

AMERICAN AMUSEMENTS CO., A NEBRASKA CORPORATION,
AND GREATER AMERICA DISTRIBUTING, INC., A NEBRASKA
CORPORATION, APPELLEES, V. NEBRASKA DEPARTMENT
OF REVENUE, A NEBRASKA STATE AGENCY,
ET AL., APPELLANTS.
807 N.W.2d 492

Filed December 23, 2011. No. S-10-804.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. ____: _____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Gaming: Words and Phrases.** Gambling occurs in Nebraska when a bet is placed on an outcome that is determined predominantly by chance.
6. **Injunction.** An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Jon Bruning, Attorney General, L. Jay Bartel, and Michael B. Guinan, and Mark C. Laughlin, Special Assistant Attorney General, of Fraser Stryker, P.C., L.L.O., for appellants.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee American Amusements Co.

Thomas M. Locher and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee Greater America Distributing, Inc.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

STEPHAN, J.

This appeal focuses on the legality of a video gaming device known as Bankshot, which was developed by American Amusements Co. (American Amusements) and distributed by Greater America Distributing, Inc. (collectively appellees). Appellees filed this lawsuit after the State seized two Bankshot devices as alleged illegal gambling devices, seeking a declaration that they were not illegal. The state agencies and officers who were named as defendants filed a counterclaim seeking a declaration that Bankshot was a “game of chance” and therefore an unlawful gambling device. Following a bench trial, the district court for Lancaster County found that Bankshot was a game of chance when played in some modes, but not when played in others. The court declined the request for injunctive relief by the named state agencies and officers, who now appeal from the judgment. We affirm.

I. FACTS AND PROCEDURAL HISTORY

1. BACKGROUND

John Fox is the president of American Amusements. In mid-2007, prior to marketing Bankshot, Fox asked a Nebraska State Patrol officer, Don Littrell, to assess the legality of the prototype. Fox understood that Littrell was the State of Nebraska’s gambling device expert, and Littrell agreed that he was the State Patrol’s “go-to-guy” in this area. Littrell advised Fox and American Amusements that the initial prototype of Bankshot was not legal, because the game did not involve a predominance of player skill. American Amusements then redesigned Bankshot and again asked Littrell to assess its legality. Littrell recommended submitting Bankshot to a third-party testing facility and suggested two such facilities: Eclipse Compliance Testing and Gaming Laboratories International. In late summer 2007, Eclipse Compliance Testing tested the device and issued a written report in October 2007 concluding that Bankshot was predominantly a game of skill and therefore was a legal device in Nebraska.

Around January 2008, Bankshot games were placed into service in Nebraska. As many as 430 Bankshot games were located in 143 different Nebraska cities. After the Bankshot

games had been in place for approximately 1 year, American Amusements received notice from the Nebraska Department of Revenue that additional testing of Bankshot was necessary, and American Amusements agreed to provide a Bankshot device for the additional testing. But before it did so, the State seized two Bankshot devices and submitted the devices for testing at both Eclipse Compliance Testing and Gaming Laboratories International. In a letter dated April 14, 2009, the director of the Charitable Gaming Division stated that the purpose of this testing “was to obtain opinions on whether Bank[s]hot was primarily a game of chance, and therefore illegal, or primarily a game of skill.” The testing again concluded that Bankshot was primarily a game of skill and was thus legal in Nebraska. At least one of the Bankshot devices submitted for testing used the same version of software that was in use at the time of trial in this case.

In September 2009, the State seized two more Bankshot devices. At the time of trial, these devices had not been returned. On September 17, appellees filed this declaratory judgment action, naming as defendants the Nebraska Department of Revenue; the Nebraska State Patrol; Col. Bryan Tuma, the superintendent of the Nebraska State Patrol; Doug Ewald, the Nebraska Tax Commissioner; and Jon Bruning, the Nebraska Attorney General (collectively the State).

2. BANKSHOT GAME

(a) Basics of Game

The Bankshot gaming device is equipped with a 19-inch video monitor, on which all game play is displayed; a currency acceptor; and either a thermal voucher printer or a ticket dispenser. A player interacts with the game by using the touchscreen interface to complete game play, and the device also includes a single-button interface (located just below the monitor) which the player can use to initiate game play and stop on puzzles.

A player may insert \$1, \$5, \$10, or \$20 into the Bankshot currency acceptor. One hundred game credits are received for each \$1 inserted into the machine. The game rules and play instructions are accessed by selecting the “Help” button on

the touchscreen. The first screen displayed explains the game play process.

To initiate a game, the player selects the number of credits to put at risk, choosing from 25, 50, 100, or 400. Each Bankshot game consists of a series of puzzles presented to the player as a three-by-three grid of pool balls, and the object of the game is to solve puzzles by creating a winning “tic-tac-toe” combination of three like-colored balls in a row. The puzzles will never by default contain a winning combination of three pool balls in a row of the same color, but a winning combination is possible with respect to each puzzle.

The game begins when the player presses the play button on the touchscreen or button panel. At that time, depending upon the mode of play selected, the pool balls will either start to spin or scroll indefinitely until the player chooses to stop on a given puzzle. Once the balls have stopped, the player then decides where to replace one of the nine displayed pool balls with a ball marked “Wild.” The player does this by touching a ball displayed on the screen to replace it with the “Wild” ball.

(b) Modes of Play

A player may choose from three different modes of puzzle presentation by selecting one of three buttons labeled “Spin,” “Slow,” or “Fast.” All three modes present the same puzzles in slightly different ways. When a player chooses to play in Spin mode, the nine pool balls displayed on the screen begin to spin in place simultaneously when the player presses start. They will then all come to a brief stop, after which they will begin to spin again. This continues indefinitely until the player presses the stop button.

The Slow and Fast modes of play both display the pool balls scrolling across the screen in a backward “S” pattern from left to right, top to bottom. When played in Slow mode, the balls continuously scroll and a green number appears on every ninth ball. The green number denotes where each puzzle in the chain starts. When the player presses the stop button, the scrolling pool balls stop when the ball with the green number then displayed on the screen reaches the lower right position of the play screen. In Fast mode, the balls will pause

on each puzzle as it is scrolled, similar to the pause during Spin mode play.

(c) Prizes

Prize amounts are based in part upon how long it takes a player to select a ball and replace it with the "Wild" ball once the player chooses a puzzle. A time meter is displayed graphically by a slider bar directly below the puzzle display. When a player chooses a puzzle, a black dot begins to move across the slider bar from left to right, through four regions colored green, yellow, orange, and red. If the player places the "Wild" ball while the black dot is in the green region, the prize amount is multiplied by 1.5. The yellow and largest region awards the amount risked, the orange region awards one-half of the amount risked, and the red region awards one-quarter of the amount risked. If the player fails to make a selection by the time the black dot reaches the far right side of the slider bar, which takes approximately 6 seconds, no prizes are awarded for that particular puzzle.

Prizes also vary depending on how many credits are put at risk and what color combination of pool balls creates the tic-tac-toe. Each pool ball has both a number and a distinct color: "1-balls" are yellow, "2-balls" are blue, "3-balls" are orange, "4-balls" are purple, "5-balls" are red, "6-balls" are green, "7-balls" are maroon, and "8-balls" are black. Pool balls labeled "Bonus" are also presented. A player may want to play one puzzle rather than another because certain puzzles contain larger possible winnings than others. The value of winning combinations is explained on the help screen and is displayed on the right side of the game screen during game play. During play, the three lowest paying matching combinations (three maroon 7-balls, three green 6-balls, or three orange 3-balls) always award the player less than the amount of credits put at risk to play the puzzle. A combination of three blue 2-balls can award at least the amount of credits put at risk. Combinations of three purple 4-balls, three yellow 1-balls, three red 5-balls, three "Bonus" balls, or three black 8-balls can award credits worth more than the amount risked.

(d) Bonus Features and Jackpot

Bankshot also offers three bonus features: The “Fast Break,” the “Speed Break,” and the “Pool” bonus. The Fast Break and Speed Break bonuses are earned, respectively, when a player correctly solves a specified number of the first puzzle presented and when the player quickly solves a specified number of puzzles. The Pool bonus is reached if a player creates a tic-tac-toe of three “Bonus” pool balls.

A jackpot prize is also available when a player correctly solves a puzzle with three 8-balls. When a puzzle presenting a jackpot solution will appear to a player is determined by a counter, and a jackpot puzzle will be presented either every 144,550 or 433,650 puzzles. The jackpot prize is awarded based on the number of games played at all Bankshot locations. As of February 12, 2010, Bankshot had been played 65,593,983 times and 50 jackpot prizes had been awarded.

(e) Puzzle Distribution

Bankshot puzzles are contained in software tables identified as “Table A,” “Table B,” and “Table C.” Each table contains 10,325 puzzles, arranged in a fixed circular or loop fashion, so that once the last puzzle in a table has been presented, the next puzzle presented from that table will be the first puzzle. When a player begins a Bankshot game, the first puzzle presented will be the next sequential puzzle from Table A. If the first puzzle is not chosen for play by the player, the next puzzle presented will be the next sequential puzzle from Table B. If the second puzzle is not chosen for play by the player, the next puzzle presented will be the next sequential puzzle from Table C. If this puzzle is not chosen, the next puzzle presented will be the next sequential puzzle from Table C, and all subsequent puzzles will be presented sequentially from Table C until a puzzle is chosen for play by the player. The cycle then starts over, with the first puzzle then presented coming from Table A. There is no time constraint on the player to select a puzzle. A player is not informed during game play how the puzzles are presented.

3. PROCEEDINGS BELOW

After conducting a bench trial, the district court determined that the proper standard in Nebraska for determining whether a game constitutes gambling is whether the outcome bet upon is determined predominantly by skill or by chance: if by skill, it is not gambling, but if by chance, it is. Applying this standard, it found the State had proved beyond a reasonable doubt that when Bankshot was played in Slow mode, the outcome was determined predominantly by chance and thus was gambling. It found that neither party had carried its burden of proof with respect to whether playing Bankshot in Fast mode was gambling. And the court determined by a preponderance of the evidence that Bankshot when played in Spin mode was not gambling, because the outcome of the game was determined predominantly by player skill.

The court found that whether Bankshot's Pool bonus and jackpot were gambling depended upon which mode of play they arose in: when played in Spin mode, they were not gambling, but when played in Slow mode, they were. It held that both the Fast Break bonus and the Speed Break bonus were gambling beyond a reasonable doubt. Ultimately, the district court concluded that Bankshot was usable for gambling and was thus a gambling device under Nebraska law. But it refused the State's request for injunctive relief, reasoning that there was no showing that appellees knowingly used Bankshot to advance unlawful gaming activity.¹ The State filed a timely notice of appeal and a petition to bypass, which we granted.

II. ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) determining its claims for declaratory and injunctive relief presented actions at law and not equity actions; (2) determining that the State bore the burden to prove beyond a reasonable doubt that Bankshot involved gambling by use of a gambling device; (3) determining that the definitions of gambling and gambling device should be interpreted to require that chance be the predominant factor in determining outcome rather than

¹ See Neb. Rev. Stat. § 28-1107(1) (Reissue 2008).

finding that only an element of chance must determine outcome; (4) failing to determine that Bankshot involves gambling by use of a gambling device because play of the game involves betting something of value on the outcome of a future event which is determined by an element of chance; (5) failing to determine that Bankshot play involves betting something of value on the outcome of a future event which is determined predominantly by chance rather than player skill; (6) determining that the outcome of Bankshot when played in Spin mode (including the Pool bonus outcome) is determined predominantly by player skill rather than chance; (7) failing to determine that the outcome of Bankshot when played in Fast mode (including the Pool bonus outcome) is determined predominantly by chance and not player skill; (8) failing to determine that chance and not player skill is the predominant factor in determining the jackpot outcome of the Bankshot game; (9) failing to determine that the Fast Break and Speed Break bonuses in the Bankshot game, other than the determination of the amount of prize awarded, are determined primarily by chance and not by player skill; (10) finding only that Bankshot was an illegal gambling device “as currently configured and programmed” and failing to find that the device was an illegal gambling device in all play modes; and (11) denying an injunction to prevent continued use, distribution, placement, or possession of the Bankshot gaming device.

III. STANDARD OF REVIEW

[1,2] The parties sought both declaratory and injunctive relief in the district court. An action for declaratory judgment is *sui generis*; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.² Because an action for injunction sounds in equity,³ we conclude that our standard of review for equity actions is

² *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009).

³ *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009); *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

appropriate here. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.⁴ But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.⁵

[3] This appeal also presents issues regarding the meaning of Nebraska statutes. Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.⁶

IV. ANALYSIS

As a preliminary matter, we note that appellees have not cross-appealed from the determinations of the district court that (1) the Speed Break and Fast Break bonus games of Bankshot are games of chance; (2) Bankshot when played in the Slow mode is a game of chance; and (3) Bankshot, as configured and programmed at the time of trial, is an illegal gambling device. At oral argument, the parties agreed that the Bankshot game has been reconfigured to remove those aspects which the district court determined to be games of chance and that the Fast mode of play has also been eliminated. Thus, the primary issue in this appeal is a narrow one: whether the district court properly found that Bankshot is not a game of chance when played in Spin mode.

1. BURDEN OF PROOF IS BEYOND REASONABLE DOUBT

The district court determined that the State was required to prove its claims for declaratory and injunctive relief beyond a reasonable doubt. On appeal, the State contends that the district

⁴ *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). See *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

⁵ *Schauer*, *supra* note 4; *Shoemaker*, *supra* note 4.

⁶ *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010); *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

court should have applied the lesser preponderance of the evidence burden.

To resolve this issue, we must view the State's claim in its proper legal context. Neb. Rev. Stat. § 28-1101(4) (Reissue 2008) provides that "[a] person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance"

Section 28-1101(5) defines "[g]ambling device" to include

any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering.

And § 28-1107(3) provides that possession of a "gambling device" is a Class II misdemeanor. In its counterclaim, the State alleged that Bankshot was an unlawful "gambling device" as defined in § 28-1101(5). It further alleged that appellees' "involvement in developing, promoting, and distributing Bankshot video gaming devices" violated Nebraska's criminal statutes prohibiting gambling.

It is thus clear that the State is claiming that appellees' conduct was criminal. In two prior cases, *Main Street Movies v. Wellman*⁷ and *Tipp-It, Inc. v. Conboy*,⁸ we decided declaratory judgment actions involving possible violations of criminal laws. In both cases, we determined that proof beyond a reasonable doubt was required because (1) our review was as a criminal case at law and (2) it would be inconsistent if the

⁷ *Main Street Movies v. Wellman*, 257 Neb. 559, 598 N.W.2d 754 (1999).

⁸ *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

standard of proof in a declaratory judgment action involving an alleged criminal violation was less than the standard of proof in a criminal prosecution.

The State contends that *Main Street Movies* and *Tipp-It, Inc.* are distinguishable from the instant case because both were brought pursuant to a specific authorizing statute and both involved First Amendment issues. We consider these to be distinctions without a difference. The statutes, Neb. Rev. Stat § 28-801 et seq. (Reissue 1995), did not independently authorize the actions in *Main Street Movies* and *Tipp-It, Inc.*, but instead only modified the prerequisites necessary for bringing an action under the declaratory judgment act when the issue involved obscenity. Because the instant case also arises under the declaratory judgment act, the same burden of proof should apply.

Similarly, assuming without deciding that the instant case does not involve a First Amendment issue, application of the reasonable doubt burden of proof is not dependent upon the existence of a fundamental First Amendment issue. This is illustrated by our lack of any reference to the First Amendment issue in *Main Street Movies* when articulating the appropriate burden of proof.⁹ The critical factor in both *Main Street Movies* and *Tipp-It, Inc.* was that the declaratory judgment sought to answer whether a criminal statute had been violated. That is the same issue presented in the instant case, and thus the district court correctly required the State to prove the allegations of criminal conduct beyond a reasonable doubt. To the extent that we have suggested otherwise, those cases are disapproved.¹⁰

2. PREDOMINANCE OF CHANCE IS APPLICABLE TEST

The primary issue in this appeal is the proper test for determining whether an activity constitutes a violation of Nebraska's

⁹ *Main Street Movies*, *supra* note 7.

¹⁰ *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991); *Indoor Recreation Enterprises, Inc. v. Douglas*, 194 Neb. 715, 235 N.W.2d 398 (1975); *Baedar v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953).

gambling statutes. According to our statutes, gambling occurs when a person “bets something of value upon the outcome of a future event, which outcome is determined by an element of chance.”¹¹ We are asked to interpret the meaning of the phrase “outcome is determined by an element of chance.”

Some contextual and historical background is necessary. Article III, § 24, of the Nebraska Constitution provides that “the Legislature shall not authorize any game of chance.” And prior to 1977, Nebraska defined a “gambling device” as one which was “adapted, devised and designed for the purpose of playing any game of chance for money or property.”¹² In *Baedaro v. Caldwell*,¹³ we held that the test for determining whether a game violated the constitutional and statutory prohibition against any game of chance was “not whether [the game] contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.” *Baedaro* held that a five-ball pinball machine capable of awarding free replays was a “game of chance” under the Constitution and the statute, reasoning:

A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.¹⁴

We applied the same “predominance” test when we decided in *Indoor Recreation Enterprises, Inc. v. Douglas*¹⁵ that poker and bridge were illegal games of chance under the pre-1977 statutes. *Indoor Recreation Enterprises, Inc.* reasoned that the card games were games of chance because the players had no control over which cards were dealt.

¹¹ § 28-1101(4).

¹² See Neb. Rev. Stat. § 28-945 (Reissue 1975).

¹³ *Baedaro*, *supra* note 10, 156 Neb. at 493, 56 N.W.2d at 709.

¹⁴ *Id.* at 494, 56 N.W.2d at 709.

¹⁵ *Indoor Recreation Enterprises, Inc.*, *supra* note 10.

In 1977, the Nebraska Legislature amended the gambling statutes. The “game of chance” language that tracked the constitutional language was changed, and “gambling” was instead defined as “stak[ing] or risk[ing] something of value upon the outcome of a contest of chance or a future contingent event not under [the person’s] control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.”¹⁶ “Contest of chance” was defined as “any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”¹⁷ The operative date of these amendments was January 1, 1979.¹⁸ We did not decide any cases addressing this statutory language during the time it was in effect.

In 1979, the Legislature again amended the statutes relating to gambling. In the course of these amendments, the definition of “contest of chance” was eliminated.¹⁹ “[G]ambling” was defined as “bet[ting] something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election.”²⁰ Other than a slight modification to the definition of gambling device in 1984,²¹ the 1979 gambling statutes have remained essentially unchanged.

Although we have decided gambling-based cases since the 1979 statutory amendments, we have not directly addressed the proper interpretation of the statutory phrase “outcome is determined by an element of chance.”²² The State contends that

¹⁶ 1977 Neb. Laws, L.B. 38, § 217(4), codified at § 28-1101(4) (Cum. Supp. 1978).

¹⁷ *Id.*, § 217(3), codified at § 28-1101(3) (Cum. Supp. 1978).

¹⁸ See Neb. Rev. Stat. §§ 28-1101 to 28-1113 (Cum. Supp. 1978).

¹⁹ 1979 Neb. Laws, L.B. 152.

²⁰ *Id.*, § 1(4), codified at § 28-1101(4) (Reissue 1979).

²¹ See 1984 Neb. Laws, L.B. 744, § 1(5), codified at § 28-1101(5) (Cum. Supp. 1984).

²² See, *Strawberries, Inc.*, *supra* note 10; *Two IGT Video Poker Games*, *supra* note 10; *CONtact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982).

based on the history of amendments and the plain language of the current statutes, gambling exists if something of value is bet on the outcome of a future event and the determination of that outcome involves *any* “element of chance.” Appellees contend that the predominance test we announced in *Baedaro* still applies because the current statutory language is functionally equivalent to the language interpreted in *Baedaro*.

[4] This is an issue of statutory interpretation, and our analysis is guided by well-established principles. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.²³ The gambling statutes are penal statutes, and penal statutes are to be strictly construed.²⁴ Penal statutes are also to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.²⁵ And an appellate court will try to avoid a statutory construction which would lead to an absurd result.²⁶

Section 28-1101(4) (Reissue 2008) defines gambling as betting on an outcome that “is determined by an element of chance.” The plain meaning of “determined” in this context is that the actual outcome must be caused by an element of chance. Because an outcome cannot be caused by a minor or insignificant thing, but, rather, is caused by a material or predominant thing, the present statutory language, strictly construed, simply and plainly asserts that an activity is gambling in Nebraska if its outcome is predominantly caused by chance. Restated, the present statutory language simply rewords the predominance standard that has always been applied in Nebraska.

[5] This interpretation of § 28-1101(4) is consistent with our prior interpretation of a similar statute. In *CONtact, Inc. v.*

²³ *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

²⁴ See, *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010); *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

²⁵ *Id.*

²⁶ *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

State,²⁷ we addressed language in a statute relating to lotteries which required winning chances to be “‘determined by a drawing or by some other method based on an element of chance.’” We held that the predetermination of a winning ticket did not negate the existence of chance, and noted that the statutory language meant that the “predominate nature of the game, i.e., skill or chance, determines its classification.”²⁸ To conclude that the same “determined” by “an element of chance” language used in § 28-1101(4) means something other than the predominance test would therefore be nonsensical. In addition, we note that it is clear from the record that at the time Bankshot was under development and being marketed and distributed in Nebraska, at least some of the state agencies involved in this case understood, and conveyed to appellees, that the predominance test applied in Nebraska. We reaffirm our prior holdings that gambling occurs in Nebraska when a bet is placed on an outcome that is determined predominantly by chance.

3. BANKSHOT IS NOT GAMBLING IN SPIN MODE

The State contends that Bankshot when played in Spin mode is gambling because its outcome is determined by chance. It asserts two elements of the game in support of its position: (1) the limited amount of time a player has to select a puzzle to play and (2) the infrequent presentation of winning puzzles.

(a) Time to Select Puzzles

With respect to the time element, the State relies heavily on the testimony of its expert witness, Kenneth Deffenbacher, a cognitive psychologist and professor emeritus at the University of Nebraska at Omaha. Deffenbacher’s testimony was based on the puzzle display times programmed into the Bankshot software through source codes. He experienced the Bankshot game on one occasion, when he played approximately 40 puzzles at an Omaha bar.

Deffenbacher testified that in Spin mode, Bankshot was programmed so that the pool balls would stop spinning for a

²⁷ *CONtact, Inc.*, *supra* note 22, 212 Neb. at 586, 324 N.W.2d at 805.

²⁸ *Id.* at 588, 324 N.W.2d at 806.

maximum of 296.5 milliseconds. He did no independent testing to verify whether the actual display times corresponded with the times in the software program. But he testified that in his career, he had never seen a “big . . . discrepancy” between the programmed times and actual display times.

Deffenbacher testified that for humans, the average reaction time required to do a simple task is 247 milliseconds. He qualified Bankshot as an intermediate task which would require 500 milliseconds for the average human to complete. Deffenbacher conceded that roughly 2½ percent of the population could do an intermediate task in 367 milliseconds, but testified that if the Spin mode display time was consistent with the 296.5 milliseconds source code program time, not even this percentage of the human population would be able to choose which puzzle they wished to play.

Deffenbacher testified that when he played Bankshot in Spin mode, he was unable to stop the Bankshot puzzle before it started spinning again. But on cross-examination, he conceded that he had played the game incorrectly. Specifically, he had tried to find two balls with the same number that were adjacent to each other during his game play. He did not realize when he played the game that the numbers on the pool balls corresponded to colors and that the object of the game was to identify balls of the same color that would appear in the same three-by-three grid if the puzzle were chosen. Deffenbacher also testified that he was trying to recognize the actual solution to the puzzle while he was deciding whether to choose that puzzle.

Fox, Bankshot’s developer, testified that numbers used in software program source codes do not always correspond to actual display times in a game. He explained this was due to interactions between the computer software itself and to interactions between the software and the hardware. Christopher Shawn Green, who has postdoctoral experience in psychology and is an expert in the field of video gaming, also testified to this effect. Green took scientific measurements of the Bankshot display and determined that the source code times in the program did not correlate with the actual display times in the game. Instead, Green calculated that when Bankshot

was played in Spin mode, the balls actually stopped spinning for 500 milliseconds, not the 296.5 milliseconds programmed into the source codes. Green testified that 500 milliseconds is enough time for a human to have visual recognition and to press a button and that in his opinion, a normal adult playing Bankshot in Spin mode could stop on the puzzle he or she chose. To support his opinion, Green conducted testing on the Bankshot game and found that his subjects when directed to select a puzzle of a specific color were able to do so 80 percent of the time. Green's subjects attempted to find only maroon, green, and orange puzzles.

The district court did not make a factual finding as to how long the balls actually paused in Spin mode. It did find, however, that the puzzles were not presented so fast that a player could not exercise skill in the selection of the puzzle to be played. In doing so, it noted that Deffenbacher's testimony was "compartmentalized" due to his misunderstanding of how to play Bankshot.

Because this is an equity action, we review the facts *de novo*.²⁹ But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.³⁰ We agree with the district court's finding that Deffenbacher's testimony was compartmentalized. We further find that the puzzles in Spin mode stop spinning for approximately 500 milliseconds and that this is sufficient time for an average human to select the puzzle he or she wishes to play. The selection of the puzzle is thus determined by player skill, not by chance.

(b) Infrequency of Winning Puzzles

The State also contends Bankshot is determined by chance because of the infrequent presentation of winning puzzles. "Winning" in this context means a puzzle that pays the player more credits than the player puts at risk. It is undisputed that every Bankshot puzzle is capable of being solved. But it also is

²⁹ *Schauer, supra* note 4; *Shoemaker, supra* note 4.

³⁰ *Id.*

undisputed that it is difficult to win more than the credits risked to play a puzzle, at least partly because of the infrequency of winning puzzles. Of the 10,325 puzzles in Table A, 1,187 pay more than the credits put at risk on the puzzle. That number is 155 in Table B and 12 in Table C.

The odds of coming away with more money than a player risks on a puzzle are remote, particularly considering that if the first puzzle (from Table A) is not chosen, the next comes from Table B, and if that is not chosen, all succeeding puzzles come from Table C, until one is chosen and the cycle repeats. To be successful at Bankshot, assuming success is defined as making money, a player must exert considerable patience while waiting for the “winning” puzzles to appear. Nevertheless, in Spin mode, Bankshot is more controlled by the player than not, and thus is predominantly a game of skill. Accordingly, Bankshot when played in Spin mode is not gambling.

4. INJUNCTION PROPERLY DENIED

[6] An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.³¹ The parties conceded at oral argument that the Bankshot game has been reconfigured to comply with the terms of the district court’s order, which persuades us that injunctive relief completely banning the development and distribution of Bankshot in any form was not warranted. We conclude that Bankshot, as currently configured to allow play in only Spin mode, is not a game of chance. The court did not err in denying injunctive relief.

VI. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

³¹ *Strawberries, Inc.*, *supra* note 10.