

No. 20-00450
Polk County No. CVCV058556

**IN THE
SUPREME COURT OF IOWA**

RED LINE VENDING, INC.,
Appellant,

v.

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS,
Appellees.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE DAVID PORTER, DISTRICT COURT JUDGE*

REPLY BRIEF FOR APPELLANT

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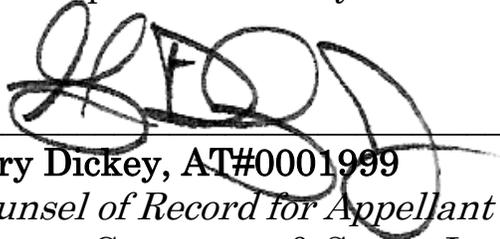
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STATEMENT OF ISSUES

WHETHER THE DEPARTMENT OF INSPECTIONS AND APPEALS CLEARLY ERRED IN INTEPRETING THE DEFINITION OF AN “AMUSEMENT CONCESSION” UNDER IOWA CODE SECTION 99B.1(1)

CASES:

Banilla Games, Inc. v. Iowa Dept. of Inspections and Appeals, 919 N.W.2d 6 (Iowa 2018)
Doe v. State, 943 N.W.2d 608 (Iowa 2020)
H & Z Vending v. Iowa Dept. of Inspections and Appeals, 511 N.W.2d 397 (Iowa 1994)
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MidWestOne Bank v. Heartland Co-op,
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Waters v. Churchill, 511 U.S. 661 (1994)

OTHER AUTHORITIES:

Iowa Code § 99B.1
Iowa Code § 99B.52
Iowa Code § 99B.53

2015 Iowa Acts ch. 99, §§ 1, 7

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012)

[What is a CHERRY MASTER Game \(slotsdirect.com\)](http://slotsdirect.com)
(last accessed Nov. 27, 2020)

REPLY ARGUMENT

This appeal requires the Court to decide two issues. First, what distinguishes an amusement concession from an amusement device under Iowa Code chapter 99B. Second, whether Red Line’s games are amusement concessions or amusement devices. The text, structure, and history of chapter 99B provide clear answers. Lightning Skill and Gold Skill 1 are amusement concessions because they are “game(s) of skill or game(s) of chance with an instant win possibility where, if the participant completes a task, the participant wins a prize.” Iowa Code § 99B.1(1).

Rather than engaging with the statutory definition of an amusement concession, the Department offers an incoherent construction of chapter 99B. According to the Department, Lightning Skill and Gold Skill 1 are amusement devices simply because it has ordained them so. And, because an amusement concession cannot be an amusement device, Lightning Skill and Gold Skill 1—so the Department’s logic goes—cannot be amusement concessions. Administrative fiat, however, is not a valid canon of statutory construction, especially in this case where

the Court affords no deference to the Department's interpretation. The failure to offer any sensible explanation of the interplay between amusement concessions and amusement devices is fatal to the Department's argument. Accordingly, the Department's license denial must be reversed.

THE DEPARTMENT'S INTERPRETATION OF "AMUSEMENT CONCESSION" IS INCOMPATIBLE WITH THE TEXT, STRUCTURE, AND HISTORY OF CHAPTER 99B

A. Red Line's games meet the three-part criteria set forth in the statutory definition of an "amusement concession"

The question of whether Red Line is entitled to an amusement concession license is one of statutory construction. The logical starting place to address the issue is in the statutory definition of an "amusement concession" found in Iowa Code section 99B.1(1). Tellingly, the Department goes out of its way to avoid dealing with the operative language of Iowa Code section 99B.1(1), which defines amusement concession to contain three elements:

- (1) It must be a game of skill or chance;
- (2) The participant must complete a task to win; and

(3) It offers awards take the form of a prize; not cash.

Iowa Code § 99B.1(1). Sensibly, the Department does not argue that the definition is ambiguous. Nor could it. Any reasonable user of the English language reading section 99B.1(1) would understand it to contain three parts. *See Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (explaining the Court’s “fair reading method,” which assumes the viewpoint of a “reasonably reader, fully competent in the language”)(citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012)).

Applying this definition to the functionality of Lightning Skill and Gold Skill 1 leads to the inescapable conclusion that they satisfy all three elements. First, they are games of skill or chance by virtue of the nudge function in phase one and the follow-me feature in phase two. Second, they require the completion of a task to win (i.e. the nudge or the follow-me feature). Third, they offer only non-cash prizes. Because the text is clear, the Court’s inquiry should end here. Period. Full stop. *Id.* (“If the text of a statute is plain and its meaning clear, we will not search for a

meaning beyond the express terms of the statute or result to rules of construction”)(quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)).

B. The structure of Iowa Code chapter 99B makes clear that the “completes a task” element distinguishes an amusement concession from an amusement device

Faced with a statutory definition that is insurmountable, the Department invites Court simply to ignore it in favor of consideration of “chapter 99B as a whole.” (Appellee’s Br. at 34). Yet, the Department fares no better in this endeavor. Consider, for example, that an amusement concession must be “a game of skill or game of chance.” Iowa Code § 99B.1(1). In turn, another section of section 99B.1 defines “game of skill” to mean “a game whereby the result is determined by *the player’s ability to do a task. . . .*” Iowa Code 99B.1(19)(emphasis added). Likewise, section 99B.1 defines “game of chance” to mean “a game whereby the result is determined by chance and *the player in order to win completes activities*” *Id.* § 99B.1(18)(emphasis added). Under either alternative, the participant must complete a “task” or “activity” as a condition to winning a prize, which mirrors the

amusement concession definition. In contrast, the definition of amusement device expressly declares that it “is not a game of skill or game of chance.” *Id.* § 99B.1(2). In other words, completion of a task or activity is not an essential element. Nor is there a requirement anywhere else in chapter 99B that completion of a task is an inherent part of an amusement device. Hence, the Department cannot reconcile its atextual interpretation an amusement concession with neighboring portions of chapter 99B.

On the other hand, consideration of the entire structure of chapter 99B brings into play the statutory construction rule of *expression unius est exclusion alterius*. See *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) (“legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned”). As relevant to the question presented, the legislature clearly intended that amusement concessions include the completion of a task as a feature because it said so. The same cannot be said for amusement devices. Instead, amusement devices refer to passive games that function similarly to slot machines and are limited to

nonmonetary prizes and restricted to locations that serve liquor.

See Iowa Code §§ 99B.52, 99B.53.

The Department's only response is to offer the following non-sequitur: "[A]n amusement device cannot be an amusement concession." (Appellee's Br. at 31). Because the Department determined Red Line's games were amusement devices, it reasons that they cannot be amusement concessions. Under the Department's novel canon of construction, an amusement concession is not defined by what it is, but instead by what it is not. This reasoning is doubly flawed.

First, the Iowa Supreme Court rejected this very logic in *H & Z Vending v. Iowa Dept. of Inspections and Appeals*, 511 N.W.2d 397 (Iowa 1994). There, the court was confronted with whether a device that fell within the amusement device safe harbor could nevertheless constitute a gambling device. *Id.* at 398. Much like in this case, the Department contended that a machine meeting the definition of an amusement device under Iowa Code section 99B.10 was still a gambling device under 725.9 because it resembled a slot machine. *Id.* Rejecting the

Department's contention, the court held that "certain devices that might otherwise be deemed to be gambling devices under section 725.9 would not be so classified if they satisfied the requirements of section 99B.10." In its opening brief, Red Line argued that *H & Z Vending's* logic applies with equal force in this case.

(Appellant's Br. at 27-28). The Department has no answer on this key point. In fact, they do not even attempt to address it in their brief.

Second, the Department's purported truism is unpersuasive because it could just as easily support the opposite inference. That is, Red Line's games are not amusement devices because they are amusement concessions. After all, when there is a conflict "between specific and general statutes, the provisions of the specific statutes control." *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 883 (Iowa 2020). Here, the definition of an amusement concession is more specific than the definition of an amusement device. In the end, the Court should avoid engaging in the Department's interpretive gymnastics altogether and simply follow the clear text of the statute.

C. The legislative history of Iowa Code chapter 99B supports Red Line’s argument that an amusement concession is determined by its functionality

The Department did Red Line a favor with its extended detour into the legislative history of chapter 99B. (Appellee’s Br. at 15-19). As the Department’s brief identifies, the 2015 legislative amendments reflected a paradigm shift in the regulation of both types of games. 2015 Iowa Acts ch. 99, §§ 1, 7. Prior to 2015, the legislature defined an amusement concession by the game’s location. In 2015, the General Assembly eliminated the “locational focus” in favor of a functional standard based on completing a task or activity. This legislative history unmistakably demonstrates that the completes-a-task element is the distinguishing feature between an amusement concession and an amusement device.

Blind to the significance of the 2015 amendments, the Department takes the startling position that a pinball machine that offers free plays or prizes is an amusement device. (Appellee’s Br. at 31). Rather, than undertake any analysis of the post-2015 definition of an amusement concession, the Department

merely points out that the amusement device statute expressly referenced pinball machines in first iteration in 1975. (Appellee’s Br. at 33). Yet, Pinball is a game of skill or chance. It requires the completion of a task – i.e. pulling the plunger to release the ball, nudging the machine, and operating the flippers. Consequently, if a pinball machine offers a prize for winning plays, it indubitably is an amusement concession. The Department’s pinball example only confirms the fallacy of its analysis.

In reality, the 2015 amendments were meant to carve out amusement devices that function like slot machines, and the Department knows better to argue otherwise. The quintessential amusement device is the Cherry Master 8-liner, which is a mainstay in bars in taverns across Iowa:



See [What is a CHERRY MASTER Game \(slotsdirect.com\)](http://slotsdirect.com) (last accessed Nov. 27, 2020). They have the same look and feel as a traditional slot machine except they dispense raffle tickets redeemable for merchandise. (App. at 89-90). This differentiation gets to the heart of the issue in this case. If the game involves the completion of a task, it is an amusement concession. If it does not, then it is an amusement device or slot machine.

D. The Banilla *Games, Inc.* decision does not answer the question presented in this case

The Department tries to sow confusion through its repeated reliance on *Banilla Games v. Iowa Dep't of Inspections and Appeals*, 919 N.W.2d 6 (Iowa 2018), as its silver bullet. *Banilla Games, Inc.*, however, does not answer the question presented in this case. It involved a vendor who sought a declaratory order that its device did not have to be registered by the Department because the outcome was primarily determined by the skill and knowledge of the participant. *Id.* at 9. The Iowa Supreme Court concluded that the nudge function did not result in the game being primarily determined by skill and therefore, it affirmed the Department's declaratory order that the machines were subject to

the registration requirements for amusement devices. *Id.* at 18. The parties framed the issue as whether the outcome of the games was predominated by chance or skill under Iowa Code section 99B.53(1). *Id.* at 14-18. The question of whether the games fell within the amusement concession definition was never presented. *Banilla Games, Inc.* opinion does not even mention Iowa Code section 99B.1(1). For this reason, *Banilla Games, Inc.* offers no guidance to any issue before the Court in this appeal. *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“cases cannot be read as foreclosing an argument that they never dealt with”).

E. The Department’s policy disagreement over the regulation of amusement concessions does not trump the statute’s text

In the end, the Department is ultimately reduced to arguing a parade of horrors. (Appellee’s Br. at 42-47). In its eyes, allowing games like Lighting Skill and Gold Skill 1 under the amusement concession safe harbor would “authorize widespread availability of games it was not intended to authorize.” (Appellee’s Br. at 47). This argument exposes the Department’s licensure decision for what it is—a results-oriented decision based

on agency fiat rather than statutory construction. In any event, it is wrong. Red Line's games are in the same vein as the electronic video games found in a Chuck E. Cheese or a Dave and Buster's that dispense tickets for merchandise after completing a task.

The rub for the Department is that Lightning Skill and Gold Skill 1 have graphics reminiscent of a slot machine, which it disfavors.

The determination of what is an amusement concession, however, cannot turn upon the extra-textual policy preferences of the

Department or this Court. If the Department wants to limit the proliferation of amusement concessions, then it must direct its

argument to the Iowa General Assembly instead of the Iowa Supreme Court.

CONCLUSION

For these reasons, Red Line Vending, Inc. asks this Court to reverse the license denial for Lightning Skill and Gold Skill 1.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was \$5.00, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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