IN THE SUPREME COURT OF FLORIDA

CANADIAN EXPRESS CLUB, a foreign business,

Petitioner,

vs.

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

Respondent.
_____/

Case No.: 73,074

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On Review of Decision of

the Fifth District Court of Appeals

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PETITIONER'S REPLY BRIEF

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I. THIS COURT CAN CONSIDER WHETHER THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED ON ALTERNATIVE GROUNDS, UNDER THE "TIPSY COACHMAN" DOCTRINE

A lower court's order can be affirmed when the result reached is correct, even though for the wrong reason, under the "TIPSY COACHMAN" DOCTRINE enunciated by this Court in Carraway v. Armour and Company, 156 So.2d 494 (Fla. 1963). It is, in fact, interesting to note that the Carraway case presents a similar situation where the deputy commissioner reached the correct substantive result even though he applied the wrong statute. Respondent now seeks to avoid the application of this doctrine through procedural artifice. Unfortunately, for Respondent, its view as to these procedural hurdles is flawed.

Citing no authority, Respondent first contends that Petitioner should have appealed the trial court's preliminary injunction and in failing to do so, waived its right to argue now that Section 501.204(1), Florida Statutes, should not be interpreted to encompass Petitioner's activities. Respondent concedes that the Florida Public Education Lottery Act was not enacted when the instant litigation was initiated and was not, therefore, considered by the trial court in its interpretation of Section 501.204(1) and finding that Petitioner's activities were violative of said statute. Moreover, even had the new lottery act formed a basis for an appeal from the preliminary injunction, Petitioner was not required to take an immediate appeal or risk losing its appeal rights. See Rule 9.130(g), Florida Rules of Appellate Procedure and Saul v. Basse, 399 So.2d. 130 (Fla. 2d

DCA 1981). Thus falls the first procedural artifice which Respondent seeks to use to avoid the merits.

Respondent next argues that Petitioner should have filed a cross-appeal as a condition precedent to urging an argument which falls within the "Tipsy Coachman" Doctrine. This position is equally without merit, as the cases cited by Respondent do not themselves support this position. A close examination of those cases will reveal that a cross-appeal is required only when the appellee did not receive full and complete relief from the lower court and sought additional relief, or received less than a complete victory, so that the appellee urges the appellate court to remand the case so that the appellee can receive an even better result. One cannot imagine a better result than that which Petitioner received from the trial court in the present case. The trial court dismissed Respondent's complaint with prejudice, thereby dissolving the preliminary injunction, and reserved jurisdiction to award costs and damages on account of the issuance of the preliminary injunction. Moreover, Respondent fails to comprehend the important distinction between the result and the reason for the result. Petitioner does not seek to change the trial court's result in any respect. Rather, Petitioner urges that the trial court's result remain in tact and be affirmed under the "Tipsy Coachman" Doctrine, even if it cannot be affirmed for the reasons relied upon by the trial court. Thus falls the second procedural artifice which Respondent seeks to use to avoid the merits.

Finally, and again citing no authority, Respondent argues that the issue of interpretation of Section 501.204(1) is outside the scope of the question certified by the DCA and proceeds to argue the constitutionality of Section 501.204(1). First, Petitioner does not challenge the constitutionality of Section 501.204(1). Rather, Petitioner urges that it should not be interpreted to encompass Petitioner's activities. The scope of this Court's review of a decision of the DCA certified to be of great public interest extends to the "decision" of the DCA, rather than the question on which it passed. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d. 610 (Fla. 1976). Thus, it is entirely proper for this Court to consider whether the DCA's decision should be reversed, and the trial court's decision be reinstated, based upon the fact that the DCA misconstrued the scope of Section 501.204(1). It is noted that Petitioner did indeed offer up this legal position to the DCA. The DCA, for reasons which are entirely unknown, chose not to address this issue. In so doing, the DCA ignored the "Tipsy Coachman" Doctrine and the most basic rule of statutory construction, which is that the constitutionality of a statute should not be reached when the statute can be construed to be consistent with the United States Constitution. See Califano v. Yamaski, 99 S.Ct. 2545, 442 U.S. 682, 61 L.Ed.2d 176 (1979). Thus falls the last procedural artifice which respondent seeks to use to avoid the merits.

II. RESPONDENT'S SUBSTANTIVE ARGUMENTS AS TO THE MANNER IN WHICH SECTION 501.204(1) SHOULD BE INTERPRETED ARE NOT PERSUASIVE

Having disposed of Respondent's procedural hurdles, we turn to the merits. The parties seem to be in agreement as to the standards against which Section 501.204(1) should be interpreted. The parties differ on the manner in which this Court should apply those standards.

Apparently conceding that Petitioner's activities would not be considered against public policy or immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers absent the enactment of Section 849.09, Florida Statutes, Respondent argues that the public policy and morals of this State should be gleaned from the existence of Section 849.09. At the outset, it should be noted that Respondent's attempt to introduce for consideration the Florida electorate's rejection of casino gambling is nothing short of a red herring. The differences between casinos and government-operated lotteries need not be listed here. Rather, sufficeth to say that the same policy arguments do not apply - i.e. surely Respondent does not suggest that the Canadian Provincial lotteries are any more susceptible to infiltration by organized crime than would be the Florida lottery. The passing reference made in M&R Investments, Co. v. Hacker, 511 So.2d. 1099 (Fla. 5th DCA 1987) was made in the context of a collection action arising from a gambling debt to a casino, and the DCA strongly implied that it would consider the votes of the Florida electorate on that subject were it required

to get astride the "unruly horse" of public policy in order to decide that case.

Respondent concedes that it did not allege that Petitioner engages in any fraudulent conduct. Respondent likewise failed to allege that Petitioner's activities are actually deceptive. By the same token, Petitioner does not contend that activities which violate criminal statutes cannot be a per se violation of Section 501.204(1). Rather, this point is made to distinguish between those types of criminal violations which are also substantively deemed to be within the coverage of Section 501.204(1) and those which are not, given the standards which should be used for interpretation. Indeed, a distinction even exists within those activities which arguably fall within the coverage of Section 849.09. The State certainly has a legitimate interest in proscribing private lotteries, commonly called "numbers games," another activity which is commonly associated with organized crime. Doubtless, Section 501.204(1) would be an appropriate civil vehicle to deal with such conduct, in addition to the obvious availability of criminal enforcement. This rationale does not apply to the marketing of government-run lotteries, absent some showing that Petitioner's activities in marketing those lotteries are somehow injurious to consumers. Absent such a showing, which Respondent made no effort to make, then the only level upon which the present case can be decided is that of pure public policy and morality.

Contrary to Respondent's argument, Petitioner's contention that the Florida electorate has established a public policy which favors government-operated lotteries is supported both by law and logic. Respondent's contention that only the Florida legislature can declare public policy is absurd. The cases cited by Respondent do not support this proposition in that neither of them addressed the establishment of public policy in the present context. Both cases do, however, recognize that the establishment of public policy by the legislature is subject and subordinate to the Florida Constitution and "organic law." To suggest that the clear will expressed by the Florida electorate in enacting a constitutional amendment should be ignored if a previous enactment of the legislature might be interpreted differently smacks of a Socialist mentality which has never been embraced by this Court. Moreover, it is Respondent's position which has no basis in logic. Would any logical person contend that there is any reason for Respondent to seek to prevent the marketing of other government-operated lotteries in this State other than to preclude competition?

The Florida Lottery Commission was at least intellectually honest by admitting in its motion for leave to file an amicus curiae brief in this case that it has a direct financial stake in the outcome of this case. Perhaps the same intellectual honesty constrained the Commission to do no more than simply state in its brief that it adopts respondent's position.

In the final analysis, we return to Respondent's use of Section 501.204(1) as an artifice, the same as it attempted to use procedural artifice to prevent this Court from dealing with this issue on the merits, to discriminate against competition. Were this not the case, it is certainly logical to assume that Respondent would offer some showing that Petitioner's activities are somehow fraudulent, deceptive, or otherwise injurious to consumers. Respondent simply cannot do so, for to do so would call into question all of the policy and morality considerations which the Florida electorate resolved in favor of government-operated lotteries in their overwhelming approval of the Florida Lottery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITIONER'S REPLY BRIEF has been furnished to Nikki Ann Clark, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, George E. Adams, Esquire, 1417 E. Concord Street, Suite 101, Orlando, Florida 32803, Gene Coker, General Attorney, A.T. & T. Communications, Inc., 1200 Peachtree Street, N.E., Atlanta, Georgia 30357 and Louisa E. Hagrett, Department of the Lottery, Capitol Complex, Tallahassee, Florida by U.S. Regular Mail on this the 18th day of November, 1988.

DAVID L. FLEMING

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