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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 REPLY 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 applicable word limits set forth in C.A.R. 28(g)(1).**

☒ It contains 3,480 words.

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.

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## SUMMARY OF REPLY ARGUMENT

The State admits that a lottery ticket is a contract under which a person pays consideration to purchase a ticket and the State agrees to "draw, at random, six numbers, certify the drawing and declare the winning numbers." (Answer Br. 4). Fundamental to that transaction—the very essence of a lottery game—is the element of chance.

In the absence of other valid lottery tickets containing matching combination for the Jackpot prize, Mr. Massihzadeh was entitled to the entire prize. Here, because the other two tickets containing the matching combination of all six numbers for the November 23, 2005 Drawing (the "Target Tickets" ) lacked the element of chance, they were void, leaving Mr. Massihzadeh as the only winner.

Not so, according to the State. The State claims the element of chance is not a requirement for a valid contract in a game of lottery. (Answer Br. 29-30). The State takes the position that it had three valid contracts among which to divide the Jackpot for the November 23, 2005 Drawing, because the co-conspirators who presented the Target Tickets for payment were not the same persons who had purchased the Tickets. (Answer Br. 4; 26).

But the issue here is whether *the Target Tickets themselves* were valid, not *who* presented the Target Tickets for payment. The State admits that the Target Tickets were obtained by fraud. (Answer Br. 5). Indeed, it secured a restitution agreement for the *exact amount paid* on those Tickets. (R. CF p. 13, ¶¶ 79-82; p. 56). The restitution agreement is based on the fact that the Target Tickets were fraudulent, as the purchasers of the Target Tickets knew the universe of combinations that would be generated for that Drawing and selected those combinations knowing full well that one of them would win. (R. CF p. 7 ¶¶ 48-52; p. 56). Yet, when it comes to Mr. Massihzadeh's claim, the State changes its position and argues that all three tickets were valid and enforceable contracts. (Answer Br. 11).

The State's shifting positions cannot be reconciled. Either there were three valid tickets with matching combinations entitled to win and split the Jackpot—in which case, there was no basis for the State to secure a restitution agreement for the amounts paid for those tickets—or two of those tickets were void and were not entitled to the share of the Jackpot. The State cannot have it both ways.

Nor is there merit to the State's argument that because it has paid Mr. Massihzadeh *something*, he is barred by statute from claiming the full prize he is entitled to. (Answer Br. 10-11). The statutory provision must be read in the context

of the larger legislative scheme in which it is placed by the legislature. The State's argument ignores that basic rule of statutory interpretation and effectively immunizes the State from any and all claims—an outcome neither intended nor permitted under Colorado law.

## REPLY ARGUMENT

### I. Under Mr. Massihzadeh's contract with the State, he was entitled to the entire Jackpot unless there were other valid contracts that entitled others to the same. Target Tickets were not valid contracts, as the State has admitted through its actions.

The State does not address the key issue in this case: how should the Jackpot be paid if two out of the three tickets presented for payment are not valid lottery tickets because they lack the element of chance? Instead, the State focuses on *who* presented the Target Tickets. This is a misdirection. Since, as discussed below, the Target Tickets were invalid at the moment they were purchased, it is entirely irrelevant who presented them for payment. They were not valid lottery tickets entitled to a share of the Jackpot prize. The State's Answer Brief entirely misses this point.

#### A. The lack of essential element of chance in procuring the Target Tickets rendered these Tickets void.

Perhaps the most disingenuous argument the State has made in an effort to avoid liability in this case is its pronouncement that "the 'element of chance' is not

a term of the parties' contract." (Answer Br. 29). According to the State's logic, a lottery ticket is a *contract*, but it is not a *lottery* which, by definition, is a game of chance. The State does not even attempt to characterize what the State lottery system is if, as the State argues, it is not a "game of chance."

The State's position is untenable and has no support in the Colorado Constitution, case law, or even the English language. *See* Colo. Const. art. XVIII, § 2(3) (permitting persons and entities to conduct "specific kind of game of chance commonly known as bingo or lotto" with a proper license); *In re Interrogatories of Governor Regarding Sweepstakes Races Act*, 585 P.2d 595, 598 (Colo. 1978) (a lottery is present if "chance is the controlling factor in the award"); Merriam-Webster's Ninth New Collegiate Dictionary 706 (1991) (defining "lottery" as "a drawing of lots in which prizes are distributed to the winners among persons buying a chance").[1]

Indeed, it is unclear what the State's position is. Despite spending pages arguing that the "element of chance" is not an element of a valid lottery ticket, the State admits it was defrauded. (Answer Br. 31). How? By paying a portion of the

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[1] *See also* cases and California Attorney General Formal Opinion cited in Mr. Massihzadeh's Opening Brief, p. 14.

Jackpot on the Target Tickets that were void because the matching combinations on those tickets were not purchased by chance. (Answer Br. 31; R. CF p. 56).

Once it is established that the Target Tickets were void and should not have been paid, the question is simple—how should the Jackpot have been paid? Under the Lottery Regulations, the Jackpot should have been paid on the only valid ticket with matching combination of numbers—Mr. Massihzadeh's. 1 Colo. Code of Regs. 206-1, Rule 10.A.5 (2005). It was not.

### B. That persons other than the Tiptons presented the Target Tickets for payment has no bearing on the fact that the Target Tickets were procured by fraud and thus were void.

By purchasing a lottery ticket, the player enters into a contract with the State. *See In re Interrogatories of Governor Regarding Sweepstakes Races Act*, 585 P.2d at 598 ("Our cases have established that a lottery is present when consideration is paid for the opportunity to win a prize awarded by chance."); 1 Colo. Code of Regs. 206-1, Rule 10.11 (2005) ("In *purchasing* an [sic] Jackpot Game ticket, the purchaser agrees to comply with all provisions of the [Lottery Act], these Rules and Regulations, all final decisions of the Director, and all

instructions and directives established by the Director for the conduct of Jackpot games.") (emphasis added).[2]

In its Answer Brief, the State takes conflicting positions. It admits that a lottery ticket is a contract formed at the time of the purchase, *before* the numbers are drawn. (Answer Br. 4 ("These contracts required the Division to draw, at random, six numbers, identify the tickets with matching combinations, and distribute the jackpot equally over the number of matching combinations.")). Yet, the State argues that a contract is formed not at the time of the purchase (before the drawing), but at the time the ticket is presented for payment (long after the consideration has been paid, the numbers selected, and the drawing concluded). (Answer Br. 7). The State does not cite any authority for this latter assertion and, indeed, there is none. The rules and cases set forth above establish that the act of paying consideration and purchasing a lottery ticket gives rise to the contract with the State.

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[2] *See also Coleman v. State*, 258 N.W. 2d 84, 86 (Mich. Ct. App. 1977) (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"); *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).

Relying on the faulty premise it has set up, the State attempts to create a separation between the procurement of the Target Tickets through the Tiptons' fraud and the presentment of those Tickets for payment. (Answer Br. 26). According to the State's logic, what were initially invalid pieces of paper because they lacked the key element of a lottery—the element of chance—were somehow transformed into valid and enforceable contracts because *co-conspirators* presented those Tickets for payment. Thus, according to the State, the fraud through which the Target Tickets were purchased has no impact on Mr. Massihzadeh's contract, because the Jackpot prize should have been split among all three tickets presented, notwithstanding the fraud. (*Id.*)

This is despite the fact that the State *has secured a restitution agreement to be repaid the exact amount it paid on the Target Tickets*.

The State's efforts are unavailing. The issue here is whether *the Target Tickets themselves* were valid, not *who* presented the Target Tickets for payment. Since, as the Complaint alleges, they were procured by fraud, these Tickets were not valid tickets and were a legal nullity.

The State concedes that fraud in the factum—which would render a contract void *ab initio*—exists where "one of the parties is defrauded as to the nature of the document signed." (Answer Br. 30). The State argues "for fraud in the factum, the

contracting party must not realize what he is signing." (Answer Br. 31). Here, the State issued and paid the Target Tickets not knowing at the time they were fraudulent. (R. CF pp. 56-57). Thus, the facts as alleged fall within the definition of fraud in the factum the State has advanced. Under that very definition, the Target Tickets are void *ab initio*.

In support of its assertion that the Target Tickets were valid contracts, the State argues that a lottery ticket is a bearer instrument. (Answer Br. 7). But that argument does not support the State's position. A fraudulent bearer instrument is not enforceable. *See* C.R.S. § 4-3-305(a)(1). Because the Target Tickets were procured by fraud, they were not enforceable contracts, bearer instruments or not.

Thus, the State's argument that the Target Tickets have no bearing on its contract with Mr. Massihzadeh is misdirection: the presence of other valid lottery contracts has a direct impact on Mr. Massihzadeh's contract with the State: Mr. Massihzadeh's contract entitles him to the entire Jackpot, *unless* there are other valid lottery contracts. If there are, the Jackpot is divided among all contracts; if not, Mr. Massihzadeh receives the full Jackpot. 1 Colo. Code of Regs. 206-1, Rule 10.A.5 (2005).

Because the Target Tickets were void *ab initio* as a matter of law and as the State has conceded through its actions in securing a restitution agreement for the

exact amount paid on those Tickets, there was only one lottery contract—Mr. Massihzadeh's— with a matching combination for the November 23, 2005 Drawing, and it was entitled to the entire Jackpot.

## II. The State's interpretation of C.R.S. § 24-35-212(3) misunderstands the statute and would lead to an absurd and illegal result.

### A. The State's suggested reading of C.R.S. § 24-35-212(3) would lead to an absurd and illegal result.

Relying on C.R.S. § 24-35-212(3), the State argues that because Mr. Massihzadeh got paid *something*, his breach of contract claim is barred. (Answer Br. 13). In support, the State argues, at some length, that the statute does not refer to "the prize," or "the designated prize," but "a prize." (Answer Br. 19).

If taken out of context, as the State claims it should be, the State could pay, by mistake or intentionally, the wrong amount in any prize category, and be immune from any claims. That interpretation leads to an absurd result and is erroneous as a matter of law. *People v. Frazier*, 77 P.3d 838, 839 (Colo. App. 2003) (Courts will not "follow a statutory construction that defeats the legislative intent or leads to an unreasonable or absurd result.").

Next, despite insisting that the payment of "any" prize, absolves the State of all liability, a few pages later, the State changes its position again, and argues that its interpretation of the statute does not improperly immunize the State under *Ace*

*Flying Service, Inc. v. Colorado Dep't of Agric.*, 314 P.2d 278, 280 (Colo. 1957). (Answer Br. 22-23). This is because, according to the State, the "statute places a condition precedent upon release from liability[:] . . . the Division is required to determine the number [of] winning tickets, verify the authenticity of those tickets, certify the drawing, calculate prize amounts, and pay *the* prize." (Answer Br. 23). (emphasis added). Now the State is talking about having paid "the" prize as the condition precedent to release of liability, despite arguing for pages that the plain language of the statute is unambiguous and requires solely a payment of "any" prize as a bar to all claims. Which one is it?

Accepting the State's first argument, that the plain language is unambiguous and should be applied out of context, necessarily leads to the conclusion that the State, unilaterally, may decide to pay "any" prize, one of many perhaps, and be discharged of "all" liability.

Not only is this interpretation absurd, it permits the State to immunize itself from all liability—a result contrary to *Ace*. Under this interpretation, the State may unilaterally define its obligations under the contract, which is precisely what *Ace* rejected:

> [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*

> *annul 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 Serv., Inc.*, 314 P.2d at 280 (emphasis added, citation omitted).

Accepting the State's second argument that there is no immunity because the State is required to take certain steps and pay "the" prize—language not found in the statute—necessarily rejects the State's first argument that the statute is unambiguous. And it requires a determination whether the State has actually taken all of the steps it argues are a condition precedent to the performance of the statute, including a determination whether "the" prize has been paid. None of those determinations may be made on a motion to dismiss under C.R.C.P. 12(b)(5).

### B. Reading C.R.S. § 24-35-212(3) in context, as we must, demonstrates that it applies to claims by third parties against the State.

C.R.S. § 24-35-212(3) should be applied in the context of the legislative scheme it is placed in; specifically, in the context of the State's liability to third parties who may have a claim against prize winnings of lottery ticketholders. *See 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). The State argues that C.R.S. § 24-35-212 is not limited to

such third-party claims. (Answer Br. 15). Examination of each of the subsections of Section 212 establishes that the State is wrong:

- Subsections (1) and (1.5) of Section 212 address the liability of the State in the event of an assignment of a prize by the prizewinner to a third party.
- Subsection (2) addresses the circumstances where third parties, namely, licensed sales agents, are authorized to retain and pay out prizes.
- Subsection (4) addresses the liability of the State to pay a third-party minor whose ticket was purchased by someone other than the minor.
- Subsection (5) addresses the liability of the State in the event there are third-party claims, such as child support obligations, against any prize.
- Subsection (6) addresses the liability of the State against third-party secured creditors where prize winnings are pledged as collateral.

Subsection (3) provides a safeguard to the State against claims by third parties: once the State pays a prize pursuant to Article 35, Part 2, including regulations enacted pursuant thereto, all clams *to that prize* by anyone else are barred. This is the only logical way to read C.R.S. § 24-35-212(3). The statute has

no bearing here, as Mr. Massihzadeh's claim arises out of the State's failure to pay him—the prizewinner—his prize.

### C. The State's attempts to inject facts not found in the Complaint should be rejected.

In its Answer Brief, the State injects a number of facts not in the Complaint:

- "The Division has not received and is unlikely to receive restitution payments from Eddie or Tommy Tipton." (Answer Br. 7).
- It "did everything required to fully perform under the contract." (*Id.* at 26).
- "But for Eddie Tipton's conduct, Massihzadeh likely would not have been a winner at all, let alone have won the entire jackpot." (*Id.* at 28).
- "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." (*Id.* at 29).
- "The largest Lotto jackpot to date was $27 million." (*Id.* at 17).

These statements are not in the Complaint or flatly contradict the allegations in the Complaint which must be taken as true on the Rule 12(b)(5) motion to

dismiss under review here. This Court should disregard these assertions improperly injected by the State.

The crux of this case is the unique circumstance the parties have found themselves in: where two out of the three lottery tickets containing the matching combination for the Jackpot were procured through fraud and are void as a result. In its Answer Brief, the State continues to ignore this fundamental fact and attempts to paint Mr. Massihzadeh as a disappointed (and unreasonable) prizewinner who claims he should receive more than what he is entitled to under his contract. That is not what the Complaint alleges.

The Complaint alleges that there was only one winner of the November 23, 2005 Drawing. (R. CF p. 16 ¶ 102). That one winner—Mr. Massihzadeh—has not been paid his prize. (R. CF p. 16 ¶ 103). At the very least, these facts must be taken as true on a Rule 12(b)(5) motion.

Both the District Court and the State insinuate that Mr. Massihzadeh may not have been a winner at all, but for Eddie Tipton's fraud. (R. CF p. 264, n. 2; Answer Br. 28). First, these assertions are entirely improper, as there are no such allegations in the Complaint. Further, they misconstrue what occurred in this case. Mr. Massihzadeh purchased his lottery ticket through "quick pick," thus receiving a randomly generated number combination. (R. CF. p. 8 ¶ 25; p. 11 ¶ 60). In doing

so, he purchased a "chance" to win the Jackpot. As to Mr. Massihzadeh's ticket, the November 23, 2005 Drawing was a game of chance. The fact that Mr. Massihzadeh's randomly generated numbers were predictable to the Tiptons and their co-conspirators does not affect the validity of Mr. Massihzadeh's ticket.

### D. The State's policy arguments regarding finality are misplaced.

The State presents a "parade of horribles," where the State is exposed to "unfunded, indeterminate liability to lottery prizewinners." (Answer Br. 17). Not so. Contrary to the State's attempts, once again, to paint Mr. Massihzadeh's claim as a garden-variety complaint by a dissatisfied prizewinner, the facts of this case are unique—this case arises out of the State's agent's actions in creating an opportunity to cheat the system by eliminating the element of chance in a game of lottery for his co-conspirators. The situation is unlikely to be repeated, and the State's public policy arguments are nothing but misdirection.

## CONCLUSION

Mr. Massihzadeh matched all six numbers on his randomly-generated "quick pick" ticket, but he did not receive all of his winnings. Despite the State's efforts to paint this case as a claim by a disappointed prizewinner, this case presents the unique circumstance where two of the three tickets sold were fraudulent and void, leaving a sole winner who was not paid the prize promised by the State. 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 with instructions to reinstate case.

Respectfully submitted: October 25, 2018.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th of October, 2018, a true and correct copy of the foregoing **REPLY BRIEF** was filed via CoCourts which caused service upon the following:

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