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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Denver District Court
Honorable Brian R. Whitney, Judge
Case No. 17CV33699

AMIR MASSIHZADEH,

Appellant,

v.

TOM SEAVER, **in his official capacity as the Colorado Lottery Director, and COLORADO STATE LOTTERY DIVISION, an agency of the State of Colorado,**

Appellees.

▲ COURT USE ONLY ▲

Case No. 18CA578

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 6516 words.

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

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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

/s/ Cynthia P. Delaney

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Signature of attorney or party

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INTRODUCTION

In a weekly Lotto drawing on November 23, 2005, three players presented winning tickets to the Division, giving rise to three separate contracts to pay one-third of the $4.8 million jackpot. The Colorado State Lottery Division performed its obligations under these contracts by paying each winning ticket-holder—including Amir Massihzadeh—$801,000, before taxes.

A decade later, investigators learned that a computer programmer in Iowa had manipulated the drawing software to ensure that the winning numbers would fall within a narrow range and, further, that two of the winning players purchased their tickets with advanced knowledge of that range.

Massihzadeh, unaware of the fraud, purchased a quick pick ticket. He now claims that the Division's payment of two-thirds of the jackpot to the other ticket holders breached his own contract with the Division. In doing so, he entirely disregards the terms of that contract. He also ignores the obvious—he was an unknowing beneficiary of the fraud, not

a victim of it. The Division was defrauded of at least $1.6 million in prize money in 2005. Massihzadeh now asks the Division to pay this amount a second time.

The General Assembly has plainly foreclosed the possibility of such payments by extinguishing the Division's liability "upon the payment of any prize." Massihzadeh is not entitled to any additional payments under his contract with the Division. The district court correctly dismissed the Complaint, and this Court should affirm.

STATEMENT OF THE ISSUES

I. Whether section 24-35-212(3), C.R.S., which discharges the Division from "all liability upon the payment of any prize," bars Massihzadeh's claim.

II. Whether the Complaint states a claim for breach of contract under Colorado law.

STATEMENT OF THE FACTS AND THE CASE

I. The Division entered into three contracts – one with each holder of a winning ticket – to pay one-third of the November 23, 2005 Lotto jackpot.

On November 23, 2005, the Division held a Lotto drawing with a $4.8 million jackpot. CF, p 11, (¶ 54). Three tickets matched all six digits of the winning combination. CF, p 11, (¶ 59); p 38. Following the drawing, the Division director certified the results, and the tickets became "winning tickets." CF, p 11, (¶ 58). The Division paid each holder of a winning ticket one-third of the jackpot. CF, p 5; p 12, (¶¶ 91, 93).

Appellant Amir Massihzadeh ("Massihzadeh") was a holder of one of the winning tickets, and there is no dispute that the Division paid him a lump sum of $568,990 on November 28, 2005, which amount was one-third of the jackpot, after taxes.[1] CF, p 5. A Texas resident, Tommy

[1] Because Massihzadeh chose a lump sum payment, his prize was reduced by fifty percent to approximately $800,000 before taxes, based on his $1.6 share of the total jackpot. *See* 1 Colo. Code of Regs. 206-1, Rule 10.A.6(d).

Tipton, and an unknown third person purchased the other two winning tickets. CF, p 9, (¶¶ 65, 70).

Although Tommy Tipton purchased a ticket, he did not claim the prize. CF, p 9, (¶ 67). Instead, a person named Alexander Hicks signed the ticket and submitted it with a claim form to the Division. CF, p 9, (¶¶ 68–69). The Division paid Hicks one-third of the jackpot in a lump sum of $568,990. CF, p 9, (¶¶ 67–68); p 38.

Cuestion de Suerte, LLC ("CDS"), a Nevada limited liability company, redeemed the third ticket and received one-third of the jackpot in a lump sum of $568,990. CF, p 12, (¶¶ 70–71); p 38.

Each of these three ticketholders entered into separate contracts with the Division. 1 Colo. Code of Regs. 206-1, Rules 10.A.4, 10.A.5, and 10.A.8.[2] These contracts required the Division to draw, at random, six numbers, certify the drawing and declare the winning numbers, identify tickets with matching combinations, and distribute the jackpot equally

[2] The 2005 Lottery Division Rules 10 and 10.A (2005) are in the record at CF, pp 99–116.

over the number of matching combinations. The Division took each of these steps. CF, 11 (¶¶ 5–10).

II. In 2015, the Division learned that Eddie Tipton manipulated the 2005 drawing, and sought restitution from the Tipton brothers after their convictions.

Ten years after the drawing, investigators learned that an insider at the Multi-State Lottery Association ("MUSL") developed a scheme to defraud the lottery. CF, p 10, (¶ 41). MUSL contracts to provide a number of services to its member states' lotteries, including Colorado. CF, p 10, (¶¶ 34, 35). These include providing the computer software used to conduct lottery drawings. CF, p 9, (¶ 35); p 10, (¶ 40).

Eddie Tipton, MUSL's Director of Information Security in 2005, manipulated software provided to the Division so that he could predict a range of combinations, one of which would be a winning number. CF, p 10 (¶41). Tommy Tipton was aware of the range of likely winning numbers when he purchased his ticket. CF, 10 (¶50). The purchaser of the third winning ticket also had advanced knowledge of the range,

though it is unclear how he or she obtained the information. CF, p 11 (¶53).

In 2015, the Iowa Bureau of Investigation contacted the Division regarding its prosecution of Eddie Tipton for manipulation of a 2014 Iowa lottery drawing. CF, p 9, (¶¶ 72–74). Iowa then filed a second complaint against Eddie Tipton alleging he engaged in an on-going criminal enterprise to influence other state lotteries, including Colorado's. CF, p 12, (¶ 74). It subsequently charged Tommy Tipton, Eddie's brother, with aiding and abetting thefts. CF, p 13, (¶ 77).

On June 12, 2017, the Tipton brothers entered into a plea agreement with Iowa, Wisconsin, Colorado, and Arizona. CF, pp 50–55. Eddie Tipton agreed to pay the Colorado Lottery $1,137,980 in criminal restitution, one-half of that amount payable jointly and severally with his brother. *Id.* Separately, Tommy Tipton agreed to pay the Colorado Lottery $568,990 in criminal restitution, jointly and severally with Eddie Tipton. *Id.* Colorado agreed it would not prosecute criminally either brother in connection with the 2005 lottery drawing. *Id.* The

Tiptons also agreed to pay restitution to the Oklahoma, Wisconsin, and Kansas lotteries. CF, pp 51–53.

The Division has not received and is unlikely to receive restitution payments from Eddie or Tommy Tipton. Eddie Tipton, for his part, has been sentenced to two consecutive five-year terms in Iowa state prison. CF, p 12, (¶ 73).

III. Eddie and Tommy Tipton did not present the winning tickets to the Division and no contract was formed between the Tiptons and the Division to pay them any portion of the November 23, 2005 Lotto jackpot.

Neither Eddie nor Tommy Tipton had a contract with the Division for payment of a portion of the 2005 jackpot. A lottery ticket is a bearer instrument. The person or entity who signs and submits a ticket is the holder of the ticket and a winner if the ticket is a winning ticket. 1 Colo. Code of Regs. 206-1, Rules 10.2(w) and 10.4(b). That person has a contract with the Division for payment of a prize.

Eddie and Tommy Tipton did not sign or submit for payment any tickets from the 2005 Lotto drawing. CDS and Hicks signed and submitted their tickets, and claimed the other two-thirds of the jackpot.

CF, p 12, (¶¶ 67–71); p 15, (¶¶ 91, 93). Therefore, the Division contracted with CDS, Hicks, and Massihzadeh to pay them each one-third of the jackpot, not the Tiptons. *Id*.

IV. The district court ruled Massihzadeh's claim is barred by statute and the Division did not breach the parties' contract.

Massihzadeh filed suit in September of 2017 after investigators informed him that the November 23, 2005 Lotto drawing had been manipulated. *See generally*, CF, pp 4–16. His suit claimed a breach of contract by the Division and sought the other two-thirds of the jackpot, with interest. The Division moved to dismiss the Complaint, arguing, in part, that it failed to state a claim for relief.[3] *See generally*, CF, pp 82–97.

The Division successfully argued below that the alleged facts, taken as true, demonstrate that the Division fully performed its

[3] The Division also argued that Massihzadeh's claim was barred by the Colorado Governmental Immunity Act ("CGIA"), section 24-10-106, C.R.S., because it sounded in tort or could sound in tort. The district court rejected the argument, and the Division has not appealed that ruling. CF, p 266.

contract with Massihzadeh when it paid him $568,990 in 2005. CF, p 88. The Division also maintained section 24-35-212(3), C.R.S., discharges the Division from "all liability upon the payment of any prize." CF, p 85.

The district court granted the Division's motion to dismiss for failure to state a claim. CF, pp 261–70. The court explained that the Division was "presented with three tickets that had matched all six numbers drawn. [It] then correctly apportioned the jackpot between the three and paid the amounts determined." CF, p 265. In the district court's view, this "concluded the contractual relationship" between Massihzadeh and the Division. *Id.* Subsequent revelations of impropriety concerning two of the tickets "[did] not renegotiate the original contract between the parties, nor [did] it constitute breach." *Id.* Accordingly, the court held, "[u]nder the facts as pled and assumed to be true, the Plaintiff has failed to state a cognizant claim for breach." *Id.*

The court also held that even if Massihzadeh had alleged facts sufficient to state a claim for breach, the plain language of section 24-35-212(3), C.R.S., would bar the claim. CF, pp 265–66. The court

further noted that the Division's rules state "the Director's decision with respect to the validation and payment of any prize, whether during an On-Line game or any drawing related thereto, shall be final and binding upon all participants in the lottery." CF, p 265 (1 Colo. Code of Regs. 206-1, Rule 10.4(j)). The district court held that these provisions fully discharged the Division's liability to Massihzadeh upon payment of the prize. CF, p 266.

Massihzadeh appeals.

SUMMARY OF THE ARGUMENT

This Court may affirm the dismissal of the Complaint on two independent grounds. First, section 24-35-212(3), C.R.S., bars Massihzadeh's claim. Section 24-35-212(3), C.R.S., discharges "all" liability of the Division upon payment of "any prize." The statute represents a policy decision by the General Assembly to establish a definite end to the Division's liability to prizewinners. In this case, it is an undisputed fact that the Division paid a prize of $568,990 to

Massihzadeh. Thus, the statute bars his breach of contract claim, and the Court's analysis may stop here.

Second, even if his claim was not statutorily barred, Massihzadeh has not—and cannot—identify a term of the parties' contract that the Division breached. Three tickets in the 2005 lotto drawing were presented to the Division with matching combinations and, thus, the Division had three separate and distinct contracts under which it was required to pay a prize of one-third of the jackpot. It is an undisputed fact that the Division paid each of the three ticket holders one-third of the $4.8 million jackpot. While Massihzadeh attempts to avoid this result by attacking the other tickets, none of his arguments about the other tickets change the specific terms of *his* contract or the Division's obligations under it.

Therefore, the district court properly dismissed Massihzadeh's Complaint for failure to state a claim. This Court should affirm dismissal of Masshizadeh's Complaint.

ARGUMENT

I. Massihzadeh's claim is barred by statute because the Division was discharged from "all" liability upon payment of "any" prize.

A. Preservation and standard of review.

The Division agrees Massihzadeh preserved the argument that section 24-35-212(3), C.R.S., does not bar his claim.

The Division agrees Massihzadeh set forth the proper standard of review and further adds that a motion to dismiss under C.R.C.P. 12(b)(5) should be granted where a plaintiff's factual allegations do not, even if true, state a claim for relief. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). "Statutory interpretation is a question of law that [appellate courts] review de novo." *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009).

B. Section 24-35-212(3), C.R.S., discharges the Division of "all liability upon the payment of any prize."

The General Assembly has provided a definite end to the State's liability in conducting the lottery: "The division shall be discharged of ***all*** liability upon the payment of ***any*** prize pursuant to this part 2."

§ 24-35-212(3), C.R.S. (2005) (emphasis added). Consistent with statute, the regulations provide that validation and payment of a prize is final and binding and that payment terminates the Division's liability. *See* 1 Colo. Code of Regs. 206-1, Rule 10.4(j) ("Director's decision with respect to the validation and payment of any prize … shall be ***final and binding upon all participants in the lottery***.") (emphasis added); 1 Colo. Code of Regs. 206-1, Rule 10.4(m) ("Payment of any prize … and all liability of the State, its officers and employees, and the Commission ***terminates upon such payment***.") (emphasis added).

1. The language of the statute and related regulations are unambiguous.

The payment of any prize discharges the Division of all liability. Here, the Complaint alleges the Division paid Massihzadeh a prize of $568,990 in 2005 after he drew one of three tickets with a six-digit matching combination. CF, p 5. As a matter of law, the statute bars his claim, and the district court properly granted the Division's motion to dismiss based on the statute's plain language. *See Gallegos Family Props. LLC v. Colo. Ground Water Comm'n*, 398 P.3d 599, 608 (Colo.

2017) (stating if the language of a statute and its accompanying regulations are unambiguous, a court applies them as written). The Court's analysis may stop here.

2. Subsection 212(3) is not limited to third-party claims.

Massihzadeh's argument that subsection 212(3) refers only to third parties, and not prizewinners, disregards the plain language of the statute as written. Instead of the relevant subsection, he focuses on other provisions of section 24-35-212, C.R.S., which authorize the Division to pay all or a portion of a prizewinner's money to certain third parties. Op. Br. at 23. He then argues that the "legislative intent behind placing [section] 24-35-212(3) in the same section" with these other provisions "is clearly that once the Lottery pays a prize to the winner, all third-party claims against the Lottery are extinguished." *Id.* This argument is without merit for three reasons.

First, his contextual argument is at odds with the plain language of subsection 212(3): "The Division shall be discharged of all liability upon the payment of any prize pursuant to this ***part 2***." *Id.* (emphasis

added). "Part 2" is the entire lottery statute under Article 24, Title 35. Therefore, while subsection 212(3) is located in a section that also addresses claims by third parties, its application is not limited to third party claims.

Second, Massihzadeh is wrong. Section 24-35-212, C.R.S., *as a whole*, governs payment to both prizewinners and their obligees—not only to third parties. It limits a *prizewinner's* right to assign his or her prize. § 24-35-212(1) and (1.5), C.R.S. It permits retailers to hold prize money for 180 days or until a *prizewinner* claims his or her prize. § 24-35-212(2), C.R.S. A prize won by a *prizewinner* under the age of 18 years old is forfeited. § 24-35-212(4), C.R.S. Most importantly from a public policy perspective, the Division must offset any prize by child support or criminal restitution obligations of a *prizewinner* prior to payment of a prize. § 24-35-212(5), C.R.S.; *see also* § 24-35-212.5(1), C.R.S.

Finally, third parties are not paid "prizes." All or a portion of prize money won by a prizewinner may be withheld and paid only to certain third parties to satisfy specific preexisting obligations. Had the

legislature intended subsection 212(3) to limit discharge of liability to third-party claims, it could have said so, as it did in subsection 212(6). That provision addresses a prizewinner's right to pledge prize money as collateral for a loan. *See* § 24-35-212(6), C.R.S. It states, "[T]he pledging of all or any part of a prize creates no liability to the state of Colorado." § 24-35-212(6), C.R.S. This provision clearly addressees claims by lenders against prizewinners.

The General Assembly's failure to include similar limiting language in subsection 212(3) is telling. "When the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, we presume that the General Assembly did so purposefully." *Well Augmentation Subdistrict v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009).

3. Subsection 212(3) and lottery regulations are not in conflict.

Massihzadeh also contends the district court's interpretation of subsection 212(3) renders Rule 10.4(c) superfluous. Op. Br. at 24. However, Rule 10.4(c) serves an entirely different purpose. It provides

the Division with a right of indemnification against a claim for any "untruth or misrepresentation" provided on the ***claim form*** a player submits to the Division to claim a prize. 1 Colo. Code of Regs. 206-1, Rule 10.4(c). It does not discharge the Division of liability upon payment of a prize.

4. Public policy considerations strongly support the statutory language discharging the Division of liability upon payment of a prize.

Section 35-24-212(1.5)(c), C.R.S. reflects the General Assembly's intent to establish finality in the award of lottery prizes. Finality is critical to the fiscal interests of the state and to the operation of the lottery.

Massihzadeh's interpretation of subsection 212(3) assumes the General Assembly intended to leave the state open to an unfunded, indeterminate liability to lottery prizewinners. For example, while prize amounts vary, the largest Lotto jackpot to date was $27 million. Adopting Massihzadeh's view, and substituting $27 million for the $4.8 million 2005 jackpot, the Division would be subject to a potential

liability of $18 million in principle plus $27.3 million in interest at the statutory rate of eight percent, running for 12 years from the date of the drawing through the date of the Complaint. The General Assembly cannot have intended such a result.

Finality is also critical to the operation of the Lottery. If disappointed Lottery winners—having already agreed to accept payment of a prize—could then sue the Division, claiming they were entitled to more, litigation would be endless, the Lottery would be impossible to conduct, and the State of Colorado would be deprived of a substantial source of revenue. *See Molina v. Games Mgt. Services*, 58 NY2d 523, 529 (1983) (holding statutory language exempting the state from liability on disputed lottery ticket claims is reasonable in view of nature and purpose of the state lottery, the disruption that would be caused by disputes with disappointed players, and the resources that would be consumed in excessive and protracted litigation).

5. The Division paid Massihzadeh a "prize" under subsection 212(3).

Massihzadeh asserts subsection 212(3) does not bar his claim because the Division did not pay him the entire $4.8 million jackpot. Thus, he has not been paid a "prize" within the meaning of the statute. As the only holder of a "valid" ticket, he claims his "share" of the jackpot is 100 percent. Op. Br. at 26–27.

Massihzadeh's logic undermines the goal of subsection 212(3): to specify a point in time at which the Division is no longer liable for payment. Liability is discharged upon the payment of *any* prize, not "the" prize, or the "designated prize," or the prize amount a player thinks he or she deserves.

Massihzadeh's argument also ignores the terms of the contract between the Division and Massihzadeh. A winner's share is determined solely by the number of matching combinations drawn, not the means by which a player purchases a ticket. 1 Colo. Code of Regs. 206-1, Rule 10.A.5. Here, it is undisputed that three matching combinations were drawn. CF, p 8, (¶ 59). Once the Division certified the drawing and the

three winners presented their winning tickets, the Division had three separate and distinct contracts with three separate and distinct parties. The terms of *Massihzadeh's* contract cannot be altered by the subsequent discovery of the events involving the Tipton brothers.

Massihzadeh relies on an Iowa trial court's ruling on a motion to dismiss in *Dawson v. Multi-State Lottery*, et al., Case No. LACL134527 (Iowa Dist. Ct. Oct. 12, 2016). However, *Dawson* is distinguishable on both the facts and the law. As the sole winner in a Hot Lotto drawing, Dawson had a contractual and statutory right to payment of the *entire* jackpot. He disputed the Iowa lottery's failure to return an unclaimed prize from a previous drawing to the pool from which future prizes were to be awarded. The contractual right at issue in Dawson was not the share of the jackpot to which Dawson was entitled.

Further, the language of the Iowa lottery statute is materially different from Colorado's statute. It states that the lottery "shall award the *designated* prize" to the holder of the winning ticket. CF, p 220 (emphasis in original). The court held Dawson's claim withstood a motion to dismiss because the question of whether a "designated prize"

includes unclaimed prize money from an earlier drawing is not clear from the language of the statute. CF, p 221.

Subsection 212(3), which discharges the Division from "all" liability upon payment of "any prize," is an all-inclusive term. Colorado statute has no corollary to the term "designated prize" in the Iowa statute. Moreover, the outcome in *Dawson* is still unknown. As yet, the trial court has not issued its final ruling. *Dawson* is thus a poor guide for resolving the current dispute.

Finally, the district court noted Massihzadeh's share would have remained one-third "had the other two tickets been held by an ineligible winner, lost, mutilated beyond validation, unclaimed, or otherwise." CF, p 266, n 3. Massihzadeh argues that his claim is not the same as a lost, mutilated, or unclaimed ticket because those tickets do not affect the "fundamental fairness" of a game. Op. Br. at 26. However, the number of matching combinations is the sole determinate of shares in a jackpot. The subsequent discovery of the Tiptons' fraud does change the fact that there were three matching combinations. Here, the Division paid

Massihzadeh "any" prize and that is all that is required to discharge liability under section 24-35-212(3), C.R.S.

6. The district court's interpretation does not immunize the Division from all contractual liability.

Massihzadeh claims the district court's interpretation of subsection 212(3) would lead to the "absurd" result that a claimant could never challenge a decision of the Division and that it immunizes the Division from all contract liability. Massihzadeh relies solely on *Ace Flying Service, Inc. v. Colorado Dep't of Agriculture*, 314 P.2d 278 (Colo. 1957) in support of his argument. Yet, *Ace* is easily distinguished. In *Ace*, the plaintiff claimed the parties entered into a contract and that the Department of Agriculture refused to perform. The agency moved to dismiss because the state is immune from suit for breach of contract "since the sovereign State of Colorado cannot be subjected to the processes of the courts without consent, and no such consent had been granted." *Id.* at 279. The supreme court disagreed, holding that the state may not "arbitrarily repudiate the contract" because, by entering into it, "it thereby waives immunity from suit." *Id.* at 280.

Here, the Division is not asserting blanket immunity from contract claims. As the district court noted, the lottery "statute places a condition precedent upon release from liability, not a unilateral ability to repudiate the contract." CF, p 265. The condition precedent is the payment of a prize. In order for payment to occur, the Division is required to determine the number winning tickets, verify the authenticity of those tickets, certify the drawing, calculate prize amounts, and pay the prize. "Each of these steps can be challenged by a winning ticket [holder] or by the director which could put payment of a prize on hold or require a new drawing…In fact, the nature of the proceedings puts an onus upon the Defendants prior to invocation of their immunity from suit." CF, pp 265–66. And, unlike the contract in *Ace*, discharge of the Division's liability is a term of the parties' contract.

II. The Complaint fails to state a claim for relief for breach of contract.

A. Preservation and standard of review.

The Division agrees Massihzadeh preserved the issue of whether the Complaint states a claim for breach of contract and that the Court applies a de novo standard of review to this issue. *See* Argument I.A above.

B. The allegations of the Complaint demonstrate that the Division fully performed its contract.

As Massihzadeh acknowledges, contract principles govern the relationship between a player and the Division. Op. Br. at 16; CF, p 5; p 14, (¶¶ 85–86). The terms of the contract are the relevant statute and rules of the Division. *See* 1 Colo. Code of Regs. 206-1, Rule 10.12 ("In purchasing an On-line ticket, the purchaser agrees to comply with all the provisions of the [Lottery] Act, these Rules and Regulations, and all final decisions of the Director, and all instructions and directives established by the director for the conduct of On-Line games.").

Nonetheless, Massihzadeh largely disregards the terms of *his* contract. Instead, he imports terms such as "legitimate", "valid", "fair

chance", and "essential element of chance." Also, rather than focusing on his own contract, he resorts to a discussion of the validity of the CDS/Hicks contracts and the Division's effort to obtain restitution in the Iowa criminal action. These arguments should be rejected.

1. Colorado law sets the terms of a player's contract, and the Division fully performed.

To state a viable claim for breach of contract, Massihzadeh must assert plausible allegations that, if true, show the Division failed to perform according to the terms of a valid agreement. *Log v. Cordain*, 343 P.3d 1061, 1067 (Colo. App. 2014). The terms of the parties' contracts are set forth in the lottery statute and related regulations, (Op. Br. at 16; CF, p 5; p 14, (¶¶ 85, 86); 1 Colo. Code of Regs. 206-1, Rule 10.12), and include the following provisions:

- a Lotto player must select six numbers in each play and a winning play must match the six winning numbers drawn by the Lottery. 1 Colo. Code of Regs. 206-1, Rule 10.A.4(a).

- each drawing determines, at random, six winning numbers. The Lottery must certify the drawing before the numbers drawn are declared winning numbers. 1 Colo. Code of Regs. 206-1, Rule 10.A.8(c).

● once a drawing is certified, tickets with matching combinations are declared winning tickets. CF, p 5–6, (¶ 28); 1 Colo. Code of Regs. 206-1, Rule 10.A.8(c).

● the prize amounts paid to each Lotto player holding a winning ticket will vary due to a pari-mutuel calculation. 1 Colo. Code of Regs. 206-1, Rule 10.A.5(a). Thus, prize amounts are determined by the total amount of prize money *distributed equally over the number of matching combinations*. CF, p 11, (¶ 85). 1 Colo. Code of Regs. 206-1, Rule 10.A.5(a).

● players have the option of receiving their prize in the form of an annuity or a lump sum. 1 Colo. Code of Regs. 206-1, Rule 10.A.6(b).

Massihzadeh fails to identify which of these terms the Division is purported to have breached. In the November 2005 drawing, three tickets with matching six-digit combinations were drawn. CF, p 11, (¶ 59). The Lottery Director certified the results. CF, p 11, (¶ 59). All three winning ticket holders—Massihzadeh, CDS, and Hicks—claimed their prize in the form of a lump sum. CF, p 11 8, (¶¶ 62, 64); p 12, (¶¶ 68, 71). And the Division paid each of the three ticket holders one-third of the jackpot. CF, p 5; p 8, (¶ 62, 63); p 9, ¶¶ (68, 71). The Division did everything required to fully perform under the contract.

In the Opening Brief's passing reference to the terms of his own contract, Massihzadeh misstates them, largely by omission. Op. Br. at 16. For example, he cites Rule 10.A.5 as stating the "prize amount should be paid to each Lotto player who selects a matching combination of numbers." *Id.* This not only misquotes the rule, it omits the language in the rule that is most pertinent to this case—how a prize is distributed among holders of tickets with matching combinations. Rule 10.A.5(a) states in full:

> The prize amounts for each drawing paid to each Lotto player who selects a matching combination of numbers will vary due to a pari-mutuel [sic] calculation. The prize amounts are based on the total amount in the prize category for the Lotto drawing *distributed equally over the number of matching combinations* in each prize category.

1 Colo. Code of Regs. 206-1, Rule 10.A.5(a) (emphasis added). Massihzadeh never addresses the contract requirement that a jackpot be distributed equally over the number of matching combinations.

Massihzadeh also misstates an allegation in the Complaint and then inaccurately states the allegation is undisputed. Op. Br. at 16. Specifically, he says the Division does not dispute that had the CDS and

Hicks tickets "not been purchased through the Tipton's criminal fraud, Mr. Massihzadeh would have received the entire Jackpot in the Drawing." *Id*. He cites paragraphs 89–95 and 102 of the Complaint in support of this statement. CF, pp 14–15, (¶¶ 89–95); CF, p 16, (¶102). First, the cited paragraphs do not make such an allegation. *Id.* Second, the statement is contrary to law. CF, p 11, (¶¶ 89–95); p 12, (¶102). Under no circumstances could Massihzadeh have received the entire jackpot. His share is determined *solely* by the number of matching combinations as stated in Rule 10.A.5(a). No prior or subsequent events change the number of matching combinations.

Indeed, the opposite is true. But for Eddie Tipton's conduct, *Massihzadeh* likely would not have been a winner at all, let alone have won the entire jackpot. The true winner would have been the person who chose numbers drawn absent Tipton's interference, and that person is unknown and unknowable.[4] Massihzadeh is the passive beneficiary of Tipton's fraud.

[4] As the district court aptly observed, it is confounding "how the Plaintiff fails to correlate the fact that his winning numbers were the

Had the Division been aware of the fraud in November of 2005, the Director would not have certified the drawing and *no* payout would have been made. According to Division rules, the Division would have conducted a second drawing in which Massihzadeh's odds of choosing a six-digit matching combination would have been 1:5.2 million. 1 Colo. Code of Regs. 206-1, Rule 10.A.8(b).

2. The "element of chance" is not a term of the parties' contract.

Massihzadeh argues tickets purchased by CDS and Hicks lacked the "essential element of chance," which he claims is a prerequisite for a "legitimate" winning ticket. Op. Br. at 14-18. Therefore, he reasons, the Division's contracts with CDS and Hicks are void *ab initio* because their purchasers knew of the winning numbers in advance of the drawing. He, on the other hand, did not have such advanced knowledge. Therefore, the drawing had an element of chance as to *him* and he is entitled to the entire $4.8 million jackpot.

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result of the overall fraud associated with this particular drawing." CF, p 264, n 2.

First, Massihzadeh's breach of contract claim is governed by contract principles, and not legal definitions of a lottery. The Division recognizes lotteries are, by their nature, games of chance. A player does not exercise any skill or specialized knowledge when he or she plays the lottery. Nevertheless, the concept of "chance" does not replace the rules governing a particular lottery game or the terms of an individual player's contract. Under those rules, the Division offers to pay the jackpot on a pari-mutuel basis to those holding tickets bearing the winning combination in exchange for the price of the ticket.

Second, Massihzadeh rests his argument that the Hicks/CDS contracts are void *ab initio* on the fraudulent conduct of the Tipton brothers. However, the Tiptons are not parties to those contracts. Moreover, he ignores the distinction between different types of fraud. Contracts based on fraud in the factum are void *ab initio*. Fraud in the factum exists where contract terms are contrary to statute or other authority before execution, or *where one of the contracting parties* is defrauded as to the nature of the document signed. RESTATEMENT (SECOND) OF CONTRACTS, § 163 Illustration 2 (1981) (fraud in the factum

is the deceptive alteration in the written terms of a contract). In short, for fraud in the factum, the contracting party must not realize what he is signing. *See Svanidze v. Kirkendall*, 169 P.3d 262, 266 (Colo. App. 2007). That is not this case.

Here, the Division, CDS, and Hicks all knew the terms of their contracts. CDS and Hicks fraudulently induced the Division to perform the contracts by misrepresenting that their tickets had been purchased and claimed in accordance with Division rules. As the district court noted, the Division reasonably relied on the representation when it validated the tickets, certified the drawing, and paid a prize to CDS and Hicks. CF, p 264.

Third, the authority upon which Massihzadeh relies to incorporate "chance" as a term of his contract is inapposite. Massihzadeh cites the Colorado Constitution. However, the Constitution merely permits Colorado to establish a lottery and states where lottery proceeds are to be directed. Colo. Const. art. XVIII, § 2(7). It says nothing about the terms and conditions under which the lottery is conducted or prizes paid.

The California authority upon which Massihzadeh relies address a regulation and a contract where the word "chance" is an express term. The California Attorney General's Opinion, 71 Cal. Op. Att'y Gen. 139 (1988), construed California's lottery statute, which defines a lottery as "[a]ny scheme for the disposal or distribution of property by *chance*…." (emphasis added). CF, p 171. No such language appears in the Colorado lottery statutes or related regulations that govern the parties' contract.

Similarly, *Horan v. State of California*, 270 Cal. Rptr. 194 (Cal. App. 1990), turned on express language of the California lottery regulations that were incorporated into a retailer's contract with the lottery. In *Horan*, a retailer's underage employee stole a winning scratch ticket worth $100,000. Once the employee realized it was a winning ticket, he returned it to his employer, who attempted to claim the prize. The court upheld the California lottery's refusal to pay the retailer, citing the terms of its retailer contract. *Id.* at 1506. The contract stated, "Retailers are prevented from playing the tickets using any method other than *fair chance* or any method that is contrary to the

principle that every ticket has an equal *random chance* of winning." *Id.* at 1505 (emphasis added).

The district court properly rejected Massihzadeh's argument that the CDS/Hicks contracts were void *ab initio* because they lacked the element of chance.

3. The Division has not rescinded the CDS/Hicks contracts and the Iowa restitution agreement has no bearing on Massihzadeh's contract.

Massihzadeh argues that the Division rescinded the CDS/Hicks contracts and, as its remedy, elected to enter into a restitution agreement with the Tipton brothers. Op. Br. at 18-21. According to Massihzadeh, once rescinded, the CDS/Hicks contracts are void, leaving Massihzadeh with the sole contract for payment of the $4.8 million jackpot. *Id.* There are several difficulties with this argument. First, the Division has not rescinded the contracts, and there are no allegations in the Complaint to the contrary. Second, if the Division had rescinded those contracts, its remedy would be against CDS and Hicks, not non-parties to the contracts. Finally, the Iowa criminal proceeding and

resulting restitution agreement have no bearing on Massihzadeh's contract with the Division.

Massihzadeh states "the Complaint alleged the State elected to rescind the Target tickets and treat them as null and void," citing paragraphs 79 through 81 of the Complaint Op. Br. at 19. It does no such thing. Those paragraphs describe the terms of the Tiptons' plea agreement. CF p, 13 (¶¶79-–81). Therefore, there are no allegations of, or factual support for, rescission in the record.

Even if the Division had rescinded the CDS and Hicks contracts, its remedy would be against CDS and Hicks, not the Tipton brothers. Moreover, rescission of those contracts or even the failure of CDS and Hicks to redeem their prizes would not change Massihzadeh's one-third share. The number of matching combinations determines a player's share, not the number of players who redeem a prize. *See* 1 Colo. Code of Regs. 206-1, Rule 10.A.8(b). Other state lotteries operate similarly. *See Aguimatang v. Cal. State Lottery*, 234 Cal. App.3d 769, 783-84 (Cal. App. 1991) (holders of three winning tickets were not entitled to share of unclaimed prize amount of fourth player because shares of a prize are

determined by the number of matching combinations at the time of drawing); *Fullerton v. Dep't of Revenue Servs.*, 714 A.2d 1203, 1208 (Conn. 1998) (concluding holders of two winning tickets were not entitled to unclaimed prize of a third winning ticket because a "winner" is a holder of the matching combination, which is determined at the time of drawing, not when a prize is claimed).

Finally, Massihzadeh's contention that the Division essentially substituted the restitution agreement for the CDS/Hicks contracts disregards the contractual nature of the relationship between the Division and the three winners. As the district court rightly concluded, Massihzadeh's contract was separate and distinct from the CDS/Hicks' contracts and entirely unaffected by the Tiptons' agreement to pay the State of Colorado criminal restitution. CF, p 264.

III. The district court did not rule on the issue of waiver.

A. Preservation and standard of review.

Massihzadeh challenges the district court's analysis of the legal impact of accepting $568,990 in prize money. By raising the argument before this Court, he has preserved the issue for appeal.

Massihzadeh does not identify a standard of review. Normally, in the absence of factual findings by a trial court, an issue is one of law and a reviewing court is not bound by a trial court's decision. *Hartman v. Regents of University of Colo.*, 22 P.3d 524, 529 (Colo. App. 2000). Here, however, the district court did not make any factual findings or rule on the issue of waiver.

B. The district court did not rule Massihzadeh waived his right to claim the $4.8 million jackpot.

The Division acknowledges neither party argued before the district court that Massihzadeh waived his right to claim the entire jackpot by accepting $568,990. However, contrary to Massihzadeh's claim, the district court did not rule that Massihzadeh had waived his claim. The district court used the term "waiver" in connection with

subsection 212(3), which discharges liability upon payment of a prize. Thus, it was equating "waiver" with the "discharge" of liability.

Even if the district court did err in this regard, this Court should affirm the district court's dismissal on the separate and independent grounds outlined above.

CONCLUSION

The Division requests that the Court affirm the district court's Order dismissing Massihzadeh's claim under Rule 12(b)(5), C.R.C.P.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon all parties herein electronically via CCE, at Denver, Colorado, this 20th day of September, 2018 addressed as follows:

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