

**IN THE IOWA SUPREME COURT**

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

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**BANILLA GAMES, INC.,  
Plaintiffs/Appellants,**

**vs.**

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS,  
Defendants/Appellees**

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

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**APPELLANT'S FINAL REPLY 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.

## **ARGUMENT**

### **Error Preservation**

Appellant Banilla Games, Inc. (“Banilla Games”) preserved error on the issues of (1) Whether the DIA’s ruling is based upon erroneous interpretations of Iowa Code § 99B.53(1), including the terms “outcome” and “knowledge;” (2) whether the DIA’s ruling was unreasonable, arbitrary, and an abuse of discretion;

and (3) whether the DIA's application of law to fact was irrational, illogical, and wholly unjustifiable. These issues were raised in the Petition for Judicial Review in the District Court. (Appendix at 15). The District Court ruled on these issues. (Appendix at 242–43).

### **Argument**

The Iowa Legislature adopted a unique statutory provision regulating registration of electrical or mechanical amusement devices. Iowa Code § 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). Section 99B.53(1) is unique because of the language “skill or knowledge.” No other jurisdiction found by Appellant has a similar statutory scheme regulating electrical or mechanical amusement devices, and the DIA does not cite to any that do. Thus, prior case law cited by the DIA should be evaluated carefully in light of the prevailing statutory schemes, all being distinct from that informing this Honorable Court in this appeal.

Section 99B.53(1) became effective July 1, 2015. 2015 Ia. Legis. Serv. Ch. 99 (S.F. 482) The Iowa Supreme Court has not yet interpreted § 99B.53(1), including the words “outcome,” “skill,” and “knowledge.” The DIA recognizes “no

published appellate opinion in Iowa has directly addressed the issue.” (DIA Brief at 13). Section 99B.53(1) is an entirely new statute, and follows a shift in Iowa law. *See* 2015 Ia. Legis. Serv. Ch. 99 (S.F. 482) (adding “new section” at 99B.53). The legislature recognized the need to modernize its approach in light of changing times: “This Act provides for the reorganization and modification of Iowa Code chapter 99B governing games of skill or chance, and raffles. The Act rewrites the chapter, eliminates outdated and redundant provisions and licenses, and updates other provisions in a manner consistent with current social and charitable gambling activities.” *Legislative Services Agency, 2015 Summary of Legislation, Iowa Gen. Assemb., Reg. Sess., available at* <https://www.legis.iowa.gov/docs/publications/SOL/680522.pdf#SF482> (last accessed January 6, 2018). In introducing the bill in the Iowa House, Representative Rob Bacon of the 48th District noted the charitable gambling laws dated back to 1974. S.F. 482, 86th Gen. Assemb., Reg. Sess. (Iowa 2015) (statement of Representative Robert Bacon), *available at* <http://www.legis.state.ia.us/dashboard?view=video&chamber=H&clip=1540&dt=2015-04-29&offset=818&bill=SF%20482&status=r> (last accessed January 6, 2018). He described the purpose of the bill as to “update, simplify, and modernize” Chapter 99 of the Iowa Code.

Prior to 1972, Iowa prohibited all forms of activity considered gambling regardless of any skill or knowledge component. Iowa Const., Art. III, § 28 (1857).



The defining aspect of gambling was whether the device awarded “any sum of money or other property of any value.” *See, e.g., State v. Ellis*, 200 Iowa 1228, 206 N.W. 105, 106 (1925); Iowa Code § 13202 (1924).

In 1972, the constitutional provision prohibiting all gambling as then defined was repealed. Iowa Const. Art. III, § 28. Nonetheless, the DIA relies on prior case law from Iowa and other jurisdictions decided under entirely different statutory frameworks and involving devices dissimilar to Superior Skill 1 and 2.

Like the language of Iowa Code § 99B.53(1), the Superior Skill devices are unique. Banilla Games’ observation of the unique nature of the devices is not a “sales pitch,” as the DIA claims. (DIA Brief at 14). Rather, the games are, as supported by the record, unlike any other known game or device in that the outcome of game play is primarily determined by the skill *and* knowledge of the operator through the performance of a skill task and the employment of the Prize Viewer feature. The DIA offers no evidence suggesting a similar device exists and cites to no authority considering the legality of such a device under § 99B.53(1) or any similar statutory scheme.

Moreover, Banilla Games’ argument that the registration requirements of § 99B.53(1) do not apply to the Superior Skill devices is not an attempt to sell anything. (*See* DIA Brief at 14). Rather, Banilla Games sought a Declaratory Order in an attempt to ensure the Superior Skill devices comply with Iowa law, as it is

invited and entitled to do pursuant to Iowa Code § 17A.9 and the Iowa Administrative Code.

Banilla Games respectfully asserts that the Superior Skill devices are not required to be registered by the DIA under Iowa Code § 99B.53(1). This is for the reasons that the DIA and District Court interpreted the words “outcome” and “knowledge” as used in § 99B.53(1) 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).

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

**A. The Outcome of Superior Skill 1 and Superior Skill 2 is the Result or Consequence of the Attempt to Solve Individual Puzzles.**

The District Court defined “outcome” as “something that follows as a result or consequence.” (Appendix at 250 (citing *Outcome*, Merriam-Webster.com, <https://www.merriamwebster.com/dictionary/outcome>)). 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 DIA argues that not only does “outcome” equate with “actually winning a prize,” but that it equates with “actually winning a prize over an *entire play session* consisting of multiple play screens.” (DIA Brief at 30). Nor does the DIA define a “play session” in its brief. The DIA’s interpretation finds no support in § 99B.53(1) or in the record.

To the extent the Court finds it meaningful to the analysis, it should interpret “outcome” as the result or consequence of play in a single “screen” or puzzle. The outcome affects only the player who chooses to start, continue, and discontinue play for a duration solely of the player’s choice. Only the individual player is affected by the outcome, or results of game play, whether it be one or more “screens” or puzzles. The “outcome” to other players is of no consequence to the individual player engaged in game play.

The DIA found that “the ordering and value of the games is really the deciding factor in determining which of the games’ players will be awarded a prize at the conclusion of play.” (Appendix at 255). However, in so doing, the DIA failed to account for the knowledge element of the Prize Viewer allowing the player to predetermine and choose the game to play, or not. It is the player’s choice of the puzzle to attempt to solve in the first instance, not the ordering and value of the screens. The DIA also assumed the only “outcome” was “winning” a prize,

presumably more than the amount the player paid to play, which Banilla Games neither concedes nor asserts is supported by the record or the applicable law.

The DIA argues the “outcome” should be based over “multiple game screens” because “few if any players end their interaction with the machine that soon.” (DIA Brief at 34). Yet, the DIA offers no evidence or support in the record suggesting “most users” or any users play any particular number of game screens or for any particular length of time. (*See* DIA Brief at 33–24). The District Court found “[i]t is ridiculous to think any one person would play through all 75,000–100,000 possible round outcomes...” but did not refer to any evidence as to the expected duration of play by a single player. (Appendix at 254–55).

After observing “...technology has advanced significantly and society has grown more tolerant of some forms of gambling” (*see* DIA Brief at 35), the DIA relies on language in a 104-year-old case from the Kansas City Court of Appeals, *City of Moberly v. Deskin*, 155 S.W. 842 (Mo. App. 1913) to support its argument that “outcome” measures more than one play screen. However, *City of Moberly* is distinguishable.

*City of Moberly* involved an “Automatic Gum Vendor” into which a player dropped a nickel or five-cent metal trade check into a slot and pulled a lever. The player would receive a pack of gum or a pack of gum in addition to a number of five-cent metal trade checks. The machine had an indicator which told the player

whether he would receive gum or gum plus five-cent metal trade checks before he or she dropped any money.

In *City of Moberly*, the issue on appeal was whether the Automatic Gum Vendor was an illegal gambling device. The city ordinance at issue prohibited *all* gambling devices, regardless of whether they involved the exercise of skill or knowledge. *Id.*, 155 S.W. at 842. The court held the Automatic Gum Vendor was an illegal gambling device. The court explained:

If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, *is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress.*

*Id.*, 155 S.W. at 844. The court did not reference any evidence, including lay or expert testimony based on any studies or any methodology, supporting its notion that players of the Automatic Gum Vendor played the device for more than one pull of the lever for the purpose of winning trade checks worth more than the player deposited. After all, the player obtained at least the equivalency of gum in each instance and there appeared to be no “uncertain chance” involved in light of the indicator. The court simply concluded, for reasons not articulated, that the device “is a direct appeal to the gambling instinct.” *Id.*

The DIA, like the *City of Moberly* court, seems to base its argument that players of the Superior Skill devices play multiple one-game screens or puzzles on the assumption that human beings have a “gambling instinct” which drives them to continue to deposit money into the game in the hope of getting a return on the next play. (DIA Brief at 34–36). In other words, the DIA assumes players will be possessed of an irresistible urge to continue playing the devices in order to gain some knowledge of the ordering of the puzzles in order to win a specific prize. The DIA’s assumption finds no support in the record or in Iowa law. This notion also fails to account for the knowledge available through the Prize Viewer feature.

Although the Iowa Supreme Court referred to the concept of “gambling instinct” or “gambling spirit” in cases considering illegal gambling devices in the past, see, e.g., *Jacobs v. City of Chariton*, 245 Iowa 1378, 1401, 65 N.W.2d 561, 573 (1954) (holding a pool table used for gambling on one particular occasion was not an illegal gambling device, noting the “mere possession” of the table “does not arouse the gambling instinct”); *State v. Marvin*, 211 Iowa 462, 233 N.W. 486, 486 (1930) (noting “[t]he only apparent economic reason for their use was that they would induce a larger deposit of nickels in the slot than would otherwise ensue.”); *State v. Ellis*, 200 Iowa 1228, 206 N.W. 105, 106 (1925) (discussing the “gambling instinct” in reference to a machine dispensing mints and five-cent “chips”), this is not noted as a consideration in § 99B.53(1). Courts of other jurisdictions,

especially in the early to mid-20th century, also relied on the concept of a “gambling instinct”, but do not appear to have supported this concept through any empirical evidence. *City of Moberly*, 155 S.W. at 844; *Hunter v. Mayor & Council of Teaneck Twp.*, 24 A.2d 553, 556 (N.J. 1942); *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113, 1116 (1941) (“The vice of the game consists not alone in the amount of money risked in playing it, but also in the encouragement of the gambling instinct latent in many people”).

Notably, § 99B.53(1) does not contain any reference to the “gambling instinct” or “gambling spirit.” Since the repeal of Iowa Const. Art. III, § 28 in 1972, the Iowa Supreme Court has not reported having used the “gambling instinct” or “gambling spirit” test to determine whether any device is an illegal gambling device.

For purposes of § 99B.53(1), the Court should define the “outcome” as the result of one puzzle the player selects to attempt to solve. Engagement in play of one puzzle has a definite beginning and end—unlike a “play session” of indeterminate length or number of puzzles. The devices do not require the player to play any particular game theme for any particular number of puzzles. Rather, he or she may redeem accumulated credits at any time.

In *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218 (Kan. Ct. App. 2011), cited by the DIA, the Kansas Court of Appeals defined “game” for purposes of a

gambling statute as one hand of a card game, rather than the entire number of hands played. The game at issue was similar to Texas hold 'em and was played one hand at a time. The evidence and witness testimony indicated most players played more than one hand and some played for hours, however, nothing in the rules required a player to do so. The court explained:

As the district court found, the proffered long-run standard is illusory because it has no end game. Kandu Challenge must be judged on the basis of a *game*: something with a discrete beginning, end, and an ascertainable winner. The rules of Kandu Challenge provide that one hand composes a discrete unit of play: it has a beginning, middle, and end. The winner of each hand is awarded the purse.

*Id.*, 255 P.3d at 1225. Similarly, the DIA's interpretation of an "entire play session" or the "long run" has no measurable end. One puzzle or game screen, however, is a discrete unit of play with "a discrete beginning, end, and an ascertainable winner." *Id.*, 255 P.3d at 1225.

The DIA analogizes the "play session" to a football game, arguing, "the outcome of a football game means the final score of the game, not one individual player's statistics or the individual result of each snap or each quarter." (DIA Brief at 37 (citing *Abernathy v. State*, 545 So.2d 185, 188 (Ala. Crim. App. 1988))). However, the result of a *single* game screen or puzzle on the Superior Skill devices is similar to the outcome of an *entire* football game. It has a "discrete beginning, end, and an ascertainable winner." *Three Kings*, 255 P.3d at 1225. A football game's time clock is carefully managed by the rules of play. The final score



determines the winner only after the allotted time expires. Unlike a Superior Skill player, if a football team leaves the field of play before time expires, it forfeits the game. Unlike the Superior Skill devices, where the player is free to select another theme or level to play at any time, the football team cannot change the field or its opponent while engaged in game. When a football team runs a play, it has no idea of its ultimate outcome. A player in Superior Skill through the Prize Viewer can predict the outcome precisely when he or she completes the skill task.

Thus, should the Court determine that “outcome” is pertinent to disposition of the appeal, it should consider it as the result or consequence of a single puzzle and from the perspective of the player who is directly affected by the result.

**B. The DIA’s Speculation Regarding the Legislature’s Intent is Nontextual.**

The DIA argues that the legislature “intended to be cautious about allowing amusement devices that resemble gambling to proliferate. Interpreting the word ‘outcome’ to encompass an entire play session is consistent with that concern.” (DIA Brief at 33). Superior Skill devices do not “resemble gambling.” The DIA itself correctly held the Superior Skill devices *are not illegal gambling devices*—they are electrical amusement devices. (DIA Ruling at 14) (“Superior Skill 1 and Superior Skill 2 are electrical and mechanical amusement devices that comply with Iowa Code Section 99B.52”). Section 99B.53(1) does not apply to gambling devices. *See* Iowa Code § 99B.52 (“If the provisions of this section and other

applicable provisions of this subchapter are complied with, the use of an electrical or mechanical amusement device shall not be deemed gambling.” Iowa Code § 99B.1 (“Amusement device” means an electrical or mechanical device...When possessed and used in accordance with this chapter... is not a gambling device.).

In drafting § 99B.53, the legislature apparently contemplated the existence of amusement devices which are different than gambling devices and are not used for gambling. Further, the legislature specifically contemplated that some amusement devices need not be registered with the DIA.

The DIA sets forth no language in the statute nor legislative history indicating the legislature intended the word “outcome” to mean the “outcome” of an “entire play session,” or defining “entire play session,” other than by referring to Iowa Code § 99B.53(1) itself and other sections of Iowa Code Chapter 99. (DIA Brief at 33). If the legislature intended to so define “outcome,” it could have done so. As the DIA admits, the operative words of the statute, including “outcome,” “skill,” “knowledge,” and “primarily,” have plain and unambiguous meanings found in the dictionary. No contention has been made that the statute is ambiguous. Consequently, the Court should not look beyond the express language of the statute to determine the legislature’s intent. *McGill v. Fish*, 790 N.W.2d 113 (Iowa 2010). The Court should decline the DIA’s nontextual invitation to speculate about the legislature’s intent beyond the plain words of the statute.

### **C. Amusement Falls within the Plain Meaning of the Word “Outcome.”**

The DIA argues, “the Court should reject out of hand the contention that the outcome of an amusement device is an intangible and subjective sense of fun.” (DIA Brief at 30). Yet, “[t]o be clear, DIA does not contend that chapter 99B and the word ‘outcome’ mandate that all amusement device players win prizes exceeding the credits wagered,” (DIA Brief at 39) leaving some uncertainty as to what the DIA deems the “outcome” to be. Contrary to the DIA’s argument, amusement is a possible “result or consequence” that follows the playing of the Superior Skill devices. The outcome of amusement is evident from the title of § 99.53: “Electrical or Mechanical *Amusement* Devices.” The DIA points to no evidence that players do not spend money on these devices for amusement, just as players do in a vast array of other activities, for example, arcade games, which offer no available prize.

To support its contention that this Court should reject the potential for amusement “out of hand,” the DIA cites dicta from a 1929 case from the South Carolina Supreme Court. *Harvie v. Heise*, 148 S.E. 66, 68 (S.C. 1929). In *Harvie*, the devices at issue were slot machines in which the player deposited a nickel, pulled a lever, turned a knob, and received a package of mints and a number of brass tokens. The devices had spinning reels which “exhibit[ed] different combinations of pictures of fruits, etc., “show[d] humorous remarks,” or “[told] the

pretended “fortune” of the customer.” *Id.*, 148 S.E. at 67. The player could deposit the brass tokens into the device and the reels would continue to spin. The applicable South Carolina statute prohibited all slot machines with “an element of chance.” *Id.* The court concluded that “in order to escape the condemnation of the statute (1) the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine.” *Id.* The Court ultimately determined that because the release of checks or tokens was at irregular intervals and in uncertain numbers, and the element of chance was always present, the statute was violated. The statute contained no “skill” or “knowledge” component, and any skill or knowledge exercised by the player was not a part of the operation of the machine.

The DIA argues “if the outcome is merely whether the player enjoys themselves, any slot machine—even one with a random number generator—would be permitted outside of licensed casinos (as long as it is registered with the DIA) because the player knows he or she will have fun playing it.” (DIA Brief at 31). A slot machine bears little similitude to a Superior Skill device. Iowa law defines a slot machine as “a mechanical, electronic, or video gambling device into which a player deposits coins, tokens or currency and from which certain credits, tickets, tokens or coins are paid out when a particular, random configuration of symbols appears on the reels, simulated reels, or screen of the device. The slot machine may

have a lever, buttons, or other means to activate or stop the play.” Iowa Admin. Code R. 481-104.1(10A, 99B). The Superior Skill devices are not slot machines, as the DIA itself so held. (DIA Ruling at 14) (“Superior Skill 1 and Superior Skill 2 are electrical and mechanical amusement devices that comply with Iowa Code § 99B.52”). Moreover, by its very definition, a slot machine does not allow the player to exercise any skill or knowledge and its outcome is entirely random and completely beyond the control of the player.

The Superior Skill devices, unlike slot machines, allow the player to exercise skill and knowledge. This very exercise of skill or knowledge allows a player to derive amusement. Electronic amusement devices exist whether or not they hold the potential for a prize (video games, etc.). The challenge presented, and possible success or failure in the effort, as in games of all variety, represent a quintessential source of amusement. Yet, the DIA in its brief calls Banilla Games’ view “that winning a prize may be an afterthought “utopian,” even though the DIA determined the Superior Skill devices to be “amusement devices.” (DIA Brief at 38; Appendix at 241). It is respectfully submitted that it is difficult to logically square the necessity of monetary award for a player to engage in the play of Superior Skill as test of skill and knowledge given the pervasive existence of video amusement devices in our society with no potential for monetary reward.

**D. Choice not to Play Falls Within the Plain Meaning of the Word  
“Outcome.”**

The DIA argues the “outcome” cannot “mean simply that the player chooses not to play. The choice not to play is a *player* outcome, not a device outcome, and § 99B.53(1) focuses on device outcomes.” (DIA Brief at 31). Yet, even should “device outcome” be the measure, if the device is not played and is unused, what is the “device outcome”? There is none. The DIA provides no support for its notion of “device outcome” in § 99B.53(1) or in the record. A player’s decision not to play a particular game screen clearly falls within the plain meaning of “outcome,” because it is a result or consequence of the player’s skill or knowledge. For each particular game screen, the Prize Viewer gives the player knowledge of the potential prize for the player’s successful completion of the puzzle through the exercise of skill. If a player views the potential prize for a particular screen or puzzle 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 choose to discontinue play altogether. (Discontinuing play at some point in time is safely predicted as inevitable). This ability to play or not to play unequivocally controls the outcome for the player.

In its Brief, the DIA continues to compare the Superior Skill devices to slot machines, arguing, “if ‘outcome’ includes choosing not to play, even slot machines could be knowledge-based amusement devices because each casino patron can

access slot machine game rules and overall payout percentages before expending any money.” (DIA Brief at 31). As discussed, the Superior Skill devices are not slot machines. Section 99.53B(1) does not regulate slot machines. Most importantly, no known slot machine has a Prize Viewer feature, in which the player may view the potential prize for a particular game screen or future spin of the reels. Knowledge of the rules of the game or “aggregate payout percentages” are not analogous to the Prize Viewer feature of the Superior Skill devices which presents the player with meaningful choices directly affecting the outcome of play. Knowledge of statistical payouts can never allow the player of a slot machine to in any way to control the totally random nature and pure chance of its outcome.

#### **E. The Pre-set Screen Order is Immaterial to § 99B.53(1)**

The DIA argues, “[m]ore than two-thirds of the available screens on the Superior Skill devices offer the player no opportunity to create a winning symbol combination. Because zero value screens are so frequent, the main factor affecting the outcome is where the player starts and ends in the predetermined screen order (and what that order is)—which the player can never influence with skill or knowledge.” (DIA Brief at 40). 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, 183).

The DIA argues because the puzzles in the Superior Skill devices are presented in a fixed order, “neither skill nor knowledge influences the result of a play session or a play screen *more* than the luck of the draw.” (DIA Brief at 40). The Appellant disagrees with this conclusion. Game screens must be presented in some manner. An alternative method of presenting puzzles, for example, a random number generator as used in slot machines, would only add an element of chance to the game. The principal not accounted for in the DIA’s argument is whether presented through either a fixed order or randomly, the player always has the ability to know in advance what the ensuing screen will provide in terms of result should the skill task be successfully completed. The player can choose from 60 different screens before selecting the one he or she desires to play by employing the knowledge imparted by the Prize Viewer. (Appendix at 141–42, 181–2). The DIA offers no alternative to how it would find the “ordering” of presentation of screens to be acceptable in order for its decision to have been different, nor did it evaluate the significance of the Prize Viewer to the knowledge component of the statute.

The DIA analogizes the Superior Skill devices to a “Tag Balloon Dart Game,” in which “the player aims darts at balloons and receives prizes that are



listed on a tag concealed beneath whichever balloons he or she pops. However, despite *appearing* to be based primarily on skill—whether the player can aim the dart correctly and throw it with enough velocity at the right angle—chance actually predominates in Tag Balloon Dart because ‘the *quality* of the prize’ is determined entirely by where the player *happens to hit*, not the exercise of their skill.” (DIA Brief at 42–43). The DIA again fails to recognize the *knowledge* component. The Superior Skill devices are more analogous to a Tag Balloon Dart game using clear balloons through which the player can see the tag below and thus know the available prize for bursting the individual balloon in advance. In such a scenario, the player can exercise his or her skill (throwing the dart) to pop the balloon corresponding to the prize the player considers most desirable.

The DIA also cites a dissent from a case from the North Carolina Court of Appeals considering a “nudge” style game. *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014), *rev’d sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015). *Sandhill Amusements* provides no persuasive authority. The applicable North Carolina statute did not contain a knowledge component. Even so, the trial judge had found the devices used in the operation of the Plaintiff’s sweepstakes are “dependent on skill and dexterity” and a “lawful promotional device,” apparently at least in part based upon the testimony of Nick Farley. *Id.* The appellate Court ultimately

exercised limited jurisdiction to vacate portions of the preliminary injunction of the trial court which exceeded its permissible scope, and made no adjudication on the merits of the case.

**F. Whether the Device Owner Makes a Profit is Immaterial to § 99B.53(1).**

The DIA focuses on whether the owner or operator of Superior Skill devices will obtain a return or profit. (DIA Brief at 19). This focus is misplaced. First, § 99B.53(1) contains no language related to payout percentage or profit.

Second, while the devices may be adjusted to set the payout percentage, the fact that the owner or operator obtains a return does not distinguish the Superior Skill devices from any other. All amusement devices presumably require a player to pay and yield a return for their owner whether awarding a prize or otherwise. Logic dictates that in a capitalistic society, devices are designed, manufactured, marketed, and operated for the purpose of yielding a return or profit to their sellers and operators. Superior Skill operators may obtain a financial return. This not only does not distinguish these devices from others, but it does not determine whether outcomes are primarily the result of skill or knowledge. Were there no potential for profit, it is also logical to assume that there would not likely be electronic amusement devices, much less other forms of amusement.

Third, it is unreasonable to expect a device designer to deploy and operate the device without some expectation of a return on investment. A return on

investment is necessary to cover the costs to develop, design, manufacture, operate, and maintain devices. Iowa law does not prohibit a device operator or other lawful business venture from obtaining a profit or return on investment.

**G. Whether the Player “Comes Out Ahead” is Immaterial to § 99B.53(1).**

As noted earlier, the DIA admits it “does not contend that chapter 99B and the word “outcome” mandate that all amusement device players win prizes exceeding the credits wagered.” (DIA Brief at 39). Nonetheless, the DIA argues that because the Superior Skill 1 and Superior Skill 2 devices feature a programmable payout percentage, they “prevent *any* player from coming out ahead in the long run,” and this requires registration under 99B.53(1). (DIA Brief at 14).

First, § 99B.53(1) does not require the player operating an amusement device “come out ahead” for any particular number of screens or puzzles or that the “aggregate universe” of players “come out ahead.” What is material to the analysis is whether the particular outcome is primarily determined by the skill or knowledge of the player.

Second, the “programmable payout percentage” does not indicate the prize or prizes any particular player might win for solving any particular puzzle or number of puzzles less than the entire order. The 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, 224, 243). However, these are the percentages of payouts for *all games*, from 75,000-100,000, in a particular game theme and level. The payout percentages do *not* indicate the prize any *one* player will win for any given length of play. Some players may exercise knowledge and greater skill than others.

The DIA further argues, “[a] player cannot skip a particular screen or otherwise alter or change the order of play screens the device presents,” and “no means exist for a player to bypass or skip that screen (within the same game theme).” (DIA Brief at 1, 20). However, a player *can* avoid a particular screen by selecting a different game theme, a different level within the same theme, playing a different device, or simply redeeming credits at any time.

As the DIA’s own Ruling noted, “[a] player may preview a game’s potential outcome through the prize viewer and many choose not to play a zero or negative net value game by either deciding not to play the device or deciding to switch to a different game theme and/or play level.” (Appendix at 226). The player “is not required to commit any money to playing the device without the option of having first accessed the prize viewer.” (Appendix at 219). Each device has five game themes and each game theme has twelve discrete play levels. (Appendix at 20, 141–42, 181–82). On each device the Prize Viewer may be used to view the

potential outcomes of 60 separate puzzles free of charge. *Id.* Thus, a player has multiple options to bypass or skip a low or zero value game outcome, contrary to the DIA’s contention.

## **II. The DIA and District Court Failed to Properly Interpret the Word “Knowledge” in the Context of the Statute.**

The DIA and District Court erroneously interpreted § 99B.53(1) by ignoring the “knowledge” component. 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.” The DIA argues, “knowledge has no effect whatsoever.” (DIA Brief at 27). The DIA further argues, “skill and knowledge do not overpower chance...Because zero value screens are so frequent, the main factor affecting the outcome is where the player starts and ends in the predetermined screen order (and what that order is)—which the player can never influence with skill or knowledge.” (DIA Brief at 40).

The DIA fails to consider the player *can* influence *every* game screen using knowledge. Through use of the Prize Viewer, at no cost, the player knows what result is available *for every game screen*. The fundamental issue is whether the outcome, which could include a “prize” or not, is primarily determined by the skill *or* knowledge of the player. The player has the ability to know whether a prize is available for *every game screen*, and the value of that prize—thus, the player’s

knowledge, determines the available outcome. In addition, the outcome of game screens are also determined by the player's skill, because he or she must complete a skill task. As the District Court found, "[k]nowing this outcome, however, does not guarantee the player will ultimately win the available prize, because players have a limited amount of time to complete the applicable skill task..." (Appendix at 243). There is no dispute that the skill task is required to complete the puzzle to determine the outcome of the particular play. The finding of Nick Farley, which was not contested, provides:

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.

(Appendix at 152). Skill combined with knowledge therefore place control of the outcome primarily in the hands and mind of the player.

The Superior Skill devices differ from slot machines. The player of a slot machine with a random number generator has absolutely no knowledge of whether he or she will win a prize on the next spin or the value of such prize. Thus, it stands to reason the player of a slot machine pulls the lever in the *hope* he will win a prize. The player of the Superior Skill devices *knows* whether he will win a prize on the next game screen upon successful completion of the skill task. If no prize is

available, the player may use this knowledge to determine whether to continue for purposes of his or her amusement.

The DIA argues, “skill and knowledge do not overpower chance.” (DIA Brief at 40). Whether skill or knowledge *overpowers* chance is not the standard under § 99B.53(1). Section 99B.53(1) does not require registration if the outcome is *primarily* determined by the skill or knowledge of the operator; chance can still exist in the game without requiring registration.

The DIA argues, “[d]evice operators have used a prize viewer before.” (DIA Brief at 47). The DIA offers no support in the record or otherwise that any video device similar to Superior Skill with a Prize Viewer feature exists. Rather, the DIA relies on the 1925 case of *State v. Ellis*, 200 Iowa 1228, 206 N.W. 105 (1925). (DIA Brief at 35).

In *Ellis*, the Iowa Supreme Court considered whether a machine was an illegal gambling device. To operate the machine, the operator placed a nickel into a slot and pulled a lever, and the machine dispensed a package of mints. The machine would sometimes dispense one or more “chips” worth five cents in addition to the mints. The machine featured an indicator which would tell the player in advance the prize he would receive.

At the time the Iowa Supreme Court decided *Ellis*, Iowa law prohibited all gambling, regardless of any skill or knowledge component. Iowa Const. Art. III, §

28. Section 99B.53(1) would not become effective for another 90 years. *Ellis* is not persuasive for the additional reason that there was no skill task required to obtain a particular result. It was determined by the Court to be “a slot machine.” The dispensing of mints or chips was entirely random and not controlled in any way by the player. The player had no method to choose another play level or different theme or puzzle. The only choice allowed the player was whether to deposit another nickel to continue to receive a package of mints or take the chance of another prize being presented. *Id.* What *Ellis* does exemplify is the unique nature of Superior Skill devices, which allow for the application of knowledge together with skill to obtain the desired outcome.

**III. The Iowa Supreme Court has not Interpreted Iowa Code § 99B.53(1), and Case Law Prior to the passage of Iowa Code § 99B.53(1) has no Precedential Value.**

In addition to *Ellis*, the DIA relies on anachronous and distinguishable case law. In *State v. Marvin*, 233 N.W. 486 (Iowa 1930) (DIA Brief at 35), the Iowa Supreme Court again considered whether a mint-vending machine was an illegal gambling device. However, Iowa Const. Art. III, § 28 and the applicable statute at the time, Iowa Code § 13210 (1927), were expansive. They did not distinguish between games of chance and games of skill, and did not contain a “knowledge” component.



In *State v. Wiley*, 232 Iowa 443, 3 N.W.2d 620 (1942), the Iowa Supreme Court considered whether a pinball machine was an illegal gambling device. The applicable statute prohibited any device with “an *element* of chance.” *Id.*, 232 Iowa at 444, 3 N.W.2d at 621 (citing Iowa Code § 13210 (1939)). The Iowa Supreme noted that the legislature had *specifically rejected* the “dominant factor” test when it passed the statute. *Id.*, 232 Iowa at 450, 3 N.W.2d at 624. The legislature has since repealed the “element of chance” language. Iowa Code § 725.9.

The question at issue here is not whether the Superior Skill devices are illegal gambling devices, or whether there is some “element of chance” in the Superior Skill devices. The Iowa legislature has in fact modernized the statutory framework and established distinct new criteria for this Court to consider. *Ellis, Marvin, and Wiley* are neither precedential nor persuasive.

The outcome of the Superior Skill devices, whether it be amusement or the winning of a prize, however the latter is to be defined, requires successful completion of a skill task. The outcome resulting from successful completion of the skill task is one which can be selected by the player through the knowledge available by use of the Prize Viewer. No other persuasive authority has been identified wherein both these elements coexist and are available to the player.

## CONCLUSION

It is respectfully requested that District Court be reversed in its affirmation of the declaration of the DIA agency action requiring registration of the Superior Skill devices, and that it be declared that registration not be required for the reason that the outcome of play is primarily determined by skill or knowledge of the player.

Respectfully submitted,

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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 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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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 37 pages was \$7.40, and that the amount has been paid in full by the undersigned firm.

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