IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ZDI GAMING, INC.,	)	
	)	
Respondent,	)	No. 83745-7
	)	
v.	)	En Banc
	)	
THE STATE OF WASHINGTON by and through THE WASHINGTON STATE GAMBLING COMMISSION,	)	
	)	Filed January 12, 2012
Petitioner.	)	

CHAMBERS, J. — This case was filed in a county other than where it was to be adjudicated. We are asked today to decide whether, as a consequence, the case will not be heard. We conclude that the proper forum is a question of venue, not the subject matter jurisdiction of superior courts. We affirm the Court of Appeals. *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 214 P.3d 938 (2009).

FACTS

For many years ZDI Gaming Inc., a family owned business, has provided "'just about anything to do with the gambling industry in the state of Washington.'"

Administrative Record (AR) at 410 (quoting Verbatim Report of Proceedings (VRP) at 88); Clerk's Papers (CP) at 18. This includes distributing pull-tabs and pull-tab machines. A pull-tab machine is a fairly modern gaming device. A traditional pull-tab involves a paper ticket containing a series of windows that hide numbers or symbols. The player "opens one of the windows to reveal the symbols below to determine if the ticket is a winner." CP at 1026. If the ticket's combination of numbers or symbols matches those listed on a sheet called a "flare" as a winning ticket, the ticket's purchaser is entitled to a prize. *Id*. Modern pull-tab machines can both dispense and read pull-tab tickets and can produce sounds and displays mimicking electronic slot machines.

In 1973, when gambling was legalized in Washington State, the legislature declared pull-tabs, along with certain other games of chance, would be authorized, but "closely controlled." Laws of 1973, ch. 218, § 1 (currently codified as RCW 9.46.010); AR at 410. Accordingly, the Washington State Gambling Commission (Gambling Commission) has heavily regulated pull-tabs and pull-tab machines. *E.g.*, former WAC 230-02-412(2) (2001); former WAC 230-08-017 (2003), former WAC 230-12-050 (2003); former WAC 230-08-010(2) (2004).

Historically, and broadly in the context of games of chance, the commission prohibited giving gifts or extending credit to players for the purposes of gambling. Former WAC 230-12-050. Accordingly, players were required to pay the consideration "required to participate in the gambling activity . . . in full by cash, check, or electronic point-of-sale bank transfer, prior to participation," with some

exceptions not relevant here. Former WAC 230-12-050(2). The Gambling Commission also had required a pull-tab player to receive winnings "in cash or in merchandise." Former WAC 230-30-070(1) (2001).

ZDI Gaming distributes the VIP (video interactive display) machine, an electronic pull-tab machine featuring a video display screen, a currency bill acceptor, and (in later version) a cash card acceptor, all housed in a decorative cabinet. ZDI Gaming intentionally designed the current VIP machine to resemble a video slot machine and programmed it to use the same "attractor" sounds used to lure players. Players see rows of spinning characters that ultimately line up and stop in winning or losing combinations. The version of the machine at issue allows a player to purchase pull-tabs from the machine itself using a prepaid card. The VIP machine credits pull-tab winnings of $20 or less back to the card. If a player wins more than $20, the VIP machine directs the player to an employee to receive payment. A player who stops playing the VIP machine with a balance on the card can use it to purchase food, drink, merchandise, or turn it in for cash at the establishment featuring the VIP machine.

An earlier version of the VIP machine was approved by the Gambling Commission in 2002. However, once the cash card acceptor was added to the machine, things became more complicated. While initially, it appears Gambling Commission employees were "optimistic" that such technology would be approved, once they understood that a player's winnings would be credited directly back onto the card itself, they became concerned. AR at 14. After working with Gambling

Commission staff for some time, ZDI Gaming submitted a formal application to the Gambling Commission requesting permission to distribute the new VIP machine, with the cash card acceptor, in Washington. After the assistant director of licensing operations formally denied the application, ZDI Gaming filed a petition for declaratory relief with the Gaming Commission. An administrative law judge (ALJ) agreed with ZDI Gaming that the VIP machines did not violate gambling statutes. However, he found the machines extended credit and allowed gambling without prepayment by "'cash, check, or electronic point-of-sale bank transfer,'" violating then-operative regulations. AR at 419, 423 (citing former WAC 230-12-050). ZDI Gaming strenuously contended the cash card utilized by its VIP machine was functionally equivalent to cash. The ALJ rejected the argument, reasoning that the "difficulty with a cash card is that it's only valid at one location. It is impossible to take the cash card from the Buzz Inn to a local Harley Davidson dealer and purchase a new helmet. . . . [C]ash cards are not cash because they require an additional step on the part of the consumer to utilize in any other location." AR at 420-21. The ALJ also found that the VIP machine violated a regulation that required that all prizes be in either cash or merchandise. AR at 422-23 (citing former WAC 230-30-070)).[1] On August 10, 2006, the full Gambling Commission issued a final declaratory order upholding the ALJ's decision that the VIP machine violated the regulations, though it disavowed the ALJ's decision that the machine

[1] Perhaps presciently, the ALJ noted that "[t]he Commission was justified in denying approval for the equipment based on violation of the above regulations but has the inherent authority to revise the rules to better comport with the modern realities of the industry if it elects to do so." AR at 423-24. Since then, many of these rules have been revised.

complied with the statutory requirements as superfluous. AR at 961-93.

On September 11, 2006, ZDI Gaming filed a petition for judicial review in Pierce County Superior Court challenging the validity of the rules the ALJ and the Gambling Commission found it had violated. Ten days later, the State informed ZDI Gaming that, in its view, RCW 9.46.095 granted exclusive jurisdiction of the matter to the Thurston County Superior Court and suggested that it may wish to withdraw its petition from Pierce County and file in Thurston County before the statute of limitations would run on October 4, 2006. The State told ZDI Gaming that it would otherwise move to dismiss the case for want of jurisdiction after October 4, 2006.[2] ZDI Gaming declined, and the State so moved. Noting that sometimes "when the Legislature uses the word 'jurisdiction,' it really mean[s] 'venue,'" Judge Chushcoff denied the State's motion to dismiss, but did transfer the case to the Thurston County Superior Court. VRP (Dec. 1, 2006) at 5; CP at 8, 17.[3]

The Thurston County Superior Court reversed the Gambling Commission. It found that cash cards were the equivalent to both cash and merchandise and thus lawful under the regulations. The court denied the Gambling Commission's motion for reconsideration, remanded the case to the Gambling Commission for action, and awarded ZDI Gaming $18,185 in attorney fees under the equal access to justice act, RCW 4.84.350, which was less than ZDI Gaming had sought.

Both parties appealed. The Court of Appeals affirmed in part, holding that

[2] We are mindful of the fact that the State has acted forthrightly by bringing this issue to ZDI Gaming's attention.

[3] Judge Chushcoff also observed, with a great deal of insight, that "sometimes when the state Supreme Court uses the word 'jurisdiction,' they mean something else." VRP (Dec. 1, 2006) at 5.

the Pierce County Superior Court had subject matter jurisdiction over the appeal under the Administrative Procedure Act, ch. 34.05 RCW, and that substantial evidence did not support the Gambling Commission's determination that the prepaid cards failed to satisfy the regulatory definition of "cash." *ZDI Gaming*, 151 Wn. App. at 795. The court remanded the case to the Thurston County Superior Court, directing it to reconsider its decision to exclude fees that ZDI Gaming spent responding to the Gambling Commission's motion to dismiss. *Id*. at 812. The State petitioned for review, contending that the use of the word "jurisdiction" in RCW 9.46.095 was unambiguous, that the courts below erred in concluding that "cash" included cash cards, and that the Court of Appeals shifted the burden of proof to the Gambling Commission. ZDI Gaming answered the petition and sought review of the attorney fee award. We granted the State's petition for review and denied ZDI Gaming's request for review of the attorney fee issue. *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 168 Wn.2d 1010, 227 P.3d 853 (2010).

ANALYSIS

Whether Pierce County Superior Court had subject matter jurisdiction over this case is controlled by *Shoop v. Kittitas County*, 149 Wn.2d 29, 37, 65 P.3d 1194 (2002). "[A]rticle IV, section 6 of the Washington Constitution . . . states in relevant part: 'The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]' That provision precludes any subject matter restrictions as among superior courts." *Id.*

Among other things, jurisdiction is a fundamental building block of law. Our state constitution uses the term "jurisdiction" to describe the fundamental power of courts to act. Our constitution defines the irreducible jurisdiction of the supreme and superior courts. It also defines and confines the power of the legislature to either create or limit jurisdiction. *See* Wash. Const. art. IV, § 4 (defining the power of the supreme court), § 6 (defining the power of the superior courts), § 30(2) (explicitly giving the legislature the power to provide for jurisdiction of the court of appeals). Our constitution recognizes and vests jurisdiction over many types of cases in the various courts of this State. Wash. Const. art. IV, §§ 1, 4, 6, 30. Superior courts have original jurisdiction in the categories of cases listed in the constitution, which the legislature cannot take away. Wash. Const. art. IV, § 6; *State v. Werner,* 129 Wn.2d 485, 496, 918 P.2d 916 (1996) (quoting *Blanchard v. Golden Age Brewing Co.,* 188 Wash. 396, 415, 63 P.2d 397 (1936)). As we ruled long ago, "Any legislation, therefore, the purpose or effect of which is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department." *Blanchard*, 188 Wash. at 415. The legislature can, however, expand and shape jurisdiction, consistent with our constitution. Wash. Const. art. IV, § 6; *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 316-17, 76 P.3d 1183 (2003). But *Dougherty, Shoop,* and *Young v. Clark*, 149 Wn.2d 130, 134, 65 P.3d 1192 (2003), all reject the principle that all procedural requirements of superior court review are jurisdictional. *E.g.*, *Dougherty,* 150 Wn.2d at 316. Simply put, the existence of

subject matter jurisdiction is a matter of law and does not depend on procedural rules. 14 Karl B. Tegland, Washington Practice: Civil Procedure § 3.1, at 20 (2d ed. 2009).

The term "jurisdiction" is often used to mean something other than the fundamental power of courts to act. The current edition of *Black's Law Dictionary* devotes six pages to different types of jurisdiction, ranging from agency jurisdiction to voluntary jurisdiction, touching on equity jurisdiction, in rem jurisdiction, and spatial jurisdiction, along with many others. Black's Law Dictionary 927-32 (9th ed. 2009). Sometimes "jurisdiction" means simply the place or location where a judicial proceeding shall occur. Where jurisdiction describes the forum or location of the hearing, it is generally understood to mean venue. *See, e.g.*, *Werner*, 129 Wn.2d 485.

In *Dougherty*, 150 Wn.2d 310, we discussed the important distinction between jurisdiction and venue. "Jurisdiction 'is the power and authority of the court to act.'" *Id.* at 315 (citing 77 Am. Jur. 2d *Venue* § 1, at 608 (1997)). Subject matter jurisdiction is a particular type of jurisdiction, and it critically turns on "the 'type of controversy.'" *Id.* at 316 (quoting *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994)). ""'If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.'"" *Marley,* 125 Wn.2d at 539 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse,* 1988 BYU L. Rev. 1, 28 (1988)).

By contrast, as we explained in *Dougherty,* rather than touching on the power or authority of courts to act on certain subjects, venue denotes the setting, location, or place '"where the power to adjudicate is to be exercised, that is, the place where the suit may or should be heard.'" *Dougherty,* 150 Wn.2d at 316 (quoting 77 Am. Jur. 2d, *Venue* § 1, at 608. As we explained in *Doughtery,* if a court has jurisdiction over the subject matter of the controversy, it need not exercise that authority if venue lies elsewhere. *Id.* at 315 (citing *Indus. Addition Ass'n v. Comm'r of Internal Revenue*, 323 U.S. 310, 315, 65 S. Ct. 289, 89 L. Ed. 260 (1945)). Nor need it dismiss the case even if the statute of limitations lapses before the defect is discovered. *Id.* (citing *Indus. Addition Ass'n,* 323 U.S. at 315 (noting that "[w]here petition timely filed in circuit court as required by statute but in wrong venue, case need not be dismissed but can be transferred to circuit court with proper venue")).

With these principles in mind, we turn to the statute before us. It says:

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

RCW 9.46.095. Read as the State would have us read it, this statute violates article IV, section 6 because it would limit the original jurisdiction of the superior court bench county by county. *Contra Dougherty,* 150 Wn.2d at 317; *Shoop,* 149 Wn.2d at 37; *Young,* 149 Wn.2d at 134 (finding that reading former RCW 4.12.020(3)

(1941) to relate to jurisdiction rendered it unconstitutional). Just as our constitution does not allow the legislature to decree that only King County judges have subject matter jurisdiction to hear child dependency actions or that only Pend Oreille County judges have subject matter jurisdiction to hear shareholder derivative actions, our constitution does not allow the legislature to decree that only Thurston County judges have subject matter jurisdiction to hear cases involving the Gambling Commission. If RCW 9.46.095 restricts the original jurisdiction of the superior court to one county, it is unconstitutional.

We interpret statutes as constitutional if we can, and here we can. The legislature wanted to have cases involving the Gambling Commission heard in Thurston County. By interpreting the word "shall" to be permissive, RCW 9.46.095 relates to venue, not jurisdiction. *Cf. In re Elliott*, 74 Wn.2d 600, 607, 446 P.2d 347 (1968) (interpreting the legislature's use of the term "shall" as permissive to save the constitutionality of an otherwise unconstitutional statute).[4] We therefore hold that the statute establishes the proper venue for judicial review of cases involving the Gaming Commission ruling in Thurston County.

We recognize that here, the superior court was sitting in its appellate capacity. Our constitution suggests, and our cases have from time to time assumed, that the legislature has greater power to sculpt the appellate jurisdiction of the individual superior courts. *See* Wash. Const. art. IV, § 6 ("The superior court . . . .

[4]Interpreting jurisdiction as venue is precisely what the Pierce County Superior Court and the Court of Appeals did below. *ZDI Gaming,* 151 Wn. App. at 801; VRP (Dec. 1, 2006) at 14 ("I do think that although the word 'jurisdiction' is used here, the effective meaning of this is as a venue matter. . . . I will order that the venue be changed to Thurston County.").

shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law."). But whether or not the appellate jurisdiction of the superior court can be limited county by county, the simple fact is, *original jurisdiction may not be*. *Werner*, 129 Wn.2d at 494; *Shoop*, 149 Wn.2d at 37 (citing Wash. Const. art. IV, § 6). Again, as we held in *Shoop*, "[t]hat provision *precludes any subject matter restrictions* as among the superior courts." 149 Wn.2d at 37 (emphasis added).

Article II, § 26

The State contends that under article II, section 26 of the Washington State Constitution, the legislature has the authority to limit trial court jurisdiction to consider suits against the State. That provision says that "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. II, § 26. It is true that prior to the general legislative abolition of sovereign immunity, we held that the legislature could limit which county could hear suits brought against the State under one of the more limited waivers, and often couched the legislature's power in terms of the court's jurisdiction. *See, e.g.*, *State ex rel. Thielicke v. Superior Court*, 9 Wn.2d 309, 311-12, 114 P.2d 1001 (1941); *State ex rel. Shomaker v. Superior Court*, 193 Wash. 465, 469-70, 76 P.2d 306 (1938); *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 688, 151 P. 108 (1915); *Nw. & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 50 P. 586 (1897). The classic formulation appears in *Pierce County*:

> the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses,

> and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed.

Pierce County, 86 Wash. at 688; *see also Thielicke*, 9 Wn.2d at 311-12 ("when a suit against the state is commenced in a superior court outside Thurston county, such court does not have jurisdiction over the action").

But in 1967, the Washington State Legislature abolished sovereign immunity. Laws of 1967, ch. 164, § 1, codified as RCW 4.96.010. We have recognized that in so doing, the State intended to repeal all vestiges of the shield it had at common law. *See Hunter v. N. Mason High Sch.*, 85 Wn.2d 810, 818, 539 P.2d 845 (1975); *Cook v. State*, 83 Wn.2d 599, 613-17, 521 P.2d 725 (1974) (Utter, J., concurring). We noted long ago that the waiver of sovereign immunity was "unequivocal" and abolished special procedural roadblocks placed in the way of claimants against the State. *Hunter*, 85 Wn.2d at 818 (striking a 120 day nonclaims statute that effectively operated as a statute of limitations). Simply put, the State may not create procedural barriers to access to the superior courts favorable to it based upon a claim of immunity it has unequivocally waived.

Article II, section 26 and article IV, section 6 may be harmonized. In order to give effect to both, we hold that the legislature can sculpt the venue, but not the subject matter or original jurisdiction, of the individual superior courts in this State.

Cash Cards and Cash Equivalents

After this case began, the Gambling Commission revised its regulations to "explicitly authorize[] the use of the Gold Crown and ZDI type electronic video pull-tab dispensers." Wash. St. Reg. 08-03-052 (Feb. 11, 2008). We recognize that this

largely moots the underlying legal controversy in this case. However, there is a plea for attorney fees at issue, so we will address the issues briefly. We must decide whether the agency erred in concluding that the VIP machine violated these repealed regulations. We sit in much the same position as the trial court, reviewing the agency record directly and showing all due deference to that agency. *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 521-22, 173 P.3d 259 (2007). As the challenger, ZDI Gaming bears the burden of demonstrating that the agency erred. RCW 34.05.570(1)(a). We conclude it has met that burden.

ZDI Gaming argues that its cash card is the functional equivalent of cash and that "[d]efining cash to exclude cash equivalents was an abuse of discretion because cash equivalents are commonly accepted forms of cash." Suppl. Br. of Resp't at 7. One can find several definitions of "cash" in dictionaries: *Black's Law Dictionary* and *The American Edition of the Oxford Dictionary*. AR at 420. *Black's* defines "cash" as "**1.** Money or its equivalent. **2.** Currency or coins, negotiable checks, and balances in bank accounts." Black's, *supra*, *at* 245. According to the ALJ, "[t]he American Edition of the Oxford Dictionary definies cash as 'money in coins or bills, as distinct from checks or orders.'" AR at 420 (quoting The Oxford Dictionary and Thesaurus, American Edition (1996)).

If a player wins more than $20 on a VIP machine, the machine directs the player to an employee of the establishment to receive cash, food, drink, or merchandise, and a player who stops playing can similarly immediately receive cash or the credits to make purchases from the gaming establishment. While we agree

with the State that an extra step is required to convert the cash card to cash, the step is de minimis. Unlike gift certificates, coupons, or rebates, the player does not have to travel or wait to receive cash. Because the cash card can be immediately converted into cash currency at the establishment where the player is playing, the VIP cash card is functionally equivalent to cash.

ZDI Gaming's request for attorney fees under RAP 18.1 is denied as untimely.

CONCLUSION

Despite its invocation of the word "jurisdiction," we find that RCW 9.46.010 is a venue statute and that the courts below properly considered ZDI Gaming's suit. We find that ZDI Gaming has met its burden of showing the Gambling Commission erred in concluding that the VIP machine violated then-in force regulations. Accordingly, we affirm.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson	Justice Debra L. Stephens
	Richard B. Sanders, Justice Pro Tem.
Justice Susan Owens	