

IN THE SUPREME COURT OF FLORIDA

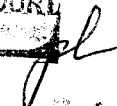
WINSHARE CLUB OF CANADA, a
Canadian corporation, a/k/a
468560 ONTARIO LTD., d/b/a
WINSHARE CLUB INTERNATIONAL;
FAIRWAY CLUB INTERNATIONAL;
and ORION INTERNATIONAL,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT
OF LEGAL AFFAIRS, ROBERT A.
BUTTERWORTH, ATTORNEY GENERAL,

Respondent.

DEC 21 2008
CLERK, SUPREME COURT
By 
Deputy Clerk

CASE NO.: 72,924

(FIFTH DCA CASE NO.:
87-1641)

On Review of Decision of
the Fifth District Court of Appeals

PETITIONERS' REPLY BRIEF

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DESIGNATION

The parties will be referred to as in Petitioners' Initial Brief.

ARGUMENT

I. RESPONDENT'S ARGUMENTS IGNORE THE EFFECT OF THE FLORIDA PUBLIC EDUCATION LOTTERY ACT, CHAPTER 24 FLORIDA STATUTES, AND WRONGLY CONCLUDE THAT THE APPLICATION OF THE STATUTES IN QUESTION DO NOT AMOUNT TO ECONOMIC PROTECTIONISM.

The whole crux of this case is that the State of Florida is now conducting its own lottery of which the stated legislative purpose and intent is to be run as an entrepreneurial business enterprise and to make the most money possible. Florida Public Education Lottery Act, Chapter 24, Florida Statutes (1987), hereinafter referred to as The Lottery Act.

Having decided to do so, after the voters gave their blessing, the State cannot now prohibit its residence from participating in other state and national lotteries. To do so does amount to the economic protectionism referred to in Brown-Foreman and Philadelphia v. N.J. (cited in previous briefs), because it is protecting its own economic interests by limiting the competition for Florida dollars. The State's argument that its purpose is to regulate gambling belies its true intentions- to keep the lottery money from its citizens pockets in this state. This true concern is revealed in the Department of the Lottery's Motion to File Brief as Amicus Curie. It stated in its motion served on September 19, 1988 that the Department is "vitaly interested in selling as many lottery tickets as possible so as to increase the funds transmitted to the Department of Education ..." and that "the promotion of other Governments lotteries in the State of Florida may have a

substantial negative effect on the sale of tickets to the Florida State Lottery ..."

The State's justification that it is merely attempting to regulate gambling activities also falls by the wayside because it does not allege that the lotteries involved are illegal where they occur and in fact alleges and recognizes that they are other state and national lotteries. These Petitioners agree that the State can and does have the right to regulate and control gambling as a valid exercise of its police power if it regulates even-handedly to effectuate a legitimate local public interest. However, the State seems to illogically conclude that simply because the statutes involved do not have reference to the residence or geographic origin that their effect as applied cannot result in economic protectionism. It is illogical to conclude that other state and national lotteries are contrary to the public morales while Florida's is not.

Additionally, the State argues in its Answer Brief that Petitioners offer to and do send lottery tickets through the mail and that such activity is prohibited by Federal law. The State alleges in its Complaint for temporary and permanent injunctive relief that the Petitioners have sold and offered for sale and transmitted by mail, lottery tickets, coupons, or shares. However, the documents relied upon by the State attached to its Complaint do not support the allegation that any lottery instrument is transported by mail. Rather, said documents clearly show that these Petitioner merely buy and enter various

state and national lotteries at persons requests and keep track of and collect winnings for the customer. There is absolutely nothing to suggest in said documents that a lottery instrument is transported through the mail.

Except for the fact that Petitioners charge a fee, the service provided by Petitioners is akin to any Florida resident calling up a person in another state and requesting that person to enter that state's lottery for them and let them know if they won. The State is suggesting that merely because that person in the other state advertises its services here in Florida through the mail or other forms of advertising, that he or she is violating the law. Conversely, what possible harm is there in persons from other States calling Florida residents to enter the Florida lottery for them?

Because the State's only real concern is its pocketbook, its attempt to apply the Statutes in question to the facts in this case are indeed violative of the Interstate Commerce Clause.

II. THE FIRST AMENDMENT PROTECTIONS DO APPLY BECAUSE THE ONLY ACTIVITY CONDUCTED BY PETITIONERS IN THE STATE ARE THE ADVERTISEMENT OF THEIR SERVICES.

The State contends that Bigelow does not apply because Petitioners were offering to conduct the lottery activity in Florida. The State does not allege in its Complaint nor offer in its argument what supposed lottery activities are actually conducted in Florida other than advertisement of the Petitioners' services.

Concededly, if the lotteries involved were illegal where they occurred, then the First Amendment Protections would not apply because Petitioners would be advertising an activity that is illegal where it occurs. However, the State does not so allege.

In Bigelow, the advertisements which ran in Virginia newspapers did not offer to conduct abortions in the State of Virginia. In essence, the advertisement said abortions are now legal in the State of New York, come get one if you want one. It is illogical to suggest that a person residing in Virginia could not call up the advertising clinic in New York to arrange an appointment or send payment.

Bigelow is completely analogous to this case. The activity is not alleged to be illegal where it occurs. It is equally illogical for the State to argue that it is illegal to solicit persons in Florida to contact Petitioners to ask them to enter other state and national lotteries for them.

The State compares this situation to the advertisement of

the sale of narcotics or solicit participation in a prostitution ring. The State however completely ignores the fact that it has not alleged that the state and national lotteries involved are illegal where they occur.

The State's argument that Petitioners' First Amendment argument was not properly preserved and cannot be considered by this Court is without merit based on the "Topsy Coachman" rule as argued by Canadian Express Club in its Reply Brief to the companion case consolidated herein. That point will not be belabored except to say that under that rule as announced in Caraway v. Armour and Company, 156 So.2d 494 (Fla. 1963), the Trial Court's ruling can be upheld on alternate grounds if it reached the correct result even if based upon the wrong reason. Petitioners do not concede that the Trial Court's decision was based upon the wrong reason but rather argue as it did in the Fifth District Court of Appeal that the Trial Court's decision can be upheld on other grounds even if this Court were to find the Trial Court's reasoning wrong. Thus, this Court can consider the First Amendment issue.

CONCLUSION

The State either intentionally or by effect is attempting to protect its economic interests resulting in economic protectionism and a violation of the Interstate Commerce Clause.

Because Petitioners are not actually conducting a lottery within the State of Florida but rather merely advertising their services to assist participation in other state and national lotteries elsewhere, their advertisements are constitutionally protected under the First Amendment. This argument was made in the Fifth District Court of Appeals and can be considered under the "Tipsy Coachman" rule.

Based upon the foregoing, it is respectfully suggested that this Court should reverse the Fifth District Court of Appeal and reinstate the Trial Court's ruling dismissing the State's Complaint.

for Gregory F. Reiss

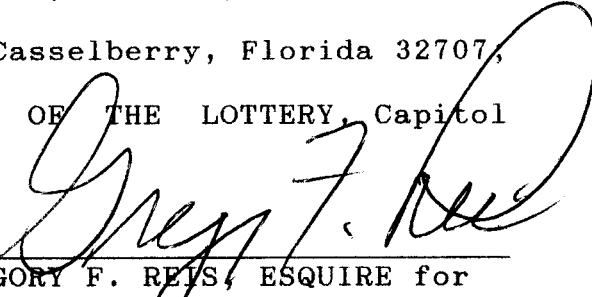
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished by U.S. Mail, this 19th day of December, 1988 to Nikki Ann Clark, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050; David L. Fleming, Esquire, LIBERIS, SAULS & FLEMING, 205 E. Intendencia Street, Pensacola, Florida 32501; Gene Coker, General Attorney, A.T.&T. COMMUNICATIONS, INC., 1200 Peachtree Street, N.E., Atlanta, Georgia 30357; Richard Robison, Esquire, ROBISON, OWEN & COOK, P.A., 5250 South U.S. Highway 17-92, Casselberry, Florida 32707, and Louisa E. Hargrett, DEPARTMENT OF THE LOTTERY, Capitol Complex, Tallahassee, Florida 32301.



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