

COMMONWEALTH OF PENNSYLVANIA

JAMES POPOVICH AND DELORES : BEFORE THE BOARD OF CLAIMS
POPOVICH, HUSBAND AND WIFE :
 :
 :
 VS. :
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 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF REVENUE : DOCKET NO. 3819

FINDINGS OF FACT

1. Claimants are James Popovich and Delores Popovich, husband and wife, adult individuals who reside at 1418 Laurel Place, New Castle, Pennsylvania 16061. (Statement of Claim Paragraph 1).

2. Defendant is the Commonwealth of Pennsylvania, Department of Revenue, which is a state agency. Its lottery division is located at 2805 Turnpike Industrial Drive, Middletown, PA 17057. (Statement of Claim Paragraph 2; Response to Statement of Claim Paragraph 2).

3. The lottery offered for sale an instant lottery game, \$100,000.00 Hold ‘Em Poker in 2005. (TR. at 13).

4. Claimants, James and Delores Popovich, purchased a ticket for the Lottery’s \$100,000.00 Hold ‘Em Poker ticket bearing game and pack number 558-038882-420-006 and bearing validation number 46804914. (TR. at 7, 8, 12; Ex. P-1).

5. The instructions for playing the \$100,000.00 Hold ‘Em Poker Instant Lottery game can be found two places; printed on the back of the ticket, and in the game rules published in the Pennsylvania Bulletin at 35 Pa.B. 3471. (TR. at 51).

6. The players were required to remove latex covering on the tickets to reveal the play symbols. The play symbols determine whether the ticket is a winning ticket or a losing ticket. (TR. at 52-55).

7. The lottery game ticket that was purchased by Claimants contained four deals. In each deal, the first two numbers are the player’s numbers, the second two numbers are the dealer’s numbers, and the community cards are common to both. The community cards are combined with the player’s cards and the dealer’s cards. If the player beats the dealer, then the player is entitled to a prize, which appears on the last line of the deal. (TR. at 12, 52-55).

8. Delores Popovich removed the layer of latex that covered the play symbols on the ticket and believed that the second card on the second deal was a three (3) of clubs. (TR. at 9, 16-17).

9. Ms. Popovich believed that the ticket was a winning ticket because she believed the play symbol in question to be a three (3) of clubs rather than an eight (8) of clubs. Were this determined to be the case, the ticket holder's hand of four nines (9's) would beat the Commonwealth's hand of an ordinary club flush. However, if the play symbol at issue is determined to be an eight (8) of clubs, the Commonwealth's hand would be a straight club flush, which would beat the ticket holder's four nines (9's), and the ticket would not be a winner. (TR. at 9, 16-17, 50).

10. Ms. Popovich submitted the ticket to the lottery at its headquarters in Middletown, Pennsylvania. (TR. at 13).

11. Claimants were subsequently advised by the Department of Revenue that the ticket was not a winner. (TR. at 14, 57; Ex. D-1).

12. The instant lottery ticket in question was printed by the lottery's contractor, Scientific Games International, Inc. ("Scientific Games"), at its printing plant in Georgia. (TR. at 29).

13. The lottery approves image fonts and symbols that are specifically designed for each lottery game it produces. These image fonts and symbols are designed by Scientific Games. (TR. at 30).

14. The playing cards on the ticket for this particular game included three components for each play symbol in the game: the playing card number or digit, the sign for the suit of cards, and a three-letter abbreviation or caption. The caption is an abbreviation for the suit and card number. (TR. at 31, 54; Ex. P-1).

15. The caption in the play symbols is used to ensure that there is no confusion over the digit or suit signs that are printed in the play symbol on the card. (TR. at 31, 53-54; Board Finding).

16. In the subject poker game, the eight of clubs is represented by a play symbol containing the digit 8, the club sign which represents the clubs suit, and the letter caption "ETC" for eight of clubs. (TR. at 32).

17. The designation for the three of clubs would be the digit three, the clubs sign and the caption beneath "THC." (TR. at 31).

18. The original ticket was presented to the Board Panel as an Exhibit at the Hearing. (TR. at 5-6, 12-15, 49; Ex. P-1).

19. The original ticket was not altered or mutilated. (TR. at 12; Ex. P-1).

20. Don Haagsma is Director of Print Quality for Scientific Games. Mr. Haagsma testified that there was no visible print line on the left side of the digit in dispute (which would close the loops as in other "eights" on the ticket). However, he also testified that the number three (3) on the ticket has a flat top and a straight stem from top to bottom; the number eight (8), in comparison, has a rounded top and rounded stem; the number three (3) is similar across the

different places it appears on the original ticket; and the digit in dispute in this particular case has a rounded top and a rounded stem, which would demonstrate that the digit in the playing symbol at issue is an eight (8). (TR. at 42-47).

21. The digit is only one component of the play symbol. Although there may have been an incomplete printing of the digit in the play symbol at issue (causing some uncertainty as to whether the digit is a three or an eight), there is no material question that the caption in the play symbol is “ETC.” This resolves any potential uncertainty over the digit and confirms that the play symbol is an eight of clubs. (TR. at 42, 47, 60-62; Ex. P-1; F.O.F. ¶s 14-20; Board Finding).

22. A visual examination of the disputed play symbol on the original ticket by the Board’s Panel caused the panel to conclude, without ambiguity, that the play symbol on the ticket represented an eight (8) of clubs. This Board adopts the Panel’s conclusion and finds that the play symbol in dispute represents an eight (8) of clubs. (Ex. P-1; F.O.F. ¶s 14-21; Board Finding).

23. The lottery ticket at issue did not contain a winning hand for the World Series of Poker (“WSOP”) deal because the ticket holder’s cards (when combined with the community cards) produced, at best, a hand of four nines (9’s) while the Commonwealth’s hand (when combined with the community cards) produced a straight club flush. (TR. at 9-12, 16-17, 50-55; Ex. P-1; F.O.F. ¶s 7-9, 14-22; Board Finding).

24. A validation code is found above the bar code on the back of each \$100,000 Hold ‘Em Poker ticket. The validation code for Claimants’ ticket was compared against the Pennsylvania Lottery’s winner’s validation file. The winner’s validation file contains information on whether each individual ticket is a winner pursuant to the Department of Revenue’s records. When the validation test code was examined in this particular case, it showed that the ticket at issue was not a winner. (TR. at 54-55).

25. The ticket status report for the Claimants’ ticket showed that the ticket contained no evidence that it was a winner. The ticket status report is generated when a ticket is scanned through the computer system during a validation attempt. After the validation attempt occurs, should the ticket be a winner, the status report would state the Pennsylvania Lottery was the redeemer of the ticket as well as the date and time of the validation. The status report for the ticket at issue also indicates that the ticket was not a winner. (TR. at 55-57).

26. Computer reconstruction of the ticket was undertaken by Scientific Games. This methodology uses the ticket’s validation code to reconstruct the ticket by displaying how the ticket should have been printed and identifies whether or not it is a winning ticket. The reconstruction of the ticket would display how the play symbols on the ticket were printed and whether or not it was a winner. Scientific Games performed the ticket reconstruction and confirmed that the ticket was not a winner. (TR. at 57-60).

27. The bttery followed established procedures in conducting validation tests on the ticket. (TR. at 54-62).

28. The validation tests on the ticket confirmed that the ticket was not a winning ticket. (TR. at 49, 54-60; F.O.F. ¶'s 24-27; Board Finding).

29. The Director of Lottery Security is James Morgan. James Morgan conducted a second validation test on the ticket and he also concluded that the ticket was not a winner. (TR. at 49, 54-60).

30. Claimants engaged Dr. Peter J. Mancino to offer an opinion as to whether the disputed digit on the ticket was a three (3) or an eight (8). (Mancino Deposition TR. at 15).

31. Dr. Mancino prepared a written report offering his opinion that the digit at issue was a three (3). However, the written opinion was based solely upon his review of a photocopy of the ticket, not the original ticket. (Mancino Deposition TR. at 22).

32. Dr. Mancino did not examine the actual ticket for his written report. (Mancino Deposition TR. at 22, 23).

33. The expert, Dr. Peter Mancino, did not appear to testify at the hearing. (TR. at 17).

34. Defendant did not object to the introduction of Dr. Mancino's deposition testimony because he was unavailable to testify at hearing. Defendant did object to the admissibility of Dr. Mancino's testimony on the grounds that he is not qualified to testify as an expert on document examination of lottery tickets and because he examined a copy of the lottery ticket, not the actual ticket itself, to form his opinion. (TR. at 17-20).

35. Although Dr. Mancino's prior expert testimony and the bulk of his work as an expert appear to be focused primarily on handwriting analysis, Dr. Mancino's voir dire indicates that he has completed professional training in document examination and is certified as a document examiner by both the International Graphoanalysis Society and the World Association of Document Examiners. He has been so certified since the 1970's and has been admitted as an expert witness in the Courts of Common Pleas in both Lawrence and Mercer counties as a document examiner. (Mancino Deposition, TR. at 6-11; Deposition Exhibits A, B).

36. Although Dr. Mancino examined only a copy of the ticket initially, he did examine the original ticket and utilized same at his deposition and confirmed that his opinion remained unchanged. (Mancino Deposition, TR. at 23-24, 34-39).

37. The Board does not find Dr. Mancino's testimony or opinion on the meaning of the play symbol at issue to be persuasive. (Mancino Deposition, TR. at 1-39; F.O.F. ¶'s 14-37; Board Finding).

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction to hear this case in accordance with its enabling statute in that it involves a claim arising from a contract with the Commonwealth of Pennsylvania. (62 Pa.C.S.A. § 1724(a)).

2. The Board of Claims has subject matter jurisdiction and personal jurisdiction to hear this matter. (62 Pa.C.S.A. § 1724(a)).

3. The expert report of Dr. Peter Mancino, a certified document examiner, which was offered by the Claimants, is hereby ruled inadmissible since the report itself is hearsay. (Pa.R.E. 801).

4. The determination of an expert's qualifications is a liberal one that is subject to a low threshold of proof and is within the discretion of the trial court. "If a witness has any reasonable pretension to specialized knowledge on the subject of the investigation he may testify, and the weight to be given to his evidence is for the jury." See e.g., Bennett v. Graham, 714 A.2d 393 (Pa. 1998); Miller v. Brass Rail Tavern, Inc., 664 A.2d 525 (Pa. 1995).

5. A witness may testify as an expert if his or her experience or education logically or fundamentally embraces a matter at issue. See, Montgomery v. South Phila. Med. Group, 656 A.2d 1385 (Pa. Super. 1995).

6. The admission of expert testimony is within the discretion of the trial court. Barrack v Kolea, 651 A.2d 149 (Pa. Super. 1994). Although it may admit all of an expert's conclusions, a court is in no way obligated to accept them. Nomland v. Nomland, 813 A.2d 850 (Pa. Super 2002).

7. Based on his certifications, prior admissions in county court, voir dire testimony as a whole and his description of the analyses he performed, the Board will accept Dr. Mancino as an expert in document examination and admit his deposition testimony, in its entirety, into the hearing record. (Conclusions of Law ¶ 4-6, F.O.F. ¶'s 30-36).

8. The Claimants bear the burden of proving their breach of contract claim by a preponderance of the evidence, and it is Claimants who bear the burden of producing evidence from which their claim can be established. See e.g., Paliotta v. Department of Transportation, 750 A.2d 388 (Cmwlth. Ct. 1999); Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 551 F. Supp. 1239 (W.D. Pa. 1982).

9. Lottery players are bound by lottery law, which substantially defines the terms of the lottery contract between the lottery and the player. The lottery's regulations are found at 61 Pa. Code §§ 819.201-819.241 and the game rules at 35 Pa.B. 3471. These rules and regulations control the play of the game and prescribe the lottery's obligations regarding payment of prizes. (61 Pa. Code §§ 812.201-819.241; 35 Pa.B. 3471).

10. The Board may take judicial notice of the lottery regulations found at 61 Pa. Code and game rules found at 35 Pa.B 3471. (Pa.R.E. 201; 45 Pa.C.S.A. § 506).

11. The ticket validation requirements are found at 61 Pa. Code § 819.213, and are as follows:

- (a) To be a valid instant lottery game ticket, the presented ticket shall meet the following conditions:

- (1) A play symbol shall appear in each play area of the ticket in accordance with standards on file.
- (2) Each play symbol shall be captioned, and each play symbol and caption shall agree with the play symbols and captions published in the *Pennsylvania Bulletin* under § 819.203 (relating to notice of instant game rules).
- (3) Each play symbol and caption shall be printed according to Lottery standards on file.
- (4) The ticket shall be intact.
- (5) The ticket may not be mutilated, altered, unreadable, reconstituted or tampered with.
- (6) The ticket may not be counterfeit in whole or in part.
- (7) The ticket shall have been issued by the Lottery in an authorized manner.
- (8) The ticket may not have been stolen.
- (9) The play symbol, pack number and validation number shall be complete, shall be legible, shall be right-side-up, may not be reversed and shall appear on the ticket according to Lottery standards on file.
- (10) The ticket shall be complete, not blank or partially blank, may not have a hole punched through it, may not be miscut, shall have the designated play symbol and caption in the play area, shall have exactly one validation number and exactly one pack number printed according to Lottery standards on file.
- (11) The validation number of the ticket shall appear on the Lottery's official file of validation numbers of winning tickets, and a ticket with that validation number may not have been previously paid.
- (12) The ticket may not be misregistered, defective or produced in error.
- (13) The printing on the ticket may not be irregular.

(14) The ticket shall pass additional confidential validation tests of the Lottery and shall be present on the Lottery's validation file.

(b) A ticket not passing all validation checks in subsection (a) is not a valid instant lottery game ticket, is void, ineligible for a prize, and will not be paid. In cases of doubt, the Secretary will determine whether an instant Lottery ticket is valid under this section. The determination will be final and binding.

7. A prize shall be paid only if the ticket is a winner under the specific game notification published in the Pennsylvania Bulletin and meets the criteria listed and established in Section 819.213. (61 Pa. Code § 819.211).

8. The lottery ticket in question is not a winning ticket under the lottery regulations because it did not contain a winning hand for the ticket holder. (61 Pa. Code § 819.211-819.213; F.O.F. ¶s 7-23; Board Finding).

9. The ticket failed to pass the validation requirements of the game. Accordingly, the ticket is not a winning ticket, and Claimants are not entitled to a prize. (61 Pa. Code § 819.213(a)(11) and (14); F.O.F. ¶s 24-29; Board Finding).

DISCUSSION

The facts of this case are not very much in dispute. The Claimants purchased a Pennsylvania Lottery \$100,000.00 Hold 'Em Poker ticket from the Cascade Express, Inc. in New Castle, Pennsylvania. The game is played by scratching off the cards and comparing the purchaser's best available poker hand from the purchaser's two cards and the community cards with the Commonwealth's best poker hand from its two cards and the community cards. The Claimants allege that they had a winning ticket based on their best poker hand of four nines (9) compared to the Commonwealth's hand of an ordinary club flush comprised of a three (3), six (6), seven (7), nine (9), and ten (10) of clubs. However, when Claimants attempted to redeem the ticket, the Pennsylvania Lottery instructed the Claimants that the ticket was not a winner. The Commonwealth contends that Claimants have misread their ticket and that what Claimants assert is a three (3) of clubs on the ticket is actually an eight (8) of clubs. Should the symbol in

question actually be an eight (8) of clubs, this would give the Commonwealth a straight club flush, which would defeat the Claimants' poker hand of four nines (9).

The most credible evidence regarding the status of the lottery ticket is the ticket itself. The original ticket was produced as an exhibit at the hearing. This was the first time the Claimants produced the ticket in a public forum. At the hearing, the panel, in addition to taking testimony, performed a careful visual inspection of the ticket and concluded that the ticket's play symbol at issue between the Claimants and the Department of Revenue was an eight (8) of clubs. Thus the panel found that the Commonwealth's hand on the ticket was a straight club flush which beat Claimants' four (4) nines. This, in and of itself, defeats the Popovich's claim.

Lest the eyesight of our panel members be called into question¹, the Board notes that there is a significant amount of corroborating evidence to support the panel's view. In fact, the Department of Revenue relies upon several forms of ticket testing, which also served to prove that Claimants' instant ticket was not a winner. These methods include sight validation, a check of retail codes, use of a ticket status report, and computer reconstruction.

Sight validation includes the visual examination of the three portions of the play symbol at issue.² First, the number of the card is inspected; next the suit of the card; and, finally the number and suit caption is inspected. In order to be a winning symbol all three portions need to match up. The play symbol for a three of clubs would include the number three (3), the clubs symbol, and the caption THC. The playing symbol for an eight (8) of clubs would include the number eight (8), the clubs symbol, and the caption ETC. James Morgan, the Director of Security for the Pennsylvania Department of Lottery, testified that the playing symbol in question was an eight (8) of clubs as it included the number eight (8), a club symbol, and the

¹ Wary of potential chain of custody, modification and/or authenticity type issues, the panel, after use and inspection of the original ticket at hearing, returned same to Claimants for safe-keeping.

² Each play symbol is comprised of three parts: printed number, suit of the card and a "caption" comprised of three letters describing (corresponding to) the number and the suit in the playing symbol.

caption ETC. Mr. Morgan further testified that even if the play symbol included the number three (3), but still had the caption ETC, it would not be a valid play symbol. There really was no serious dispute that the caption for the symbol at issue was ETC, and the panel's own inspection of the original ticket confirmed this.

Second, a validation code is found above the bar code on the back of each \$100,000 Hold 'Em Poker ticket. The validation code for Claimants was compared against the Pennsylvania Lottery winner's validation file. The winner's validation file contains information on whether each individual ticket is a winner pursuant to the Department of Revenue's records. When the validation test code was examined in this particular case, it showed that the ticket at issue was not a winner.

Third, the ticket status report for the Claimants' ticket showed that the ticket contained no evidence that it was a winner. The ticket status report is generated when a ticket is scanned through the computer system during a validation attempt. After the validation attempt occurs, should the ticket be a winner, the status report would state the Pennsylvania Lottery was the redeemer of the ticket as well as the date and time of the validation. Exhibit R6, which is the status report for the ticket at issue, also indicates that the ticket was not a winner.

Lastly, computer reconstruction of the ticket was undertaken by Scientific Games International, Inc. ("Scientific Games"). Scientific Games printed the ticket in question. This methodology uses the ticket's validation code to reconstruct the ticket by displaying how the ticket should have been printed and identifies whether or not it is a winning ticket. The reconstruction of the ticket would display how the play symbols on the ticket were printed and whether or not it was a winner. Scientific Games performed the ticket reconstruction and confirmed that the ticket was not a winner.

For all of the above reasons, the Board finds that the play symbol at issue is an eight (8) of clubs, that Claimants' ticket was not a winning ticket and that the claim of James and Delores Popovich against the Commonwealth of Pennsylvania, Department of Revenue, must be denied.

ORDER

AND NOW, this 21st day of February, 2008, after a hearing and a review of the briefs in this matter, it is hereby **ORDERED** and **DECREED** that the claim of James Popovich and Delores Popovich, husband and wife, against the Commonwealth of Pennsylvania, Department of Revenue, Pennsylvania Lottery Bureau, is hereby **DENIED**. Each party shall bear its own costs and attorneys' fees.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

ORDER SIGNED

Ronald L. Soder, P.E.
Engineer Member