

SUPREME COURT OF NORTH DAKOTA

Midwestern Enterprises, Inc. v. Stenehjem

625 N.W.2d 234 (N.D. 2001) · No. No. 20000168 · Decided April 12, 2001

SUMMARY

The Supreme Court of North Dakota affirmed summary judgment declaring Midwestern Enterprises' Lucky Strike two-minute phone card dispensing device a gambling apparatus and a coin-operated gaming device under North Dakota law. The court held that the chance to win cash prizes constituted consideration, prize, and chance, despite the device dispensing a phone card and offering limited free game pieces. The court also held that the device did not qualify for the bona fide vending-machine exception because it incorporated gambling features.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Vande Walle, Chief Justice; Sandstrom, Justice; Kapsner, Justice; Maring, Justice; Neumann, Justice
JURISDICTION	North Dakota
DECIDED	April 12, 2001
DOCKET	No. 20000168
DISPOSITION	affirmed
PROCEDURAL POSTURE	Midwestern appealed the district court's summary judgment declaring its Lucky Strike two-minute phone card dispensing device to be a gambling apparatus and a coin-operated gaming device under North Dakota law.
STANDARD OF REVIEW	Summary judgment is appropriate when a party is entitled to judgment as a matter of law and no dispute exists as to material facts or inferences, or when resolving factual disputes would not alter the result. On appeal from summary judgment, questions of law are fully reviewable.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of North Dakota
PARTIES	Midwestern Enterprises, Inc. v. Wayne K. Stenehjem, North Dakota Attorney General

TOPICS

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QUESTIONS PRESENTED

1. Whether the Lucky Strike device was a gambling apparatus under N.D.C.C. § 12.1-28-01(3), based on whether the game constituted gambling under N.D.C.C. § 12.1-28-01(1).
2. Whether the availability of free game pieces meant that the Lucky Strike game lacked consideration and was merely a promotional sweepstakes rather than gambling or a lottery.
3. Whether the Lucky Strike device was a coin-operated gaming device under N.D.C.C. § 12.1-28-02(4)(a) and whether it qualified for the bona fide vending-machine exception in § 12.1-28-02(4)(b).

HOLDINGS

1. The Lucky Strike device was a gambling apparatus under N.D.C.C. § 12.1-28-01(3) because it was used in the playing phases of gambling activity. The device involved consideration, a chance-based prize, and a prize, even though each paid play also delivered a phone card.
2. The availability of a limited number of free game pieces did not eliminate consideration or exempt the Lucky Strike game from North Dakota's gambling and lottery definitions.
3. The Lucky Strike device was a coin-operated gaming device under N.D.C.C. § 12.1-28-02(4)(a) and did not qualify for the bona fide vending-machine exception because gambling features were incorporated into it.

KEY QUOTATIONS

"Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control." (625 N.W.2d at 237)

"It is adequate to be defined as a lottery if some of the participants have given a consideration for the chance to be selected." (625 N.W.2d at 240)

"The Lucky Strike device incorporates "gambling features" and therefore does not qualify for the exception described by N.D.C.C. § 12.1-28-02(4)(b)." (625 N.W.2d at 241)

FACTUAL BACKGROUND

Midwestern operated Lucky Strike devices that dispensed a two-minute prepaid phone card and a game piece offering a chance to win cash prizes of up to \$500 for each dollar inserted. The devices resembled slot machines, used randomly generated spinning-wheel graphics, did not return change, and paid out approximately 65 percent of the money inserted into a cartridge as cash prizes. Although players could request a limited number of free

game pieces by mail and unused phone cards were available free at some locations, customers continued to insert money into the devices.

PROCEDURAL HISTORY

After the Attorney General informed Midwestern that the Lucky Strike devices were illegal, Midwestern filed an action seeking declaratory and injunctive relief. The parties agreed that a justiciable controversy existed and submitted cross-motions for summary judgment. The district court entered judgment for the Attorney General, declared the device illegal under the cited statutes, and awarded costs and disbursements of \$1,435.58. The North Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- DeCoteau v. Nodak Mut. Ins. Co., 2000 ND 3, 603 N.W.2d 906
- Jones v. Barnett, 2000 ND 207, 619 N.W.2d 490
- Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589 (1941)
- State v. Apodoca, 32 N.M. 80, 251 P. 389 (1926)
- Boynton v. Ellis, 57 F.2d 665 (10th Cir. 1932)
- Mueller v. Wm. F. Stoecker Cigar Co., 89 Neb. 438, 131 N.W. 923 (1911)
- State v. Branney, 62 Wyo. 40, 160 P.2d 972 (1945)
- Kirk v. Morrison, 108 Fla. 144, 146 So. 215 (1933)
- Ferguson v. State, 178 Ind. 568, 99 N.E. 806 (1912)
- Meyer v. State, 112 Ga. 20, 37 S.E. 96 (1900)
- Mississippi Gaming Commission v. Six Electronic Video Gambling Devices, 2001 WL 19737 (Miss. Ct. App. Jan. 9, 2001)
- People ex rel. Lockyer v. Pacific Gaming Technologies, 82 Cal. App. 4th 699, 98 Cal. Rptr. 2d 400 (2000)
- Mississippi Gaming Commission v. Treasured Arts, Inc., 699 So. 2d 936 (Miss. 1997)
- Boyd v. Piggly Wiggly Southern, Inc., 115 Ga. App. 628, 155 S.E.2d 630 (1967)
- Kroger Co. v. Cook, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970)
- State ex rel. Schillberg v. Safeway Stores, Inc., 75 Wash. 2d 339, 450 P.2d 949 (1969)

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