Massihzadeh entered a contract with the State, whereby Mr. Massihzadeh would have a chance of winning a prize according to the advertised rules and procedures of the Lottery and the LOTTO game specifically. In contrast, the Target Tickets were procured via criminal fraud, with advance knowledge of the possible winning combinations the Lottery Software would generate in the Drawing. Accordingly, the Target Tickets lacked the essential element of chance—the "bargain" at the heart of the purchase of any lottery ticket—and were therefore null and void as lottery tickets.

Mr. Massihzadeh is the only winner of the Drawing, and is entitled to the full amount of the Jackpot. By failing to pay the entire prize to Mr. Massihzadeh, the State breached its contract with him.

But even if the Target Tickets were not void but, as the District Court held, voidable, the State voided the Target Tickets by rescinding those Tickets and obtaining a restitution agreement for the prizes paid. Either way, Mr. Massihzadeh was the only winner of the Drawing, and the State breached its contract with Mr. Massihzadeh by failing to pay him the full amount of the Jackpot. The District Court's finding that the State's voiding of the Target Tickets had no impact on Mr. Massihzadeh's rights was an error.

Next, the District Court erred in ruling that C.R.S. § 24-35-212(3) discharged the State of all liability to Mr. Massihzadeh. First, C.R.S. § 24-35-212(3) applies to claims by third parties with statutory rights to the prize moneys ahead of the winners and has no application here. Second, the statute does not apply because Mr. Massihzadeh has not been paid his "prize," a necessary condition precedent to any discharge of liability under the statute. Third, the District Court's expansive reading of C.R.S. § 24-35-212(3) effectively immunizes the State from all contractual liability—an outcome contrary to established Colorado law, legislative intent, and principles of statutory interpretation.

Finally, the District Court's conclusion that Mr. Massihzadeh waived his claims against the Lottery by accepting one-third of the prize to which he was entitled, an issue not raised or briefed by either party, was contrary to the factual allegations and has no support under the law.

The District Court did not apply the proper standard when resolving the State's motion under Rule 12(b)(5). It made findings of fact, as opposed to taking the factual allegations in Mr. Massihzadeh's Complaint as true, and it failed to construe all allegations in light most favorable to Mr. Massihzadeh. The District Court even questioned the legitimacy of Mr. Massihzadeh's Winning Ticket—something that has not been challenged by the State, and for which there is no basis in the Complaint.

ARGUMENT

I. Mr. Massihzadeh stated a cognizable claim for breach of contract against the Lottery.

A. Standard of review and preservation.

Rule 12(b)(5) dismissal orders are reviewed *de novo*. *M. ex rel. Lopez v. Trujillo*, 397 P.3d 370, 373 (Colo. 2017). Motions to dismiss under Rule 12(b)(5) are "viewed with disfavor," and are only properly granted where "the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff, do not present plausible grounds for relief." *Begley v. Ireson*, 399

P.3d 777, 779 (Colo. App. 2017) (citing *Warne v. Hall*, 373 P.3d 588 (Colo. 2016)). Mr. Massihzadeh preserved this issue at R. CF. pp. 147-153.

B. The Target Tickets lacked the essential element of chance and were therefore void *ab initio*. Thus, Mr. Massihzadeh was the sole winner of the Drawing entitled to the full amount of the Jackpot.

The fundamental premise underlying this case is the notion that a lottery is a "game of chance." *See* Colo. Const. art. XVIII, § 2 (allowing a state-supervised lottery and certain "games of chance" such "as bingo or lotto"); *In re Interrogatories of Governor Regarding Sweepstakes Races Act*, 585 P.2d 595, 598 (Colo. 1978) ("Our cases have established that a lottery is present when consideration is paid for the opportunity to win a prize awarded by chance."). Indeed, the "sine qua non entitling one to the proceeds of a winning lottery ticket is that the ticket was played in a manner consistent with fair chance." *Horan v. State of California*, 270 Cal. Rptr. 194, 196 (Cal. Ct. App. 1990) (emphasis added). It is not until a player purchases "a ticket without the benefit of an advance tip-off that a particular ticket is a winner" that "he or she has the same random chance of winning as everyone else." *Id.* at 197 (emphasis added).

In a formal opinion, the California Attorney General has emphasized the element of chance as it relates to the players themselves as a critical component of a "lottery." *See* 71 Cal. Op. Att'y Gen. 139 (1988). "[W]hether the distribution of

a prize is distributed by chance is to be determined from the perspective of the players." *Id.* (emphasis added). "[W]here the persons conducting the scheme remove all element of chance in determining the winner by fraudulently contriving to have one of themselves selected as the winner the scheme is not a lottery." *Id.* (citing *People v. Carpenter*, 297 P.2d 498, 500 (Cal. App. 1956)).

Here, three lottery tickets matched all six numbers in the November 23, 2005 Drawing. (R. CF. p. 11, ¶ 59). Two of those tickets—the Target Tickets—lacked the essential element of chance. The individuals who purchased the Target Tickets were supplied the matching combination by Eddie Tipton, who knew those numbers could be winners in advance of the Drawing. (*See, e.g.*, R. CF. pp. 10-12, ¶¶ 50-51, 53, 69). Thus, the Target Tickets were not valid lottery tickets. *See Horan*, 270 Cal. Rptr. at 196 ("When this element of chance is absent," the player has not engaged in a game of lottery); *Nat'l Football League v. Governor of State of Del.*, 435 F. Supp. 1372, 1383 (D. Del. 1977) ("It is unquestioned that there are three elements necessary to a lottery: prize, consideration and chance.").

Although a novel issue in Colorado, courts across the country have held that, by offering lottery tickets for sale, a lottery makes "a public offer that the purchaser of a lottery ticket would have a chance of winning a prize according to advertised rules and procedures of the lottery." *See, e.g., Coleman v. State*, 258

N.W. 2d 84, 86 (Mich. Ct. App. 1977); *Driscoll v. State, Dep't of Treasury, Div. of Lottery*, 627 A.2d 1167, 1171 (N.J. Super. Ct. Law Div. 1993) ("A ticket holder is said to have accepted an offer upon purchasing the lottery tickets at the licensed agency."); *Rice v. Ohio Lottery Comm.*, 708 N.E.2d 796, 798 (Ohio Ct. Cl. 1999) (purchase and sale of lottery tickets create a contract between the lottery and the purchaser).

In effect, offering lottery tickets for sale creates a unilateral contract; one which may be "accepted by a return performance rather than a promise to perform." *See Scoular Co. v. Denney*, 151 P.3d 615, 619 (Colo. App. 2006), *as modified on denial of reh'g* (Dec. 14, 2006).

Mr. Massihzadeh's purchase of his ticket created a contract with the State. (R. CF. p. 11, ¶ 60; R. CF. p. 14, ¶¶ 85-86). The State does not dispute that fact. (*See* R. CF. pp. 85, 88). Under Lottery's 2005 version of Rule 10A.5, "prize amount should be paid to each Lotto player who selects a matching combination of numbers." The Complaint alleged, and it is undisputed, that had the Target Tickets not been purchased through the Tiptons' criminal fraud, Mr. Massihzadeh would have received the entire Jackpot in the Drawing. (R. CF. pp. 14-15, ¶¶ 89-95; R. CF. pp. 16, ¶ 102).

Because the Target Tickets were void or voided, they were treated by the State as if they had never been purchased. Yet the State has taken the position, and the District Court agreed, that Mr. Massihzadeh is without a remedy.

Contrary to the District Court's holding, the Target Tickets were not analogous to a contract "for purchase of goods that are misrepresented as to quality at the execution of the contact." (R. CF. p. 264). At issue here are not any representations made to the State by the Tiptons, but whether the Target Tickets were valid LOTTO tickets. Because they lacked the essential element of chance—a legal prerequisite for a legitimate ticket—they were void *ab initio* and were a legal nullity. *See Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 840 (Colo. App. 2007) (defining void *ab initio* as "[n]ull from the beginning, as from the first moment when a contract is entered into."). This left Mr. Massihzadeh as the sole winner entitled to the full amount of the Jackpot.

The District Court went beyond the allegations of the Complaint and remarked that "the winning tickets were not selected at random." (R. CF. p. 263, n. 1). To the contrary, and as Mr. Massihzadeh alleged in the Complaint, the Seed Number and the winning combination were unpredictable and unknowable to the honest LOTTO players. (R. CF. p. 11, ¶ 57). The Drawing was random and comprised a game of chance for Mr. Massihzadeh and all other honest players.

The State certified the Drawing. (R. CF. p. 11, ¶ 58). And there is no allegation in the Complaint the Drawing itself was invalid, contrary to the District Court's comment that Mr. Massihzadeh's argument "brings into question whether his own ticket could be voided accordingly." (R. CF. p. 263, n. 1; R. CF. p. 14, ¶ 88).

The State must honor its end of the bargain. Mr. Massihzadeh purchased his ticket based on the promise fundamental to any game of lottery: if he matched all six numbers in the Drawing, he would win the Jackpot. (R. CF. p. 14, ¶¶ 85-86). As the holder of the only legitimate ticket matching all six numbers of the Drawing, he is entitled to be paid the full amount of the Jackpot. By refusing to distribute the full amount of the Jackpot owed to Mr. Massihzadeh, the State breached its contract with him.

C. Even if the Target Tickets were voidable, the State treated the Target Tickets as void by rescinding and obtaining a restitution agreement to recover the precise amounts paid on those tickets.

Even if the Target Tickets, as the District Court held, were voidable, as opposed to void *ab initio*, the result is the same: Mr. Massihzadeh is the sole winner, entitled to the entire Jackpot. A voidable contract may be disaffirmed (or rescinded), or it may be ratified. *See, e.g.*, *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981). Once rescinded, the contract becomes void, a legal nullity. *See*

Doenges-Long Motors, Inc. v. Gillen, 328 P.2d 1077, 1080 (Colo. 1958) ("On disaffirmance the contract is abrogated ab initio.").

Assuming the Target Tickets were voidable and not void, the State had a choice: it could rescind the Target Tickets, or it could ratify them and treat them as enforceable despite the fraud. "It is settled rule of law that, where a party has an election to rescind a contract, he must rescind it wholly or not at all." *Walker v. MacMillan*, 160 P. 1062, 1063 (Colo. 1916).

As the Complaint alleged, the State elected to rescind the Target Tickets and treat them as null and void. (R. CF. p. 13, ¶¶ 79-81). The State then elected to pursue and secured an agreement for restitution for the precise amounts paid on the Target Tickets and, by doing so, placed the parties back in the position they would have been in had the Target Tickets not existed. (R. CF. p. 13, ¶¶ 79-81).

The District Court erred when it ruled that the State's rescission of the Target Tickets did not impact Mr. Massihzadeh's contract with the State. To the contrary, as the amount of the prize distributed to Mr. Massihzadeh is dependent on the number of other valid tickets matching all six numbers in the Drawing, the State's decision to void the Target Tickets had a direct impact on Mr. Massihzadeh.

The State cannot have it both ways: to pretend, on one hand, that the Target Tickets were valid and entitled to a share of the Jackpot, and on the other, nullify them and recover restitution for the ill-gotten prizes paid for the Target Tickets. *See Walker*, 160 P. at 1063 (having rescinded a contract, a party "cannot consider it void for one purpose and in force for another"); *see also Lowe v. Howell*, 170 P. 180, 181 (Colo. 1917) ("After having elected to rescind the contract, he must consistently adhere to the choice of remedies. He cannot pursue a double course by attempting on the one hand to rescind, and on the other to still exercise dominion over the subject matter of the contract.").

Following the Tiptons' guilty plea, the Colorado Attorney General's Press Release proudly proclaimed the State would receive $568,990 in restitution from Eddie Tipton individually, and an additional $568,990 jointly and severally with Tommy Tipton; referring to those sums as "[i]ll-gotten gains" from a "fraudulent lottery win." (R. CF. pp. 13-14, ¶¶ 82-84; R. CF. p. 56).

Having taken that position, the State should be effectively estopped from taking a contrary position here to escape its contractual liability to Mr. Massihzadeh. While Mr. Massihzadeh acknowledges the formal elements of judicial estoppel do not apply here, the rationale underlying judicial estoppel still applies: "[to] require parties to maintain a consistency of positions in the

proceedings, assuring promotion of truth and preventing the parties from deliberately shifting positions to suit the exigencies of the moment." *Estate of Burford v. Burford*, 935 P.2d 943, 947 (Colo. 1997).

Here, the State's chosen remedy treated the Target Tickets as if they should not have been paid and restored the parties to their positions prior to the Target Tickets' sale. Once the Target Tickets were rescinded, they were null and void and could not be entitled to a share of the Jackpot. Thus, Mr. Massihzadeh is the only winner of the Jackpot. Under his contract with the State, he was entitled to be paid the full amount of the Jackpot.

II. C.R.S. § 24-35-212(3) does not bar Mr. Massihzadeh's breach of contract claim against the State.

The District Court dismissed Mr. Massihzadeh's claim on the additional grounds that C.R.S. § 24-35-212(3) bars Mr. Massihzadeh's claim. (*See* R. CF. pp. 265-266). The statute provides in relevant part: "[t]he division shall be discharged of all liability upon the payment of any prize pursuant to this part 2." C.R.S. § 24-35-212(3).[1] The District Court concluded the plain reading of C.R.S. § 24-35-

[1] All references to C.R.S. § 24-35-201, *et seq.* herein refer to the 2005 version of the statute in effect at the time of the Drawing. (*See* R. CF. p. 11, n. 1; R. CF. pp. 178-217).

212(3) is that the statute discharges the State of any and all liability upon payment of any prize. (*See* R. CF. p. 266).

The District Court erred in so ruling. First, the statute is inapplicable as it addresses narrow circumstances not present here: it protects the State from claims by third parties who, by statute, are entitled to a portion of the prize money before it is paid to the winner. Second, the District Court's interpretation of the words "any prize" in the statute leads to an absurd result. Third, under the District Court's reading, the statute immunizes the State from all contract liability, which is contrary to *Ace Flying Service, Inc. v. Colorado Department of Agriculture*, 314 P. 2d 278, 280 (Colo. 1957).

A. Standard of review and preservation.

The interpretation of a statute is a question of law that the appellate court reviews *de novo*. *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 164 (Colo.2001). Mr. Massihzadeh preserved this issue at R. CF. pp. 153-162.

B. C.R.S. § 24-35-212(3) applies to claims by third parties, not persons, like Mr. Massihzadeh, who have a contract with the State.

When interpreting a statute, courts must "ascertain and effectuate the legislative intent," which is "to be discerned when possible from the plain and ordinary meaning of the statutory language." *People v. Longoria,* 862 P.2d 266, 271 (Colo. 1993). "The plainness or ambiguity of statutory language is determined

by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis added); *see also People ex rel. Dunbar v. Trinidad State Junior College*, 520 P.2d 736, 738 (Colo. 1974) (legislative intent may be derived by consideration of the language in the context of the statute).

Reading the statute in its entirety, it becomes apparent subsection (3) was intended only to limit the State's liability to third-parties, not *all* liability as the District Court concluded. The statute identifies those third parties that may step ahead of a lottery winner and claim some or all of his or her prize before the State pays the winner, including assignees (C.R.S. § 24-35-212(1)(b)), one entitled to child support payments (C.R.S. § 24-35-212(5)(a)-(b)), the beneficiary of outstanding restitution obligations (C.R.S. § 24-35-212.5(1)-(2)), or other outstanding debts or arrearages (C.R.S. § 24-35-212.5(3)). (*See* R. CF. pp. 203-206); C.R.S. § 24-35-212, C.R.S. § 24-35-212(5)(e) (incorporating previous provisions of C.R.S. § 24-35-212.5).

By placing C.R.S. § 24-35-212(3) in the same section as these provisions, the legislature made clear that subsection (3) was meant to extinguish all third-party claims against the State after payment of the prize to a winner. In light of its context, C.R.S. § 24-35-212(3) was merely intended to avoid the possibility that

the State might pay a winner his or her prize, then face claims from third parties entitled to a portion of the funds to satisfy the winner's child support, restitution, or other obligations.

The District Court's broad interpretation of C.R.S. § 24-35-212(3) also renders portions of the Lottery Rules superfluous. The Court must read the statute as a whole, giving "consistent, harmonious, and sensible effect to all of its parts." *Bd. of County Comm'rs, Costilla County v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1192 (Colo. 2004).

The 2005 version of the Lottery's Rule 10, 1 CCR 206-1-10, specified that the Lottery's prize claim form "shall incorporate the following information: . . . (c) indemnification of the Lottery for any loss occasioned by an untruth or misrepresentation by the On-Line ticket owner or the person claiming the prize on the winner's behalf." (*See* R. CF. p 86, n.1; R. CF. pp. 102, ¶ 10.4(c)(3)). If C.R.S. § 24-35-212(3) truly discharged the State of "all" liability, indemnification would be unnecessary, as the State could not be held liable for *any* payment of *any* prize.

Mr. Massihzadeh is not a third party making a claim to winnings of another. Rather, Mr. Massihzadeh seeks only the winnings he should have been paid.

Because the legislature did not intend C.R.S. § 24-35-212(3) to apply to cases such as Mr. Massihzadeh's, it does not bar Mr. Massihzadeh's breach of contract claim.

C. C.R.S. § 24-35-212(3) does not bar Mr. Massihzadeh's claim because Mr. Massihzadeh has not been paid his prize, a necessary condition precedent to the discharge of the State's liability.

The crux of Mr. Massihzadeh's claim is that he has not been paid his prize. The "prize" at issue is the Jackpot awarded in the Drawing. (*See* R. CF. p. 8, ¶¶ 19-22; R. CF. p. 11, ¶¶ 60-61). The 2005 version of the Lottery's Rule 10 set forth the basic requirements for all Lottery Jackpot Games (including the Drawing):

> m. "Shares" means the total number of matching combinations within each prize category as determined for each drawing.
>
> . . .
>
> q. "Prize Amounts" means the amount of money payable in each prize category to each share or the annuitized future value of each share in a prize category for each drawing.
>
> r. "Prize Category" means the matching combinations as described in Specific Game Playing Rules.

(R. CF. pp. 100-101, ¶¶ 10.2(m), 10.2(q), 10.2(r)) (emphasis added). In the Drawing, the "prize category" was the $4.8 million Jackpot, while the "prize amount" was the amount payable to each "share" of the Jackpot amount.

The "prize amount" due to Mr. Massihzadeh under the terms of his contract was the amount payable to each "share" of the Jackpot amount. As discussed above, the Target Tickets were void from the moment of their purchase or have

been voided through the State's actions, and do not constitute valid shares of the Jackpot. *See Aguimatang v. California State Lottery*, 286 Cal. Rptr. 57, 70 (Cal. Ct. App. 1991) ("[i]f no valid ticket issues and there is consequently no wager or bet, no 'prize' is created.").

For this reason, the Target Tickets were not comparable to a lost or mutilated, or an otherwise unclaimed ticket, contrary to the District Court's conclusion. In those cases, there is no suggestion the ticket was acquired by improper means. While the holder of the ticket may fail to redeem the prize, the ticket itself remains otherwise valid.

The same is true in the case of an ineligible individual, such as a minor, holding a winning ticket. While the individual's status may impact his or her ability to claim the prize, it has no impact on the legitimacy of the ticket itself.

In both scenarios, the fundamental fairness of the game itself is not altered: unredeemed tickets or tickets purchased by ineligible individuals have the same chance of containing a matching combination as any other ticket purchased.

Here, in contrast, the Target Tickets were procured through criminal activity and would not have been generated but for the purchasers' criminal conduct. *See Horan*, 270 Cal. Rptr. at 197 ("The distinction between the two situations is not

based on classes of ownership but rather the point at which the element of fair chance enters the picture.").

Accordingly, Mr. Massihzadeh was entitled to the full Jackpot of $4.8 million ($2,404,179 as a lump sum before taxes), yet has been paid just one-third of it ($801,393 as a lump sum before taxes). (R. CF. p. 15, ¶¶ 95-97; R. CF. p. 16, ¶¶ 102-104). Because the State has failed to pay Mr. Massihzadeh the full amount of the Jackpot, his "prize" has not been paid, and C.R.S. § 24-35-212(3) is not triggered.

Further, the District Court's interpretation leads to an absurd result. Courts will not "follow a statutory construction that defeats the legislative intent or leads to an unreasonable or absurd result." *People v. Frazier*, 77 P.3d 838, 839 (Colo. App. 2003). The District Court's interpretation of "any prize" in C.R.S. § 24-35-212(3) creates the absurd and unreasonable result of barring claims even where the State has unequivocally breached its contractual obligations, or where there has been a mistake. Under the District Court's interpretation, the State could pay its winners $1, irrespective of the prize to which the winners are entitled, and avoid liability under C.R.S. § 24-35-212(3) because a "prize" was paid. This cannot be the statute's intended effect.

Another court recently addressed a substantially similar statute in a closely related case arising from Eddie Tipton's criminal conduct. *See Dawson v. Multi-State Lottery Association and Iowa Lottery Authority*, Case No. LACL134527. (R. CF. pp. 218-228). In *Dawson*, the plaintiff Larry Dawson ("Mr. Dawson") sued MUSL and the Iowa Lottery Authority (the "ILA") claiming that he, as the sole subsequent winner, was entitled to the funds "won" on a fraudulent ticket in the immediately prior drawing. (*See* R. CF. p. 218).

MUSL and the ILA moved to dismiss Mr. Dawson's suit arguing, among other things, that Mr. Dawson's claims were barred by Iowa Code Section 93G.31(2)(f). (R. CF. p. 220). Similar to C.R.S. § 24-35-212(3), Iowa Code Section 93G.31(2)(f) states that the ILA is "discharged of all liability upon payment of a prize pursuant to this section." (R. CF. p. 220). The court denied ILA's motion to dismiss, holding that the statute did not apply, as the prize had not been paid. (R. CF. pp. 220-221).

Here, as in *Dawson*, at issue is the total amount to be awarded to the legitimate winner. In *Dawson*, the question was whether fraudulently "won" but unclaimed funds should have been paid to the subsequent winner as part of the total prize pool. Here, the question is whether fraudulently "won" funds should be paid to the legitimate winner. Just as the ILA failed to pay Mr. Dawson his

"designated prize," so too has the State failed to pay Mr. Massihzadeh the "prize" he is owed.

D. The District Court's interpretation of the statute effectively immunized the State from all contractual liability, contrary to the Colorado Supreme Court's precedent articulated in *Ace Flying Service.*

When the State enters into a contract with private individuals, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). As a corollary to this principle, the Colorado Supreme Court has rejected the notion that the State may immunize itself from contractual liability:

> The principle that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annual or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.

Ace Flying Service, Inc., 314 P. 2d at 280 (quoting *Carr v. State ex rel. Coetlosquet*, 26 N.E. 778, 779 (Ind. 1891)). The Supreme Court continued: "by entering into a contract, [the state] abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, as an individual does . . . [t]he state

may not impair any of the substantial rights secured by its contract to a citizen with whom it contracts." *Id.* at 280-81 (emphasis added).

The *Ace* court did not limit its holding to circumstances in which the state "arbitrarily repudiate[es] a contract," as the District Court concluded. (R. CF. p. 266). The question in *Ace* was whether the state impliedly consented to be sued on a contract, where the legislature authorized the Colorado Department of Agriculture to appropriate funds and contract for certain services. 314 P.2d at 281.

The Court faces analogous circumstances here. Just as in *Ace*, the Lottery has been authorized by the legislature to appropriate funds, establish a state-supervised lottery, and enter contracts in relation thereto. *See* Colo. Const. § 2, art. XVIII; C.R.S. § 24-35-201, *et seq.* As in *Ace*, the State now seeks to avoid liability arising from its contract. The "applicable principle" announced in *Ace* controls: "when a state enters into authorized contractual relations it thereby waives immunity from suit." *Id.* at 280. The District Court's interpretation of C.R.S. § 24-35-212(3) effectively immunized the Lottery from all contractual liability: a result contrary to *Ace*.

III. The District Court erred in ruling Mr. Massihzadeh waived his claim against the Lottery by accepting one-third of the Jackpot.

A. Standard of review and preservation.

Issues of waiver and intent are matters for factual determination and are generally not appropriate for summary disposition. *Grimm Const. Co., Inc. v. Denver Bd. of Water Comm'rs*, 835 P.2d 599, 602 (Colo. App. 1992). This issue was raised *sua sponte* in the District Court's Order. (R. CF. p. 266). However, neither party had raised or briefed the issue.

B. Mr. Massihzadeh's acceptance of one-third of the Jackpot did not constitute a knowing and voluntary waiver of his claims against the Lottery.

Although the State did not raise the argument, the District Court *sua sponte* made the factual finding that Mr. Massihzadeh waived his potential claims by accepting one-third of the Jackpot before the Tiptons' fraud was discovered.

A waiver consists of "the voluntary relinquishment of a known right, and the issue of waiver is generally a matter for factual determination. *Grim Const. Co. Inv.*, 835 P.2d at 602 (internal citations omitted). "[T]he issue of a party's intent is a question of fact and is generally not appropriate for summary disposition." *Id.* While a waiver may be express or implied, in either case, a "waiver requires full knowledge of all the relevant facts" and an express "intent to relinquish the right or privilege . . . ." *Johnson v. Industrial Com'n of State of Colo.*, 761 P.2d 1140,

1147 (Colo. 1988); *see also Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797, 798 (Colo. 1983) (requiring knowledge of the facts concerning such waiver).

Mr. Massihzadeh respectfully submits the District Court's decision was in error. There are no factual allegations in the Complaint that suggest a knowing and intentional relinquishment of rights by Mr. Massihzadeh. To the contrary, Mr. Massihzadeh alleged that he did not discover the Tiptons' criminal fraud, or the other facts underlying his claim, until on or about October 12, 2015, when he was contacted by the CBI agents. (R. CF. p. 13, ¶¶ 75-76). Without knowledge of the Tiptons' fraud or the illegitimacy of the Target Tickets, Mr. Massihzadeh could not have known or had reason to know that the prize money he received from the State was not the full amount of the prize to which he was entitled. The District Court's findings, unsupported by and contrary to these factual allegations, violate the appropriate standard to be applied to motions to dismiss under Rule 12(b)(5).

CONCLUSION

Although a novel question before this Court, Mr. Massihzadeh's entitlement to the full Jackpot is the right outcome legally and as a matter of common sense.

Two fundamental principles underlie a lottery game. First, it must be a game of chance for all players. A ticket purchased without an element of chance is

not a lottery ticket. Second, thousands purchase lottery tickets on the promise that, if they match all of the numbers drawn, they win the jackpot.

Mr. Massihzadeh matched all six numbers on his "quick pick" ticket, but he did not receive all of his winnings. The District Court erred in dismissing Mr. Massihzadeh claim and holding that he has no remedy where, due to the actions of others, he was deprived of his winnings. Mr. Massihzadeh respectfully requests that the Court reverse the District Court's Order and remand.

Respectfully submitted: July 12, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of July, 2018, a true and correct copy of the foregoing **OPENING BRIEF** was filed via CoCourts which caused service upon the following:

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