O/a 18-5-84

IN THE SUPREME COURT OF FLORIDA

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, a State agency, and ROBERT M. SMITH, Director of the Division of Pari-mutuel Wagering, and GARY RUTLEDGE, Secretary of the Department of Business Regulation,

Appellants

v.

FLORIDA HORSE COUNCIL, INC., CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWN, INC. and TOURIST ATTRACTIONS, INC.,

Appellees

FILED
SID J. WHITE
SEP 24 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

CASE NO. 65,820

BRIEF OF APPELLEE

On Certification from the District Court of Appeal
Third District, State of Florida

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STATEMENT OF THE CASE AND FACTS

The Appellees [plaintiffs below] are all racetrack permit holders who conduct horse racing in Dade, Broward and Hillsborough County, Florida. Appellees filed their Complaint in the Circuit Court of Dade County in December, 1983 seeking to have declared unconstitutional the provisions in Chapter 550, Florida Statutes, which prohibit the conduct of pari-mutuel wagering at horsetracks on Sunday.

Appellants [defendants below] filed appropriate answers, memoranda of law and stipulated to the existence of no genuine issue of material fact seeking to have a summary judgment issued on the law based on the issues brought by appellees in the lower court.

On July 26, 1984, the lower court entered summary judgment in favor of Appellees and in so ruling, stated that "with respect to the defendants' contention that the noxious characteristics of racing authorized Sunday closing, both the record and common sense unequivocably indicate that, whatever these noxious characteristics may be, they are no more likely to occur on Sunday than on any other day of the week". In so ruling, the lower court determined that the provisions contained in Chapter 550, F.S., which prohibited the conduct of pari-mutuel wagering at horsetracks on Sunday were unconstitutional.

The Appellants, the Department of Business Regulation, its Secretary and the Division of Pari-mutuel Wagering and its Director, timely filed a Notice of Appeal and pursuant to their motion, concurred in by Appellees, the District Court of Appeal, Third District, pursuant to Florida Appellate Rule 9.125, certified as a question of public importance, the decision of the lower court. The Florida Supreme Court accepted jurisdiction of the case on September 10, 1984; denied the Motion of Appellees to vacate the automatic stay granted to Appellants, and set this case for early argument on October 5, 1984.

ISSUE I

THE STATUTORY PROHIBITIONS AGAINST RACING ON SUNDAY ARE NOT REASONABLY RELATED TO ACHIEVING ANY VALID STATE OBJECTIVE AND ARE AN INVALID EXERCISE OF THE POLICE POWER.

Several statutory provisions within the current Pari-mutuel Wagering Law, Chapter 550, Florida Statutes, prohibit horseracing on Sunday.[1] This prohibition against racing on Sunday has been in the laws authorizing pari-mutuel wagering since their inception in 1931.[2] A review of the context in which this prohibition arose is helpful in evaluating its validity, its current purpose and its effect in the law.

Prior to the enactment of statutes authorizing pari-mutuel wagering in racing, the Florida Legislature, in 1905,

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[1] See, e.g., §§550.04 [thoroughbred] 550.33(3) [quarterhorse], 550.37(4) [harness], 550.39, 550.41(3) [summer racing]. These prohibitions are penal in nature since §550.07 allows the Division of Pari-mutuel Wagering to impose a fine or seek administrative penalties for violation of the provisions of Chapter 550; and §550.25 provides criminal penalties for the conduct of any unauthorized race meeting.

[2] See C. 14832, Laws of Florida 1931, Vol. 1.

enacted a general prohibition against engaging in horseracing, as well as other games and sports, on Sunday. Chapter 5436, Section 1, of General Statutes of the State of Florida 1906 (approved June 5, 1905), provided:

> That whoever engages on Sunday in any game or sport, such as baseball, football or bowling, as played in bowling alleys, or horse racing, whether as player, manager, director or otherwise, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment. [emphasis added].

This 1905 penal prohibition against engaging in horse racing or other sports on Sunday was just one thread in a fabric of laws known as Sunday Closing Laws, Sabbath Laws or Blue Laws[3] which pervaded the statutes of Florida and most other states.

Civil Sunday Laws such as these are ancient, having originated in the Roman Empire by Emperor Constantine, who in 321 A.D. ordered all judges and inhabitants to rest on Sunday. The Biblical origin of such Sunday Laws is apparent; however, the Sabbath originally decreed for reverence was the Hebrew Sabbath or Seventh day[4] of the week and not Sunday, the first day of the week, now observed predominately by Christian religions. The

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[3] Called "Blue Laws" since 1781 when the Sunday Laws of New Haven, Connecticut, were printed on blue paper. Sunday Closing Laws in the United States: An Unconstitutional Anachronism, Vol. XI Suffolk University Law Review at 1089.

[4] See Exodus 20: 8-11

first Sabbath Laws in America were those enacted in Virginia in 1614. The Colonies later enacted similar laws which generally made a criminal offense of any travel, labor, sport or business on Sunday. See People v. Abrahams, 353 N.E.2d 574, 576 (N.Y. Ct. App. 1976). These early American Sunday Laws, often prescribing harsh penalties for failure to attend church as well, followed the English act of 1676, passed during the reign of Charles II, the law which had the greatest influence on American Sunday Laws. The English Act of 1676 required church attendance, prohibited all labor except that of necessity and charity, and prohibited sales of merchandise on Sunday.[5] The American colonies followed suit and enacted similar laws.

As early as 1832, the Territory of Florida enacted laws which made criminal "offences against religion, chastity, morality and decency."[6] These provisions prohibited disruption of divine worship or camp meetings, employment of apprentices, servants or slaves, conduct of other business, and sale of goods. Following a trade or business on Sunday in Florida was

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[5] XI Suffolk University Law Review at 1095-1096.

[6] Act February 10, 1832, Sec. 62, 69, 70, Duval 124, 125, 126. These provisions, reenacted after statehood in 1845m are codified in Chapter VII, Crimes and Misdemeanors, Digest of Statute Law, State of Florida 1847.

specifically prohibited in 1879 by enactment of Ch. 3146, Sec. 1, 3.

In 1868, the Florida Legislature enacted Chapter 1637, Act of August 6, 1868, which made a criminal offense of inter alia, peddling, gaming or horse racing near a camp [religious] meeting. See McClellan's Digest Laws of Florida, 1881. This provision remained in the law well into the 1900's. These various provisions prohibiting activity on Sunday and protecting worship services from disruption were codified together in the Revised Statutes of Florida in 1892, Article 12 and Article 15.

By 1951, Florida's Sunday Laws, all penal provisions, were codified in Chapter 855, Florida Statutes. Section 855.01 prohibited following any pursuit, business or trade on Sunday, with certain exceptions. Section 855.02 prohibited sale or barter of goods or wares on Sunday, with certain exceptions. Section 855.03 prohibited employing apprentices or servants in labor on Sunday. Section 855.04 prohibited use of firearms on Sunday. Section 855.05 prohibited engaging in sports, games or horse racing on Sunday. Section 855.06 prohibited engaging in the sport of trap, target or skeet shooting on Sunday. Section 855.07 specifically made it lawful to play baseball and to operate certain industrial plants. These Florida statutory Sunday Laws were similar to the Sunday Laws in other states which began to come under challenge on a number of bases, including

violation of the "establishment clause"[7] and the equal protection clause of the U. S. Constitution.

The United States Supreme Court, in a group of cases decided in 1961, found that the Maryland, Massachusetts and Pennsylvania Sunday Laws in question were valid, based not upon observance of the Sabbath, but upon those states' legitimate secular objective of providing a uniform day of rest and recreation for all members of the family and community. In McGowan v. State of Maryland, 81 S.Ct. 1101, 366 U.S. 420 (1961), the Court had under consideration the validity of Maryland's Sunday Closing Laws or Blue Laws which proscribed all labor, business and other commercial activity on Sunday. The questions presented involved whether the laws were vague; whether they denied equal protection; and whether they violated the establishment clause or the free exercise clause[8] of the U. S. Constitution. The Supreme Court concluded that although Sunday laws were indisputably religiously motivated [Id. at 1108-1109], they presently fulfilled the secular purpose of providing a uniform day of rest and recreation in which "all members of the

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[7] First Amendment to the United States Constitution providing that "[c]ongress shall make no law respecting an establishment of religion..." made applicable to the states by the Fourteenth Amendment. Florida has its own "establishment clause" in A 1, S.3 of the Constitution of Florida.

[8] The First Amendment's prohibition against enactment of any law prohibiting the free exercise of religion.

family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities....". Id. at 1118.[9] The Supreme Court found no violation of equal protection by the presence of exceptions to the Sunday Laws, where the exceptions dealt with sales of items necessary or helpful to enjoyment of a uniform day of rest for the majority of workers. Id. at 1106.

In Gallagher v. Crown Kosher Super Market of Mass., 81 S.Ct. 1122 (1961), the Supreme Court reached similar conclusions, finding, in addition, that the exception to the Sunday Laws allowing professional and amateur sports was in keeping with a day of rest and recreation for the majority of workers and, therefore, did not render the laws susceptible to an equal protection challenge. Id. at 1125. A similar result was reached in the companion case of Two Guys from Harrison-Allentown v. McGinley, 81 S.Ct. 1135 (1961), regarding Pennsylvania statutes, and likewise in Braunfeld v. Brown, 81 S.Ct. 1144 (1961) where the Court explained:

> We also took cognizance, in McGowan, of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation....

Id. at 1145.

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[9] See also Braunfeld v. Brown, 81 S. Ct. 1144, 1145 (1961).

Justices Frankfurter and Harlan, in their separate opinion,[10] conceded that Sunday Laws impose a financial burden on those who observe a Saturday Sabbath and then must close again on Sunday as well. The Justices concluded, however, that such burden was not unwarranted, when balanced against the Legislature's objective of a uniform day of rest and "...the burden which the Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal." Id. at 1186.

Several years before the McGowan decisions, in a suit brought by operators of used car lots, the Florida Supreme Court found that the Sunday Closing Laws[11] as amended in 1951, were unconstitutional. In that decision, Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952), this Court stated:

> These Sections as amended cannot be upheld upon any religious principle, tenet or belief although it be founded upon the Biblical adminition to 'Remember the Sabbath Day to keep it holy', because of our constitutional provisions requiring the complete separation of church and state.... The constitutionality of these laws must be determined upon a consideration of the query whether each or either was justified as an exercise of the policy power which inheres in the state.
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[10] 81 S.Ct. 1153.

[11] Sections 855.01, 855.02.

> Laws similar to these have been upheld as a general rule not, as aforesaid, because of any right of the government to promote religious observances by legislative enactment but only as an exercise of the police power in the protection of all citizens from the physical, as well as moral, degradation which might result from continuous labor. [Id. at 8].

In response to the defensive assertion that the Florida Sunday Closing Laws did not deny equal protection because they operated equally on all members within the class of used car dealers, this Court in Henderson, disagreed, stating:

> "It may be said that the closing of all business houses on Sunday, except in cases of emergency, bears a rational and reasonable relationship to the general public health, safety, morals or general welfare because thereby protection is aforded all citizens from the evils attendant upon uninterrupted labor. Nevertheless, it does not follow that laws containing the exemption of many businesses and vocations, such as the legislative enactments now under consideration, can be said to bear such relationship to the public health, safety, morals or general welfare as to declare them to be valid general laws (although they may are effective in each and every county of the State) simply because they operate equally upon all within a certain class or classes. It is necessary that there be a valid and substantial reason to make such laws operate ONLY upon certain classes rather than generally upon all."

Id. at 8-9; [emphasis added]. Therefore, where numerous classes of businesses are allowed to remain open on Sunday, there must be a "valid and substantial" reason why only certain classes of

business are required to close. Thus the Court concluded that a law requiring used car dealers to close on Sunday, while numerous other businesses and tourist attractions were allowed to operate failed to bear a reasonable relationship to accomplishing any objective within the police power of the state. Id. at 9. The Florida Supreme Court explained:

> "We can think of no reason, and none has been suggested to us, why the health, safety, morals and general welfare of our citizens would be safeguarded to any greater degree by requiring used car dealers to close their places of business on Sunday than such rights or guaranties (sic) would be safeguarded were such persons allowed to do business on the Sabbath along with proprietors of tourist attractions". [Id. at 9].

In 1957, in the case of Kelly v. Blackburn, 95 So.2d 260 (Fla. 1957), the Florida Supreme Court again struck §§855.01 and 855.02, as amended in 1955, for the same infirmities present in the 1951 law, even though the Legislature had reduced the number of exemptions to the law.

The Florida Supreme Court, in Moore v. Thompson, 126 So.2d 543 (Fla. 1961), was likewise called upon to determine the constitutionality of Chapter 59-295, Laws of Florida, which prohibited the sale or exchange of automobiles on Sunday, as well as other legal holidays. The Preamble of the Act set forth no less than eight (8) asserted purposes of the act. The Supreme

Court, after again acknowledging that the law obviously cannot be upheld on any religious basis, reiterated:

> ...The general rule [is] that findings of fact made by the legislature are presumptively correct. However, it is well recognized that the findings of fact made by the legislature must actually be findings of fact....Moreover, findings of fact made by the legislature do not carry with them a presumption of correctness if they are obviously contrary to the proven and firmly established truths of which courts may take judicial notice.

Id. at 549-550 [emphasis in opinion added].

The Florida Supreme Court in Moore went on to explain that legislative findings of fact as to policy behind the law do not remove the "yardstick" standard--the requirement of a valid and substantial reason for the legislation. Id. at 550. The Court concluded that the "valid and substantial reason" yardstick had not been met which would allow the Legislature to make the Sunday closing law operate on less than generally all businesses [Id. at 551] and Chapter 59-295, Laws of Florida, was therefore held unconstitutional. In so doing, the Court noted the decisions of other states upholding similar laws based on the policy of those states to close businesses on Sunday. The Court stated:

> ("Such, [uniform day of rest] we have pointed out, is not the public policy of this State.")
> Id. at 552.

More recently, court decisions of other states have struck Sunday closing laws on similar grounds.[12] In County of Spokane v. Valu-Mart, Inc., 419 P.2d 993 (Wash. 1966), the Washington Supreme Court struck a prohibition against Sunday sales as an invalid exercise of the police power, not justifiable as day of rest legislation, since there was no uniform community-wide day of rest provided. The court concluded that the law did not reasonably bring about any legitimate state purpose or objective.

In State v. Greenwood, 187 S.E.2d 8 (N.C. 1972), the Supreme Court of North Carolina found unconstitutional an ordinance which created a Sunday ban on the operation of billiard halls but on no other business which provided recreation, amusement and sport. The court pointed out that in making such determination, it is necessary to look at both the purpose of the ordinance and the classification upon which it operates, both of which must bear a reasonable relation to the accomplishment of a legitimate state objective. As to the purpose of the law, the court noted:

> Assuming Asheville's objective was to promote Sunday as a day of rest, tranquility and relaxation, the subject

[12] See also Caldor's, Inc. v. Bedding Barn, Inc., 417 A.2d 343 (Conn. 1979), striking Connecticut Sunday Closing Laws as a violation of due process and equal protection and not rationally related to a day of rest or other legitimate state objective.

> ordinance provision does nothing to accomplish that objective except prohibit the operation of billiard halls.

In this cause before the court, we are faced with the same type issue as presented to the North Carolina Supreme Court. To-wit, if we should assume that the state's objective is to promote Sunday as a day of rest, the statute does nothing to accomplish that objective, except to prohibit the operation of pari-mutuel facilities. If we should conclude that the cessation of wagering or racing is a legitimate objective for the statutes, with nothing more, would be to conclude that state regulation is an end in itself, and begs the question before the court. If we should conclude that any pari-mutuel statute must be constitutional merely because there could be a reason, though not expressed which could justify it, is to effectively conclude that the courts have no check and balance with the legislature in the area of pari-mutuel wagering, which is an absurd position.

However, Appellant takes the basic position that if there are any state of facts known, or to be assumed that would justify the law; the court's power of inquiry ends, and the statute must be found constitutional.

Appellee strongly disagrees with that position before the court. The pari-mutuel wagering industry is not a brigandage or lawless business. The pari-mutuel business has been legitimized in the Constitution of the State of Florida, and in Chapter 550. Therefore, the industry has been historically and

legislatively legitimized and is entitled to the same constitutional guarantees as any other business. See Mayhue v. City of Plantation, 375 F.2d 447 (5th Cir. 1967) wherein the court reiterated the principle that even though the sale of alcoholic beverages (like pari-mutuel wagering) is subject to extensive regulation:

> "The sale of intoxicating liquor, moreover, is not a brigandage business. It has been historically and legislatively legitimized and is within the constitutional pale and protection."

Likewise, a similar argument to that espoused by the Appellant in the instant case was rejected in Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). The court explained:

> "...It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power [citations omitted], but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion. ...The dangers [to public health safety and welfare] do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards. (Emphasis added).

The Florida Supreme Court, in declaring unconstitutional a statute regulating sales of beer and wine, also reached the same conclusions in Castlewood International Corp. v. Wynne, 294 So.2d 321 (Fla. 1974), wherein the court stated at page 324 that:

> Our conclusion acknowledges the power of the legislature to impose legitimate burdens upon licensees involved in the intoxicating beverage industry. However, such restrictions must be rationally related to the purpose in issue....

In reaching this conclusion, the Florida Supreme Court approved the principles set out on Mayhue v. City of Plantation, supra.

In addition, the Florida Supreme Court in 1954, confronted with the same argument as that espoused in this appeal: to-wit that a tax should be sustained because it was in the exercise of the police power to further regulate a business with a "noxious" odor, stated in Volusia County Kennel Club v. Haggard, 73 So.2d 884 (Fla. 1954), that:

> [i]t is also urged that the tax should be sustained because it is in the exercise of the police power to further regulate a business with a noxious odor, although legal.
>
> This Court in that case pointed out as follows:
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> All doubt with reference to the legality of these enterprises was removed by the adoption of Section 15, Article 9, of the State Constitution...(now Article X, Section 7), whereby the fundamental law recognized the operation of pari-mutuel pools as being legal. As further evidence of the legislative intent to eliminate the odor, theretofore surrounding the operation of race track gambling and to recognize the importance of such businesses, declared that the same 'is a substantial business compatible to the best interest of the state and the taxes derived therefrom constitute an integral part of the tax structures of the state and county'...and

> development of this business and influences and affects the financial stabilities of the state and counties. (Section 550.081, F.S.).
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> In considering that opinion, this Court wrote:
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> "There may have been a time when all money from gambling was considered 'tainted' money, but now the only complaint about money from legalized race tracks appear to be 'taint enough of it'". Id. at 886.

Legislative history of horse racing in this state is such that the legislature has since 1975 passed a series of legislative acts quoting extensively in reference to the best interest of thoroughbred racing in this state, and in the best interest of pari-mutuel wagering in the state.[13]

Thus, it can be seen that the horseracing industry, once treated as a suspect noxious privilege was in the eyes of the Court, in 1954, beginning to be viewed as a legitimate substantial business important to the state of Florida. This view has continued in 1975, 1977, 1979 and finally in 1980 with the last major revision of the pari-mutuel law.[14]

Even since 1980, substantial pieces of legislation have been passed which expand the ability of the operators of pari-mutuels to reach and hold its market. This type legislation

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[13] Chapter 75-43, Laws of Florida; Chapter 77-167, Laws of Florida.

[14] The revisions from 1975-1980 were major tax reductions, reducing total state revenue from horse track from 7.5% per $1 of handle to 3.3%.

includes legitimizing of certain therapeutic medications,[15] legitimizing the ability of a racetrack owner to take and send bets interstate[16] and to wager on the Kentucky Derby, the Preakness and the Belmont. Congress has also recognized the legitimacy of the thoroughbred horseracing industry in the passage of the interstate horseracing act, upon which many of our Florida statutes are now based.

In addition, Mr. Rutledge, in his deposition [see page A-13,14] emphatically stated that the horse tracks patrol and police their grounds substantially and further, that any noxious activity which may occur would be no more prevalent on Sunday than any other day of the week.

Thus, the apparent position of the Appellant is to raise the noxious quality issue as a factual issue before this Court on appeal, after the same was rejected in the testimony and by the lower court; and to have this Court seek to assume some unknown state of facts or circumstances which may lead this Court to inquire beyond the statute into a nebulous area to seek to obtain some type of legislative intent.

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[15] §550.241, Florida Statutes.

[16] Chapter 84-9, Laws of Florida; Chapter 84-59, Laws of Florida; Chapter 84-68, Laws of Florida; Chapter 84-254, Laws of Florida; Chapter 84-282, Laws of Florida.

It was best said by Justice Powell in Schweiker v. Wilson, 450 U.S. 244 when addressing the question of the legislative intent of a Congressional act. His quote is as follows:

> "When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice, as its absence." (Emphasis added].

In Horsemen's Benevolent and Protective Association v. Division of Pari-mutuel Wagering, 397 So.2d 692 (Fla.1981), this Court declared to be an unconstitutional deprivation of due process, by an unlawful exercise of the police power, a statute which required the deduction of one percent of the purse pool to be paid to a horsemen's association. This Court stated:

> "Indisputably, the state, through the exercise of the police power, has the right to regulate, control and supervise horse racing in Florida. Division of Pari-mutuel Wagering v. Caple, 362 So.2d 1350 (Fla. 1978); State, ex rel. Mason v. Rose, 122 Fla. 413, 165 So. 347 (1936). But this power must be exercised for a public purpose. State v. Lee, 356 So.2d 276 (Fla. 1978); United Gas Pipeline Co. v. Bevis, 336 So.2d 560 (Fla. 1976). Further, the statutory enactment must be reasonably appropriate to accomplish the purpose of this act..in evaluating the argument advanced by the Horsemen's Benevolent Protective Association and Wood, that [the statute] is an unreasonble exercise of the police power, we must decide whether the means utilized, the enactment of §550.2615,

> bears a rational or reasonable relationship to a legitimate state objective, remaining cognizant of the legislature's broad range of discretion in its choice of means and methods by which it will enhance the public good and welfare...
>
> ***
>
> There is no reasonable relationship between the stated objective of the statute and the form of the statute chosen by the legislature to advance this purpose."

In addition, in Simmons v. Division of Pari-mutuel Wagering, 407 So.2d 269 (Fla. 3d DCA 1982), affirmed 412 So.2d 357, this Court recognized that the test to be applied in evaluating the pari-mutuel wagering statute, was in effect, virtually identical to the test applied to evaluate other statutory provisions. The court determined that where the avowed purpose of a legislative act are valid, such as protecting the health of horses and the integrity of the sport by prohibiting the racing of an animal under the influence of drugs and medication, then "when measured against the articulated reason for the enactment of the statute", those provisions which bear fair and substantial relationship to those objectives will be upheld as valid exercises of the police power. However, the Court held that the provisions which do not bear a fair and substantial relationship to a valid legislative purpose will be stricken.

A review of these decisions discloses that in the area of pari-mutuel wagering, just as in the area of all other regulations promulgated under the mantle of the police power, only those regulations which are reasonably related to achieve a valid police power objective will be sustained. Regulations simply for the sake of regulation cannot be sustained in the pari-mutuel law, any more than it can in the areas of alcoholic beverage, agriculture, taxation or the professions.

Therefore, it is Appellee's position that the test used to determine whether a statute, enacted under the guise of the police power, is valid and constitutional is relatively simple. (1) Does there exist a valid legislative objective to protect the health safety and welfare of the public; (2) If so, is the statute reasonably related to the achievement of that valid objective?, and (3) Does the classification itself created by the statute, rest on some difference bearing a reasonable relationship to the objective of the legislation.

If the above test is applied to the prohibitions against Sunday racing and the pari-mutuel laws, the question must be answered in the negative. No legislative objective is stated or is conceivable which would be served by prohibiting pari-mutuel wagering on Sunday. No valid objective, such as a community-wide day of rest exists in Florida. A classification of only pari-mutuel wagering for this Sunday prohibition is not based on a

difference bearing a reasonable relationship to a valid objective. These prohibitions are in lineage and current practice nothing more than derivatives from Blue Laws which should now be removed from the law.

Similarly, in terms of any such asserted state objective behind the prohibition against Sunday racing in Florida, racing along with football games, baseball games, concerts and other similar tourist and recreational attractions are in the same classification. No real purpose is served by segregating racing for disparate treatment in prohibiting such activity on Sunday. As the Court in Greenwood, supra, noted, "[i]n terms of the purpose of the ordinance all [entertainment facilities] are within the same classification." [emphasis in opinion].

The Court of Appeals of New York reached a similar conclusion in People v. Abrahams, supra, finding that state's Sunday Closing Law invalid. In reaching this conclusions, the court explained:

> Our analysis...leads to the inescapable conclusion that it no longer possesses the requisite rationality in light of its avowed purpose. [Id. at 578; emphasis added].

This recognition, that changing facts and circumstances can remove the necessary nexus between any given statutory provision and any legitimate state objective, has been recognized in Florida. Indeed, it is recognized as a settled principle of

constitutional law that where the validity of a statute depends upon the existence of certain facts or circumstances, the statute may be stricken as an invalid exercise of the police power when those facts or circumstances cease to exist. Conner v. Cone, 235 So.2d 492, 498 (Fla. 1970). See also Hall v. King, 266 So.2d 33 (Fla. 1972); Georgia Southern & Florida Ry. Co. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965).

The facts and circumstances which existed at the turn of the century when racing prohibitions originated in Florida consisted of a pervasive scheme of Sunday Closing Laws which prohibited all labor and sports on Sunday. The prohibition against racing on Sunday which carried over into the pari-mutuel wagering law has remained unchallenged through the extinction of Sunday Closing Laws generally, through the pronouncement of the only permissible justifications set out in McGowan, supra, through the Florida Supreme Court's pronouncements in Henderson, and, importantly, through the 1967 and 1969 legislative repeal of Florida's codified Sunday Closing Laws.

In 1967, the Florida Legislature enacted Chapter 67-158, Sec. 1, Laws of Florida, which repealed §855.05, the prohibition against engaging in games or sports, including horse racing, on Sunday. In 1969, the Legislature enacted Chapter 69-87, Sec. 1, Laws of Florida, which repealed the remainder of Florida's Sunday Laws. The only Sunday prohibitions remaining in Florida law are

the Sunday racing prohibitions contained in the Pari-mutuel Wagering Law.[17] This Sunday racing prohibition is only now being challenged for a number of reasons, including the fact that racing is permitted on Sunday in Florida's major competitive racing states; racing on Sunday will now be economically feasible; and there no longer exists any uniform day of rest policy in Florida to provide a basis for a legislative ban on Sunday racing.

It is clear from the foregoing authorities, both State and Federal, that the ban on Sunday racing in Florida cannot be upheld on religious grounds relating to the observance of the Christian Sabbath, even though this is indisputably the origin of the prohibition. Nor can the prohibition be upheld on the basis that it provides a uniform day of rest for all persons from uninterrupted labor. No such laws or policies exist in Florida today, and the Sunday racing prohibition in no way achieves such a result.

If the prohibition against Sunday racing is to be upheld at all, it must be as a valid exercise of the police power and must be reasonably related to the accomplishment of a valid state objective. This "yardstick" is the appropriate measure of the validity of an exercise of the police power, regardless of

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[17] Other than regulations relating to hunting and fishing which are clearly designed to preserve and protect wildlife resourses and are of more recent origin.

whether the Court is evaluating a pari-mutuel wagering enactment or any other statute. See Simmons v. Division of Pari-mutuel Wagering, 407 So.2d 269 (Fla. 3d DCA 1982), affirmed 412 So.2d 357. Not only must the court find that a legitimate state objective reasonably will be achieved by the prohibition against racing on Sunday, the court must also find that the classification which the law singles out for disparate treatment, here only those engaged in the business of racing or operating a racing or pari-mutuel facility, is a classification reasonably related to the accomplishment of a valid state objective.

That is, even if there could be found a valid state objective to be achieved by a ban on Sunday racing, the Court must also find that application of the law only to one business, rather than all such tourist and recreational attractions, sport facilities and other similarly situated businesses will achieve the desired result. Otherwise, as the Court found in Henderson v. Antonacci, supra, even though a rational relationship may be found between closing all businesses on Sunday thereby achieving a valid objective--uniform uninterrupted labor--it does not follow that such a law operating only upon one business will achieve that result. There must, therefore, be a "valid and substantial reason" why one class is singled out. Henderson, supra.

The classification, to satisfy the Equal Protection Clause, must rest on "some difference bearing a reasonable relationship to the object of the legislation". Soverino v. State, 356 So.2d 269 (Fla. 1978) [emphasis added]. The classification may not be sustained by judicial hypotheses. Rather, the Court must ascertain a "clearly enunciated purpose" to justify it. Rollins v. State, 354 So.2d 61, 64 (Fla. 1978). Further, the distinction must rest on some real and practical basis relating to the purpose of the legislation. Gluesenkamp v. State, 391 So.2d 192 (Fla. 1981). However, if any valid objective is to be achieved by imposition of a Sunday prohibition on only one tourist, recreational or sport industry--here racing, that objective is truly a mystery.

A third element of the court's inquiry, and perhaps the most important, is the necessary finding of a specific legitimate state objective to be accomplished by prohibiting racing on Sunday. The courts have recognized numerous legitimate state objectives to be accomplished within the broad regulatory scheme under which pari-mutuel wagering is allowed. Foremost amd unquestioned among these objectives is increased state tax revenues from increased wagering or "handle". Additionally, enhancement of the racing and tourist industries in Florida by encouragement of a year-round quality racing program is a constitutionally permissible objective, as noted by the Florida

Supreme Court in Horseman's Benevolent and Protective Association v. Division of Pari-mutuel Wagering, supra, There, however, the Court invalidated the statutory provision requiring payment of money to the Horseman's Benevolent and Protective Association on the ground that such provision was not reasonably related to accomplishment of the permissible state objective.

Protecting the integrity of the sport and the health of the horses are two long-recognized state objectives in the regulations of racing. See Simmons v. Division of Pari-Mutuel Wagering, supra. In Simmons, this court struck a portion of the statute governing use of medication and drugs in racing because the provision, banning the racing of an animal after administration "of any foreign substance", was not rationally related to accomplishing the valid objectives of protecting the integrity of the sport against drugging.

All the above-recognized valid state objectives in the regulation of racing could be furthered, rather than impeded by removal of the statutory prohibition against Sunday racing. It is certainly difficult to envision a rational nexus between accomplishment of these or any other valid objectives, and the prohibition against Sunday racing.

The notion has long been laid to rest that simply because the state could prohibit pari-mutuel wagering entirely, it may enact or countenance statutes which deprive those engaging

in such endeavor of their equal protection or due process rights. See Simmons, supra, and Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979). Equal protection and due process principles dictate that any statute, even those contained in Chapter 550, must make classifications for disparate treatment only as are necessarily and reasonably related to accomplishing a valid objective within the state's police power; and, those statutes must contain only those prohibitions or requirements reasonably related to accomplishing the valid state objective. The statutory provisions prohibiting racing only on Sunday fail in both respects.

The lack of any legitimate state objective to be accomplished by the continued prohibition against Sunday racing is only highlighted by the Legislature's 1983[18] amendment to §550.162, F.S. Pursuant to that amendment, commencement of dog races and jai alai after midnight, including midnight on Saturday, is no longer prohibited. Since Sunday prohibitions have traditionally been held to take effect at midnight on Saturday,[19] Chapter 83-133 effectively permits dog racing during a portion of Sunday in spite of the prohibitions against Sunday racing elsewhere in the Chapter. This Legislative incursion into the long-standing Sunday racing prohibition demonstrates that the

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[18] See Chapter 83-133, Laws of Florida.

[19] Gillooley v. Vaughn, 110 So.2d 653 (Fla. 1926); 83 C.J.S. Sunday, §2.

Legislature had no "clearly enunciated purpose"[20] in imposing what is, in heritage and effect, a Sunday Closing or Blue Law.

No claim is being asserted, nor is one warranted that invalidation of the Sunday racing prohibitions will somehow increase the allotted number of racing days. To the contrary, the permitted maximum number of racing days is set by statute and will not be increased. Removal of the Sunday racing prohibitions, which no longer bear any valid or substantial relationship to a valid state objective, will simply afford those engaged in racing and operating race tracks the ability to make sound business decisions as to which days not to race.

Such sound business decisions can only increase revenues to the State by increasing handle, raise the quality of racing in Florida by offering higher purses, and provide Florida's invaluable tourists with a full weekend at one of Florida's most popular tourist attractions. The time has come for Florida's last remaining prohibition emmanating from the Blue Laws to be removed from the statutes of Florida. Therefore, the prohibitions against Sunday racing found in Chapter 550, Florida Statutes, should be recognized to be an invalid exercise of the police power, depriving those engaged in the racing industry of due process and equal protection and failing to accomplish any valid objective, and should be finally removed from the law.

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[20] Rollins v. State, supra.

ISSUE II

THE LOWER COURT DID NOT ERR IN REACHING A FACTUAL CONCLUSION THAT THERE WAS NO VALID, SUBSTANTIAL OR RATIONAL BASIS FOR THE PROHIBITION OF SUNDAY RACING.

Appellees, in appropriate discovery, questioned Mr. Gary R. Rutledge, Secretary of the Department of Business Regulation [formerly Director of Pari-mutuel Wagering for two and one half years, and Secretary for two years]; and Mr. Robert Smith, Director of the Division of Pari-mutuel Wagering, for the two years following Mr. Rutledge's tenure. Both parties were qualified as experts in the depositions taken and attached hereto as Appendix A.

Appellees sought in such discovery any written, oral or otherwise stated purpose of policy of the state in regard to the statutory prohibition against Sunday racing. [A13,14-Rutledge; A9-Smith].

A review of the depositions reveals that in questioning both parties, experts in the regulation of pari-mutuel wagering, they indicated that they foresaw no significant economic or regulatory problems in the event Sunday racing was conducted; further that they foresaw no increase in any noxious qualities, should such noxious qualities exist, at the pari-mutuel facilities if Sunday racing were conducted; and further, that the permitholders themselves did a good job of policing the quality of conduct at their tracks.

Following substantial legal argument indicating that no intent was expressed by the legislature within the legislation prohibiting Sunday racing, a fact which this Court and the lower court can take judicial notice of the non-existence thereof; the Appellant and Appellees did stipulate before the court that there, in fact, existed no genuine issue of material fact, which would affect the court's ability to grant a Motion for Summary Judgment.

In view of the fact that Appellees [plaintiffs below] brought forth a showing of no expressed legislative intent and a showing of no factual basis to support Sunday closing, the Appellants then had some form of obligation to come forward with proof of the facts which it now presses this Court to assume might exist. None of these asserted conclusory facts of Apellant is apparently entitled to any judicial notice and therefore should have been proven. To the contrary, Appellees came forward

with proof below that there existed no factual or policy justifications which could have been known by the legislature, or could be assumed to have been relied upon to justify the prohibition of the conduct of pari-mutuel wagering on Sunday.

In the United States v. Carolene Products Company, 304 U.S. 144, a case which was relied upon by the Florida Supreme Court in State v. Bales, 343 So.2d 9 (Fla. 1977); and the Appellant so cites Bales for the proposition that there exists a rebuttable presumption of facts necessary to support a legislative enactment; and that if any facts can be assumed to support a statutory prohibition, the court's inquiry ends. In United States v. Carolene Products Company, supra, the Supreme Court held that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry.

Therefore, unless the "assumed facts" are those entitled to judicial notice, the court's inquiry is not at end. Further, that power extends to the receipt of evidence. As stated, this being the case, the Appellants then had an obligation to come forward with a recitation of proof of those facts, or conclusions to rebut the evidence presented by the Appellees in the lower court.

However, instead of coming forth with such evidence of such facts below, which Appellee doubts exists, and which

Appellants have previously stated does not, they now ask this court to make assumptions, neither based on proof or judicial notice, to support their contention. This procedure is not that envisioned by the United States Supreme Court in United States v. Carolene Products Company, supra, nor by this Court when it adopted the reasoning of the United States Supreme Court in Hamilton v. State, 366 So.2d 8 (Fla. 1978). Appellees respectfully suggest that the contention and argument of Appellants relating a potential set of facts which may justify the holding of the statute to be constitutional is a "red herring"; is not well founded; and should be disregarded.

CONCLUSION

In view of the fact that there has been no demonstration of a valid and substantial reason for Sunday closing law to operate on only one class of business rather than all classes; and further because the statutes prohibiting the conduct of pari-mutuel wagering on Sunday serve no valid secular purpose rationally related to a legitimate state objective, they are in violation of the constitutional mandates, and are therefore unconstitutional.

Therefore, the decision of the lower court should be sustained.

Respectfully submitted,

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and
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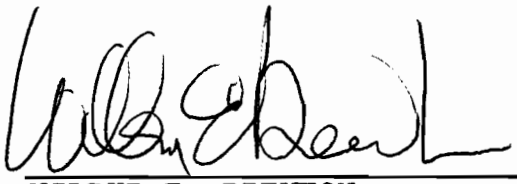
CERTIFICATE OF SERVICE

I DO CERTIFY a true and correct copy of the foregoing has been furnished by hand delivery, to Louis F. Hubener, Assistant Attorney General, Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32301, and David Maloney, Department of Business Regulation, The Johns Building, 725 South Bronough Street, Tallahassee, Florida 32301, this 24th day of September, 1984.



WILBUR E. BREWTON