[Cite as *Struna v. Ohio Lottery Comm.*, 2003-Ohio-4011.]

IN THE COURT OF CLAIMS OF OHIO

JOHN W. STRUNA	:	
Plaintiff	:	CASE NO. 2002-01861
v.	:	DECISION
OHIO LOTTERY COMMISSION	:	Judge J. Warren Bettis
Defendant	:	

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{¶1} On May 28, 2003, defendant, Ohio Lottery Commission (OLC) filed a motion for summary judgment. On June 25, 2003, plaintiff filed a memorandum in opposition. The case is now before the court for a non-oral hearing on the motion for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the

evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} Although plaintiff's complaint is not specific as to the theory upon which relief is sought, the crux of plaintiff's complaint is that OLC failed to adequately notify him of the one million dollar payout cap on the prize for its Buckeye Five lottery contest; that defendant's failure caused plaintiff to continue to purchase additional tickets for the same prize drawing even though the additional tickets did not increase the payout to plaintiff when he eventually won the prize.

{¶5} The sale and purchase of lottery tickets is governed by general principles of contract law. *Peters v. Ohio Lottery Commission* (1992), 63 Ohio St.3d 296, 299. Lottery tickets such as those purchased and redeemed by plaintiff herein, contain express terms requiring compliance with the rules and regulations of the commission, and lottery players are deemed to agree to abide by the terms of the game. See *Woodbridge Partners Group, Inc. v. Lottery Com.* (1994), 99 Ohio App.3d 269; *Board v. Ohio Lottery Comm.* (Dec. 14, 1999), Franklin App. No. 99AP-208; *Rice v. Ohio Lottery Comm.* (1999), 96 Ohio Misc.2d 25.

{¶6} The lottery commission regulations at Ohio Adm.Code Section 3770:1-9-22 provide:

{¶7} "(E) For each individual drawing there shall be a jackpot payout cap of one million dollars for tickets bearing selections which match all five integers drawn. If there are more than ten winners matching all five integers drawn, the total jackpot of one million dollars shall be divided by the number of winning tickets to determine the amount of the prize award for each winning ticket for that drawing."

{¶8} Plaintiff claims that the language of the contract at issue provides inadequate notice to players of the payout cap on the prize. The court disagrees.

{¶9} If language in a contract is clear and unambiguous, "this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. If no ambiguity exists, the terms of the contract must simply be applied without resorting to methods of construction and interpretation. Id. The Ohio Supreme Court has held that "[i]f a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322. Additionally, contracts must be read as a whole and interpreted so as to give effect to every provision. *Farmers' National Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 337. The mere fact that parties to a contract adopt conflicting interpretations of the document does not create ambiguity or a basis for interpretation of the contract language where no ambiguity can reasonably be said to exist in the language. *Complete General Construction Company v. City of Westerville, Ohio*, Franklin App. No. 02AP-63, 2002-Ohio-4778. The question of whether ambiguity or uncertainty in the language of a contract requires resort to extrinsic evidence to ascertain the intent of the parties is a question of law for the court. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214 ("if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined"); *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, 1993-Ohio-195; *P & O Containers, Ltd. v. Jamelco, Inc.* (1994), 94 Ohio App.3d 726, 731

("the interpretation of a written contract is a question of law, absent patent ambiguity").

{¶10} The court finds, as a matter of law, that the express terms relating to the payout cap clearly and unambiguously communicate the one million dollar limit. Despite plaintiff's protestations to the contrary, the contract at issue is not reasonably susceptible to another interpretation.

{¶11} Nevertheless, plaintiff has provided the court with the affidavit and report of Kenneth J. Levine, a law professor, who has opined that the materials provided to players at the point of purchase (betting slip and receipt) do not adequately notify the player of the one million dollar cap. Plaintiff argues that Levine's affidavit and report create issues of fact regarding the misleading nature of the contract language.

{¶12} An affidavit may include an expert's opinion if the requirements of Civ.R. 56(E) and Evid.R. 702-705 are satisfied. *Smythy v. Miguel*, Cuyahoga App. No. 59274, 1990 Ohio App. LEXIS 4432. Therefore, the affidavit must demonstrate that the affiant's opinion is based on personal knowledge; that the facts contained in the affidavit are admissible evidence; and that the affiant is competent to testify as to the matter stated. Civ.R. 56(E). Id. Since the purpose of an affidavit is to demonstrate that there exists a genuine issue of material fact requiring a need for trial, the affidavit must set forth specific facts and not merely legal conclusions or opinions. Id.; *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69. Accordingly, expert testimony regarding matters of law is not appropriate because the court may not abdicate its role as finder of law. *Sikorski v. Link Elec. & Safety Co.*, 117 Ohio App.3d 822, 831, citing *Payne v. A.O. Smith Corp.* (S.D.Ohio 1985), 627 F.Supp. 226, 228-29. As such, an expert's opinions cannot create a duty where no such duty exists.

Id. The contract terms, however, are unambiguous and control; any expert opinion interpreting them has no effect. See *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172 (plaintiff's expert engineer is not permitted to interpret a contract so as to impose a duty on defendants).

{¶13} Based on the above-cited law, the court must disregard the legal opinions of plaintiff's expert; such opinions do not create an issue of fact in this case. Moreover, the opinions of plaintiff's expert are limited to the information printed on the point-of-purchase materials. Plaintiff's expert does not even offer an opinion regarding the clarity of the governing OLC rules and regulations. In short, given the clear and unambiguous terms of the contract at issue, plaintiff cannot prevail on his breach of contract claim as a matter of law.

{¶14} Plaintiff argues in the alternative that OLC's advertising catch-phrase "1 dollar wins 100,000" constitutes a deceptive sales practice under Chapter 1345 of the Ohio Consumer Sales Practices Act in that the one million dollar cap is not expressly mentioned in OLC's advertisements.

{¶15} The purpose of R.C. Chapter 1345, the Ohio Consumer Sales Practices Act, is to protect consumers from suppliers who commit deceptive or unconscionable sales practices. *Thomas v. Sun Furniture & Appliance Co.* (1978), 61 Ohio App.2d 78, 81. The act is remedial and courts must liberally construe it in favor of the consumer. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29; *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, 334. Intent to deceive is not an element required for a violation of the deceptive-practices portion of the act. *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815, 823; *Thomas*, supra, 61 Ohio App.2d at 82-83. An act is deceptive only if it "'has the likelihood of inducing in the mind of the consumer a belief which

is not in accord with the facts.'" *Funk*, supra, quoting *Brown v. Bredenbeck* (C.P.1975), 2 O.O.3d 286, 287.

{¶16} Plaintiff admits that the advertisements at issue expressly state that the Buckeye Five drawings and prizes are "subject to the rules and regulations of the *** Commission." As stated above, the rules and regulations clearly inform players of the one million dollar cap applicable to the Buckeye Five prize. Plaintiff again relies on the affidavit and report of his expert to establish a genuine issue of material fact regarding the deceptive nature of the advertising. Indeed, Professor Levine opines that it was reasonable for plaintiff to conclude from the Buckeye Five advertisement that no prize cap existed. However, even if the expert's testimony is to be accepted, plaintiff's notice of the applicable rules and regulations establishing the prize cap, precludes his recovery under Chapter 1345. See *Rice v. Ohio Lottery Comm.*, supra, 96 Ohio Misc.2d 25. (Plaintiff's notice of the material terms of the contract regarding the jackpot payout amount, including Commission policy resulting in different "present value" figures for the annuity and cash options when the prize winner elects the lump-sum payment, precludes recovery under Ohio Consumer Sales Practices Act.) Id. at 30-31.

{¶17} In short, plaintiff's claim for relief under the Consumer Sales Practice Act fails, as a matter of law. Upon review of defendant's motion for summary judgment and the memoranda filed by the parties, and construing the facts in a light most favorable to plaintiff, the court finds that no genuine issues of material fact exist and that defendant is entitled to judgment as a matter of law.

{¶18} Defendant's motion for summary judgment is hereby GRANTED and judgment is rendered in favor of defendant. All other pending motions are DENIED as moot.

{¶19} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Additionally, all other pending motions are DENIED as moot. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

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