

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 707 CD 2023

**IN RE: THREE PENNSYLVANIA SKILL AMUSEMENT DEVICES, ONE
GREEN BANK BAG CONTAINING \$525.00 IN U.S. CURRENCY,
AND SEVEN RECEIPTS**

APPEAL OF COMMONWEALTH OF PENNSYLVANIA

**BRIEF OF AMICUS CURIAE
PENNSYLVANIA GAMING CONTROL BOARD**

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Interest of the Pennsylvania Gaming Control Board.

The Pennsylvania Gaming Control Board (“the Board”) is tasked with overseeing legalized gaming in Pennsylvania, which includes slot machine gaming which may only occur in a licensed slot machine facility as permitted under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101 et seq., (“the Gaming Act”). Among the many responsibilities placed on the Board are the protection of the public through the regulation of gaming as well as regulating the play of slot machines to generate significant revenues for the Commonwealth. Unregulated and arguably unlawful activity involving gaming devices that are directly comparable to slot machines, including “skill-based” games in the Commonwealth, undermines the public protection as well as the collection of tax revenues under the Gaming Act. The Board, as the entity tasked with general and sole authority over the conduct of gaming and related activity, has a strong interest in ensuring that the directives of the General Assembly are met, and that a judicial determination in this matter finds that “skill-based” games are unlawful gambling devices under 18 Pa.C.S. § 5513, thereby ending the exponential proliferation of these machines throughout the Commonwealth.

II. INTRODUCTION

The Gaming Act.

The Gaming Act, enacted in 2004, promoted a primary purpose of protecting the public through the regulation and policing of all activities involving gaming¹ and practices that continue to be unlawful. 4 Pa.C.S. §1102(1). The authorization of limited gaming as set forth in the Gaming Act² was intended, among other things, to enhance live horse racing, employment, revenues to the Commonwealth, tax revenues to support property tax relief, wage tax reduction, economic development activities, and host county and municipality benefits. The Gaming Act created the Board, 4 Pa.C.S. §1201, granted the Board general and sole regulatory authority over the conduct of gaming and related activities under the Gaming Act, and created a strict investigation, licensing, testing and oversight regulatory role over the conduct of gaming in order to promote the protection of the public and the generation of revenues for the Commonwealth in a manner promoting the public interest. *See generally* 4 Pa.C.S. §§1207-1904.

¹ The Gaming Act uses the term “gaming” and not “gambling” in describing the activity overseen and regulated by the Board.

² While the Gaming Act gives the Board authority to regulate slot machines, table games, interactive gaming and sports wagering, it excludes from the Board’s oversight gaming conducted under the State Lottery Law, the Bingo Law, the Race Horse Industry Reform Act, the Local Option Small Games of Chance Act, Keno, I-Lottery and Fantasy Contests (Fantasy contests are regulated by the Board but not under the Gaming Act).

Pursuant to its broad authority, the Board has licensed 18 slot machine licensees, 11 of which (Category 1 and 2 licensees) paid a \$50,000,000 license fee to the Commonwealth simply for a slot machine license, while two Category 3 licensees each paid \$5,000,000 as a slot machine license fee. The Board has also issued five Category 4 slot machine licenses to entities who paid varied amounts for the licenses during an auction process, as provided for in Act 42 of 2017 (P.L. 419), a bill that amended and expanded the Gaming Act³. Each has invested hundreds of millions of additional dollars to build first class casino facilities, add table games, sports books, on-line gaming offerings and additional amenities. In addition to the monies paid at start-up, the slot machine licensees pay taxes on slot machine revenues which flow to the Commonwealth for designated purposes including, *inter alia*, property tax relief, horse racing development, economic and tourism grants, and volunteer fire company grants in an amount of nearly 54% of every dollar received from slot machine gaming.

At the very core of slot machine gaming, the Commonwealth and its subdivisions are the majority beneficiaries of all authorized slot machine play in Pennsylvania. Tax revenues to the Commonwealth, counties, and local

³ One of the Category 4 licensed facilities has yet to be built and open, due to ongoing legal disputes regarding the issuance of the slot machine license. The other four are fully operational.

municipalities, including for all designated funds in the Gaming Act, just from slot machines for the fiscal year 2022/2023 was \$1,356,438,542.

And just as the Commonwealth is the primary beneficiary, the Board carries the mission to protect the public, which involves at its heart assuring that games offered to the public in licensed facilities are tested, function as represented, and are fair to the consuming public. Additionally, the Board bears the fundamental regulatory oversight of the generation, security and accounting of all monies owed the Commonwealth through slot machine operation.

Amendments to the Gaming Act by Act 42 of 2017.

On October 30, 2017, Act 42 of 2017 (P.L. 419) became effective after being signed into law by then-Governor Tom Wolf. The Act, commonly referred to as the Gaming Expansion Bill, created several new forms of gaming under the regulatory purview of the Board (Fantasy Contests, Interactive Gaming, Sports Wagering, and Video Gaming Terminals⁴), created an auction process and licensing scheme for Category 4 slot machine facilities, and made amendments and additions to the definitions section of the Gaming Act⁵.

⁴ Fantasy Contests and Video Gaming Terminals are technically not part of the Gaming Act but exist in a different Parts in Title 4 (Amusements).

⁵ The amendments listed made by Act 42 of 2017 is not an exhaustive list of the changes made by the General Assembly.

One amendment made by the General Assembly is particularly relevant to the inquiry regarding the legality of “skill-based” games, and that was the changes made to the definition of “Slot machine.” The Gaming Act now defines three types of slot machines, depending on the degree of chance or skill involved in playing the game: a slot machine, a hybrid slot machine, and a skill slot machine.

A “Slot machine” is now defined in the Gaming Act as follows:

(1) The term includes:

(i) Any mechanical, electrical or computerized contrivance, terminal, machine or other device approved by the Pennsylvania Gaming Control Board which, upon insertion of a coin, bill, ticket, token or similar object therein or upon payment of any consideration whatsoever, including the use of any electronic payment system except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both:

(A) May deliver or entitle the person or persons playing or operating the contrivance, terminal, machine or other device to receive cash, billets, tickets, tokens or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually.

(B) May utilize spinning reels or video displays or both.

(C) May or may not dispense coins, tickets or tokens to winning patrons.

(D) May use an electronic credit system for receiving wagers and making payouts.

(ii) Associated equipment necessary to conduct the operation of the contrivance, terminal, machine or other device.

(iii) A skill slot machine, hybrid slot machine and the devices or associated equipment necessary to conduct the operation of a skill slot machine or hybrid slot machine.

(iv) A slot machine used in a multistate wide-area progressive slot machine system and devices and associated equipment as defined by the Pennsylvania Gaming Control Board through regulations.

(v) A multi-use computing device which is capable of simulating, either digitally or electronically, a slot machine.

(2) The term does not include a fantasy contest terminal within the meaning of Chapter 3.

4 Pa.C.S. § 1103 (emphasis added)⁶.

A "Hybrid slot machine" is a slot machine in which a combination of the skill of the player and elements of chance affect the outcome of the game. A "Skill slot machine" is one in which the skill of the player, rather than the element of chance, is the predominant factor in affecting the outcome of the game. *Id.*

Additionally, the General Assembly added this provision to the Legislative Intent section of the Act: "It is also the intent of the General Assembly to ensure the sustainability and competitiveness of the commercial gaming industry in this Commonwealth by authorizing interactive gaming, the operation of multistate wide-area progressive slot machines, *skill and hybrid slot machines.*" *4 Pa.C.S. § 1102(12.2)* (emphasis added).

⁶ Bolded text is language amended or added by Act 42 of 2017.

III. ARGUMENT

Skill Games in an unlicensed and unregulated scenario are contrary to the public interest and not consistent with the General Assembly’s intent to restrict the offer of skill slot machines within the confines of the Gaming Control Board’s oversight in licensed facilities.

While the Board meets its obligations to the public and the Commonwealth, the Board has been forced to watch the proliferation throughout the Commonwealth of so-called “skill-based” games, like the ones in this matter, which mimic the appearance of casino slot machines. The invasion of these machines has occurred in an environment which is completely unregulated, creating a scenario where games can be offered by persons within criminal organizations or with criminal backgrounds without limit, games lack player protections of appropriate testing, age restriction or mandatory paybacks, and no assurance of fairness to the Pennsylvania resident playing the games is present.

Moreover, the public purposes designated for slot machine tax revenues in Pennsylvania are ignored and unserved – receiving zero dollars of tax revenues from the “skill-based” games as occurs with legitimate, slot machines licensed by the Board. The operation of these “skill-based” games also includes little if any accountability or audit trail of play and revenues.

In the Commonwealth Court’s November 20, 2019 Opinion in *POM of Pennsylvania, LLC v. Dept’ of Revenue*, 221 A.3d 717 (Pa. Commw. Ct. 2019)⁷, the Court has held that the “skill-based” games at issue meet the definition of a “skill slot machine” in the Gaming Act⁸, yet fall outside the jurisdiction of the Gaming Control Board because they are not located in a Board-licensed facility. *See Id* at 725, 734-35. Of particular note, the Court stated,

The legislative intent outlined in the Gaming Act also demonstrates that the General Assembly only intended the Gaming Act to regulate **legal and licensed** gaming. Of particular importance, section 1102(8) provides that one of the objectives of the Gaming Act is **to provide strict monitoring “and enforced control over all limited gaming authorized”** by the Gaming Act. 4 Pa.C.S. §1102(8)(emphasis added). Section 1102(8) does **not** state that it is the General Assembly’s intention to provide strict monitoring and enforced control **over all gambling in the Commonwealth, whether legal or illegal**, but merely that the General Assembly intended to strictly control the limited gaming authorized by the Gaming Act.

Id at 732.

While the Board agrees with the Court’s conclusion that the Board’s jurisdiction and regulatory oversight is limited to licensees under the Gaming Act

⁷ POM brought the action seeking declaratory and injunctive relief after some of its “skill amusement devices” were seized as illegal gambling devices. POM asserted that as “skill-based” machines, they are not illegal gambling devices under 18 Pa.C.S. §5513.

⁸ “Because POM alleges that its game requires consideration to play, provides something of value, and is skill-based, if POM’s activities are subject to the Gaming Act, **then the POM Game fits within the definition of “Slot machine” under the Gaming Act**. Similarly, since POM alleges that players of the POM game must use skill, if the Gaming Act applies to unlicensed games **then the POM Game would fit within the definition of “Skill slot machine” under the Act**.” *Id* (emphasis added).

and the Board has not been directed by the General Assembly to regulate “skill-based” games outside of those facilities⁹, the Board believes the Court’s conclusion concerning the strict monitoring and enforced control over all gambling in the Commonwealth, whether legal or illegal, overlooks the big-picture intent of the General Assembly in enacting the Gaming Act and its amendments in 2017 as it pertains to the proliferation of “skill-based” games.

The Board further submits that the General Assembly’s express intent in enacting the amendments in Act 42 of 2017 was that skill slot machines like the “skill-based” games in dispute here only be offered in licensed and regulated facilities. Given that express intent, it can be further argued therefore that possession of and offer for play of skill slot machines outside of licensed and regulated facilities be considered unlawful gambling under 18 Pa.C.S. § 5513¹⁰.

⁹ Despite agreeing in principle with the regulatory oversight issue, the Board still maintains reservations regarding the conclusion reached by this Court in that November 20, 2019 Opinion that the Gaming Act does not by itself prohibit possession of slot machines outside of a licensed facility.

¹⁰ The Board acknowledges that this Court found in its November 20, 2019 Opinion that the passage and existence of the Gaming Act does not supersede or supplant 18 Pa.C.S. § 5513 as the statute that criminalizes possession of unlawful gambling devices. *Id* at 736. The Board does, however, believe that provisions of the Gaming Act cited in this *Brief of Amicus Curiae* can be readily used by this Court in determining whether the General Assembly intended for “skill-based” games to unlawful gambling devices under 18 Pa.C.S. § 5513.

Given the adoption of the Gaming Act and the 2017 amendments thereto, the “predominate factor test” is an antiquated method of determining whether “skill-based” games are unlawful gambling devices under 18 Pa.C.S. § 5513.

Turn back the clock 40 years to the year 1983. This is the year when the Pennsylvania Supreme Court decided the case of *Commonwealth of Pennsylvania v. Two Electronic Poker Game Machines*, 465 A.2d 973 (Pa. 1983), establishing the “predominate factor test” to evaluate whether a machine is a *per se* gambling device, and thereby illegal under § 5513 of the Crimes Code (Title 18). Under that test, for a machine to be considered to be a gambling device *per se* (in addition to the requirements of “consideration” and a “reward”¹¹), “it must be a game where chance predominates rather than skill.” *Commonwealth v. Dent*, 992 A.2d 190, 193 (Pa. Super. Ct. 2010); see also *Commonwealth v. Irwin*, 636 A.2d, 1107 (Pa. 1993).

It is noteworthy, however, that 40 years ago when the Pennsylvania Supreme Court decided the *Two Electronic Poker Game Machines* case and created the “predominate factor test,” regulated slot machine gambling in the Commonwealth did not yet exist. Therefore, at that time it was necessary for the Court to make a judicial determination as to what constituted gambling and what would make a machine a gambling device *per se*, as no other statutory provisions from the General

¹¹ It does not appear that the elements of “consideration” and “reward” are in dispute with the “skill-based” games in question.

Assembly could provide guidance on the disputes in the underlying cases and 18 Pa.C.S. § 5513 did not contain definitions for courts to utilize.

Regulated slot machine gaming in the Commonwealth only came into existence in 2004 with the initial passage of the Gaming Act, in which the General Assembly provided for a comprehensive framework and regulatory scheme for how slot machine gaming in the Commonwealth would occur. This framework included a definition of what was a “slot machine.” The General Assembly, in Act 42 of 2017, amended that framework to specifically include “skill slot machines” and “hybrid slot machines” as types of slot machines that it intended to allow casinos to offer as a form of regulated gaming under the regulatory oversight of the Board. With one exception, no provision in law expressly permits the play of a slot machine, whether a traditional slot machine, or a hybrid or skill slot machine, outside of a Board-regulated and licensed casino¹².

It stands to reason that the General Assembly’s adoption of legislation establishing regulated slot machine gaming and defining what a “slot machine” is in the Gaming Act would be instructive to the Courts on what should be considered a “slot machine” or unlawful gambling device *per se* under 18 Pa.C.S. § 5513. Taking

¹² The General Assembly has specifically permitted Video Gaming Terminals to be placed in certain truck stops in Pennsylvania. See 4 Pa.C.S. Part III, §§3101 – 4506. For all practical purposes, VGT’s operate identically to slot machines. The fact that the General Assembly only permitted those slot machines to be placed in limited areas indicates an intent that they not be located elsewhere.

this argument further, the fact that the General Assembly in 2017 specifically provided for “skill slot machines” to be authorized as gaming devices that could be offered in licensed facilities could reasonably be construed as the General Assembly’s intent that *only* licensed facilities be permitted to offer for play “skill slot machines,” to the exclusion of all other locations.

It is these facts that the Board believes renders the “predominate factor test” antiquated in determining if something is a slot machine or an unlawful gambling device *per se* under 18 Pa.C.S. § 5513. In essence, the General Assembly has spoken on the fact that “skill slot machines” like the “skill-based” games in question are gambling devices by including them in the Gaming Act, the legislation that provides the entire framework for gambling in the Commonwealth. This should render moot the debate as to whether the game in question is predominately skill versus predominately chance.

Given that “skill slot machine” and “hybrid slot machine” can now be found in the definition of “slot machine” in the amendments to Gaming Act in 2017, it is reasonable to suggest that the General Assembly’s specific inclusion of these terms makes the possession of or offer for play of skill or hybrid slot machines by any entity other than a slot machine licensee unauthorized and outside what is permitted by law. Therefore, the “skill-based” games in question should be deemed as

unlawful gambling devices under 18 Pa.C.S. § 5513, regardless of whether skill predominates chance in determining the results of the game¹³.

To hold otherwise undermines the General Assembly's legislative intent as addressed in the Gaming Act, as well as the public interest, public protection and generation of tax revenues from the conduct of gaming intended for the benefit of all Pennsylvanians. To bifurcate the public policy and create two groups of the public (one protected if they play in a casino and another without any protection), implies that the General Assembly only cared about the protection of the public who were playing skill machines in a licensed facility to the exclusion of the public interest and protection of those playing outside a licensed casino facility. This creates an untenable and, we believe, absurd result indicating that all of the public is not entitled to the same degree of protection from unfair machines or unscrupulous operators¹⁴.

A finding that "skill-based" games are not unlawful gambling devices under 18 Pa.C.S. § 5513 would also imply that the General Assembly, in passing Act 42 of 2017, intended to create and permit two parallel forms of gaming: (1) regulated "skill-based" gaming in licensed facilities, subject to slot machine taxation and with

¹³ This is assuming, of course, that the games are in fact games of skill and not games of chance.

¹⁴ To this end, the Board submits that the danger to the public in terms of problem and compulsive gaming is significantly of greater concern in the unregulated market, simply because of the ready availability of machines next door or on the next block without safeguards of responsible gaming plans and resources as provided in the regulated slot machine licensee context.

public protections outlined previously; and (2) unregulated “skill-based” gaming in unlicensed locations, with no corresponding taxation structure and no public protections. Considering the Commonwealth is the primary beneficiary of licensed and regulated gaming and the comprehensive regulatory framework it created in the Gaming Act to provide protections for patrons and tax revenue for the Commonwealth, it seems absurd to suggest that the General Assembly would intend such a result.

Such implications and results would eradicate the statutory construction presumptions that the General Assembly does not intend a result that is absurd or unreasonable, and that the General Assembly intends to favor the public interest as against a private interest. *See 1 Pa.C.S. §1922(1)(5)*. To be frank, it is absurd to suggest that the General Assembly would intend to permit the unregulated and untaxed offer and play of “skill-based” games, while simultaneously amending the Gaming Act to include such devices as gambling devices that may be offered in licensed facilities.

Accordingly, the Board urges this Court to follow the intent of the General Assembly, and find that all slot machines in Pennsylvania, whether based on chance, skill or a combination thereof, must be confined only to licensees as contemplated by the Gaming Act to protect the public interest as well as the Commonwealth’s taxable revenues.

IV. CONCLUSION

For the forgoing reasons, the Court should reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I, Chad W. Zimmermann, Esquire hereby certify that the Pennsylvania Gaming Control Board has complied with the Pa.R.A.P. 531(b)(3), and that the word count for the foregoing Brief of Amicus Curiae is 3509 words, as tabulated by the Microsoft Word software.

Dated: August 16, 2023

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CERTIFICATE OF COMPLIANCE

I certify this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 16, 2023

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CERTIFICATE OF SERVICE

I, Chad W. Zimmermann, hereby certify that on this **16th day of August 2023**, caused a true and correct copy of the foregoing Amicus Curiae Brief to be served via the Court's PACFile system, upon the following:

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