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SUPREME COURT
STATE OF WASHINGTON
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No. 83745-7

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

ZDI Gaming, Inc.,

Respondent,

v.

THE STATE OF WASHINGTON, by and through the
Washington State Gambling Commission,

Petitioner.

**SUPPLEMENTAL BRIEF OF RESPONDENT ZDI
GAMING, INC.**

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I. Introduction

The Court of Appeals affirmed ZDI Gaming, Inc. (ZDI) timely perfected its appeal to Thurston County Superior Court. The Court reviewed under the applicable standards of the Administrative Procedure Act (APA) the Gambling Commission's (Commission) decision to deny ZDI use of cash card technology on its updated VIP electronic pull tab dispenser. The Court indicated the regulatory definition of "cash" includes cash equivalents such as a cash card. The Court then ruled the Commission improperly denied ZDI permission to upgrade its VIP dispenser to allow use of a cash card on the approved equipment.

II. Standard of Review

A reviewing court interprets the meaning of RCW 9.46.095 de novo. Op. 12 and *Franz v. Employment Sec. Dept.*, 43 Wn. App. 753, 719 P.2d 597 (1986). The Court of Appeals applied well established legal principles to conclude the Gambling Act provision concerns venue, not subject matter jurisdiction. The APA provides subject matter jurisdiction in this case as a matter of law. The Court of Appeals applied the appropriate review standards of the APA set forth at RCW 34.05.570(3) to the administrative record. Op. 14. The same review standards are appropriately applied at this level of review.

III. The Legislature Waived Sovereign Immunity In the Administrative Procedure Act, Not the Gambling Act

ZDI filed a petition for judicial review under the APA. RCW 34.05.570(3). The petition required a review of an agency order issued on a petition for declaratory order filed under RCW 34.05.240, the APA. The Commission argues the Gambling Act provision, RCW 9.46.095, waives sovereign immunity to support its claim that this case presents a constitutional question. Pet. Br. at 8. However the full text of the applicable section of RCW 9.46.095 reveals the statute does not authorize suit against the Commission and is not a statute that waives sovereign immunity at all:

No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission or any member thereof for anything done or omitted to be done in or arising out of the performance of his or her duties under this title: PROVIDED, That an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license shall be governed by chapter 34.05 RCW, the Administrative Procedure Act.

The statute does not provide for any cause of action against the Commission.

The statute that authorizes action against a state agency such as the Commission is the APA, specifically RCW 34.05.240 and RCW 34.05.570. The APA is the authorizing statute that permits the action that was brought by ZDI. The Supreme Court has clearly stated that the critical concept in determining whether a court has subject matter

jurisdiction is the “type of controversy.” *Dougherty v. Department of Labor and Industries*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003). “If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *Id.* at 316. Absent the APA provisions, ZDI would have no ability to file a petition for declaratory order with the Commission, nor would ZDI have had the right to petition for judicial review as there are no provisions in the Gambling Act authorizing such action. The APA specifically authorizes filing a petition for judicial review in Superior Court in counties across the State, at the petitioner’s option. RCW 34.05.514. RCW 9.46.095 is a venue provision, rather than a provision waiving state sovereign immunity. The Legislature was not invoking Superior court jurisdiction for purposes of authorizing a particular type of case or cause of action.

The directives of RCW 9.46.095 may be interpreted consistently with the provisions of the APA when read as a venue provision. If read as a statute limiting Superior Court subject matter jurisdiction exclusively to Thurston County, then the statute conflicts with the APA and with the provisions of RCW 4.92.010 governing actions against the State. Under the APA, ZDI may file a claim in multiple counties of its choosing. RCW 34.05.514. Similarly, under RCW 4.92.010, ZDI has an absolute right to bring its case against the state in superior court in multiple counties of its choosing.

This case does not present a jurisdictional dilemma because it is

precisely the type of case that may be brought outside Thurston County under RCW 9.46.095. ZDI appealed the Commission's final decision refusing to license its ZDI upgrade. The Commission denied a license to ZDI to upgrade its approved pull tab dispenser to record low tier cash prizes on a cash card.

ZDI's petition for declaratory order under RCW 34.05.240 has the same status as any other order entered in an agency adjudicative proceeding. RCW 34.05.240(8). An adjudicative proceeding includes all cases of licensing and any case in which the granting of an application is contested by a person having standing to contest under the law. ZDI filed an application to approve its ZDI upgrade. Op. 5. The application was denied. The Commission would not approve the upgrade with the cash card feature activated to record low tier winning prizes.

The Commission argues vociferously that it does not license gambling equipment. Yet, it claims to have authority to deny ZDI use of cash cards on its approved equipment. Op. 1. If the Commission has authority to either approve or deny technology, it is issuing a "license". The APA defines a "license" as an approval or similar form of authorization required by law. RCW 34.05.010(9)(a).

Electronic video pull-tab dispensers, such as the ZDI VIP upgrade with cash card, is a gambling device that the Commission insists it must approve. WAC 230-14-047. Operators may not put out any pull tab dispenser that does not comply with statute or rules. WAC 230-14-025.

Devices that are used solely in the activity for which the license was issued are legal. RCW 9.46.215. Gambling devices such as electronic pull tab dispensers are approved and subject to fees by the Commission. RCW 9.46.116. The Commission's process of approval of a device by its licensing division to include review fees, and stamp fees equates to a licensing action, whether the Commission calls the approval a license or an authorization. RCW 34.05.010(9), WAC 230-05-030, and 230-14-295.

The Commission has no legitimate basis to argue the ZDI case was anything other than an appeal from an adjudicative proceeding regarding the denial of license to ZDI to upgrade its electronic video pull tab dispenser with a cash card feature properly filed outside Thurston County. The Court of Appeals correctly interpreted RCW 9.46.095 as a venue provision. The ZDI matter was heard in Thurston County despite the statutory authority for the matter to have been heard in Pierce County where it was originally filed. The Gambling Act statute does not provide any basis to reverse the decision on jurisdictional grounds. The Court of Appeals decision should be affirmed.

IV. An Adjudicative Proceeding Is Not the Proper Forum For Defining "Cash" to Exclude Accepted Industry Practices

The Legislature did not restrict pull tab gambling when adopting the Gambling Act. In fact, the Legislature instructed the Commission to treat pull tabs as a social pastime and to protect the activity from regulation that would restrict participation in the activity. RCW 9.46.010, RCW

9.46.0209, and RCW 9.46.0325. Pull tabs were declared to be of public benefit for non-profits and as a commercial stimulant. *Id.* The Commission was given authority to adapt to innovative changes in the industry by authorizing the Commission to revise the definition, according to rules and regulations promulgated pursuant to the Gambling Act. RCW 9.46.0273. The Commission authorized electronic video pull tab dispensers in 1997 and had approved ZDI's VIP years before his upgrade. These electronic video pull tab dispensers were approved knowing the equipment looked like a slot machine. However, the equipment was not a slot machine because the machine did not generate a prize. Before this appeal, the Commission never labeled the approved electronic video pull tab dispensers as "faux slot machines." The Commission favored the technology because the electronic features added entertainment value to the play of pull tabs, making pull tabs popular as a commercial stimulant and for non-profits and charities. CP 911, 916-919.

Historically, innovation has been a mission of the Commission. AR 701 (ALJ Hearing Transcript Miller Testimony at 33), Tull Dec. Ct. of Appeals Oct. 5, 2007. The Legislature did not prohibit automation, and the Legislature did not require human interaction in the sale of pull tabs. Pull tab devices were in existence long before the Gambling Act. AR 760. Pull tab dispensing devices were grandfathered into the Act and originally were taxed. RCW 9.46.116. Pull tab dispensers progressed from the stamp machine dispensers to the electronic video devices in play today.

The natural progression of gambling has been to move towards automation that improves regulatory control. *Id.* The automated cashier feature inherent to cash card technology is precisely the type of innovation traditionally approved by the Commission. *Id.* and AR 761, 797-798, 864. Public harm is not an issue with cash card technology; the technology improves regulatory control. AR 705, 854, 880-881. Cash cards improve the regulatory control of pull tabs by restricting the cash exchange and creating a recorded transaction that can be monitored and audited.

In its petition, the Commission asks this Court to support a definition of the term “cash” it made up on an ad hoc basis by way of an adjudicative proceeding. The Commission argues it has unrestricted power to give definition to terms used in its rules without following rulemaking procedures and without specific legislative authority to do so. The Commission may not circumvent rulemaking requirements by defining the term “cash” in an adjudicative proceeding. *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992) and *Budget Rent A Car Corp. v. Washington State Dept. of Licensing*, 100 Wn. App. 381, 997 P.2d 420 (2000). The Legislature specifically required the Commission follow rulemaking requirements when defining pull tabs. RCW 9.46.0273. Defining cash to exclude cash equivalents was an abuse of discretion because cash equivalents are commonly accepted forms of cash.

When ZDI sought approval of its cash card feature, the term “cash”

was not defined by the Commission. The plain dictionary meaning of cash includes cash equivalents, which in practice were commonly utilized. Op. 17. The Commission never restricted the play of pull tabs to currency prizes. Cash equivalents, such as cash cards, gift certificates, chips, and vouchers were common. Op. 16. Cash cards under state law are treated as gift certificates, a legally recognized alternative to currency. RCW 19.240.010(4) and (5). The Commission by policy recognized gift certificates as appropriate pull tab prizes. AR 572, 890-891, and WAC 230-14-085.

There was no policy against cash cards, in fact, just the opposite. The Commission adopted a rule to allow cash cards on pull tab dispensers. WAC 230-14-047. The Commission authorized cash cards on ZDI's VIP, in part. ZDI could not automatically record a low tier winning prize on a cash card. The player could have a cashier award the prize on the card at the counter. This restriction was just for ZDI's dispensers.

Thousands of automated transactions occur in this state with cash card technology, including gambling under the direct approval of the Commission. AR 283, 285, 297-299, 488-495, 537-538, 742-744, 784, 797-798, 864. The Commission approves cash cards for pull tab gambling for purchases made at the counter. The Commission approves use of cash cards at the dispenser as well. The only part of the technology not approved is the recording of low tier prizes on the card automatically at the dispenser. At tribal venues, the equipment is fully automated.

Winning prizes record automatically at the terminal. The automated record of a prize improves the ability to remotely and immediately audit pull tab prizes. The automated cashier feature of cash cards cannot present a risk of public harm in one forum and not the other. Gaming using a cash card offers the same benefits and protections in tribal venues as in non-tribal venues. Denying the full benefit of cash cards to ZDI makes no regulatory sense. The automated feature at the dispenser is an improvement in regulation from an exchange of currency at the counter with an unlicensed cashier.

Interpreting the meaning of "cash" to exclude cash equivalents in an adjudicative process rather than through rulemaking when cash equivalents are commonly accepted is an abuse of discretion and arbitrary and capricious. The Commission undertook a major policy shift with the ZDI case. Previously, innovative changes that enhanced regulatory controls that were not specifically prohibited were approved. The ZDI upgrade was denied in adjudicative proceeding based upon an arbitrary and capricious meaning applied to the term "cash." The Commission violated its own standards that allow for cash equivalents such as checks, vouchers, gift certificates, pull tabs and chips to be substituted for a cash pull tab prize.

The Court of Appeals correctly applied commonly accepted rules of statutory construction to the term "cash", a term not previously defined or limited by the Commission by rule or in practice. The Court of Appeals

decision should be affirmed.

V. ZDI Requests An Award of Attorney's Fees

ZDI renews its request for attorney's fees and costs pursuant to the Equal Access to Justice Act and the *Costanich* decision to recover its costs and attorney's fees for this Supreme Court level of review. RCW 4.84.350 and *Costanich v. State of WA, Dep't of Social and Health Services*, 164 Wn.2d 925, 194 P.3d 988 (2008). Under the *Costanich* decision, a qualified party may seek up to twenty-five thousand dollars for each level of appellate review from a petition for judicial review. The court shall award a prevailing party fees and other expenses. *Id.*

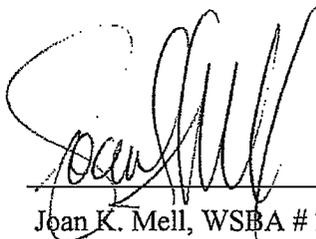
A Supreme Court affirmation of the Appellate Court decision in this matter entitles ZDI to an award. The expenses it has incurred and the losses it has suffered well exceed the statutory maximum. The Legislature specifically found that the greater resources and expertise of the State of Washington often deter small businesses from seeking to redress their rights or defending against adverse agency actions. Here, the Commission has applied its extraordinary resources to drain the limited revenues of ZDI. The Commission should not be encouraged to seek ongoing appellate review to deter licensees from challenging the Commission. The Equal Access to Justice Act apportions the costs of appellate review to ensure aggrieved small businesses have an opportunity to assert their rights. ZDI should be afforded the relief specified by the Legislature, which includes costs and expenses not governed by RAP 18.1.

VI. Conclusion

The Court of Appeals decision should be affirmed, as the court correctly applied basic principles of statutory interpretation to resolve the issues before it. ZDI should be awarded attorney's fees and costs on appeal under the Equal Access to Justice Act.

Dated this 2nd day of April 2010.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Joan K. Mell', is written over a horizontal line.

Joan K. Mell, WSBA # 21319

Attorney for Respondent ZDI Gaming, Inc.

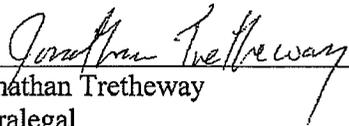
CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Supplemental Brief of Respondent ZDI Gaming, Inc. on all parties or their counsel of recorded by legal messenger on the date below as follows:

Jerry A. Ackerman, WSBA# 6535
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1125 Washington St. SE
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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Date this 2nd day of April 2009 at Fircrest, Washington.


Jonathan Trethewey
Paralegal

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