IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC05-2130

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Appellants,

v.

GULFSTREAM PARK RACING ASSOCIATION, INC.

Appellee.
_____/

APPELLEE'S AMENDED ANSWER BRIEF

On Appeal from the District Court of Appeal, First District

CYNTHIA S. TUNNICLIFF
Florida Bar Number: 134939
PETER M. DUNBAR
Florida Bar Number: 146594
PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.
215 South Monroe Street - 2nd Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126

TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES

CASE **PAGE**

CITATION OF AUTHORITIES continued

CASE **PAGE**

OTHER AUTHORITIES

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

STATEMENT OF THE CASE AND FACTS

Gulfstream Park Racing Association, Inc. ("Gulfstream") filed a Complaint in Broward County against Defendant, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("DBPR"), seeking a declaratory judgment (R: 1-16). The Complaint alleged that § 550.615(6), Fla. Stat., was an unconstitutional special law, violated constitutional guarantees to equal protection and was constitutionally vague. *Id.* Section 550.615 provides in material part as follows:

> (1) Any horserace permitholder licensed under this chapter which has conducted a full schedule of live racing may, at any time, receive broadcasts of horseraces and accept wagers on horseraces conducted by horserace permitholders licensed under this chapter at its facility.
>
> (2) Any track or fronton licensed under this chapter which in the preceding year conducted a full schedule of live racing is qualified to, at any time, receive broadcasts of any class of pari-mutuel race or game and accept wagers on such races or games conducted by any class of permitholders licensed under this chapter.
>
> (3) If a permitholder elects to broadcast its signal to any permitholder in this state, any permitholder that is eligible to conduct intertrack wagering under the provisions of ss. 550-.615-550.6345 is entitled to receive the broadcast and conduct intertrack wagering under this section; provided, however, that the host track may require a guest track within 25 miles of another permitholder to receive in any week at least 60 percent of the live races that the host track is making available on

> the days that the guest track is otherwise operating live races or games. A host track may require a guest track not operating live races or games and within 25 miles of another permitholder to accept within any week at least 60 percent of the live races that the host track is making available. A person may not restrain or attempt to retrain any permitholder that is otherwise authorized to conduct intertrack wagering from receiving the signal of any other permitholder or sending its signal to any permitholder.
>
> (6) Notwithstanding the provisions of subsection (3), in any area of the state where there are three or more horse race permitholders within 25 miles of each other, intertrack wagering between permitholders in said area of the state shall only be authorized under the following conditions: Any permitholder, other than a thoroughbred permitholder, may accept intertrack wagers on races or games conducted live by a permitholder of the same class or any harness permitholder located within such area and any harness permitholder may accept wagers on games conducted live by any jai alai permitholder located within its market area and from a jai alai permitholder located within the area specified in this subsection when no jai alai permitholder located within its market area is conducting live jai alai performances; any greyhound or jai alai permitholder may receive broadcasts of and accept wagers on any permitholder of the other class provided that a permitholder, other than the host track, of such other class is not operating a contemporaneous live performance within the market area.

DBPR filed a Motion to Dismiss or Transfer asserting only a Leon County venue privilege for state agencies (R: 17). On March 31, 2003, the Broward County Circuit Court entered an Order transferring the case to Leon County (R:

37).

On April 17, 2003, DBPR filed a Motion to Dismiss for Failure to Join Indispensable Parties, i.e., the other pari-mutuel interests in the effected area (R: 43). DBPR did not answer the Complaint until June 11, 2003, at which time it raised Gulfstream's alleged failure to exhaust administrative remedies as an affirmative defense and filed a Motion for Dismiss for Failure to Exhaust Administrative Remedies on September 5, 2003 (R: 36, 155).

Hartman-Tyner, Inc.; West Flagler Associates, Ltd.; The Aragon Group; Summersport Enterprises, LLP; and Florida Gaming Centers, Inc. (the "Intervenors") were allowed to intervene by Order dated August 29, 2003 (R: 142).

Plaintiffs and Intervenors both moved for summary judgment (R: 178, 328). The trial court, however, denied the Motions stating that resolution of the dispute required "a more thorough understanding of the circumstance" in that he could not determine on the record that there was no disputed issue of fact (R: 597).

The Motion to Dismiss for Failure to Exhaust Administrative Remedies was argued at the hearing on the Motions for Summary Judgment, but not ruled on by the Court (Transcript of Hearing held on October 30, 2004, p. 20, *et. seq.*). The matter went to final hearing on April 22, 2004.

Section 550.615 was enacted in 1996 to remove various restrictions on intertrack wagering and simulcasting (TR: 54). Simulcasting is the ability to wager at a Florida pari-mutuel facility on races from outside of Florida (TR: 52). Intertrack wagering is sending and receiving broadcasts of races being conducted at facilities within the State (TR: 68). Simulcasting began in the early 1980's, but was restricted to 20% of the live races (TR: 53). After 1996 the Florida facilities could receive an unlimited number of races from outside the State (TR: 54).

From 1996 until 2002, Gulfstream rebroadcast the races that it received from outside the State to other pari-mutuel facilities both within and outside its market area on the days it was not conducting live races (TR: 55). When Gulfstream entered into an agreement to sell all its races to Pompano and stopped re-broadcasting the out-of-state races to the other pari-mutuel facilities, the Division informed Gulfstream that it could not send its races to Pompano because of § 550.615(6), Fla. Stat., (TR: 56). During the period of time from 1996 until 2002, Gulfstream reported its rebroadcast to facilities in its market area to the Division and paid taxes on those races (TR: 58).

Section 550.615(6) describes only the 25-mile area in south Florida where Gulfstream is located (TR: 70). With the enactment of § 550.615(6), the thoroughbred permitholders in that 25-mile area, including Gulfstream, are the

only pari-mutuel facilities that cannot receive races from other facilities or sell their races to other facilities (TR: 71, 72).

Doug Donn, the President of Gulfstream, has been involved in the legislative process for a number of years, including the legislative session that enacted § 550.615 (TR: 69). Mr. Donn testified that the phrase "any area of the state where there are three or more horse race permitholders within 25 miles of each other" is used by the Legislature in pari-mutuel statutes to describe the Dade-Broward market area (TR: 71). It was used in prior legislation pertaining to the allocation of race dates and its use in § 550.615(6), Fla. Stat., was "targeted to Dade-Broward." *Id.*

Tampa Bay Downs and Gulfstream have identical permits to operate thoroughbred horse races (TR: 60, 61). Tampa Bay Downs is subject to all the same regulatory statutes as Gulfstream except for § 550.615 and therefore can send its races to the jai alai and dog tracks in its market area whereas Gulfstream is prohibited from doing so (TR: 78, 79). Indeed, Tampa Bay Downs sent its signal to Hollywood Greyhound Track which is within Gulfstream's market area (TR: 60).

Dr. Richard Thalheimer has a Ph.D. in economics, teaches economics at the university level, and estimated tax revenues for the state of Kentucky for nine

years (TR: 150-154). Dr. Thalheimer specializes in the economics of the pari-mutuel industry and has consulted on such issues in a number of states and foreign countries (TR: 150; 153).

Dr. Thalheimer testified that there would be approximately a three million dollar ($3,000,000) increase in state tax revenues if there were unrestricted simulcasting in the Dade-Broward pari-mutuel market (TR: 158). In arriving at this conclusion, Dr. Thalheimer did a comprehensive analysis in which he determined the gross amount of handle (bets) being generated in the Dade-Broward market; the tax revenue generated by that handle; apportioned the tax revenue by whether it was matinee or evening; and then computed the increase in revenue and the net effect (TR: 158-168). Dr. Thalheimer based his analysis on Division of Pari Mutuel Wagering annual reports and actual data from Gulfstream and Pompano (TR: 162-163). Dr. Thalheimer's testimony was based on unrestricted intertrack wagering, but he also testified that if only Gulfstream engaged in intertrack wagering, it would have a net positive effect on state revenues (TR: 197).

Mr. Lou Cross, an expert cartographer, testified that because of the mileage restrictions in § 550.054(2)[1], the only portion of the state where a thoroughbred track could be located is in the lower Florida Keys and that when one pari-mutuel facility was located there, then even that location would be unavailable (TR: 35, 36). Mr. Cross also testified that the only location where there are three or more horse tracks within 25 miles of one another is in an area in Palm Beach County, Broward County and Dade County (TR: 36). That area is not duplicated anywhere else in the State (TR: 38).

Quarter horse permits, however, are not subject to the mileage restrictions contained in § 550.054, Fla. Stat. Mr. Donn, who has been involved in the pari-mutuel industry since 1969 and President and CEO of Gulfstream since 1978, testified regarding the factual basis for the assertion that the area described n § 550.615(6) cannot be replicated anywhere in the State (TR: 51; 63, *et. seq.*). Mr. Donn's testimony was uncontradicted. He testified that Gulfstream, Pompano,

[1]Section 550.054(2) provides: "In addition, an application may not be considered, nor may a permit be issued by the division or be voted upon in any county, to conduct horseraces, harness horse races, or dograces at a location within 100 miles of an existing pari-mutuel facility, or for jai alai within 50 miles of an existing pari-mutuel facility; this distance shall be measured on a straight line from the nearest property line of one pari-mutuel facility to the nearest property line of the other facility."

Ocala Breeders, and Tampa Downs all have quarter horse permits, but none of them conduct quarter horse races (TR: 63). Quarter horse races do not attract enough people to make them successful. *Id.* Even with an existing facility, such as Gulfstream where there are only operational costs, quarter horse racing is not successful (TR: 64). The last quarter horse race in Florida was conducted over five (5) years ago. *Id.*

While a pari-mutuel facility could be placed in Key West, it could not replicate the area described in § 550.615(6). Mr. Donn testified that Key West would not support three horse race tracks (TR: 65). It does not have the available land or sufficient population to support those facilities and it would be cost prohibitive. *Id.* Moreover, there was a greyhound track in Key West which went out of business because of the lack of attendance (TR: 65-66).

The trial court entered its Final Declaratory Judgment on July 26, 2004 (TR: 749). The Court found that "there was at the time of enactment, during the entire time since enactment and is now precisely 'one area of the state where there are three or more horserace permitholders within 25 miles of each other' and that is the area that includes Gulfstream, Calder, Pompano Park and Hialeah." The trial judge dismissed Appellant's argument about two areas of the state as follows:

> The intervenors suggest that there were 2 areas of the state with 3 or more horserace permitholders at the

> time of the enactment. What they actually proved is that there was at the time of enactment one area of the state with 4 horserace permitholders within 25 miles of each other. By wobbling the circle it is possible to include three at a time. This fact of geometry makes section 550.615(6) no less special or local within the meaning of Article III Section 10.

The Court continued that "neither party offered any legislative history to explain some public purpose served by limiting the intertrack wager authorization with the 25 mile border. The most plausible explanation in the testimony was that there was no public policy that led to the 25 mile intertrack border. The restrictions against intertrack wagering at Gulfstream were simply what Gulfstream was required to give up for various other benefits." The Court concluded that "[t]his sort of local interest horse trading is specifically prohibited by Article III, Section 10" and that the "classification created by section 550.615(6) was constitutionally closed at the time of its enactment and remains so."

On appeal from that judgment, the District Court of Appeal recognized the mixed question of fact and law presented to the trial court: "As a general principle, a decision on the constitutionality of a statute is a question of law and is therefore reviewable de novo. In this case, however, the Final Judgment has both factual and legal components. Whether the statute could be applied to permitholders in other areas of the state is, at least in part, an issue of fact. We accept the trial

court's finding of fact and apply the de novo standard of review only to the legal conclusion drawn from those facts" (citations omitted).

The trial court found as a matter of fact that there was only one area of the state described in § 550.615(6). Indeed, the Court held:

> The plaintiff presented testimony sufficient to establish and I now find, that there was at the time of enactment, during the entire time since the enactment and is now precisely one "area of the state where there are three or more horse race permit holders within 25 miles of each other."
>
> * * *
>
> The preponderance of the evidence and Florida legislative scheme supports the conclusion that the classification created by Section 550.615(6) was constitutionally closed at the time of its enactment and remains so.

The trial court also found, based upon the evidence, that the only purpose of the statute was "to carve out the Dade-Broward market area as it existed when the statute was enacted.

The First District accepted these findings and also concluded, as did the trial court, that § 550.615(6), Fla. Stat., is a special law because "[t]he statute prohibits thoroughbred permit holders from engaging in intertrack wagering in any area of the state where there are three or more horse race permit holders within twenty-five

miles of each other.' These conditions exist only in the area where Gulfstream is located and they will never exist in other parts of the state in the future."

The District Court concluded, after analyzing the case law, "that the question is not whether it is imaginable or theoretically possible that the law might be applied to others, but whether it is reasonable to expect that it will." The Court held that the evidence below demonstrated that there is no reasonable possibility that section 550.615(6) will be applied to another area of the state. The Court rejected the hypotheticals raised by Appellants as contrived situations which demonstrated that there is no real potential for § 550.615(6) to apply to other areas of the state.

The District Court also held that the statute cannot be upheld as a general law because the classification it makes bears no reasonable relation to the subject regulated. Again, citing the evidence before the trial court, the District Court held that "no legitimate state interest is promoted prohibiting thoroughbred permit holders in one limited area of the state from engaging in intertrack wagering."

STANDARD OF REVIEW

The District Court of Appeal correctly stated the standard of review as follows:

> As a general principle, a decision on the constitutionality of a statute is a question of law and is

> therefore reviewed *de novo*. See In re Estate of Caldwell, 247 So. 2d 1 (Fla. 1971); Ocala Breeders' Sales Co., Inc. v. Florida Gaming Ctrs., Inc., 731 So. 2d 21 (Fla. 1st DCA 1999), aff'd, 793 So. 2d 899 (Fla. 2001). In this case, however, the final judgment has both factual and legal components. Whether the statute could be applied to permit holders in other areas of the state is, at least in part, an issue of fact. We accept the trial court's findings of fact and apply the *de novo* standard of review only to the legal conclusion drawn from the facts.

Similarly, this Court should accept the trial court's finding of fact and review de novo only the legal conclusion drawn from those facts.

SUMMARY OF ARGUMENT

The circuit court and District Court of Appeal correctly held that § 550.615(6), Fla. Stat., is an unconstitutional special law. A general law may apply to a specific geographic location if it is reasonably related to the purpose of the statute. The purpose of § 550.615(6) is the regulation of intertrack wagering between jai alai, greyhound and harness permitholders, but is described as an area of the state "where there are three or more horse race permitholders within 25 miles of each other." There is no reasonable relationship between the subject matter of the statue and the description of the area. Moreover, the uncontroverted evidence is that the statute applies only to one area of the state and will never apply to any other area. As such, it is an unconstitutional special act.

The doctrine of exhaustion of administrative remedies was not timely raised and, in any event, is inapplicable to this case.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT § 550.615(6) IS AN UNCONSTITUTIONAL SPECIAL LAW.

Article III, Section 10 of the Constitution of the State of Florida prohibits "special laws" unless a "notice of intention to seek enactment thereof has been published in the manner provided by general law" or the law "is conditioned to be effective only upon approval by vote of the electors of the area affected. "Special law" is defined as a "local law" in Article X, Section 12(g). Section 550.615(6) was enacted as a general law.

A local law is "a statute relating to particular subdivisions or portions of the state, or to particular places of classified locality." See *Carter v. Norman*, 38 So. 2d 30 (Fla. 1948). A "special law" is a statute relating to particular persons or things or other particular subjects of a class. *Id.* A special law is not converted into a general law by the Legislature treating it and passing it as a general law. "[E]ven though a bill is introduced and treated by the Legislature as a general law, if the bill in truth and in fact is clearly operative as a local or special act and the court can so determine from its obvious purpose or legal effect as gathered from its language or its context, this court will so regard it and deal with it as a local or

special act in passing on its validity, regardless of the guise in which it may have been framed and regardless of whether the particular county or locality intended to be affected by it is in terms named or identified in the act or not." *Dept. of Bus. Reg. v. Classic Mile, Inc.*, 541 So. 2d 1155 (Fla. 1989) [citing *Anderson v. Board of Public Instruction*, 136 So. 334 (Fla. 1931)].

A general law may apply to a specific geographic area if the classification of the area is reasonably related to the purpose of the statute. *State, Dept. of Nat. Resources v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA 1992). In order for a general law which employs a classification scheme to be valid the factors used to establish the classification must have a rational relationship to the primary purpose of the statute. *Classic Mile, Inc., supra*; *City of Miami v. Magrath*, 824 So. 2d 143 (Fla. 2002). "A statute is invalid if 'the descriptive technique is employed merely for identification rather than classification'," *Classic Mile*, 541 So. 2d at 1159 (citing *West Flagler Kennel Club, Inc. v. Florida State Racing Comm.*, 153 So. 2d 5 (Fla. 1963). In *West Flagler*, the court held a statute invalid as an unconstitutionally enacted special law because the classification was based on the time of issuance and usage of a permit and the purpose of the statute was to provide for harness racing in Broward County.

In *Classic Mile*, the Supreme Court struck down a statute authorizing

simulcast horse racing and pari-mutuel wagering thereon because there was no reasonable relationship between the statutory classification scheme and the subject of the statute. The classification there was also based on time of issuance and usage of a permit. The court held that the purported classification scheme was merely descriptive of a particular county. Similarly, in *Magrath*, the court struck down a law which permitted municipalities with a certain population to enact a parking facility tax. In invalidating the statute, the court held that classifications based on population must be reasonably related to the purpose of the statute.

The area described in § 550.615(6) is an area of the state "where there are three or more horse race permitholders within 25 miles of each other." The purpose of the statutory subsection appears to be the regulation of intertrack wagers between jai alai, greyhound and harness permitholders. It specifically excludes thoroughbred permitholders from its application, but nonetheless uses horse race permitholders as the basis for describing the area in which the statute is to operate.

There is no reasonable relationship between the subject matter of the statute – the regulation of intertrack wagering among certain permitholders – and the description of the area of the state in which the regulation is to apply – an area where there are three or more horse race permitholders within 25 miles of each

other. It is undisputed that the only area of the state to which § 550.615(6) applies is an area in Dade County and Broward County. That is the only area of the state which contains three or more horse race permitholders within 25 miles of each other. The statute uses an area which contains "three or more horse race permitholders" simply as a technique to describe the area in Dade County and Broward County to which the statutory regulatory scheme is to apply. The identification of the area, however, has no relationship to the purpose of the statute which is the regulation of intertrack wagers for greyhound, jai alai, and harness permitholders.

The District Court stated that it was "unable to uphold the statute as a general law of limited applicability because the classification it makes bears no reasonable relation to the subject regulated," citing *McGrath, supra*; *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879, 881 (Fla. 1983); and *Carter v. Norman, supra*. The District Court continued by citing the evidence in the trial court as showing that no legitimate state interest is promoted by prohibiting thoroughbred permitholders in one limited area of the state from engaging in intertrack wagering. This is true whether or not any credit is given to the testimony of Dr. Thalheimer. The issue here is not whether Dr. Thalheimer's evidence is given any weight. The testimony, which is challenged by Appellants,

was based on unrestricted intertrack wagering. Dr. Thalheimer also testified that if Gulfstream were the only thoroughbred facility to take advantage of the lifting of the statutory restriction, it would still have a net positive effect on state revenues (TR: 197). This testimony was uncontradicted. The District Court pointed out that the trial court noted that the parties had failed to explain the basis for the statute's classification and the parties were unable to offer any reasonable basis for the classification when questioned at oral argument before the District Court.

In determining if a reasonable relationship exists between the purpose of the statute and the classification to which it applies, one of the factors which is determinative is that "the classification is potentially open to other tracks." *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879 (Fla. 1983). As the District Court correctly held, the law imposes a "reasonable" standard on the courts determination of whether an area of the state can be replicated. *See City of Coral Gables v. Crandon*, 25 So. 2d 1 (Fla. 1946). Appellants cite *Sanford-Orlando Kennel Club* for their erroneous contention that the District Court Opinion here deviates from earlier special act cases. *Sanford-Orlando Kennel Club* was addressing a statute that provided for the conversion of a harness track permit to a dog racing permit based upon certain income and tax revenue levels. The Court there quite correctly found that the class was open – others could potentially meet

the revenue levels – and that the classification was reasonably related to the purpose of the statute. Such is not the case here.

Summersport Enterprises, Ltd. v. Pari-Mutuel Commission, 493 So. 2d 1085 (Fla. 1st DCA 1986), *rev. den.*, 501 So. 2d 1283 (Fla. 1986), also offers little comfort to Appellants The provision of the statute at issue in that case was not the allowance of the conversion from quarter horse permit to jai alai, but rather the provision which did not allow the jai alai fronton to conduct matinee performances unless the permittee under the permit as it existed prior to the conversion had conducted matinees. The Court upheld the provision against a special act claim stating that it applied to any quarter horse permitholder that converted to a jai alai permit. The identified area contained in § 550.615(6), Fla. Stat. can never be reasonably duplicated anywhere in the state. It only identifies a particular area in Dade County and Broward County where there are "three or more horse race permitholders within 25 miles of each other" and certain harness, jai alai, and greyhound tracks.

Florida law prohibits permits to be issued within certain mileage parameters so that there can never be another area of the state which replicates the area in Dade and Broward Counties to which subsection (6) applies. Section 550.054, Fla. Stat., provides in part:

> In addition, an application may not be considered, nor may a permit be issued by the division or be voted upon in any county, to conduct horse races, harness horse races, or dog races at a location within 100 miles of an existing pari-mutuel facility, or for jai alai within 50 miles of an existing pari-mutuel facility; this distance shall be measured on a straight line from the nearest property line of one pari-mutuel facility to the nearest property line of the other facility.

The Defendant admits that currently the only area of the State to which § 550.615(6) applies is located in Dade and Broward Counties where the Plaintiff is located (Plaintiff's Exhibit 2, ¶ 4).

Mr. Cross testified that due to the mileage restriction in § 550.054(2), Fla. Stat., the only location in the State where a new pari-mutuel facility could be located is Key West, Florida (TR: 36). However, when one facility of any kind is located in Key West, then no other facility could be located there. *Id.* This testimony was accepted by the trial court in arriving at its conclusion that there was at the time of the enactment and now precisely one area of the state which meets the statutory description. Indeed, the District Court relied on this evidence stating:

> The evidence presented in this case plainly shows that there is no reasonable possibility that section 550.615(6) will be applied in another area of the state. Someone would have to obtain a thoroughbred permit in Key West, which would then be subject to the prohibition against intertrack wagering in the statute only if two other stand-alone quarter horse permits were issued in Key West, and then only if all three horse racing tracks

> were located within twenty-five miles of each other. Alternatively, the Department would have to issue a stand-alone quarter horse permit in a twenty-five mile area that includes an existing thoroughbred permit holder and at least one other horse racing permit holder.

Although quarter horse permits are not subject to the mileage restricting, Mr. Donn's uncontradicted testimony was that three or more quarter horse permits could not be located within a 25-mile area. First, quarter horse racing does not attract enough people to make it successful. Second, the only location where three or more pari-mutuel facilities could be located is in Key West and it does not have sufficient land or population to support such facilities. Similarly, this testimony supported the trial court decision and was quoted extensively in the District Court Opinion.

The area described in § 550.615(6), Fla. Stat., is an area in Dade and Broward Counties which has three horse race permits, harness racing, jai alai and greyhound racing. That factual situation cannot be reasonably duplicated anywhere in the state. There is no other harness track in the State and with the mileage restrictions, there never will be another harness track (TR: 67). The evidence overwhelmingly demonstrates that the description in § 550.615(6) intentionally and specifically targeted the area of Dade and Broward Counties for unique regulation of intertrack wagering which is not applicable in any other area

of the State. Moreover, the uncontroverted evidence demonstrates that it is not reasonable to assume that the area will be replicated anywhere else in the State.

Section 550.615(6) is an unconstitutional special act because the operative phrase is descriptive only and not reasonably related to the purpose of the statute which is the regulation of intertrack wagering. Furthermore, the statute refers to only one area of the State and will never apply to any other geographic area.

POINT II

THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT APPLICABLE TO THE INSTANT CASE.

A. ISSUE WAS NOT PROPERTY RAISED.

Rule 1.140(h), Florida Administrative Code, provides that:

> (1) A party waives all defenses and objections that the party does not present either by motion under subdivision (b) (e) or (f) of this rule or, if the party has made no motion, in a responsive pleading . . .

In this case, the Department filed a Motion to Dismiss or Transfer Venue when the case was still pending in Broward County. That is a Rule 1.140(b) motion. This Motion did not contain as grounds for a motion to dismiss, failure to exhaust administrative remedies. The commentary under the rule specifically states that "All defenses and objections, whether provided for by that rule or by any of the other rules or by statute are waived." The defense or objection was therefore waived under the clear language of the rule. Moreover, it was not addressed by the District Court of Appeal and is, therefore, not properly before this Court.

B. FACIAL CONSTITUTIONAL CHALLENGE CAN BE BROUGHT IN CIRCUIT COURT.

It has been clear since *Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1983), that if a statute being implemented by an agency is claimed to be facially unconstitutional, circuit courts may entertain declaratory action on the statute's validity. The instant case is a facial challenge to the constitutionality of § 550.615(6).

In *Florida Public Employees v. Department of Children & Families*, 745 So. 2d 487 (Fla. 1st DCA 1999), this Court held: "In accordance with Key Haven reasoning, the appellants were entitled to present their constitutional question in a declaratory judgment action in circuit court despite having initiated and not completed the administrative process."

The counts of the Complaint which were litigated clearly involve the facial constitutionality of § 550.615, Fla. Stat., *i.e.*, whether it was an unconstitutional special law, violated constitutional guarantees of equal protection or was unconstitutionally vague.

Count III of the Complaint sought a declaratory judgment on the application of § 550.615 to the specific facts of this case. The count, however, was never

argued to or decided by the circuit court. Moreover, it clearly does not present an "as applied" argument which should have been presented in an administrative forum.

Even if Count III had presented an "as applied" constitutional argument, it would not be grounds to dismiss the facial constitutional arguments. See *Chrysler Corporation v. Florida Department of Highway Safety & Motor Vehicles*, 720 So. 2d 563 (Fla. 1st DCA 1998). In *Chrysler Corporation*, Chrysler sought an adjudication in circuit court of both a facial and an "as applied" constitutional challenge to a statute while there was a pending administrative proceeding. This Court held that the facial challenges should be resolved in circuit court and the "as applied" constitutional challenges should be dismissed. In the instant case the Court relied on the three counts which raised facial challenges and did not address Count III of the Complaint. Its failure to dismiss the Complaint under these facts is not reversible error.

CONCLUSION

For the foregoing reasons, the decision of the District Court of Appeal should be affirmed.

Respectfully submitted,

CYNTHIA S. TUNNICLIFF
Florida Bar Number: 134939
PETER M. DUNBAR
Florida Bar Number: 146594
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street - Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to JOSEPH M. HELTON, JR., ESQUIRE, Chief Attorney for Pari-Mutuel Wagering, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-2202; BRUCE D. GREEN, ESQUIRE, 1313 South Andrews Avenue, Fort Lauderdale, Florida 33316; WILBUR E. BREWTON, ESQUIRE, of Roetzel & Andress, L.P.A., 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; and HAROLD F. X. PURNELL, ESQUIRE, of Rutledge, Ecenia, Purnell & Hoffman, P.A., Post Office Box 551, Tallahassee, Florida 32302-0551, this _____ day of February, 2006.

_____

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in this Answer Brief is Times New Roman 14-point.

_____

G:\Barbaras\Cynthia\Gulfstream\2130AnswerBrief02-06-06.wpd