S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DIMITRIOS PAPAS, TED GATZAROS, VIOLA PAPAS and MARIA GATZAROS,	FOR PUBLICATION August 5, 2003 9:00 a.m.
Plaintiffs-Appellees,	
v	No. 243989 Wayne Circuit Court
MICHIGAN GAMING CONTROL BOARD,	LC No. 02-203605-CZ
Defendant-Appellant.	Updated Copy September 12, 2003

Before: Cooper, P.J., and Sawyer and Zahra, JJ.

SAWYER, J. (*dissenting*).

I respectfully dissent.

Although plaintiffs' complaint alleges various claims, at issue is the trial court's September 6, 2002, order denying defendant's motion for summary disposition and granting plaintiffs' motion for partial summary disposition. Although broader coupon programs had been previously involved, the summary disposition order at issue here dealt only with one program proposed by plaintiffs. The trial court's order identifies that program as follows:

> A casino issues complimentary coupons to its patrons for use as payment at non-casino third party businesses ("Third Party Vendors") that do not maintain contractual arrangements with the issuing casino which would restrict, limit, dictate or control the casinos' issuance of complimentary coupons or the location of patrons' use of the coupons. The patron then presents the complimentary coupon to a Third Party Vendor as payment, in whole or in part, for the service provided by the Third Party Vendor to the patron. The Third Party Vendor, having provided the service to the patron, thereafter submits the complimentary coupon to the issuing casino for payment (i.e., redemption). The issuing casino may identify for its patrons, any Third Party Vendors the casino knows to accept complimentary coupons.

The trial court's order stated the following holdings of the court: (1) The circuit court had jurisdiction to consider plaintiffs' claim that defendant lacks jurisdiction to regulate a third party vendor participating in a complimentary coupon program; (2) an actual and justiciable controversy exists regarding plaintiffs' proposed complimentary coupon program; (3) plaintiffs were not required to exhaust administrative remedies before going to circuit court; and (4) under plaintiffs' proposed complimentary coupon program, third party vendors would be providing services to casino patrons and not to the casinos and, therefore, the third party vendors would not be casino suppliers subject to defendant's jurisdiction and authority to regulate.

We granted defendant's application for leave to appeal to address the following questions raised in the application:

> I. Should the Michigan Gaming Control Board be given an opportunity to interpret the supplier licensing requirements in the Gaming Control and Revenue Act and Administrative Rules before a party may seek relief in the Circuit Court?
>
> II. Can the Circuit Court issue declaratory relief based upon hypothetical facts when no case or controversy currently exists?
>
> III. Does the Michigan Gaming Control Board have regulatory authority over restaurants and hotels that provide goods or services to casino patrons that are paid for by complimentary coupons issued by the casino and then redeemed by those restaurants and hotels?

Turning to the first question, defendant argues that it has primary and exclusive jurisdiction under the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq.*, over licensing, regulation, and control of casino gaming and that plaintiffs could not seek relief in the circuit court because they had failed to exhaust their administrative remedies. In essence, defendant argues it was for defendant to determine in the first place whether plaintiffs' businesses need to have a supplier license or exemption in order to participate in the complimentary coupon program. Like the trial court, I disagree.

The trial court rejected defendant's argument, relying on *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209; 516 NW2d 54 (1994), and *Huggett v Dep't of Natural Resources*, 232 Mich App 188; 590 NW2d 747 (1998), aff'd 464 Mich 711; 629 NW2d 915 (2001). Not at issue in this appeal is defendant's denial of the "field of commerce" exemption requests or whether plaintiffs' businesses should be issued supplier licenses. Rather, at issue here is whether plaintiffs, having taken the position that hospitality vendors who would participate in the proposed complimentary coupon program would not be a "casino supplier" subject to licensing, may obtain such a declaration in circuit court or whether such a question must first be directed to defendant. I agree that the circuit court had the jurisdiction to answer the question without defendant's first ruling on it.

In *Huggett*, this Court addressed the question of the jurisdiction of the Department of Natural Resources with respect to whether a wetland permit was needed. The plaintiffs had applied for a permit to construct a cranberry farm, which permit was denied. Before the conclusion of the administrative proceedings, the plaintiffs filed an action in the circuit court seeking a declaration that the proposed activity was exempt from the statutory wetland permit requirement. The defendant argued that the plaintiffs' claim should have been denied because of the plaintiffs' failure to first exhaust their administrative remedies. This Court disagreed, opining as follows:

> In *Int'l Business Machines Corp* [*v Dep't of Treasury*, 75 Mich App 604; 255 NW2d 702 (1977)], this Court allowed the plaintiff to seek relief in the circuit court even though the available administrative remedies had not been exhausted because the plaintiff did not challenge the propriety of the agency action taken (declaration of tax liability). Instead, the plaintiff argued that the agency had no authority to take any action in the first place. Because the plaintiff sought to avoid submitting the dispute to the agency procedures, the "very harm that plaintiff seeks to avoid would inevitably occur if plaintiff were required to exhaust administrative remedies before access to judicial review." *Id.* at 610. This Court also considered whether the agency's statutory authority to act was clearly framed for the circuit court, whether extensive findings of fact were unnecessary, and whether a resolution of the issue did not demand special technical expertise. *Id.*; see also *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 38-39; 494 NW2d 787 (1992) (holding that where the plaintiff claimed that the agency lacked statutory authority to regulate the plaintiff's activity, "both judicial economy and the interests of justice supported the plaintiff's actions in filing a complaint in the circuit court for declaratory relief"). [*Huggett, supra* at 192.]

In its brief on appeal, defendant simply avoids dealing with *Huggett* at all. Rather, defendant first argues that it has primary and exclusive jurisdiction over casino gaming licensing and then bootstraps that into an argument that that jurisdiction includes the determination of the scope of their licensing authority, with an argument of failure to exhaust administrative remedies tacked on for good measure. Turning first to the issue whether defendant's jurisdiction is "exclusive," the case defendant relies on, *Burt Twp v Dep't of Natural Resources*, 459 Mich 659; 593 NW2d 534 (1999), is inapplicable. *Burt* dealt with the issue of a state agency's jurisdiction relative to the local zoning authority. It does not stand for the proposition that an agency's jurisdiction is exclusive of judicial review.

Turning to the issue of primary jurisdiction, this concept was discussed at length by the Supreme Court in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001). As the Court explained, the doctrine of primary jurisdiction is invoked where an agency is better suited to address a complex issue than is the court, even if the court has jurisdiction over the claim:

> The doctrine of primary jurisdiction also reflects practical concerns regarding respect for the agency's legislatively imposed regulatory duties. Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency. "A question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." [*Dist of Columbia v Thompson*, 570 A2d 277, 288 (DC App, 1990).] [*Travelers, supra* at 197.]

The Court further noted that the doctrine of primary jurisdiction is also closely related to the requirement of exhaustion of administrative remedies. *Id.*[1]

Given the nature of the claim before us, I am not convinced that the doctrine of primary jurisdiction applies. We are not faced with the question whether a supplier license or an exemption should have been issued. Rather, at issue is the question whether defendant's regulatory authority extends to third-party vendors who accept a casino's complimentary coupons without any preexisting contractual relationship with the casino. In essence, plaintiffs are arguing that defendant is interfering with their business interests by extending its regulatory reach beyond that permitted by statute. The question of the scope of jurisdiction granted defendant by the Legislature does not, in my view, invoke a specialized analysis to which the courts should defer to an agency's expertise. That is, the question whether defendant's authority extends to plaintiffs' businesses under the program proposed by plaintiffs is a simple matter of statutory interpretation, a question well suited for the courts to answer.[2]

Indeed, this brings us full circle to the *Huggett* decision. As noted in *Huggett, supra* at 192-193, an argument that the agency has no authority to act in the first place is properly cognizable in court. For these reasons, I agree that the trial court could properly address this issue without deferring to defendant under either the doctrine of primary jurisdiction or the requirement of exhaustion of administrative remedies.

Defendant next argues that the trial court improperly granted declaratory relief on the basis of a hypothetical fact situation for which no actual case or controversy existed. I disagree. This Court discussed the "actual controversy" requirement in *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 54-55; 620 NW2d 546 (2000):

> MCR 2.605(A) empowers the circuit court to issue a declaratory judgment in "a case of actual controversy." "[T]he existence of an 'actual controversy' is condition precedent to invocation of declaratory relief." *Kuhn v East Detroit*, 50 Mich App 502, 504; 213 NW2d 599 (1973). This Court lacks jurisdiction because there is no case of actual controversy.

[1] The distinction between the two is that under exhaustion of remedies, the claim *must* first be brought before the administrative agency. Under the doctrine of primary jurisdiction, the court may hear the claim before any conclusion by the administrative agency, but the court chooses to defer to the administrative agency to address the question in the first instance. *Id.*, quoting *United States v Western P R Co*, 352 US 59, 63-64; 77 S Ct 161; 1 L Ed 2d 126 (1956).

[2] Indeed, the ultimate conclusion following from defendant's argument is that the courts should defer to an administrative agency's determination of the agency's statutory powers. In other words, that an administrative agency may do whatever the administrative agency determines it can do, without interference by the courts. I find that position to be untenable. Our citizens rightfully expect to be able to look to the courts for protection against an overreaching bureaucracy.

> Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978); *Durant v Michigan (On Remand)*, 238 Mich App 185, 204-205; 605 NW2d 66 (1999). "[W]hat is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Shavers, supra* at 589; *Fieger v Comm'r of Ins*, 174 Mich App 467, 470-471; 437 NW2d 271 (1988). Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist. *Recall Blanchard Comm v Secretary of State*, 146 Mich App 117, 121; 380 NW2d 71 (1985).

I agree with the trial court that this case presents an actual controversy. Although, as defendant points out, the precise complimentary coupon program identified in the trial court's order has not been implemented, clearly there is an actual controversy regarding complimentary coupons and the need for supplier licensing. Defendant initially sent a directive to the Detroit casinos stating that they could not do business with plaintiffs' businesses unless those businesses obtained supplier licenses. Thereafter, plaintiffs' businesses endeavored to provide services through a relationship with Detroit Hospitality, L.L.C. That is, Detroit Hospitality contracted with casinos to provide hospitality services through a complimentary coupon program and then contracted with various vendors, including plaintiffs' businesses, to actually supply those services. Defendant again sent a directive stating that the casinos could not participate in such a program unless the businesses actually providing the hospitality services were licensed as a supplier or granted an exemption. Thus, there is an actual controversy regarding the scope of defendant's authority over vendors. The hypothetical coupon program identified by plaintiffs and the subject of the trial court's order merely represents an attempt to at least partially define the limits of defendant's authority.[3]

Defendant has clearly taken the position that for any hospitality vendor to receive payment from a casino for providing hospitality services to a casino patron that vendor must obtain a supplier license or be granted an exemption. Although the original focus of plaintiffs' complaint does appear to be more on the relationship they had with Detroit Hospitality before defendant ordered that relationship to be terminated, the program identified in the trial court's order merely draws the line further away from the casino. Moreover, plaintiffs' actual rights are at issue and an answer to the question would provide a guide to future conduct. Each day that plaintiffs' businesses are not permitted to participate in a complimentary coupon program represents lost revenue because the casinos' patrons go elsewhere. Further, defendant's regulatory stance, including levying a substantial fine against Greektown Casino for paying for

[3] It does not appear that plaintiffs have conceded the need for licensure as a supplier in the context of their previous relationship with Detroit Hospitality. Indeed, during oral argument, plaintiffs' counsel indicated that plaintiffs would invite this Court to address the need for licensure in that situation, but admitted that the issue was not before this Court at this time under the order granting partial summary disposition. Accordingly, the issue is properly left for the trial court to resolve if it remains an issue in this case.

complimentary hospitality services rendered by an unlicensed vendor, would provide a chilling effect for the casinos engaging in any such program where the program has not been previously approved.

Furthermore, defendant's argument that there was inadequate notice of the issue to allow for discovery is disingenuous. First, the complimentary coupon program at issue here was the subject of questions to defendant's executive director during his deposition. Thus, not only was there adequate notice to make it the subject of discovery, it *was* the subject of discovery. Similarly, contrary to defendant's assertion, plaintiffs did factually establish the nature of their program through affidavit or otherwise. At most, the program outlined in the trial court's order is slightly more detailed than that previously set forth by plaintiffs, but that represents the trial court's more carefully drawing the lines around the program in order to be able to definitively rule that the program is outside defendant's regulatory jurisdiction.

For these reasons, I conclude that there was an actual case of controversy for which the trial court could grant declaratory relief.

Finally, turning to the substantive issue of this case, I would conclude that the complimentary coupon program identified in the trial court's order lies outside defendant's regulatory authority and that defendant may not require such third-party vendors to obtain a supplier license or exemption. The trial court concluded that third-party vendors under plaintiffs' proposed complimentary coupon program provide services to casino patrons, not to the casinos themselves, and, therefore, are not casino suppliers. I agree.

MCL 432.202(gg) defines "supplier" as follows:

> [A] person who the board has identified under rules promulgated by the board as requiring a license to provide casino licensees or casino enterprises with goods or services regarding the realty, construction, maintenance, or business of a proposed or existing casino, casino enterprise, or related facility on a regular or continuing basis, including, but not limited to, junket enterprises, security businesses, manufacturers, distributors, persons who service gaming devices or equipment, garbage haulers, maintenance companies, food purveyors, and construction companies.

Although defendant has also defined the term "supplier" by rule, we need not consider the administrative rules in resolving this issue. First, the definition under the administrative rules essentially reiterates the statutory definition with minor format changes. Second, the statute does not grant defendant unlimited authority to define "supplier." Rather, the statutory grant of power to defendant limits defendant to defining a "supplier" as a person who must be licensed in order "to provide casino licensees or casino enterprises with goods or services . . . ." *Id.* That is, defendant may adopt a regulatory definition of "supplier" that excludes persons who do, in fact, provide goods or services to a casino but who defendant has determined do not need to be licensed as a "supplier."[4] However, the statute does not permit defendant to define as a "supplier" a person who does not provide goods or services to a casino.

We must interpret a statute to give effect to the legislative intent as shown by the words used by the Legislature in the statute itself:

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001); *Donajkowski* [*v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999)]. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. [*Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).]

The clear and unambiguous language of the statute provides that a "supplier" must be a person who provides "casino licensees or casino enterprises with goods or services . . . ." MCL 432.202(gg). Defendant cannot expand that basic statutory limitation of the definition of "supplier" for the reasons explained in *In re Quality of Service Standards for Regulated Telecom Services*, 204 Mich App 607, 611; 516 NW2d 142 (1994):

> Generally, a statute that grants power to an administrative agency is strictly construed. *Mason Co Civic Research Council v Mason Co*, 343 Mich 313, 326; 72 NW2d 292 (1955). Administrative authority must be granted affirmatively or plainly, because doubtful power does not exist. *Id.* at 326-327; *Taylor v Michigan Public Utilities Comm*, 217 Mich 400, 402-403; 186 NW 485 (1922).

Thus, the question presented here is whether a third-party vendor who accepts complimentary coupons under the conditions set forth in the trial court's order provides goods or services to a casino and, therefore, may be defined as a "supplier" under the statute. Plaintiffs and the trial court take the position that the goods and services are provided to the casino patron, while defendant takes the position that the goods and services are provided to the casino. I agree with plaintiffs and the trial court.

It is the casino patron who sleeps in the hotel room and eats the meal in the restaurant, not the casino. More to the point, the third-party vendor is providing nothing to the casino itself.

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[4] For example, defendant could presumably exclude a publicly traded corporation from the definition of "supplier" if it were to conclude that a publicly traded corporation is an entity not "requiring a license" in order to provide goods or services to a casino.

The third-party vendor has not obligated itself to accept the coupon, provide a discount,[5] or guarantee availability (e.g., reserve a group of rooms for use by casino patrons only), and so forth. Furthermore, under the program outlined in the trial court's opinion, the casino has no control over where the coupon is used. That is, while no vendor is required to accept the coupon, the casino does not limit where it may be used. Thus, a casino patron may present the coupon at one of plaintiffs' businesses, or at a competitor's.

Indeed, defendant does not clearly identify what goods or services are being provided to the casino. At most, defendant argues that the complimentary coupon program establishes another means by which a casino is able to provide amenities to its patrons. In my view, however, this falls short of showing that goods or services are being provided to the casino. The goods or services are still being provided to the casino patron by a vendor of the patron's choosing; at most, the casino is picking up the tab. That is, I see a fundamental difference between a food wholesaler or a caterer, chosen by the casino, who may contract with a casino to deliver food to the casino in order for the casino to set up a complimentary buffet for the enjoyment of its patrons and a casino's giving its patrons a coupon that the patrons may redeem anywhere the patrons so choose (assuming the vendor is willing to accept the coupon).

Defendant also argues that a business relationship is established between a vendor and a casino because the coupon represents an offer by the casino to pay and the vendor's taking of the coupon from the customer constitutes an acceptance. First, this is tenuous logic at best. Taken to its logical conclusion, that would mean that a Federal Reserve Bank is a contractual party to every transaction in which money changes hands because the presentation of a Federal Reserve Note in payment for a purchase constitutes an offer and acceptance and, therefore, a contract with the issuing authority (the Federal Reserve Bank). Second, and more importantly, defendant's argument makes an unwarranted assumption; namely, that the mere existence of a business relationship with a casino makes one a "supplier" to the casino in need of a supplier's license. However, as discussed above, the term "supplier" is a term of art that is defined by the statute to refer to only those persons who supply goods or services to a casino. Thus, if a person has a business relationship with a casino that does not involve supplying goods or services to the casino, that person is not a "supplier" within the meaning of the statute.

Ultimately, perhaps the most telling point in this analysis is the following statement in defendant's brief on appeal (made in the context of defendant's "business relationship" argument):

> In the scenario presented by the Circuit Court's Order, there is an offer from the casino that is evidenced by the coupon. The offer is to pay for *goods and services provided* by the restaurants and hotels *to the casino's patrons*.

[5] I note that there was some discussion whether such coupons might provide a discount under their terms and conditions (e.g., the casino would pay $45 if the third-party vendor provided the casino patron with $50 worth of food). However, discounts were not addressed in the trial court's order. In any event, I merely note that under the proposed program, vendors have not contractually obligated themselves to provide a discount.

> Acceptance of the offer occurs when the hotel or restaurant accepts the coupon with the understanding that it will be paid for the *services or goods provided to the casino's patrons* in return for accepting the coupon. [Emphasis added.]

Thus, ultimately, even defendant admits that the goods and services are being provided to the casinos' patrons, not to the casinos.

In sum, this issue was properly before the trial court for resolution. Further, the trial court correctly interpreted the statute as excluding third-party vendors, under the complimentary coupon program outlined in the trial court's order, from the statutory definition of "supplier," and, thus, such vendors are not subject to the supplier licensing requirements.

I would affirm.

/s/ David H. Sawyer