

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 24, 2008 Session

**LESLIE SMITH v. TENNESSEE EDUCATION LOTTERY
CORPORATION**

**Appeal from the Chancery Court for Davidson County
No. 06-648-II Carol L. McCoy, Chancellor**

No. M2007-02028-COA-R3-CV - Filed December 3, 2008

The trial court granted the Tennessee Education Lottery Corporation summary judgment on plaintiff's claim that he won the powerball lottery based on numbers aired on a television broadcast. We affirm finding that the applicable rules prohibited selection of a winner based on media dissemination of numbers and, that even if a contract was formed as alleged by the plaintiff, the Lottery did not breach it.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and RICHARD H. DINKINS, JJ., joined.

Sam F. Cole, Jr. and James H. Kee, Memphis, Tennessee, for the appellant, Leslie Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Laura T. Kidwell, Assistant Attorney General; Gary R. Thompson, Senior Counsel, for the appellee, Tennessee Education Lottery Corporation.

OPINION

Mr. Smith brought this action against the Tennessee Education Lottery Corporation ("Lottery") seeking to be awarded 93.5 million dollars for breach of contract. According to Mr. Smith, the Lottery breached its contract with him when it failed to award him the Powerball jackpot for its September 24, 2005 drawing. The trial court granted the Lottery summary judgment, and Mr. Smith appeals.

I. FACTS

The following facts are not in dispute.

The “How to Play Tennessee Powerball” brochure instructs players of the powerball lottery to find out if they have won by watching the drawings at 10:00 p.m. on selected TV stations, including WMC Channel 5 in Memphis (“Channel 5”). Specifically, the brochure provided as follows:

How to Find Out If You’ve Won

Powerball drawings are held every Wednesday and Saturday at 9:59 p.m. Central Time (10:59 p.m. Eastern Time).

Watch for drawings at 10:00 p.m. (11:00 p.m. Eastern Time) on these stations:

* * *

WMC Channel 5 Memphis

* * *

The plaintiff, Leslie Smith, bought tickets for the Tennessee Powerball drawing to be held on September 24, 2005. The reverse side of the ticket provided that all tickets, transactions, and winners were subject to Tennessee Education Lottery rules and applicable state laws. One of Mr. Smith’s Powerball tickets for the September 24 drawing had the numbers “05-09-27-49-52 and PB 06.” As was his custom, he had selected the numbers that were designated as the winning number from the immediately prior drawing.

A transcript of the Channel 5 September 24, 2005 broadcast was introduced into evidence. On Saturday night at the beginning of the 10:00 p.m. broadcast, Channel 5 aired the correct numbers for the September 24, 2005 powerball drawing which were “2-10-31-43-55-PB14.” None of Mr. Smith’s lottery tickets had this number.

During the same September 24 broadcast, Channel 5 then erroneously aired the prior week’s lottery drawing footage which displayed the date of September 17, 2005. Consequently, the erroneously aired broadcast provided that the winning number for September 17, 2005 was “05-09-27-49-52- PB06.” While the September 17 footage should not have aired, it was correct regarding the September 17 drawing in all respects. Almost immediately, Channel 5 announced that the September 17 footage had aired erroneously and reiterated the winning September 24, 2005 numbers. Mr. Smith only saw the portion of the broadcast that ran the September 17 footage and did not notice that the erroneously run footage included a September 17, 2005 date. According to Mr. Smith, he believed the drawings on Channel 5 were the “live” drawings although he cited no representation by the Lottery to that effect. Mr. Smith learned that he did not have the winning numbers for the September 24, 2005 Powerball drawing when he read the newspaper on the following day. Mr.

Smith, however, presented his ticket to the Lottery claiming that he won the September 24, 2007 Powerball Lottery.

When the Lottery declined to award Mr. Smith the Powerball lottery prize, Mr. Smith filed suit against the Lottery in March of 2006. According to Mr. Smith's complaint:

By its print and broadcast instructions and advertising, Defendant had made a standing offer to the residents of Tennessee and others that if a player purchased a Powerball play for a dollar, for the drawing on the date specified on the Powerball ticket, and that play matched the winning numbers drawn in the official drawing of the bouncing balls as broadcast by Defendant's partner stations, the player would receive the jackpot announced for that drawing (or a share thereof if there were other winning plays sold).

...

At all times prior to September 24, 2005, Defendant made an offer to Plaintiff and others, which offer was accepted by Plaintiff and a contract was then formed. All contingencies of the contract, *i.e.*, Plaintiff's ticket containing a play which contained the numbers matching the numbers drawn on the drawing broadcast by Defendant's partner station, WMC, on September 24, 2005, have been fulfilled.

Defendant has refused to pay Plaintiff the jackpot of \$93.5 announced for the drawing of September 24, 2005, and has breached the contract entered with Plaintiff.

Mr. Smith alleged in his complaint that if any rules or regulations of the Lottery are contrary to this contract then the rules and regulations are modified by this contract.

The parties filed cross-motions for summary judgment. Finding that Mr. Smith did not have a winning ticket for the September 24 lottery drawing under the rules governing the Lottery, the trial court granted the Lottery summary judgment. Mr. Smith appeals.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

III. ANALYSIS

Mr. Smith argues that based on the Lottery brochure quoted above a contract existed between Mr. Smith and the Lottery to the effect that if Channel 5 aired the ticket number held by him on September 24, then he won. According to the Lottery, the winner is not determined by Channel 5's broadcast and Mr. Smith did not have a winning ticket to the September 24 lottery drawing under the rules and regulations governing the drawing.

The trial court's ruling that Mr. Smith is not entitled to recover is affirmed on two independent, alternate grounds. First, the rules Mr. Smith concedes were incorporated into the contract through the ticket clearly provide that the winner is selected based on the drawing results electronically recorded in the central computer system and not based on any dissemination by the media. Second, even if the rules do not apply, the Lottery did not breach the contract which Mr. Smith alleges existed.

First, the Lottery is correct that under the rules and laws governing the lottery, Mr. Smith did not win. The lottery ticket provided, and Mr. Smith agrees, that all tickets, transactions and winners were subject to Tennessee Education Lottery rules and applicable state laws. The *sole* ground relied upon by Mr. Smith is that he is a winner based upon Channel 5 erroneously airing the September 17 footage. Mr. Smith, however, is expressly prohibited from relying on public dissemination of the winning number under Lottery Rule 3.1 .4(M) which provides as follows:

M. Dissemination of Winning Numbers

The dissemination and publication of winning numbers by telephone or in the media is for informational purposes only, and the TEL shall not pay a prize based upon information obtained from winning number information lines or any source other than the official draw results electronically recorded in the central computer system.

Tennessee Education Lottery Rule 3.1.4(m)

Mr. Smith never argues that his numbers were the "official draw results electronically recorded in the central computer system" for the September 24 drawing. In fact, Mr. Smith concedes that the September 24 Powerball drawing did not produce his numbers but, instead, produced the numbers "02-10-31-43-55-14." Since it allegedly represented the drawing, Mr. Smith argues that the Channel 5 broadcast was not dissemination of winning numbers in the media under Rule 3.1.4(m). Rule 3.1.4(M) is not so limited and is quite clear about the effect of media dissemination of Lottery numbers, which is no effect whatsoever. Unless the number is selected as the "official draw result electronically recorded in the central computer system," then the number is not the winning number, regardless of what Channel 5 or any other media outlet may broadcast or publish.

Second, even if a contract existed between Mr. Smith and the Lottery as alleged by Mr. Smith and the rules did not govern, Mr. Smith is not successful because the Lottery did not breach the

alleged contract he claims was formed by the brochure. Channel 5 aired footage at the top of the broadcast on September 24 that showed the correct numbers for the September 24 drawing, and those were not Mr. Smith's numbers. Consequently, the Lottery complied with the alleged contract by not paying on a ticket that did not have the winning number. Even if Mr. Smith is correct about how a winner is selected, the transcript of the footage shows the correct numbers were broadcast on September 24. Channel 5 also aired footage of the previous drawing, but that footage clearly showed the September 17 date. Airing other footage does not detract from the fact that the Lottery complied with the alleged contract as interpreted by Mr. Smith. Since there is no breach of any contract that allegedly existed, the Lottery is entitled to summary judgment.¹

The judgment of the trial court is affirmed. Costs of appeal are taxed against the appellant, Leslie Smith, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.

¹Since Mr. Smith does not argue he is entitled to win under the ticket validation process in the Lottery rules, we need not address them. Also, since the Lottery complied with the contract Mr. Smith alleges was formed, we need not address whether the alleged contract existed.