No. 83745-7

J.M. JOHNSON, J. (dissenting)—In contrast to the majority's view, the question in this case is whether the Washington State Constitution prohibits the legislature from adopting a statute granting exclusive jurisdiction to Thurston County Superior Court to review appeals of certain decisions of the Washington State Gambling Commission (Commission). RCW 9.46.095 limits the superior court's appellate jurisdiction rather than its original jurisdiction. Additionally, sovereign immunity concerns attach where the state or one of its agencies is named as a party to the suit. I would hold that RCW 9.46.095 does not violate the grant of general jurisdiction to superior courts found in article IV, section 6 of the Washington Constitution, and thus dissent.

RCW 9.46.095 expressly grants Thurston County Superior Court exclusive jurisdiction to review the decisions of the Commission and provides

that "[n]o court of the state of Washington other than the superior court of Thurston county shall have *jurisdiction* over any action or proceeding against the [C]ommission." (Emphasis added.) The Commission denied the application of ZDI Gaming Inc. to distribute its VIP (video interactive display) electronic pull tab machine. ZDI Gaming filed in Pierce County Superior Court to seek review. I would hold that Pierce County Superior Court lacked subject matter jurisdiction and dismiss the case.

1. The History of Gambling in Washington

I begin my analysis by briefly noting the history of gambling in Washington State. In 1889, our state constitution originally provided that "[t]he legislature shall never authorize any *lottery* . . . ." Wash. Const. art. II, § 24 (orig. text) (emphasis added), *amended by* Wash. Const. amend. 56. In subsequent cases, we interpreted the term "lottery" broadly to encompass virtually any game involving "'prize, chance and consideration'" so long as it did not involve "'*any substantial degree of skill or judgment* . . . .'" *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 150, 247 P.2d 787 (1952) (quoting *State v. Coats*, 158 Or. 122, 132, 74 P.2d 1102 (1938)).

In 1972, the people of the state of Washington amended the state

constitution to remove this broad and absolute prohibition. Wash. Const. amend. 56. The amended article II, section 24 permitted lotteries, but only where affirmatively approved by a supermajority (i.e., 60 percent) of the legislature. Wash. Const. art. II, § 24. In light of this new constitutional authority, the legislature enacted the gambling act of 1973, chapter 9.46 RCW. Though the gambling act now authorizes some forms of gaming, it expressly recognizes the potential dangers presented by legalized gambling and requires that all such activities be "closely controlled . . . ." RCW 9.46.010. Within this context, I turn to the issue presented.

2. Subject Matter Jurisdiction over Claims against the Commission

With respect to subject matter jurisdiction, the proper standard of review is de novo. "Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (citing *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999)).

The term "subject matter jurisdiction" refers to the power of a court to hear a case. *Morrison v. Nat'l Austl. Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869, 2877, 177 L. Ed. 2d 535 (2010). The subject matter jurisdiction of the

superior courts comes from either the Washington Constitution or the State's legislature. Wash. Const. art. IV, § 6 (establishing jurisdiction of superior courts and authorizing jurisdiction "as may be prescribed by law"); *see also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 295, 197 P.3d 1153 (2008) (stating that the legislature may confer limited appellate review of administrative decisions to the superior courts); *Dougherty*, 150 Wn.2d at 314 (describing legislation that grants appellate jurisdiction to the superior courts); *Bellingham Bay Imp. Co. v. City of New Whatcom*, 20 Wash. 53, 63, 54 P. 774 (holding that an act conferring appellate review of administrative decisions to the superior courts did not violate the Washington Constitution), *aff'd on reh'g*, 20 Wash. 231, 55 P. 630 (1898). The Washington Constitution distinguishes between two types of subject matter jurisdiction: "original jurisdiction" and "appellate jurisdiction." *See* Wash. Const. art. IV, § 6. An appeal from an administrative agency invokes a superior court's appellate jurisdiction. *Skinner v. Civil Serv. Comm'n*, 168 Wn.2d 845, 850, 232 P.3d 558 (2010). "Because an appeal from an administrative body invokes the superior court's appellate jurisdiction, 'all statutory requirements must be met before

jurisdiction is properly invoked.'" *Id*. at 850 (internal quotation omitted) (quoting *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)).

In addition to these broad jurisdictional considerations, special sovereign immunity concerns attach where the state or one of its agencies is named as a party to the suit as well. The state constitution provides that "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Wash. Const. art. II, § 26. "It may be said without question that an action cannot be maintained against the state without its consent. . . . Since the state, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right." *O'Donoghue v. State*, 66 Wn.2d 787, 789, 405 P.2d 258 (1965). As we said regarding article II, section 26:

> "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."

State ex rel. Shomaker v. Superior Court, 193 Wash. 465, 469-70, 76 P.2d 306 (1938) (quoting *State ex rel. Pierce County v. Superior Court*, 86 Wash.

685, 688, 151 P. 108 (1915)). For these reasons, if the State chooses to subject itself to suit exclusively in Thurston County, then "when a suit against the state is commenced in a superior court outside of Thurston [C]ounty, such court does not have jurisdiction over the action." *State ex rel. Thielicke v. Superior Court*, 9 Wn.2d 309, 311-12, 114 P.2d 1001 (1941).

Thurston County Superior Court possesses exclusive appellate jurisdiction over challenges to the decisions of the Commission. The Washington State gambling act provides:

> *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 (emphasis added).[1] ZDI Gaming challenged the

[1] ZDI Gaming also argues that RCW 9.46.095 provides an exception to the Thurston County jurisdictional requirement for licensing decisions. This argument fails. First, the Commission licenses gaming *businesses*; it does not license gaming *equipment*. *See* WAC 230-14-001 (defining "licensees" as "the business holding the punch board and pull-tab license."); *see also* WAC 230-14-045(1) (defining the requirements for "[a]uthorized pull-tab dispensers"). Second, both the superior court and the Court of Appeals applied the jurisdictional provision and treated it as a venue provision with respect to ZDI Gaming's appeal. The determination of the lower courts also warrants our review of this provision.

Commission's action in Pierce County Superior Court. Due to the legislature's exclusive grant of jurisdiction to the superior court of Thurston County, the Pierce County Superior Court lacked subject matter jurisdiction over ZDI Gaming's appeal of the Commission's decision. "When a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take." *Shoop v. Kittitas County*, 149 Wn.2d 29, 35, 65 P.3d 1194 (2003). Because the court lacked jurisdiction, dismissal is the appropriate remedy.

The Court of Appeals reached the opposite conclusion. It incorrectly rewrote the legislature's term "jurisdiction" in RCW 9.46.095 to read "venue." *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 801, 214 P.3d 938 (2009). In arriving at this conclusion, the Court of Appeals relied heavily on this court's decisions in *Dougherty* and *Shoop*. *Id*. at 801-03. The Court of Appeals interpreted *Shoop* to preclude "'any subject matter [jurisdiction] restrictions as among superior courts'" under article IV, section 6 of the Washington Constitution. *Id*. at 803 (alteration in original) (quoting *Shoop*, 149 Wn.2d at 37). Based on this principle, the court concluded that a "constitutional reading" of RCW 9.46.095 "suggests

that the statute was intended to govern venue . . . ." *Id*. at 804.

The Court of Appeals misapplied the case law. In *Dougherty*, we held that the filing requirements of a different statute, RCW 51.52.110, referred to venue and not to subject matter jurisdiction. *Dougherty*, 150 Wn.2d at 320. Dougherty was an injured worker who filed an industrial insurance claim for worker's compensation. *Id*. at 313. The Department of Labor and Industries (Department) denied the claim. *Id*. The statute[2] at issue in *Dougherty* directed the claimant to file his appeal in his county of residence, the county where the injury occurred, or Thurston County. *Id*. at 315. Dougherty appealed the Department's decision to Skagit County Superior Court, but he did not live in Skagit County, and the injury did not occur in Skagit County. *Id*. at 313. The superior court granted the Department's motion to dismiss and the Court of Appeals affirmed, holding that Skagit County Superior Court

[2] The text of the statute at issue in *Dougherty* reads as follows:

> "In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the [Department of Labor and Industries'] records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county."

Dougherty, 150 Wn.2d at 315 (quoting RCW 51.52.110).

lacked subject matter jurisdiction. *Id*. at 313-14. We reversed the Court of Appeals, holding that RCW 51.52.110 referred to venue and that Skagit County Superior Court did not lack subject matter jurisdiction over Dougherty's appeal. *Id*. at 320.

The statute at issue in *Dougherty* did not use either the term "jurisdiction" or "venue." *Id*. at 315. After engaging in a conceptual analysis of the doctrines of jurisdiction and venue, we announced a general canon of statutory interpretation that "[*u*]*nless mandated by the clear language of the statute*, we generally decline to interpret a statute's procedural requirements regarding location of filing as jurisdictional." *Id*. at 317 (emphasis added). In the case at bar, the statute is very different. The statute expressly reserves all "jurisdiction" over actions against the Commission to Thurston County Superior Court. RCW 9.46.095 ("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 . . . ." (emphasis added)). Because the clear language of the statute addresses jurisdiction, the interpretive canon announced in *Dougherty* does not apply.

Only a few months prior to the decision in *Dougherty*, we decided

Shoop. In *Shoop*, we held that the requirements of the statute there at issue, former RCW 36.01.050 (1997),[3] related only to venue and not to subject matter jurisdiction. *Shoop*, 149 Wn.2d at 37. Shoop brought a personal injury claim against several unnamed defendants and Kittitas County. *Id*. at 32. The statute at issue in *Shoop* directed the plaintiff to commence her action against Kittitas County in either Kittitas County or one of the two nearest counties. *Id*. at 35. The two nearest counties were Yakima County and Grant County. *Id*. at 32. Shoop brought her suit in King County. *Id*. Kittitas County moved to dismiss for lack of subject matter jurisdiction. *Id*. The superior court granted the motion and the Court of Appeals reversed. *Id*. at 32-33. We affirmed the Court of Appeals, holding that the requirements of former RCW 36.01.050 (1997) relate to venue rather than subject matter jurisdiction. *Id*. at 37-38.

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[3] The text of the statute at issue in *Shoop* reads as follows:

> "(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest counties . . . .
>
> "(2) The determination of the nearest counties is measured by the travel time between county seats using major surface routes, as determined by the office of the administrator for the courts."

Shoop, 149 Wn.2d at 35 (alteration in original) (quoting former RCW 36.01.050 (1997)).

The primary issue in *Shoop* was our previous holding in *Cossel v. Skagit County*, 119 Wn.2d 434, 834 P.2d 609 (1992), *overruled by Shoop v. Kittitas County*, 149 Wn.2d 29, 65 P.3d 1194 (2003). In *Cossel*, we held that a predecessor statute, former RCW 36.01.050 (1963), restricted the subject matter jurisdiction of the superior courts. *Shoop*, 149 Wn.2d at 34. In Shoop's case, the Court of Appeals distinguished *Cossel* on grounds that the 1997 legislative amendments transformed former RCW 36.01.050 (1997) into a venue rather than a jurisdictional statute. *Id*. at 35. We disagreed with the Court of Appeals' conclusion that the 1997 legislative amendments transformed the statute. *Id*. at 36-37. Nonetheless, we affirmed the Court of Appeals. *Id*. at 37. Though *Cossel*'s jurisdictional reading of RCW 36.01.050 (1997) still controlled, such a reading would violate article IV, section 6 of the Washington Constitution. *Id*. To avoid this constitutional problem, we overruled *Cossel* and construed the statute as a restriction on venue rather than jurisdiction. *Id*. In short, *Shoop* overruled *Cossel*, determined that a jurisdictional reading of former RCW 36.01.050 (1997) violated the state constitution, and, for that reason, construed the statute as a restriction on venue rather than a limit on subject matter jurisdiction. *Id*.

This case does not raise the constitutional issues at stake in *Shoop*. *Shoop* involved constitutional original jurisdiction of a superior court. *Id*. at 32. So long as the amount in controversy surpasses the jurisdictional threshold, a superior court's original jurisdiction comes directly from the state constitution. Wash. Const. art. IV, § 6 ("The superior court shall have original jurisdiction in all cases at law . . . and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law . . . ."). While the legislature can restrict the superior court's jurisdiction by changing the amount-in-controversy requirement or abolishing the substantive law for a particular type of common law tort claim (*see Dougherty*, 150 Wn.2d at 314), the legislature cannot otherwise restrict the type of tort controversy that a superior court may adjudicate.[4]

In contrast to *Shoop*, the present case involves legislatively created appellate jurisdiction of a superior court to review an administrative agency

[4] *See* 1 Wilfred J. Airey, A History of the Constitution and Government of Washington Territory 466 (June 5, 1945) (unpublished Ph.D. dissertation, University of Washington) (on file with Washington State Law Library) (stating that the Constitutional Convention of 1889 fixed the jurisdiction of the Washington courts and that "[t]he superior courts were always to be open and to have original jurisdiction in practically all types of criminal, civil, and probate cases if the amount in civil actions exceeded $100").

decision. Appellate jurisdiction over administrative decisions is a creature of statute. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 295. "This court has consistently held that a right of direct review in superior court of an administrative decision invokes the limited appellate jurisdiction of the court." *Id*. at 294. The state constitution does not expressly provide for this type of appellate jurisdiction; however, "[a]llowing only limited appellate review over administrative decisions, rather than original or appellate jurisdiction as a matter of right, 'serves an important policy purpose in protecting the integrity of administrative decisionmaking.'" *Id*. at 295 (quoting *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993)). "The legislature may confer such limited appellate review by statute." *Id*.

With respect to the Commission, the legislature clearly determined that Thurston County Superior Court possesses exclusive jurisdiction. Thus, Pierce County Superior Court lacked subject matter jurisdiction. *Shoop* has defined the remedy: "When a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take." 149 Wn.2d at 35.

Conclusion

I would hold that, under RCW 9.46.095 as written by the legislature, the Thurston County Superior Court possesses exclusive subject matter jurisdiction to review Commission orders. Because the Pierce County Superior Court lacked subject matter jurisdiction, I would dismiss the case.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Chief Justice Barbara A. Madsen

Gerry L. Alexander, Justice Pro Tem.

Justice Mary E. Fairhurst