

**OPINION SUMMARY**

**MISSOURI COURT OF APPEALS EASTERN DISTRICT**

**DIVISION TWO**

PATRICIA M. RASTER, et al.,	)	Nos. ED90984 and ED91098
	)	
Plaintiff/Appellants,	)	Appeal from the Circuit Court
	)	of St. Charles County
vs.	)	
	)	Honorable Lucy D. Rauch
AMERISTAR CASINOS, INC., et al.,	)	
	)	
Defendants/Respondents.	)	FILED: February 17, 2009

This appeal is brought by the plaintiffs, who are certain video-poker machine players at the defendants' Ameristar Casino, located in St. Charles County, Missouri. The instant dispute stems from the defendants' alleged changes to their Star Award compensation program. The plaintiffs brought suit, averring that the defendants' actions violated the Missouri Merchandising Practices Act (MMPA) and constituted a breach of contract. The defendants filed a motion to dismiss the plaintiffs' petition for failure to state a claim upon which relief could be granted. The trial court granted the defendants' motion and dismissed all counts of the plaintiffs' petition. In so doing, the court considered matters outside the pleadings, without converting the motion to dismiss into a motion for summary judgment. The trial court also, upon defendants' motion, disqualified plaintiffs' legal counsel. The trial court found that counsel was disqualified both by a conflict of interest due to his status as class member and attorney of record, and also as a "necessary witness" under Rule 4-3.7. The plaintiffs appeal the trial court's rulings.

**JUDGMENT REVERSED; CAUSE REMANDED**

**DIVISION TWO HOLDS:** First, in considering matters outside the pleadings when ruling on the defendants' motion to dismiss, the trial court erred in not expressly converting the defendants' motion to dismiss to a motion for summary judgment and not notifying the parties that it was doing so, affording them the opportunity to present all pertinent materials.

Second, the trial court erred in dismissing the plaintiffs' MMPA claims. The plaintiffs' gambling activities constitutes a purchase of merchandise within the meaning and scope of the MMPA. The plaintiffs set forth sufficient facts in their petition establishing the elements of a MMPA cause of action.

Third, the trial court erred in dismissing the plaintiffs' breach-of-contract claims. The plaintiffs set forth sufficient facts establishing the elements of a breach-of-contract cause of action.

Fourth, the doctrine of primary jurisdiction does not apply in this case, such that the court would dismiss the plaintiffs' petition and defer the issue to the Missouri Gaming Commission.

Fifth and finally, the trial court abused its discretion in disqualifying legal counsel for the plaintiffs. The trial court's ruling, finding counsel had a disqualifying conflict of interest based on his status as a class member, was premature. And the defendants failed to carry their burden of proof showing counsel should be disqualified as a necessary witness pursuant to Rule 4-3.7.

Opinion by: Lawrence E. Mooney, J. Roy L. Richter, P.J., and George W. Draper III, J.,  
concur.

Attorneys for Appellants: Arthur G. Muegler, Jr., and Louis J. Basso

Attorney for Respondents: David T. Hamilton

**THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.**