

IN THE COURT OF APPEALS OF IOWA

No. 7-942 / 06-2086
Filed February 13, 2008

D2 ENTERPRISES, INC.,
Plaintiff-Appellant,

vs.

**STATE OF IOWA DEPARTMENT OF
INSPECTIONS AND APPEALS,**
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, William H, Joy,
Judge.

D2 Enterprises, Inc. appeals from the district court order on judicial review.

AFFIRMED.

Blake Parker of Blake Parker Law Office, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, and John Lundquist, Assistant
Attorney General, for appellee.

Heard by Eisenhauer, P.J., and Baker, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

EISENHAUER, J.

The sole issue presented for our review in this case is whether the Department of Inspections and Appeals correctly determined the Speed Master is an electrical amusement device subject to the registration requirements of Iowa Code section 99B.10(4) (2003). Because we find it did, we affirm the district court's order on judicial review.

I. Background Facts and Proceedings. D2 Enterprises, Inc. (D2) is a business that sells and leases electronic games to distributors. Its Speed Master device allows a player to win the "prize" of credits that can be applied for the purchase of merchandise. Credits are won when a player aligns three symbols in a line on a randomly generated screen. Credit is deducted each screen played and added in varying amounts based on the value of the symbols aligned when a player wins a screen.

Prior to introducing the Speed Master in Iowa, D2 filed a petition for declaratory order with the Iowa Department of Inspections and Appeals seeking a determination that the Speed Master game is not an electrical amusement device requiring registration with the department. D2 submitted a forensic report and a meeting between a representative of the department and D2 was held on January 16, 2006. The department denied the request on April 11, 2006. The department's order refers to additional information made available to the department by D2, however it is unclear what additional information was submitted. The record on appeal consists of the pleadings, the forensic report, and four photographs of the machine. The district court affirmed the department on judicial review.

II. Scope and Standard of Review. Iowa Code chapter 17A (2005) governs judicial review of agency action. When the district court exercises its judicial review power it acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*, 649 N.W.2d 744, 748 (Iowa 2002). Our review of the district court's decision requires application of the standards of Iowa Code section 17A.19(10) to determine whether our conclusions are the same as those of the district court. *P.D.S.I. v. Peterson*, 685 N.W.2d 627, 632 (Iowa 2004). If they are the same, we affirm; if not, we reverse. *Id.* A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. See *id.* § 17A.19(10).

III. Analysis. "Each electrical and mechanical amusement device in operation or distributed in this state that awards a prize, . . . where the outcome is *not primarily* determined by the skill or knowledge of the operator," must be registered by the Department of Inspections and Appeals. Iowa Code § 99B.10(1)(f)(1) (emphasis added). The department determined that the legislature's use of the word "primarily" is "the litmus test for determining whether the device must be registered." It found this language "suggests that if chance plays an equal or greater role than the players' skill of knowledge in determining the outcome of the game, then the device needs to be registered." D2 does not dispute this portion of the ruling. Instead, it disputes there is evidence to support

the department's finding that player skill or knowledge is not the principal factor in determining the results of the Speed Master game.

We conclude the department's determination that the Speed Master is not a device where the outcome is primarily determined by skill is not arbitrary and capricious as urged by D2. The department had before it a forensic report presented by D2 and it conducted a meeting where the device was demonstrated and discussed. Randomly assigned screens are presented to the player. These screens have different values assigned to them. A player's skill does not influence the appearance of high value screens. The number of credits won correlates more closely to the presence of high value screens than the skill of the player. This finding is supported by the expert witness evidence presented by D2, which found:

In regard to the "game won" all players showed a typical "learning curve" – each has started with some low score. The score shows the tendency of increasing with time and by the end of the test or sooner did approach "terminal level" of skill which is different for different players. For example the player which started with 57% "game won" reached a "terminal level" of approximately 91% Another player, playing under the same settings, started with a "game won" of 85% and reached own "terminal level" of 99% All 7 players have reached own 'terminal level' ranging from 90% to 100%.

The "credit won," on the other hand, does not show 'learning curve' or correlation with the "game won." *In fact the scores were quite erratic and random.* For example 94% "game won" (supposedly good skill) got only 20% "credit won" . . . , or 57% "game won" (poor skill) got 101% "credit won" . . . or 75% "game won" (fair skill) got 158% "credit won"

(Emphasis added.)

Because no error was committed, we affirm.

AFFIRMED.