IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,561

OCALA BREEDERS' SALES COMPANY, INC.,
Appellant,

v.

FLORIDA GAMING CENTERS, INC.
d/b/a/ OCALA JAI ALAI,
Appellee.

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT (DCA NO. 97-4783)

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ARGUMENT

I.

THE ISSUE OF THE CONSTITUTIONALITY OF SECTION 550.615(9) IS MOOT AND COMPLETE VACATUR IS THE PROPER REMEDY.

In its answer brief ("AB"), Jai Alai takes the three-pronged position that: (a) section 550.615(9), Florida Statutes (1997), has been "neither repealed nor replaced" (AB at 16) and therefore the question of its constitutionality is not moot (AB at 16-19); (b) even if section 550.615(9) is no longer a viable statute, any decision on the merits of its constitutionality should be preserved "as precedent for judging the similar effect of § 550.6308, [Florida Statutes (Supp. 1998),] which the parties are now litigating" (AB at 19-21, 1); and (c) even if this appeal is moot, dismissal of it would not require vacatur of the trial court's underlying declaratory judgment (AB at 21-23). Jai Alai is wrong on all counts.

A.

Jai Alai's position that the old statute and the new statute are now "parallel or alternative licensing schemes" (AB at 17), usable at the election of Breeders (AB at 21) is without support.[1] While repeal by implication may be disfavored, s*ee e.g.* 1A Sutherland Stat. Const. § 23.10, 353 (5th ed. 1993), it is nevertheless properly applied where an amendment or comprehensive revision covers the same subject, is clearly intended to revise it completely, and is complete by itself. *Id.* §§ 23.12, 23.13, at 363, 366. *See State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983), *receded from on other*

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[1] Jai Alai's argument that "Breeders' could toggle back and forth between parallel licensing mechanisms, § 550.615(9) and § 550.6308, and preserve indefinitely its special dispensation for off-track betting" (AB at 21) has no support in logic or law.

grounds, Daniels v. State, 587 So. 2d 460, 462 (Fla. 1991); *Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978); *Orange City Water Co. v. Town of Orange City*, 255 So. 2d 257, 259 (Fla. 1971); *DeBolt v. Department of H&R Servs.,* 427 So. 2d 221, 225 (Fla. 1st DCA 1983). That is the case here.

There are two categories of repeal by implication: "(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976), *citing Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). In each category "the intention of the legislature to repeal must be clear and manifest." *In re Glacier Bay*, 944 F.2d 577, 581 (9th Cir. 1991).

This case fits—indeed, exemplifies—both categories of implied repeal. Even though the Florida Legislature did not expressly repeal section 550.615(9), new section 550.6308 operates on exactly the same subject matter, relates to the same single license, and has effectively amended the criteria for obtaining that one license, as well as the criteria for selecting the recipient of the one license when it is sought by more than one applicant (see App. H to Initial Brief, comparing the language of the two statutes). These two statutes conflict irreconcilably. Each covers the whole subject matter of the issuance of the single license to conduct limited intertrack wagering at a thoroughbred horse sales facility. The latest version of the law controls. *See Dunmann*, 427 So. 2d at 168; *Oldham,* 361 So. 2d at 143; *DeBolt,* 427 So. 2d at 225.

The legislative intent is clear. The legislature's statement of public purpose in the first paragraph of section 550.6308 provides that because of the economic importance of the thoroughbred breeding industry to the state and its tourism and the importance of a permanent thoroughbred sales facility as a focal point for the activities of the industry, the issuance of a limited intertrack wagering license would ensure the continued viability and public interest in thoroughbred breeding in Florida (IB, App. D, H). That statement of legislative purpose clearly is a basis on which to conclude that the legislature intended to repeal the former statute and ensure that each aspect of the former statute was comprehensively reviewed and revised as needed (to take into consideration the striking of the prior statute by the trial court in this case). The new statute carefully includes some provisions that carry over from the previous statute, deletes some provisions, and amends or adds different provisions (IB, App. H). There can be no doubt that the legislature clearly evinced its intent to enact new section 550.6308 and replace and repeal the former statute, section 550.615(9),[2] on the very same subject matter.[3]

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[2] Indeed, as Jai Alai's brief shows, the Division of Pari-Mutuel Wagering, the agency charged with implementing the law, considers the new statute to be the operative one (*see, e.g.,* AB at 10-11; IB, App. E-10, attach).

[3] The frivolity of Jai Alai's position on this question is found in its argument that Breeders must have *wanted* both statutes to remain on the books, supported only by Jai Alai's rhetorical question as to why Breeders "did not ask the 1998 legislature simply to repeal § 550.615(9)" (AB at 17). As we will discuss further below, the legislature passed the bill, not Breeders.

B.

It is clear that Jai Alai's only stake in the opinions of the district court and trial court are their purported usefulness as support for its current arguments challenging the new statute. In light of the fact that Breeders' license under section 550.615(9) expired and Breeders has not sought a license under that statute (nor could it obtain one), there is no basis for those advisory opinions to stand, or for this Court to now render an advisory opinion on the constitutionality of a statute that has been superseded by a new statute on the same subject matter.

Jai Alai's brief reveals that it clearly understands that this issue is moot, and that its purpose for arguing so vigorously against the mootness of the constitutionality of former section 550.615(9), Florida Statutes (1997), is to enable it to attempt to use the lower courts' decisions as precedent in litigating the constitutionality of new section 550.6308, Florida Statutes (Supp. 1998) (*see* AB at 1, 11-12, 19-20). Jai Alai states that there is now ongoing litigation in the courts below regarding the constitutionality of section 550.6308 and claims that the decisions regarding section 550.615(9) can be used "as precedent for judging the similar effect of § 550.6308, which the parties are now litigating" (AB at 19). It frankly asks this Court to affirm the district court's advisory opinion so that Jai Alai can attempt to use it as precedent in the future. That is not an argument against mootness; indeed, it is a concession of it.

Since the decisions below cannot now be enforced or given effect and Breeders already has ceased operating under its license issued under the former statute, the

constitutionality of that former statute is academic.[4] The district court's opinion that the former statute was unconstitutional was, when made, advisory at best, and at worst, formulated to apply to the new statute, while purporting to address only the replaced statute under which Breeders no longer holds a license to conduct intertrack wagering.

The trial court's declaratory judgment order cannot be carried out. An issue is moot unless this Court can enter a judgment that "would affect the rights of the parties as they stand at the time the case is reviewed." *DeHoff v. Imeson*, 153 Fla. 553, 15 So. 2d 258, 259 (1943); *see also, Arbelaez v. Butterworth,* 24 Fla. L. Weekly 306 (Fla. June 24, 1999) (corrected opinion), finding that the funding and structure of the CCRC offices had been substantially modified by the State while the case was pending and that under the changed facts and circumstances there was no present case in controversy.

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[4] Even if this Court were to accept Jai Alai's strained argument that *the trial court's ruling* should not be vacated, that argument would not apply to the advisory opinion of *the district court*, issued twenty-nine days *after* Breeders obtained a license under the new statute. Surely Breeders is not responsible for the lapse of time from June 18, 1998, the date we filed our reply brief, until March 3, 1999, the date the district court issued its advisory opinion. In that interim period, Breeeders received its license under the new law, and began operating under that license on February 5, 1999. At that point mootness was definitively established and Breeders promptly advised the district court, which nonetheless reached out to issue its advisory opinion.

C.

Jai Alai also takes the unsupported and unsupportable position that *Breeders, itself,* amended the statute and then uses this obvious fiction as a segue into cases that hold that vacatur of the trial court's judgment is not appropriate when the appellant has entered into a settlement agreement that moots out the issue on appeal, citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). While Jai Alai argues that Breeders amended the statute *all alone* and thus *caused* the issue of the constitutionality to become moot, it cannot escape that it was the Florida Legislature Õ both houses Õ that amended the statute. Breeders was not capable of amending the statute and it can hardly be equated with those elected members of the state legislature. Indeed, the amendment creating section 550.6308 was *prompted by the decision of the trial court in this very case*, as stated by the Senate Staff Analysis and Economic Impact Statement in support of Senate Bill 440 (*see* App. E-4, attach at 6).

Indeed, even if Breeders urged the amendment of the statute, that fact would not bring this case under the umbrella of case law holding that vacatur of the underlying judgment was unnecessary where the parties had entered into a settlement. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 25.[5] This case does not present the

[5] This Court has not adopted some blanket rule that a voluntary action such as a settlement between the parties saves a trial court decision from vacatur based on mootness. *See Santa Rosa County v. Administration Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995) (finding mootness where settlement reached by parties, while disapproving the trial court's opinion to the extent of conflict with this Court's decision).

kinds of circumstances considered by the line of cases on which Jai Alai relies in arguing against vacatur of the trial court's judgment. Breeders has not settled this case, has not concluded the case pursuant to arbitration, and has not dismissed its appeal. Instead, the Florida Legislature, in response to the trial court's decision that one of its statutes was unconstitutional, enacted a statute that in effect has superseded the statute held unconstitutional by the trial court. The provisions of the supplanted statute can no longer meaningfully be examined on appeal.[6]

The vacatur rule set out in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961), is an equitable remedy based upon matters attributable to "happenstance." *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995). A refusal to order vacatur must be based upon a factual examination and finding that appellant created the situation resulting in mootness. *Id.; see also Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987) (rather than apply the rule automatically, the court should look to the policies behind *Munsingwear* and *Mechling* to see if they are implicated). In situations where the order under review will have no real continuing effect on the appellant, there would be no need to vacate the trial court's order. Here, however, the policy considerations require vacatur to prevent the attempted use of the opinions as precedent, where the issue became moot before a final judgment of the appellate court could issue.

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[6] This Court does not have jurisdiction to issue advisory opinions except as provided the Florida Constitution. *See Sarasota-Fruitville Drainage District v. Certain Lands*, 80 So. 2d 335, 336 (Fla. 1955); Art. V, § 3(b)(10) and Art. IV, § 1(c), Fla. Const.

Thus, the trial court's decision concerning the constitutionality of the now-replaced statute was rendered non-final by Breeders' timely appeal of that ruling, not by some extrajudicial action by Breeders. This appeal was litigated promptly and vigorously. The declaratory judgment of the trial court cannot be enforced now. Litigation of that judgment has become moot as a result of the legislative amendment and the issuance of a license to Breeders under the new statute, and the situation presented by this case cannot be equated with the "voluntary action" that would be equivalent to a settlement *See, e.g., Anderson v. Green*, 513 U.S. 557, 561 (1995) ("Unlike settlement…or a losing party's decision to forgo appeal, . . . California's loss of the federal approval necessary to implement its program was not voluntary.") (citations omitted).

Courts of this State repeatedly have dismissed appeals as moot where the passage of a new statute or rule or regulation changed the issues on appeal. *See DeHoff v. Imeson,* 153 Fla. 553, 15 So. 2d 258, 259 (1943); *Glisson v. Alachua County*, 558 So. 2d 1030, 1037 (Fla. 1st DCA 1990); *Department of Highway Safety & Motor Vehicles v. Heredia*, 520 So. 2d 61, 62 (Fla. 3d DCA 1988) (appellant rescinded its suspension of driver license during appeal of temporary injunction of suspension and then new statutes controlled many of the issues, thus creating a declaration of mootness for the appellant); *Curless v. County of Clay*, 395 So. 2d 255, 258 (Fla. 1st DCA 1981) ("nothing can be accomplished by ruling unconstitutional a statute or ordinance no longer in effect"); *Coursen v. City of South Daytona*, 127 So. 2d 905, 906 (Fla. 1st DCA 1961) (same).

II.

SECTION 550.615(9) IS CONSTITUTIONAL.

A.

Because we do not believe that Jai Alai has made any arguments in its answer brief we did not anticipate, we rely on our arguments in our initial brief that section 550.615(9) is not a special act and is constitutional.

We do, however, wish to correct and clarify one fact that Jai Alai repeatedly has stated with reference to the equal protection issue. It contends that the *only* public purpose served by the first version of section 550.615(9) was that money would be set aside for additional breeders' awards (*see, e.g.* AB at 13, 24), and contends that the elimination of this "public purpose" obliterated any other public purpose served by the statute.[7] That position does not comport with the public purpose recognized by the trial court and district court of appeal. Quoting the trial court, the district court said: "Based on the undisputed evidence, the trial court concluded that the statute was originally enacted 'to serve the public purpose of benefitting thoroughbred horse breeding sales and related economic activities.'" *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21, 27

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[7] Jai Alai refers to the 1990 act as a "special gambling dispensation to fund public interest 'breeders award'" (AB at 2). It glosses over or fails to appreciate that Breeders' *limited* intertrack wagering license under this statute is *only for thoroughbred horse racing*, while Jai Alai holds a license to conduct intertrack wagering on all kinds of pari-mutuel races and games, without restriction. And, Jai Alai conducts intertrack wagering on many, many days during which it does not run live performances (*see* AB at 35). Jai Alai's contention that Breeders engages in "otherwise illegal off-track betting" (AB at 24), fails to admit that *it also* conducts *unlimited* "off-track betting" when it runs simulcasts on days it is not conducting live performances. Thus, Breeders is *not* "Florida's only off-track gambling parlor" (*see* AB at 30). Moreover, Breeders conducts its operation from a facility at which there is a race track just a surely as Jai Alai conducts its operation from a fronton.

(Fla. 1st DCA 1999). Jai Alai's cribbed interpretation of the legislative purpose does not comport even with the lower courts' decisions on which it relies.

Moreover, the legislative purpose explicit in new section 550.6308 comports with the most logical reading of the legislative provisions here at issue:

> In recognition of the economic importance of the thoroughbred breeding industry to this state, its positive impact on tourism, and of the importance of a permanent thoroughbred sales facility as a key focal point for the activities of the industry, a limited license to conduct intertrack wagering is established to ensure the continued viability and public interest in thoroughbred breeding in Florida.

(IB, App.D, ¶ 1). That same legislative purpose is applicable to the former statute, 550.615(9). (*See also* 3R 413-14, 423).

One final word on this issue. While the district court and Jai Alai deride that there is a rational relationship between the requirement that the applicant hold a quarter horse permit and the above public purpose, those arguments seek to apply a logical relationship test, a test not required under an equal protection analysis. The rational relationship test—one extremely deferential to the legislative enactment—is that the enactment should not be overturned unless the result is "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). If there is a plausible link between the purpose of the law and the method selected to implement it, courts should uphold the law. *See Schwartz v. Kogan*, 132 F.3d 1387, 1391 (11th Cir. 1998) (considering Florida law). The fact that Jai Alai does not see a plausible link between the state's interest in promoting more quarter horse permits to encourage activity in that related field of the horse industry, and the

stated interest in thoroughbred breeding and sales and related economic activity, as a key focal point for the activities of the whole horse sales and racing industry, does not make the relationship irrational.

B.

Jai Alai contends, without citing to any support for the contention, that although Breeders unsuccessfully challenged standing in motion practice before the trial court, it somehow waived the argument because it did not "preserve" it in its cross-motion for summary judgment and at oral argument on that motion (AB at 33). Yet, it is well-established that the law does not require a party to "do a vain and useless thing." *Haimovitz v. Robb*, 130 Fla. 844, 849, 178 So. 827, 830 (Fla. 1937); *see Simpson v. State*, 418 So. 2d 984, 987 (Fla. 1982) (futility doctrine does not require motion for mistrial after timely objection is overruled). Breeders did not waive its objection on standing.

Jai Alai contends that it has standing to challenge subsections (b) and (e) because subsection (a) of the statute in question recognizes "competitive injury on Ocala Jai Alai's pari-mutuel business" (AB at 33) by its prohibition of conducting intertrack wagering when Jai Alai is conducting live performances (see IB, App. A). Yet, this argument supports our contention that Jai Alai can only challenge subsection (a)'s criteria for awarding the single license to any entity.

Jai Alai's basic contention in this declaratory judgment action is that it suffers competitive injury. Logically, then, the provisions of the remainder of section 550.615(9) can have no effect on its claim of standing to challenge subsection (a). If the licensing criteria under (a) are valid, the remaining subsections are irrelevant

to Jai Alai's competitive injury challenge. If the criteria under (a) survive the constitutional challenge, allowing an entity Õ any entity Õ to qualify under (a), it matters not to Jai Alai's competitive interest how that entity is chosen from among competing applicants, none of which is Jai Alai. There would still be competition. As the district court's decision below and Jai Alai's argument here demonstrate, however, it is only the combining and commingling of all of the subsections that give Jai Alai's argument facial plausibility to the district court, although it still does not withstand legal scrutiny.

There is nothing about severable subsections (b) and (e) that gives Jai Alai standing to contest the rights of hypothetical others or to claim rights under other statutes not challenged below.

CONCLUSION

For all of the reasons we have given here, and for all of the reasons given in our initial brief, we ask this Court to reverse the decision of the First District Court of Appeal as without jurisdiction because the issue is moot, or on finding that the statute is constitutional, and to remand the district court with directions to dismiss the appeal and declaratory judgment action as moot, or to enter summary judgment for Breeders, and to issue its order to the trial court accordingly to vacate the declaratory judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August __, 1999, I mailed a true and correct copy of the foregoing reply brief to counsel for Jai Alai: Robert P. Smith, James S. Alves, and Gabriel E. Nieto, Hopping Green Sams & Smith, P.A., 123 South Calhoun St., Tallahassee, FL 32314; and William P. Cagney, III, WILLIAM P. CAGNEY, III, P.A., 501 E. Atlantic Av., Delray, FL 33483; and to counsel for the State of Florida: Stephanie A. Daniel, Assistant Attorney General, Office of the Attorney General, PL-10, The Capitol, Tallahassee, FL 32399.

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