

IN THE IOWA SUPREME COURT

No. 17-1300
District Court of Polk County Case No. CVCV053114

BANILLA GAMES, INC.,
Plaintiffs/Appellants,
vs.
IOWA DEPARTMENT OF INSPECTIONS AND APPEALS,
Defendants/Appellees

On Appeal from Iowa District Court for Polk County,
THE HONORABLE MARY PAT GUNDERSON, District Court Judge

APPELLANT'S FINAL BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Whether the Department of Inspections and Appeals' ("DIA") and District Court's decisions should be reversed pursuant to Iowa Code § 17A.19(10)(c) because they are based upon erroneous interpretations of Iowa Code § 99B.53(1).
2. Whether the DIA's and District Court's decisions should be reversed pursuant to Iowa Code § 17A.19(10)(c) because they are based upon erroneous interpretations of the term "outcome" for purposes of § 99B.53(1).
3. Whether the DIA's and District Court's decisions should be reversed pursuant to Iowa Code § 17A.19(10)(c) because they are based upon erroneous interpretations of the term "knowledge" for purposes of § 99B.53(1).
4. Whether the DIA's and District Court's decisions be reversed pursuant to Iowa Code § 17A.19(10)(n) because the DIA's ruling was unreasonable, arbitrary, and an abuse of discretion and the District Court failed to so find.

ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa Rule of Appellate Procedure § 6.1101(2)(c) because it presents a substantial issue of first impression in Iowa. This appeal involves interpretation of Iowa Code § 99B.53(1), specifically the words “outcome” and “knowledge.” The Iowa Supreme Court has not interpreted § 99B.53(1) or the words “outcome” or “knowledge” as used therein, nor has the Iowa Court of Appeals in any published case. Determination of the issue will have implications for all electrical and mechanical amusement devices to be deployed for operation in the State of Iowa and whether they are required to comply with the registration provisions of Iowa Code § 99B.53.

STATEMENT OF THE CASE

Appellant brings this action pursuant to Chapter 17A.19 of the Iowa Administrative Procedure Act for review of final agency action of the DIA set forth in the Ruling on Amended Petition for Declaratory Order (hereinafter “DIA Ruling”) dated October 31, 2016, and the Iowa District Court of Polk County’s Ruling on Petition for Judicial Review (hereinafter “District Court Ruling”), dated June 30, 2017.

Appellant filed a Petition for Declaratory Order and supporting Brief with the DIA on March 4, 2016. (Appendix at 15). Appellant filed an

Amended Petition for Declaratory Order and Amended Brief in Support on April 15, 2016. (Appendix at 116). In its Amended Petition, Appellant sought a declaration that, among other things, the outcomes of its devices named “Superior Skill 1” and “Superior Skill 2” are primarily determined by the skill or knowledge of the operator and, therefore, the devices are not subject to the registration provisions set forth in Iowa Code § 99B.5(1). (Appendix at 116).

The DIA requested clarification (Appendix at 222). Appellant provided a written response to the DIA’s questions. (Appendix at 224). The DIA sent written notice to other potentially interested parties pursuant to Iowa Code § 17A.9(3). (Appendix at 227).

On July 8, 2016, the parties met via videoconferencing. (Appendix at 229). Appellant demonstrated and discussed the games at issue. *Id.* Appellant provided additional information and clarification orally in response to the DIA’s questions. *Id.*

On October 31, 2016, the DIA issued its ruling denying the relief requested by Appellant. (Appendix at 228). The DIA ruled, *inter alia*, the outcomes of the Superior Skill 1 and Superior Skill 2 devices are not primarily determined by the skill or knowledge of the operator and,

therefore, the devices must be registered pursuant to Iowa Code §§ 99B.53 and 99B.56.

Appellant appealed the DIA's Ruling to the Iowa District Court for Polk County (Appendix at 6). On July 18, 2017, the District Court issued its Ruling on Petition for Judicial Review. (Appendix at 242). The District Court affirmed the DIA's decision, finding that the Appellant had not carried its burden of persuasion in establishing the agency action was erroneous, that there were errors of law in the DIA's interpretation of the statute at issue, and that the application of law to fact was illogical, irrational, or wholly unjustifiable. Appellant timely appealed to this Court.

STATEMENT OF FACTS

1. Petitioner Banilla Games, Inc. is a North Carolina corporation located in North Carolina. (Appendix at 15 ¶ 1, 242).
2. Petitioner manufactures electronic game devices and sells them in several jurisdictions, including Georgia and Iowa. (Appendix at 15 ¶ 2).
3. Petitioner designed and developed two electronic devices named "Superior Skill 1" and "Superior Skill 2." (Appendix at 15 ¶ 3, 242).
4. Each Superior Skill 1 and Superior Skill 2 device is a single machine that offers different game themes that a player may select to play. (Appendix at 15 ¶ 4, 141, 181, 242–43).

5. Each Superior Skill 1 and Superior Skill 2 device contains a touch screen used to navigate throughout the terminal. (Appendix at 16 ¶ 5, 142, 182).
6. Each touch screen displays visual meters indicating the player's credits, the previous outcome, and the "Prize Viewer," which indicates the future outcome of the next game(s) available to be played. (Appendix at 16 ¶ 7, 142, 182).
7. Each Superior Skill 1 and Superior Skill 2 device features a bill acceptor located at the front of the cabinet into which players may insert U.S. notes of varying denominations. (Appendix at 16 ¶ 6, 142, 182, 243).
8. Bills inserted are displayed on the device screen as "Credits" available for play, where one Credit equals one cent. (Appendix at 20, 142, 182, 243).
9. The devices cannot and do not award cash. (Appendix at 16 ¶ 8, 142, 182).
10. The devices may be configured to either print out a redeemable voucher for a maximum of fifty dollars in value or dispense a ticket, worth up to fifty dollars that can be redeemed for merchandise on the premises where the device is located. (Appendix at 16 ¶ 9, 150, 190).

11. If configured to dispense tickets, the device will not operate without a supply of tickets present in the ticket dispenser. (Appendix at 16 ¶ 10, 150, 190).
12. The devices do not possess a “knock-off” switch to permit the release of free games nor do the devices permit the player to “double-up” or “raise.” (Appendix at 16 ¶¶ 11– 12, 150–151, 190).
13. The devices do not allow the play of poker, black jack, or keno. (Appendix at 17 ¶ 14, 151, 231).
14. The devices do not award free games and, thus, do not feature a meter to record the number of free games awarded. (Appendix at 17 ¶ 13, 151, 190).
15. The devices are not designed, and cannot be adapted, to enable a person to increase the chances of winning free games, portions of games, or anything else by paying more than ordinarily required to play the game. (Appendix at 17 ¶ 15, 151, 177).
16. Game outcomes that incorporate a visual simulation of free game play are merely providing an entertaining means to display the predetermined prize value to the player, based upon a successful skill result, because no free games may be released from the game. (Appendix at 17 ¶ 13, 151, 190).

17. The Superior Skill 1 device offers the following five different game themes: Bathtime Bucks, Fruity Sevens, Searing Sevens, Snake Eyes, and Wheel Deal. (Appendix at 18, 141).
18. The Superior Skill 2 device offers the following five different game themes: Spooky's Loot, Mega Money Reel, Lucky Striker, Major Cash, and Pedro's Hot Tamales. (Appendix at 18, 181).
19. Each game theme in both Superior Skill 1 and Superior Skill 2 has twelve different play levels, including 25, 50, 75, 100, 150, 200, 250, 300, 400, 500, 1000, and 2000. (Appendix at 19, 142, 182). The play level determines the quantity of credits expended. (Appendix at 144, 183).
20. Fruity Sevens, Snake Eyes, Searing Sevens, Lucky Striker, Major Cash, and Pedro's Hot Tamales are traditional "nudge" style games. (Appendix at 19, 142, 182).
21. In each "nudge" style game, three electronic reels are displayed which spin when the "PLAY" button is pressed and then stop. (Appendix at 19, 142, 182). The reels may be stopped immediately if the player presses the "STOP" button. (Appendix at 19, 142, 182).
22. After the reels in the "nudge" style games stop spinning, the player must determine first whether a potential winning combination of two or more icons is present. (Appendix at 19, 142, 182). The player then must decide

which reel to nudge, and whether to nudge it up or down, in order to complete a winning pattern. (Appendix at 19, 142, 182). These decisions and actions by the player must be completed within the allotted time limit. (Appendix at 19, 142, 182).

23. The player cannot solve any nudge puzzle and win a prize without the correct skill interaction within the limited time. (Appendix at 20, 142, 182).

24. The themes Bathtime Bucks, Wheel Deal, Spooky's Loot, and Mega Money Reel are all "hot swap" style games. (Appendix at 20, 142, 182).

25. Each "hot swap" style game consists of five electronic reels which spin when the "PLAY" button is pressed and then stop. (Appendix at 20, 142, 182). Or, the reels may be stopped immediately if the player presses the "STOP" button. (Appendix at 20, 142, 182).

26. When the reels in the "hot swap" style game stop spinning, the player then must determine whether, after the spin, a winning combination of icons is present lacking one icon needed to complete the pattern. (Appendix at 20, 142, 182). After making that determination, the player must decide which icon to pick from a variety of icons to not only complete the winning pattern, but also to do so using the highest value

icon. (Appendix at 20, 142, 182). All of this must be completed within the allotted time limit. (Appendix at 20, 142, 182).

27. Each game theme includes a “Rules” feature. (Appendix at 143, 183).

Activating the Rules feature within a game theme produces a screen which furnishes explanations for the active game theme. (Appendix at 143, 183). For hot swap game themes, the Rules feature also displays pay tables. (Appendix at 143, 183).

28. On each device, game play begins with the player selecting a game theme and play level. (Appendix at 19, 142, 182). The player may change the play level at any time prior to engaging in game play. (Appendix at 19, 142, 182).

29. Game play is initiated by pressing the “PLAY” icon on the video screen or by pressing the “PLAY” button on the cabinet’s exterior. (Appendix at 19, 142, 182).

30. Every game play offers the player the opportunity to win a prize of at least \$.01. (Appendix at 142, 182).

31. While a winning combination is not available on every play, for each game played, at the time that the player is given the option to nudge or swap (depending upon the game theme chosen), the game offers the

player the option to “Take a Penny,” which will simply award the player \$.01 and end the game. (Appendix at 142, 182, 185).

32. All prizes won are displayed as “Win” and added to the “Balance” of credits available for additional game play or for immediate redemption. (Appendix at 143, 183).

33. The player may redeem their Balance after each game play by pressing the “Ticket Button.” (Appendix at 143, 183, 243). The printed ticket may be presented to the local venue for redemption. (Appendix at 143, 183).

34. The player is not required to exhaust all funds at once or on the same game theme. (Appendix at 143, 183).

35. Each Superior Skill 1 and Superior Skill 2 device is a standalone device that operates independently of other Superior Skill 1 and Superior Skill 2 devices. (Appendix at 143, 183).

36. Each Superior Skill 1 and Superior Skill 2 device has its own dedicated pools of outcomes. (Appendix at 143, 183).

37. Each play level for each game theme has a discrete pool of outcomes presented sequentially to the player. (Appendix at 143, 183, 243). The first outcome from the sequential, finite pool is pre-determined. (Appendix at 143, 183). Game outcomes will be presented sequentially thereafter. (Appendix at 143, 1833). When the last game outcome is

reached, the next outcome presented will be the first from the pool, followed by the second, and so on sequentially through the pool. (Appendix at 143, 183).

38. In the Superior Skill 1 device, each play level in the Fruity Sevens and Wheel Deal game themes contains 75,000 outcomes. (Appendix at 143).

Each play level in the Bathtime Bucks, Searing Sevens, and Snake Eyes game themes contains 100,000 outcomes. (Appendix at 183).

39. In the Superior Skill 2 device, each play level in the Spooky's Loot, Mega Money Wheel, Lucky Striker, and Major Cash game themes contains 75,000 outcomes. (Appendix at 143). Each play level in the Pedro's Hot Tamales game theme contains 100,000 game outcomes. (Appendix at 183).

40. Each device contains a "Prize Viewer" feature which allows the player to view the upcoming game outcomes. (Appendix at 19, 142, 182, 243).

41. The Prize Viewer is activated by pressing the "Prize Viewer" icon on the video screen. (Appendix at 19, 142, 182, 243).

42. The Prize Viewer may be activated at any time prior to the initiation of the game. (Appendix at 19, 243).

43. No payment or purchase is required to use the Prize Viewer. (Appendix at 19, 143–44, 182).

44.The Prize Viewer is available in each game theme on both devices.
(Appendix at 19, 142, 182).

45.If a player chooses not to use the Prize Viewer, the preview for the upcoming game outcome is not displayed and the player may proceed to play the game without knowing the game outcome in advance.
(Appendix at 19, 142, 182).

46.Both devices may be configured so that, if the player plays every one of the 75,000 or 100,000 games within a game theme and play level, and further correctly performs the skill task on each such play, the game will award prizes totaling 92%, 94%, 96%, or 98% of the amount expended.
(Appendix at 154, 194, 225, 243).

47.Nick Farley & Associates, Inc. (hereinafter “Farley”) examined the Superior Skill 1 device on behalf of Appellant for the benefit of the DIA.
(Appendix at 141).

48.On the question of whether the outcome of the Superior Skill 1 device is primarily determined by the skill or knowledge of the operator, Farley concluded:

[O]n each play of each of the games on *Superior Skill 1*, the outcome is primarily determined by the skill or knowledge of [the] player.

On each play of each game, the player may view the upcoming prize outcome. Therefore, on that play of the game, the player knows with certainty which prize, if any, is available. Thus, on that play of the game, chance does not play a role. Then, the player must perform the skill task in order to win that prize outcome.

On each of the games on *Superior Skill 1*, the player may not win a prize without correctly discerning a pattern and completing that pattern correctly.

The *Superior Skill 1* reviewed contains a skill task which requires the patron to evaluate the puzzle to recognize the best winning game outcome and select the appropriate symbol to swap, or the correct reel and direction to nudge that will align three (3) (or more) like symbol combinations on the prize line. It is our opinion that the task that is required by the *Superior Skill 1* can be mastered by a reasonable person.

[T]his system is designed to provide the player with a method to view upcoming game outcomes. At any given time the player may preview the upcoming game outcomes. No payment or purchase is required for the player to exercise the ability to cause the electronic system to disclose the upcoming game outcomes for the game theme and “Play Amount” selected. The game themes offered on the system contain a skill task. The player must participate in the skill task in order to receive a prize. The game themes offered on the system are such that the outcome of each play of the game is determined by the skill or knowledge of the player.

(Appendix at 151–53).

49. Farley also examined the Superior Skill 2 device on behalf of Petitioner for the benefit of the DIA. (Appendix at 181).

50. On the question of whether the outcome of the Superior Skill 2 device is primarily determined by the skill or knowledge of the operator, Farley concluded:

[O]n each play of each of the games on *Superior Skill 2*, the outcome is primarily determined by the skill or knowledge of [the] player.

On each play of each game, the player may view the upcoming prize outcome. Therefore, on that play of the game, the player knows with certainty which prize, if any, is available. Thus, on that play of the game, chance does not play a role. Then, the player must perform the skill task in order to win that prize outcome. On each of the games on *Superior Skill 2*, the player may not win a prize without correctly discerning a pattern and completing that pattern correctly.

The *Superior Skill 2* reviewed contains a skill task which requires the patron to evaluate the puzzle to recognize the best winning game outcome and select the appropriate symbol to swap, or the correct reel and direction to nudge that will align three (3) (or more) like symbol combinations on the prize line. It is our opinion that the task that is required by the *Superior Skill 2* can be mastered by a reasonable person.

[T]his system is designed to provide the player with a method to view upcoming game outcomes. At any given time the player may preview the upcoming game outcomes. No payment or

purchase is required for the player to exercise the ability to cause the electronic system to disclose the upcoming game outcomes for the game theme and “Play Amount” selected. The game themes offered on the system contain a skill task. The player must participate in the skill task in order to receive a prize. The game themes offered on the system are such that the outcome of each play of the game is determined by the skill or knowledge of the player.

(Appendix at 191–93).

51. Neither Superior Skill 1 nor Superior Skill 2 uses a random number generator. (Appendix at 224).

STANDARD OF REVIEW

The Iowa Supreme Court reviews the Polk County District Court’s decision for correction of errors at law. Iowa R. App. P. § 6.907; *State v. Stoneking*, 379 N.W.2d 352, 353–54 (Iowa 1985) (cases involving statutory interpretation are reviewed for errors at law).

Judicial review of agency action is governed by Iowa Code § 17A.19(10). (District Court Ruling at 4); *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10 (Iowa 2010); *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 282 (Iowa 1983).

Iowa Code § 17A.19 provides:

10. The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

Iowa Code § 17A.19. A reviewing court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and if the agency action meets one of the criteria contained in § 17A.19(10). *Renda*, 784 N.W.2d at 10. An appellate court applies the standards of § 17A.19(10) to determine if it reaches the same results as the district court. *Id.*

ARGUMENT

Iowa Code § 99B.53 regulates registration of electrical or mechanical amusement devices. Section 99B.53 provides:

In addition to the requirements of section 99B.52, an electrical or mechanical amusement device in operation or distributed in

this state that awards a prize where the outcome is not primarily determined by skill or knowledge of the operator shall be registered by the department as provided in this section.

Iowa Code § 99B.53(1). The Superior Skill I and Superior Skill II devices allow the play of games in which the outcome is primarily determined by the skill or knowledge of the operator. Thus, the Superior Skill I and Superior Skill II devices are not required to be registered by the DIA under Iowa Code § 99B.53. Requiring registration affects a substantial right of the Appellant in selling its devices for use in the State of Iowa when no registration should be required. The DIA and District Court erred in holding the registration requirement applies.

At issue is the phrase “where the outcome is not primarily determined by skill or knowledge of the operator.” The DIA and District Court interpreted the words “outcome” and “knowledge” as used in § 99B.53 in a manner contrary to the rules of statutory construction and applied them in a manner inconsistent with the words’ plain meanings. Thus, the DIA and District Court’s decisions should be reversed pursuant to Iowa Code § 17A.19(10)(c).

This Court is free to substitute its judgment for the DIA’s regarding the meaning of these words because, as the District Court correctly held, the

legislature did not clearly vest the DIA with discretion to interpret these words, nor are these words sufficiently technical to warrant deference to the DIA's view.

When the words “outcome” and “knowledge” are correctly interpreted, a different conclusion necessarily results. The *outcomes* of the Superior Skill I and Superior Skill II games *are* primarily determined by the skill *or* knowledge of the operator.

I. The DIA's interpretation of Iowa Code § 99B.53(1) is not Entitled to Deference.

The District Court correctly determined the DIA's interpretations of the words “outcome” and “knowledge” are not entitled to deference. (Appendix at 247).

Judicial review of an agency decision is governed by Iowa Code § 17A.19(10). *Renda*, 784 N.W.2d at 10. Agency interpretation of law receives no deference upon judicial review unless (1) there is an express grant of interpretive authority, or (2) the legal terms being construed have independent legal meaning not within court's expertise. *Irving v. Employment Appeals Board*, 883 N.W.2d 179, 185 (Iowa 2016).

The first inquiry is whether the relevant statute expressly grants the agency the authority to interpret the term or phrase at issue. *Irving*, 883

N.W.2d at 185; *Renda*, 784 N.W.2d at 11. The District Court correctly held the Legislature did not explicitly grant the DIA authority to interpret the phrase. (Appendix at 246–47).

The second inquiry is whether the legal terms being construed have independent legal meaning not within court’s expertise. *Irving*, 883 N.W.2d at 185. The agency’s interpretations should only be given deference if the terms are “complex or beyond the competency of the courts.” *Id.* For example, in *Mosher v. Dep’t of Inspections & Appeals*, the Iowa Supreme Court considered whether to give deference to the DIA’s interpretation of the terms “dependent adult,” “caretaker,” “dependent adult abuse,” and other terms found in *Iowa Code* § 235B. *Mosher v. Dep’t of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501, 510 (Iowa 2003). The Court observed the terms at issue were not “highly technical” and gave no deference to the DIA’s interpretation. *See Irving*, 883 N.W.2d at 185 (holding the terms “employer” and “in connection with” were well within the Court’s competency); *Renda*, 784 N.W.2d at 14 (holding the terms “employee” and “dwelling” were not specialized terms within the expertise of the Iowa Civil Rights Commission). Likewise, in this case, the District Court correctly held the terms at issue, “primarily,” “outcome,” “skill,” and “knowledge” did not have independent legal meaning not within the court’s

expertise. (Appendix at 247). The Court held the terms were “well within the competency of the courts to understand and interpret.” *Id.*

Thus, the DIA’s interpretation of the terms is not entitled to deference. Iowa Code 17A.19(10)(c) applies, and the District Court was free to substitute its judgment for that of the DIA. *Renda*, 784 N.W.2d 8. Similarly, this Court may substitute its judgment for that of the DIA. *Id.*

II. The DIA and District Court Erroneously Interpreted the Word “Outcome”

According to the DIA, “[t]he word ‘outcome’ as used within the context of Iowa Code Section 99B.53(1) equates to “actually winning a prize.” (Appendix at 239), and the District Court agreed. (Appendix at 251). The DIA and District Court erred in this interpretation.

A. The DIA’s and District Court’s Interpretations Change the Plain Meaning of the Terms of § 99B.53(1)

A court may not, under guise of judicial construction, add modifying words to a statute or change its terms. *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990). When interpreting a statute, courts look to what the legislature actually said, not to what it should or could have said. *Miller v. Marshall Cty.*, 641 N.W.2d 742, 748 (Iowa 2002). When the text of a statute is plain and its meaning clear, the court should not search for a

meaning beyond the statute's express terms. *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999).

The Iowa Legislature, when drafting the phrase “where the outcome is not primarily determined by skill or knowledge of the operator,” used the word “outcome,” not “prize.” The Legislature could have drafted the statute to read “where the *prize* is not primarily determined...” It did not. The DIA and District Court cannot look to what the Legislature could have said or change the terms it actually used. The statute says some things and not others. It must be enforced as written, not as edited or amended by the DIA.

B. The DIA's and District Court's Interpretations Render the Word “Outcome” Superfluous

Courts must presume a statute does not contain superfluous words. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 75 (Iowa 2015); Iowa Code § 4.4(2) (“In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.”). “In interpreting a statute, each term is to be given effect” and, thus, a court must “not read a statute so that any provision will be rendered superfluous.” *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012) (internal citations omitted).

Iowa Code § 99.53b(1) applies to “an electrical or mechanical amusement device...that awards a *prize* where the *outcome* is not primarily

determined by skill or knowledge of the operator.” Iowa Code § 99.53b(1). Each term of the statute must be given effect. “Outcome” has a specific meaning different than “prize.” The legislature used both terms separately without equating the meaning of one to the other. By interpreting “outcome” to mean “actually winning a prize,” the DIA and District Court in effect edited the word “outcome” out of the statute. “Outcome,” despite its specific meaning, would be rendered superfluous under the DIA’s and District Court’s interpretations, contrary to the rules of statutory construction.

C. The DIA and District Court Failed to Apply the Plain Meaning of “Outcome”

When interpreting a statute, courts need not look beyond the plain meaning of the express statutory terms. *Schultz*, 604 N.W.2d at 62. When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the statute’s express terms. *Id.* In looking at the language used, courts should not construe a statute in a way which creates an impractical or absurd result, nor should courts speculate as to the probable legislative intent beyond what the language clearly states. *Id.*

The term “outcome” in § 99B.53(1) is not statutorily defined. (Appendix at 250). Thus, the courts must give words their “plain and ordinary meaning.” (Appendix at 250 (*citing Remer v. Board of Med.*

Exam'rs, 576 N.W.2d 598, 601 (Iowa 1998)). When the legislature has not defined a term, courts look to the common meaning of that term to interpret the statute. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 354 (Iowa 2005). The dictionary provides a ready source for the common meaning of a word or phrase. *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005).

The District Court referred to Merriam-Webster's online dictionary, which defines "outcome" as "something that follows as a result or consequence." (Appendix at 250 (citing *Outcome*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/outcome> (last accessed July 13, 2017))). Although the District Court applied the correct analysis in seeking the plain and ordinary meaning of the term, it went on to determine, "[c]learly the outcomes the legislature is concerned about in drafting these requirements is limited to circumstances under which a prize is or is not awarded to a player." (Appendix at 251).

The District Court erred in this conclusion. Whereas the legislature used the term "prize" to limit the application of the registration requirements to certain categories of devices, this does not redefine the plain and ordinary meaning of the term "outcome" in the context of the statute. The legislature chose to use the terms "outcome" and "prize" in distinct context and not interchangeably.

For reasons set forth in this Brief, “outcome” is a term that is plainly more expansive than the term “prize.” When applying the proper definition of the term “outcome” (its plain and ordinary meaning), the player’s use of knowledge and skill completely controls the outcome of game play. Chance plays *no* role in the outcome of game play. The decision *not* to continue play, to play at a different level, or to select a different game or puzzle are but examples of several consequences or results driven by the knowledge of the player, all solely within his or her control.

The plain language of the statute does not compel the result that an “outcome” is “actually winning a prize.” Like “outcome,” “prize” is not statutorily defined. The District Court did not define it. (*See* Appendix at 242–59). According to Merriam-Webster’s online dictionary, a “prize” is “something offered or striven for in competition or in contests of chance.” *Prize*, Merriam-Webster.com, <https://www.merriamwebster.com/dictionary/prize>. This definition differs from that of “outcome.” It stands to reason that a “prize” (“something offered or striven for”) is not the only thing which might follow as an outcome (“result or consequence”) of the game. The “outcome” of the game, considering its dictionary definition, might be winning a prize, failing to win a prize, playing to win a predetermined prize, choosing to play a different game or to play the same

game at a different increment, or some other result, including for the amusement of game play itself without regard to prize. In any outcome, because the player has the ability to know the result before play, the player controls, not any element of chance.

The DIA and District Court failed to account for outcomes other than “actually winning a prize.” For example, amusement is a possible “result or consequence” that follows the playing of Superior Skill 1 and Superior Skill 2. Players may spend money on these devices for amusement, just as players do in a vast array of other activities. Home gaming consoles, carnival games, arcade video games, skee ball, pinball machines, crane games—all require money to acquire or play and all may give the player amusement whether offering the potential for a “prize” or otherwise.

Amusement, clearly falling within the plain meaning of “outcome,” may be the only, or at least a primary, outcome sought or obtained by a player, even with respect to games or devices that also offer a “prize.” Winning a prize may be an afterthought, or secondary to the primary goal of amusement. Amusement may be derived from the exercise of skill or knowledge, as is the case in numerous electronic amusement devices whether holding out the potential for a prize or not. The challenge presented,

and possible success or failure in the effort, is a quintessential source of amusement flowing as a result or consequence of the exercise.

The District Court considered the potential outcome of amusement, but held it did not fall under the definition of “outcome.” The court held, “if...the legislature was concerned about alternative outcomes like sheer enjoyment of playing the game, then any operator or developer of electronic amusement machine could argue it is not subject to regulation under this section.” (Appendix at 251). This statement ignores the role of knowledge which allows the player to predetermine the result as well as the completion of a skill task. Unlike the Court’s conclusion that others would “simply claim that the ‘outcome’ of amusement is primarily determined by the individual’s skill or knowledge, no matter how little effect those things had on the individual’s ability to win or lose the game” (Appendix at 251–52), winning or losing is not what is to be determined, rather, whatever the outcome may be, it is to be determined primarily by the skill or knowledge of the player. The knowledge component of the statute may lead the player to determine whether to play a particular puzzle at all.

The statutory language includes devices within its registration requirement if it awards a prize, thereby excluding other devices that do not. It is respectfully submitted that the District Court’s recitation cited earlier

misses the fundamental issue, i.e., whether any *outcome*, which could include a “prize” or not, is primarily determined by the knowledge or skill of the player. Although the District Court seems to think that others could argue that “amusement” as an outcome will somehow dispense with the skill or knowledge component, the Appellant finds no support for this concept in the language of the statute or otherwise. Appellant has found no decision where another game allows a player to know precisely what outcome will ensue if the skill task is successfully completed.

The legislature chose the words in the statutory framework and there is no evidence in the record as to its legislative intent. Because there is no ambiguity in the statute, or the terms defined by the District Court, speculations as to legislative intent should not have been considered in the analysis.

The District Court erred in its conclusion. Even if the “outcome” of the Superior Skill 1 and Superior Skill 2 games *is* winning a prize meaning a credit greater than paid to play or simply amusement, outcome must still be *primarily determined by skill or knowledge of the operator* under § 99B.53(1). The player must exercise skill or knowledge to obtain *whatever* outcome might result (including, but not limited to, winning a prize). The

nature or amount of the particular “outcome” which results from the exercise of skill or knowledge is immaterial to the literal terms of the statute.

Not every exertion of skill or knowledge results in success (winning a prize). At the county fair, players may pay for the opportunity to win a prize by knocking over a stack of milk bottles with a baseball. The activity is one requiring application of skill (throwing the baseball) and knowledge (hitting the middle of the stack increases the chances of success). While a prize results only from successful attempts, amusement results from both successful and unsuccessful attempts. A player need not “actually win a prize” in order to conclude that the outcome of the game, in which amusement is ubiquitous but a prize is not, is primarily determined by skill and knowledge. The DIA’s and District Court’s restriction of the meaning of “outcome” to “actually winning a prize” casts too wide a net, inappropriately ensnaring all manner of games played by individuals willing to engage in an exercise of skill or knowledge for the certain outcome of amusement and possible outcome of a prize.

D. The DIA’s and District Court’s Interpretations are not Supported by Chapter 99B

Chapter 99B does not require amusement devices, in order to avoid the registration requirement of 99B.53, give a *specific outcome* to the player.

Chapter 99B concerns devices which award a prize, but does not require the devices award a player a prize of any particular type or value (other than that a prize of merchandise cannot exceed fifty dollars in value). Iowa Code § 99B.52(2). Chapter 99B does not require an amusement device distribute a prize for *every* game or skill task a player completes or with any particular frequency. The DIA's and District Court's rulings attempt to add such requirements without support from any statutory language.

The definition of "outcome" includes winning a prize which is less than the amount expended to play the game. The player of Superior Skill 1 and Superior Skill 2 may always choose to "Take A Penny," which will award the player \$.01 (Appendix at 142, 182). The penny falls within the definition of "prize," even though it might be less than the amount expended to play. Undoubtedly many prizes awarded for successfully knocking over the milk bottles (or other skill games) at the county fair have a value less than the cost to play the game. Winning the prize often means losing money in the transaction. The outcome of the game is still determined by skill or knowledge. The value of the prize does not dictate the result of the analysis. If it did, all manner of games at county fairs, carnivals, and arcades would be swept up in the registration requirement, subject to the dictates of the statute and the DIA. This Court should avoid such an absurd result.

E. The DIA and District Court Relied on Distinguishable Case Law Which is not Controlling

The DIA cited two cases as support for its narrow interpretations of “outcome” to equate to “actually winning a prize.” (Appendix at 239). The District Court adopted the DIA’s interpretation of Iowa Code 99B.53(1), partially based on these cases. (Appendix at 249–50). The first case, *D2 Enterprises, Inc. v. State, Dep’t of Inspections & Appeals*, 2008 WL 373637 (Iowa Ct. App. 2008) is not a viable basis for the DIA’s and District Court’s interpretations. First, D2 Enterprises is factually distinguishable because the game at issue in that case did not permit the player to know the potential prize in advance of play. In other words, it did not have a Prize Viewer. Second, the court in D2 Enterprises was not required to, and in fact did not, adopt any particular interpretation of the word “outcome.” Third, D2 Enterprises is an unpublished opinion and therefore by rule it does not constitute controlling legal authority. Iowa R. App. P. 6.904(2)(c) (“Unpublished opinions or decisions shall not constitute controlling legal authority”).

The second case cited by the DIA and District Court to support the erroneous interpretations of “outcome,” *Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 72 A.D.3d 1144 (2010), actually *contradicts* the DIA’s interpretation. The Pace-O-Matic opinion, as quoted by the DIA, states

“[t]he outcome includes *both whether the player correctly solves the puzzle and what prize is awarded.*” (Appendix at 235, 249); *Pace-O-Matic, Inc.*, 72 A.D.3d at 1146. This understanding of “outcome” is at odds with the DIA’s and District Court’s narrow interpretations focusing solely on winning a prize.

F. The DIA’s and District Court’s Interpretations are Undeniably Prejudicial

Had the DIA and District Court interpreted § 99B.53(1) using the proper definition of outcome as “something that follows as a result or consequence,” they could have easily reached the opposite conclusion—that the outcomes of the Superior Skill devices are primarily determined by the skill or knowledge of the player. The Prize Viewer feature allows the player to control the outcomes. The Prize Viewer provides the player with knowledge of the attainable prize, and thus the possible outcomes, of any game, without any cost to the player. Through application of this knowledge, and the subsequent application of skill to attempt to solve the game, logic clearly dictates the outcomes are within the player’s control.

This is true even where the Prize Viewer reveals a game that would not provide a monetary return to the player. Whether a particular game provides a return to the player is immaterial because a proper interpretation

of “outcome” does not limit the term to winning a prize or obtaining a positive monetary return—the “outcome” might be winning a prize of a value less than the cost to play or failing to win a prize at all. Through use of the Prize Viewer, the player initiates the game with full knowledge of the outcome should he or she successfully solve the puzzle through application of his or her skill. The player makes an informed choice about whether to play and that choice directly determines the outcome. Of necessity, the outcome is within the player’s control and, therefore, “primarily determined by the skill or knowledge of the player.”

III. The DIA and District Court Erroneously Interpreted the Word “Knowledge”

As discussed, a principle of statutory construction is that a court must presume that the statute does not contain superfluous words. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass’n for Justice*, 867 N.W.2d 58, 75 (Iowa 2015); Iowa Code § 4.4(2) (“In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.”). “In interpreting a statute, each term is to be given effect” and, thus, a court must “not read a statute so that any provision will be rendered superfluous.” *Neal*, 814 N.W.2d at 520 (internal citations omitted).

The DIA and District Court erroneously interpreted § 99B.53(1) by conflating, and failing to give separate meanings to, the words “skill” and “knowledge.” The registration requirement of § 99B.53(1) is triggered by a device “that awards a prize where the outcome is not primarily determined by skill *or* knowledge of the operator.” Iowa Code § 99B.53(1). The word “or” is a disjunctive particle, and usually marks an alternative as either “this” or “that.” *Lahn v. Inc. Town of Primghar*, 281 N.W. 214, 216 (Iowa 1938). Therefore, “skill” and “knowledge” in § 99B.53(1) are alternatives; the registration requirement may be avoided if the outcome is primarily determined by the operator’s skill *or* by the operator’s knowledge.

“Skill” has a different meaning than “knowledge.” The District Court defined “skill” by referring to Merriam-Webster’s Online Dictionary:

- (1) The ability to use one’s knowledge effectively and readily in execution or performance;
- (2) Dexterity or coordination especially in the execution of learned physical tasks; and
- (3) A learned power of doing something competently...a developed aptitude or ability.

(Appendix at 250 (citing *Skill*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/skill> (last accessed July 13, 2017))).

The court defined “knowledge” as “the fact or condition of knowing something with familiarity gained through experience or association.” (Appendix at 250–51 (citing *Knowledge*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/knowledge> (last accessed July 13, 2017))).

The DIA’s ruling failed to mention the discrete meanings of “skill” and “knowledge” and made no effort to apply the concept of player “knowledge” apart from the concept of player “skill.” While the DIA at times correctly quoted the “skill or knowledge” language from § 99B.53(1), the DIA undertook no separate analysis of “knowledge” as a concept distinct from skill. The DIA’s failure to give meaning to the word “knowledge” was a critical error in light of the Prize Viewer feature.

The District Court considered the “knowledge” requirement. The District Court recognized the player has “knowledge” of the potential prize for the next round of play, but suggested this is not enough. The court explained:

...although a player can know which potential prizes are or are not available before they begin playing each round, the player has no practical way to know what order potential outcomes are presented. It is ridiculous to think any one person would play through all 75,000-100,000 possible round outcomes; and more ridiculous still that an individual who managed to play for that long would 1) recognize that there is a repeating, finite order in which outcomes are presented, 2) memorize that order, allowing them to make an informed, knowledgeable decision about whether they should start or keep playing at a particular point in the cycle based on when the best prizes are available.

(Appendix at 254). The District Court erred in the foregoing conclusion. First, it assumes that a player will be possessed of an irresistible urge to continue playing the game in order to gain some knowledge of the ordering of the display of puzzles in order to win a specific prize. The fact that the “ordering” of puzzles does not rely on a random number generator simply removes any element of chance. The Appellant agrees with the District Court that such an exercise of cycling through the universe of puzzles would be ridiculous, but respectfully urges that it is not germane to the outcome of the core questions presented.

The District Court’s discussion ignores the multiple choices presented to a player who has the means to obtain knowledge before each play. The player has absolute control over the result that can be obtained upon completion of the skill task because of the Prize Viewer feature. The player may choose to discontinue play and choose a different device. He or she may choose to play a different puzzle in the same device by selecting another game, or may play at different levels in the same or a different game. It is not the *order* of the presentation of the puzzles that holds any significance as to the control the player retains in directing the outcome due to the knowledge the player may easily attain, without cost, before ever picking and playing any puzzle to be presented.

The knowledge the player has in *each particular round* satisfies the statutory requirement of “primarily determined by... skill or knowledge.” For each particular round, the Prize Viewer gives the player knowledge of the result for the player’s successful completion of the puzzle in that round. The Prize Viewer is available in every game theme and for every play level. If a player views the potential outcome for a particular round of a particular game on the Prize Viewer, and the outcome is not desirable to the player, he or she may simply not play that particular puzzle and choose another, or discontinue play. This ability equates to knowledge which unequivocally

controls the outcome of game play. This control does not rely on “linguistic gymnastics” (Appendix at 255) but rather the realities of game play.

The outcome is based “primarily on the skill or knowledge of the player” regardless of whether the player has knowledge of potential prizes more than one round in advance. The device does not require the player play any particular game for any particular number of rounds. Rather, he or she may change games or redeem accumulated credits at any time.

The District Court failed to discuss the significance of the fact that the player has several options available before *each round* of the game. In each scenario, the available outcome is known and in control of the player, who is given the knowledge to make an informed choice of which available outcome to pursue or not to pursue. Any possible connection between chance and the outcome is severed by the free knowledge that the devices give to the player of the available outcome.

The District Court further held, “[t]he most cunning and physically coordinated person may still find themselves winning significantly less in prizes than someone who is less adept at the game simply because of when he or she begins playing.” (Appendix at 254). The court erred in this conclusion. For each round with an available prize, a player with higher skill is more likely to reliably solve the puzzle and thus more likely to win the

prize by completing the skill task. Chance or luck does not play a role in that context. A skill task must still be completed. However, knowledge will also allow a lesser skilled player to control the outcome of game play through the ability to make informed decisions before engaging in the skill task at all.

No other known game or device imparts knowledge of the potential outcome to the player. That knowledge makes the playing of Superior Skill 1 and Superior Skill 2 a qualitatively different exercise. In the game at issue in *D2 Enterprises*, the player never had knowledge of the potential outcome. Other games where outcome is primarily controlled by chance lack such a feature to impart knowledge of the outcome before completion of the skill task. Slot machine players do not know the potential outcome, nor is skill a factor at all. Blackjack players do not know what card will be dealt next. All of those games are determined primarily by chance due to the unknown and uncontrollable. By contrast, Superior Skill 1 and Superior Skill 2 eliminate the unknown and uncontrollable. The outcome is known and within the control of the player, should he or she choose it and exercise sufficient skill to obtain it.

The devices at issue are different in kind than chance-based games. If the DIA and District Court properly interpreted the word “knowledge” in the context of § 99B.53(1), it may have recognized this. Instead, the DIA’s and

District Court's interpretations rendered the word knowledge to be superfluous, contrary to well-established rules of statutory construction. The DIA's and District Court's interpretations of the "knowledge" component should be reversed.

CONCLUSION

This is a case that calls upon this Honorable Court to be mindful of the separation of powers, an important foundational principle of our system of government. Laws are created by the legislature, administered by the executive branch, and interpreted solely by the courts.

Under the statutory scheme created by the legislature in this instance, in the seeking of a declaration as to the subject devices, the DIA was called upon, within the confines of a narrowly-defined, statutorily created role, to draw reasonable conclusions based upon facts and fair interpretations of the law constrained by traditional rules of statutory interpretation established by the judiciary.

Unfortunately, the DIA failed to apply undisputed facts to the analysis of the critical question of whether the "outcome" of game play is primarily determined by skill or knowledge of the player versus that of chance, beyond the control of the player. The DIA and District Court ignored, and misinterpreted the effect of, the critical feature unique to Superior Skill 1

and 2 of imparting knowledge of the potential outcome, through the use of the Prize Viewer, which makes the outcome *completely* within the control of the player assuming the player exercises the requisite skill. There has been no controversy identified in this case that the completion of the puzzle selected by the player requires the exercise of skill.

In each instance, the Prize Viewer presents the player with the ultimate choice to play the game. He or she, if choosing to seek a particular outcome, whether amusement or monetary award, must apply skill by completing a puzzle by either nudging or swapping a symbol within the allotted time. Thus, indisputably, the player applies knowledge *and* skill in determining the outcome in each instance of game play and chance has no role in such outcome.

Even if we accept the DIA's and District Court's interpretations of what a game of skill must constitute, i.e., that the outcome means "actually winning a prize," the devices at issue nonetheless afford the player that opportunity. The outcome is clearly presented by the Prize Viewer, imparting knowledge to the player before engaging in game play. This element distinguishes these games from any other. A player may choose to play for the potential outcome, choose another game, another play level, another device, or to not play at all. That process is applying the other

critical element contemplated by the legislation—the role of knowledge in determining the outcome.

Superior Skill 1 and Superior Skill 2 afford every player in every play the opportunity to not only garner that knowledge, but to apply it to their benefit. For this reason alone, there is *no* element of chance. There is nothing unknowable to the player, or chance presentation that is equal to or greater than the roles of skill or knowledge in the outcome.

There are practical consequences to the DIA's and District Court's decisions, when purporting to edit or amend the literal terms of the statute. It deprives the opportunity for a business to supply a lawful amusement device and for the citizens of Iowa to be denied the opportunity to entertain themselves through the exercise of knowledge and skill.

We respectfully request the Court apply a reasoned interpretation of the statute which, when applied to undisputed facts, supports a reversal of the findings of the DIA, to which it owes no deference, and the District Court.

In so doing, the Court will necessarily find that the Appellant has carried its burden of persuasion in establishing that the DIA's agency action was invalid and the Appellant was undoubtedly prejudiced in requiring

registration of the amusement devices known as Superior Skill I and Superior Skill II.

The DIA conclusion that knowledge and skill are not primarily determinative of outcome is not logical, rational or justifiable and the facts have not been properly applied to the law. Further, the DIA ruling was arbitrary and capricious when ignoring the primary role of knowledge and skill in the outcome of play. In so doing, the action was taken without regard to the law or facts of the case.

REQUEST FOR ORAL SUBMISSION

Appellants request that this appeal be submitted with oral argument.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certify that they, or a person acting on their behalf, will file the attached Proof Brief of Appellant with the Clerk of the Iowa Supreme Court via EDMS on January 24, 2018.

The undersigned further certifies that on November January 24, 2018, they, or a person acting on their behalf, did serve the attached Proof Brief of Appellant on the other party to this appeal via EDMS and by mailing one (1) copy hereof to each of the following counsel of record:

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CERTIFICATE OF COST

The undersigned hereby certify that the actual cost of reproducing the necessary copies of the foregoing Appellant's Proof Brief consisting of a total of 50 pages was \$10.00, and that the amount has been paid in full by the undersigned firm.

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