STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL, Plaintiff-Appellant,	FOR PUBLICATION January 5, 2010
v	No. 283858 Kent Circuit Court
POWERPICK PLAYERS' CLUB OF MICHIGAN, LLC, a/k/a POWERPICK, Defendant-Appellee.	LC No. 06-011767-CP Advance Sheets Version

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J. *(concurring in part and dissenting in part).*

I agree and join with the holdings of the majority in part II (C)(2) that PowerPick violates MCL 432.27(1) by reselling lottery tickets at a price greater than that fixed by the Michigan Lottery commissioner and part II (C)(3) that PowerPick violates MCL 750.372 because its random drawings for Michigan scratch-off lottery tickets constitute an illegal lottery and that its MegaPools constitute an illegal gift enterprise. I also agree and join with the holding of the majority in part III that PowerPick's affirmative defenses fail as a matter of law. In addition, I agree that a remand is appropriate for consideration of the Attorney General's Michigan Consumer Protection Act, MCL 445.901 *et seq*., claims.

However, I respectfully disagree with the majority's conclusion in part II (C)(1) that PowerPick's business practice of randomly assigning its customers to pools constitutes a second bet because the customer is "*buy*[*ing*] *the chance* of being assigned to one or more winning pools," *ante* at 8 (emphasis in original), and this chance is one of the reasons why its customers pay an amount that is 51 percent greater than the face value of the tickets purchased. On the basis of its interpretation of PowerPick's practice of assigning its customers to pools, the majority holds that PowerPick receives bets contrary to MCL 750.301, registers bets contrary to MCL 750.304, and possesses memoranda of bets contrary to MCL 750.306. In contrast, although not disputing that it charges its customers 51 percent more than what it spends to purchase lottery tickets, PowerPick maintains that it is merely providing a service to its customers and that the amount greater than that used to purchase tickets represents its costs and profits. In my opinion, whether the amount charged in addition to the cost of the purchased lottery tickets is a reasonable amount to pay for PowerPick's business expenses and profits, or in part is a second bet that buys the customer a chance to be assigned to a winning pool, is a disputed question of fact that cannot be resolved on a motion for summary disposition.

Consequently, on this specific issue, I would affirm the trial court's holding that factual issues remain.

I also respectfully disagree with the holdings of the majority in parts II (C)(4) and (5) that "PowerPick's business operations, taken as a whole, constitute a public nuisance," *ante* at 16, and that "PowerPick's office in Comstock Park and 'the furniture, fixtures, and contents' of that office constitute a nuisance as a matter of law," *ante* at 16. Because I believe that factual questions exist concerning whether PowerPick's business practice of assigning its customers into pools violates the at provisions of the Michigan Penal Code at issue, any determination whether PowerPick's business operations and its office constitute a nuisance for such violations is premature. Moreover, whether PowerPick's violation of MCL 432.27(1) constitutes a public nuisance and, if it does, whether the violation is subject to the sanctions provided for in MCL 600.3801 are questions of first impression. In *Attorney General, ex rel Optometry Bd of Examiners v Peterson*, 381 Mich 445, 465; 164 NW2d 43 (1969), the Supreme Court noted that, "[a]t common law, acts in violation of law constitute a public nuisance" and the Attorney General may sue to enjoin such nuisances. Therefore, although no court has addressed the issue, it is arguable that PowerPick's violation of MCL 432.27(1) renders its business a public nuisance. However, the *Peterson* Court qualified its holding by noting that "[h]arm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare." *Id*. at 465. Numerous cases hold that the criminal gambling statutes, such as MCL 750.301, MCL 750.304, and 750.306, were enacted to preserve public health, safety, and welfare. See, e.g., *Parkes v Recorder's Court Judge*, 236 Mich 460, 465-466; 210 NW 492 (1926); *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App 318, 326; 256 NW2d 776 (1977). But whether MCL 432.27(1) was enacted to preserve public health, safety, and welfare is not a settled question. Because the Attorney General only argued below that a violation of MCL 432.27(1) provided an additional reason for concluding that PowerPick's operation was a public nuisance, the issue whether MCL 432.27(1) was enacted to preserve public health, safety, and welfare was not raised in the trial court, nor was it briefed on appeal. Under these circumstances, I would remand to the trial court for initial consideration of whether a violation of MCL 432.27(1) constitutes a public nuisance and, if so, whether, and to what extent, the violation is subject to the sanctions of MCL 600.3801.

Finally, I agree with the holding of the majority in part II (C)(5) that PowerPick's drawings for scratch-off lottery tickets are "gambling" and, therefore, PowerPick can be sanctioned under MCL 600.3801. However, unlike the majority, I would also remand to the trial court for a determination of what, if any, assets are subject to the sanction provided by MCL 600.3801 for this particular violation.

/s/ Joel P. Hoekstra