IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING, Case No. SC05-2130
DCA Case No. 1D04-4094

And

HARTMAN-TYNER, INC.; WEST
FLAGLER ASSOCIATES, LTD.;
THE ARAGON GROUP, INC.,
SUMMERSPORT ENTERPRISES,
LLLP; and FLORIDA GAMING
CENTERS, INC., Case No. SC05-2131
DCA Case No. 1D04-3819

APPELLANTS,

vs. LT Case No. 2002 CA 2971

GULFSTREAM PARK RACING
ASSOCIATION, INC.

APPELLEE.
_____/

APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF THE APPELLANT STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION DIVISION OF PARI-MUTUEL WAGERING

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellant, the State of Florida, Department of Business and Professional Regulation, is referred to in this brief as "the Division."

Appellee, Gulfstream Park Racing Association, Inc., is referred to in this brief as “Appellee.”

Appellants/Intervenors, Hartman-Tyner, Inc., West Flagler Associates LTD., The Aragon Group, Inc., Summersport Enterprises, LLLP, and Florida Gaming Centers, Inc., the Appellants in DCA Case No. 1D04-3819, are referred to collectively as “Intervenors.”

References to the record are cited as (R. __).

References to trial exhibits are cited as (Pl./Def. __ Ex. __).

References to the transcript of the trial are cited as (Trans. __).

All references to the Florida Statutes refer to Florida Statutes (2003), unless otherwise noted.

STATEMENT OF CASE AND FACTS

On April 8, 2002, the Division filed an Administrative Complaint against Appellee. The Administrative Complaint alleged that Appellee violated section 550.615(6), Florida Statutes by participating in an unauthorized exchange of intertrack wagering signals with PPI, Inc. (Pompano). [Def. Ex. 1, D-1]

On April 29, 2002, Appellee filed a motion for an extension to file its answer to the Administrative Complaint. In its motion, Appellee indicated that an extension would be appropriate under the Florida Supreme Court's decision in *Key Haven Associated Enterprises, Inc. vs. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982). [Tr. Def. Ex. 1, D-2]

On December 9, 2002, Appellee filed a Complaint for Declaratory and Injunctive relief in the Circuit Court of the Seventeenth Judicial District in and for Broward County, Florida. [R. 1-16] The Complaint sought relief based upon four specific counts. Count I claimed that Section 550.615(6), Florida Statutes, was an unconstitutional special law in violation of Article III, Section 10 of the Florida Constitution. [R. 4-6] Count II claimed that Section 550.615(6), Florida Statutes, violated Appellee's Equal Protection rights. [R. 6-8] Count III presented a Statutory Construction claim in

which Appellee sought a declaration favoring its interpretation of Section 550.615(6), Florida Statutes, that Appellee claimed authorized the exchange of intertrack wagering signals between itself and Pompano. [R. 8-9] Count IV presented a claim that Section 550.615(6), Florida Statutes is unconstitutionally vague. [R. 9-10]

Section 550.615(6), Florida Statutes, provides:

> (6) Notwithstanding the provisions of subsection (3), in any area of the state where there are three or more horserace 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.

In response to the Complaint the Department filed a Motion to Dismiss or Transfer for Venue. [R. 17-19] The motion was granted by the Circuit Court and this matter was transferred to the Second Judicial Circuit, in and for Leon County, Florida. [R. 37]

The Division filed its answer to Appellee's Complaint on June 11, 2003. [R. 86-92] The Division's answer contained an affirmative defense alleging that Appellee failed to exhaust administrative remedies. [R. 91]

Intervenors filed their Motion to Intervene on July 1, 2003. [R. 100-116] Appellee filed its memorandum in opposition to the motion to intervene. [R. 126-132] In their Memorandum of Law in Support of Motion to Intervene, the Intervenors argued that the effect of intertrack wagering under Section 550.615(6), Florida Statutes, upon their pari-mutuel permits that are located within Broward and Dade Counties and the reverse severability clause for Chapter 96-364, Laws of Florida, which is now codified in Section 550.71, Florida Statutes, would be of sufficient impact upon them as to authorize their intervention. [R. 133-138] The Motion to Intervene was granted by an Order entered on August 29, 2003. [R. 142]

Appellee filed its Motion for Summary Judgment on August 27, 2003, which it amended on October 8, 2003. [R. 139-141 and 178-242] The Division filed a Motion to Dismiss for Failure to Exhaust Administrative Remedies on September 5, 2003. [R. 155-163] Intervenors filed their Motion for Summary Judgment on October 27, 2003. [R. 328-359] These motions were heard by the trial court on October 30, 2003, and denied by the court's Order dated January 9, 2004. [R. 597-602]

At trial, Appellee presented the testimony of Mr. Louis Cross, III, an expert in cartography, Douglas Donn, Appellee's corporate representative, and Dr. Richard Thalheimer, an expert economist, along with five exhibits.

Mr. Cross testified regarding the geographic locations of pari-mutuel wagering permitholders in Florida. During his testimony, Appellee offered its Exhibit 4. This exhibit was used in conjunction with the overall testimony presented regarding mileage areas referenced in Sections 550.054 and 550.615(6), Florida Statutes. [Trans. 31-38]

Mr. Cross' testimony during direct and cross examination showed that there were two areas of the state with three horse race permitholders located within 25 miles of each other in 1996. [Trans. 36-37; 44-45] During cross-examination, Mr. Cross also demonstrated that removing Jefferson County Kennel Club from his maps would create an area where there would be no pari-mutuel permitholders within the 100 mile buffer provided by Section 550.054, Florida Statutes. [Trans. 39-40]

In Mr. Donn's testimony Appellee asserted that its interpretation of Section 550.615(6), Florida Statutes, was the correct interpretation authorizing the exchange of intertrack signals with Pompano. [Trans. 71, 84, 104, 107-8] Mr. Donn testified regarding the effect of the Division's interpretation of the statute on intertrack wagering. [Trans. 71-2, 75-6, 80,

82-4, 103-4] Mr. Donn specifically stated that the last quarter horse meet attempted was five to seven years ago. [Trans. Page 64, Lines 22-24]

Appellee also presented the testimony of Dr. Richard Thalheimer, an expert economist, to support its contention that Section 550.615(6), Florida Statutes, had the effect of thwarting state revenues and those revenues would increase if the statute were declared unconstitutional. Dr. Thalheimer's projection was based upon the assumption that the two thoroughbred permitholders in the area would participate in unlimited simulcasting. [Trans. 185-186]. However, he admitted he made no inquiry as to whether Tropical Park or Calder would participate. [Trans. 187] Further, Mr. Dunn testified that he had no authorization to speak at trial on behalf of Calder Racetrack or Tropical Park. [Trans. 101, 138] Section 550.615(5), Florida Statutes, provides that "[n]o permitholder within the market area of a host track shall take an intertrack wager on the host track without the consent of the host track."

The Division presented a composite exhibit containing an a copy of a motion for an extension to respond to the Administrative Complaint filed by the Appellee.

On July 26, 2004, the trial court issued its Final Declaratory Judgment from which Appellee and Intervenors appealed. [R. 749-759] The Final Declaratory Judgment made no

mention of the testimony of either Dr. Thalheimer or Mr. Donn and concludes by finding that Section 550.615(6), Florida Statutes, does not violate the due process clauses of the Florida or United States Constitutions and that it is not void for vagueness. [R. 758]

On August 24, 2004, Intervenors filed their Notice of Appeal. [R. 760-722] The Division filed its Notice of Appeal in August 25, 2004. [R. 773-785]

On September 2, 2004, Appellee filed its Plaintiff's Notice of Cross Appeal. [R. 786-798]

On August 31, 2005 the District Court issued an opinion finding section 550.615(6) to be an unconstitutional special act. *State, Dep't of Bus. and Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616 (Fla. 1st DCA 2005).

On September 15, 2005 the Appellants and the Division filed Motions for Rehearing and Rehearing in Banc, which were denied on October 21, 2005.

On November 18, 2005 Appellants filed their Notice of Appeal and the Division on November 21, 2005 filed its Notice of Appeal for review in this Court.

STANDARD OF REVIEW

A trial court decision on the constitutionality of a statute is reviewed by the *de novo* standard, because it presents a pure issue of law. When a trial court has declared a statute unconstitutional, the reviewing court must begin the process of appellate review with a presumption that the statute is valid. *State, Dep't of Ins. v. Keys Title and Abstract Co.*, 741 So. 2d 599 (Fla. 1st DCA 1999).

SUMMARY OF THE ARGUMENT

The First District Court of Appeal erred in applying a reasonableness standard to Section 550.615(6), Florida Statutes, as though that section was created in 1996. The error appears be have been made because of a fundamental misunderstanding of the history of Section 550.615(6), Florida Statutes.

The statutes governing intertrack wagering in high concentration market areas serve to balance the interests of protecting all pari-mutuel wagering revenue streams. Promotion of the economic viability of pari-mutuel wagering venues is a valid state interest. *Ocala Kennel Club v. Rosenberg*, 725 F. Supp. 1205 (M.D. Fla. 1989). How to best balance competing interests in regulating legalized gambling is within the prerogative of the legislature. *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103 (2003).

Section 550.615(6), Florida Statutes, which contained the language describing the disputed area as any area of the state where three or more horserace permit holders are located within 25 miles of each other, was created in Chapter 92-348, Laws of Florida. At that time, consent from all permitholders in the 25 mile area was required in order to conduct intertrack wagering to protect the economic viability of those permitholders. The vast majority of the statutes creating the pari-mutuel wagering statutory scheme, including those regulating intertrack wagering

were sun set under provisions of Chapter 91-197, Laws of Florida.

Section 550.615(6), Florida Statutes, was amended by Chapter 96-364, Laws of Florida. The amendments allowed for some intertrack wagering in the area along with other changes, including those to allow for full card simulcast. Again the legislature struck a balance between opening the transmission of wagering signals with the protection of individual revenue streams from various tracks. Thus, the statute's history demonstrates that the there is a rational basis for the classification contained in the statute both at the time of its creation in 1992 and of its amendment in 1996.

The First District applied a reasonableness standard which has never before been applied in special act cases. The standard is whether the statute creates a class which is not possible to duplicate in the future. *Department of Bus. Regulation v. Classic Mile*, 541 So. 2d 1155, 1158 (Fla. 1989)

A reading of the provisions of Chapter 550, Florida Statutes, demonstrates that the area defined in Section 550.615(6), Florida Statutes, is capable of duplication. If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law. *Ocala Breeder's Sales Co., Inc. v. Florida Gaming Ctrs., Inc.*, 731 So. 2d 21 (Fla. 1st DCA 1999). Since the area

described in Section 550.615(6), Florida Statutes, can be duplicated, the statute is not an unconstitutional special act.

In a constitutional challenge to the validity of any statute, the trial court has an affirmative obligation to give the challenged statute a construction that will uphold the act if at all possible. *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981). In Count III of its Complaint, Appellee offered its own preferred construction of Section 550.615(6), Florida Statutes, which it contends authorizes intertrack wagering between itself and Pompano. The Court erred in ruling that Section 550.615(6), Florida Statutes, was an unconstitutional special act while still being offered an inconsistent theory giving a construction of the statute which the Appellee continued through trial to assert as correct. *Key Haven,* 427 So. 2d 153, provides that only a facial challenge to the constitutionality of a statute may proceed prior to the requirement that the complainant exhaust its administrative remedies. A challenge to an agency's interpretation of the statutes it governs is not exempt from the requirement that administrative remedies be exhausted. Therefore, the First District Court of Appeal should have reversed for failure of the Appellee to exhaust its administrative remedies.

ARGUMENT

I. The First District Court of Appeal Erred in Declaring Section 550.615(6), Florida Statutes, an Unconstitutionally Enacted Special Law.

A. The First District erred in finding Section 550.615(6), Florida Statutes, was an Unconstitutional Special Act because the phrase "any area of the state where there are three or more horserace permitholders within 25 miles of each other" was enacted in 1992, not 1996.

The history of Section 550.615(6), Florida Statutes, demonstrates that the First District Court of Appeal erred in determining that the statute was an unconstitutional special act and that there is a rationale basis supporting the statute. The First District's opinion in *State, Dep't of Bus. and Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616 (Fla. 1st DCA 2005), demonstrates a fundamental misunderstanding of the history of the statute.

The First District overlooked the fact that the operative phrase "any area of the state where there are three or more horserace permitholders within 25 miles of each other" was enacted during a special session in 1992, not 1996. Regardless of whether a reasonableness standard is correct, it must be applied to the legislation at the time it was passed. Otherwise a validly enacted general law could be overcome by events and lose its general status thus becoming a special act by virtue of changes in facts after the law is enacted. Indeed, the First District seems to have been of the impression that properly

enacted statutes can be overcome by events when it stated that quarterhorse racing is “a thing of the past” which is a clear present time evaluation of the facts presented at trial in 2004.

The area described in Section 550.615(6), Florida Statutes, was created in Chapter 92-348, Laws of Florida, which reenacted the operative provisions of the pari-mutuel statutes after the majority of the statutes had been repealed via sun set provisions contained in Chapter 91-197, Laws of Florida. Among the repealed provisions that were reenacted were those creating the intertrack wagering scheme. The 25-mile area was included in the original language of the statute and remained unchanged by the 1996 act. Prior to the enactment of Chapter 96-346, Laws of Florida, Section 550.615(6), Florida Statutes (1995), read as follows:

> (6) In <u>any area of the state where there are three or more horserace permitholders within 25 miles of each other</u>, no intertrack wager may be taken by any permitholder without the consent of all operating permitholders within 25 miles of each other. (Underline added.)

Evidence presented at trial showed that the requirement of obtaining consent from all operating permitholders within 25 miles of each other precluded intertrack wagering in the area. [Trans. 55, 109-110, 116]

While based upon an equal protection claim the United States Supreme Court’s holding in *Fitzgerald*, 539 U.S. 103,

regarding a balancing of interests is instructive as the policy discussions regarding classification in special act cases often involve equal protection claims . In recognizing that legislation often involves balancing of sometimes-conflicting interests, the Court held:

> The Iowa Supreme Court could not deny, however, that the Iowa law, like most laws, might predominantly serve one general objective, say, helping the racetracks, while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective as a whole. See *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S. Ct. 453, 66 L.Ed.2d 368 (1980)(STEVENS, J. concurring in judgment)(legislation if often the "product of multiple and somewhat inconsistent purposes that led to certain compromises.")
>
> *Id.* at 108.

In *Summersport Enters., Ltd. v. Pari-Mutuel Comm'n*, 493 So. 2d 493 (Fla. 1st DCA 1986), a case which also included an equal protection claim, this Court found the validity of classifications of pari-mutuel permitholders are further strengthened by the fact those laws regulate legalized gambling. In *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 37 So. 2d 692 (Fla. 1948), the Florida Supreme Court found:

> The state has become pecuniarily interested in racing
>
> because of the revenue from the pari-mutuel betting. Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished

> from those enterprises not affected with a public interest and those enterprises over which the exercise of police power is not so essential for the public welfare.

Id. at 694.

Section 550.615(6), Florida Statutes, which contained the language describing the disputed area as any area of the state where three or more horserace permit holders are located within 25 miles of each other, was created in Chapter 92-348, Laws of Florida. At that time, consent from all permitholders in the 25 mile area was required in order to conduct intertrack wagering to protect the economic viability of those permitholders. The vast majority of the statutes creating the pari-mutuel wagering statutory scheme, including those regulating intertrack wagering were sun set under provisions of Chapter 91-197, Laws of Florida.

There was also rational basis for the statute after the amendments to Section 550.615(6), Florida Statutes, in 1996. Prior to the amendments the language section 550.615(6), Florida Statutes (1995), clearly provided significant protection to tracks located within the affected area from losing business to other intertrack wagering conducted at other tracks located in their market area. The present version of section 550.615(6), Florida Statutes, provides a balance between the desire to allow

intertrack wagering in the area and the protection of individual market areas.

In *Ocala Kennel Club v. Rosenberg*, 725 F. Supp. 1205 (M.D. Fla. 1989), the court upheld a 100-mile statutory limitation for new permits for the protection of the revenue producing capacity and promotion of the economic viability of existing pari-mutuel wagering facilities as valid under the large umbrella of the state's interest in revenues generated by pari-mutuel operations. Therefore, the First District erred in substituting its judgment for that of the Legislature in relying on the Appellee's expert regarding the impact of unlimited intertrack wagering presented at trial in 2004 because there is clearly a rationale basis for the statute. Thus, the statute's history demonstrates that the there is a rational basis for the classification contained in the statute both at the time of its creation in 1992 and of its amendment in 1996.

Under *Fitzgerald*, 539 U.S. 103, balancing such legitimate objectives in pursuit of the overall goal of increasing revenue was within the prerogative of the legislature in 1992 and 1996. Further, both versions of Section 550.615(6), Florida Statutes were created by large pari-mutuel acts which addressed a multiplicity of subjects, Chapters 92-348 and 96-364, Laws of Florida, which again within the broad purview of the legislature in addressing legalized gambling. Thus the First District erred

in substituting its judgment for that of the legislature regarding the overall classification in Section 550.615(6), Florida Statutes.

In *Ocala Breeders' Sales Co. Inc. v. Fla. Gaming Ctrs.*, 731 So. 2d 25(Fla. 1st DCA 1999), the First District reiterated the rule that special laws are subject to procedural requirements that do not apply to general laws. Those procedural requirements would obviously relate to the time at which the statute was enacted. If a special act analysis of a statute is not based the time of its passage by the Legislature, then the reasonableness standard applied by the First District in this case could be applied in such a way as to invalidate a properly enacted general law after it has been overcome by other events regardless of whether later events may change again. In effect, a statute could move in and out of viability under the reasonableness rationale of the First District if it is not specifically analyzed as of the time it was enacted. Thus, the First District erred in its analysis of the time in which the location of three permit holders within twenty-five miles of each other was itself enacted.

While the conditions for an exchange of intertrack signals within the area was amended in Section 550.615(6), Florida Statutes, by Chapter 96-346, Laws of Florida, the description of the effective area of the state where there are "three or more

horserace permitholders within 25 miles of each other" was not changed by that act. The 1996 amendments to Section 550.615(6), Florida Statutes, were made in conjunction with the introduction of full card simulcast and furthered the interest of creating more revenue by introducing some intertrack wagering in an area where it had previously been impossible to obtain consent.

Section 550.334(4), Florida Statutes, exempts a issuance of a quarterhorse permit is not subject to the mileage restrictions contained in Section 550.054(2), Florida Statutes. There is no evidence in the record as to whether a quarterhorse permit was considered viable or not in 1992 when the phrase describing the area was enacted. Indeed, even taking the testimony of Mr. Donn, Gulfstream's General Manager, in a light most favorable to the Appellee, a court would be lead to the conclusion that Section 550.615(6), Florida Statutes, was not improperly enacted in 1992. Mr. Donn specifically stated that the last quarterhorse meet attempted was five to seven years ago. Thus, given that Mr. Donn's testimony was presented at the trial of this matter in 2004, the evidence in the record is that quarter horse racing was viable as recently as 1997, five years after the enactment of the critical description of the area in 1992 and, indeed, one year after 1996. Therefore, the First District's finding of fact that quarterhorse racing is a "thing of the past" is not supported by the evidence presented by the

Appellee at trial.

Given the fact that the area described in Section 550.615(6), Florida Statutes, has not changed since 1992 and there is no evidence that the description was invalid at the time it was enacted, the holding that Section 550.615(6), Florida Statutes, is an unconstitutional special act could not be based upon the procedure followed by the Legislature in 1992, which was the specific date of enactment of the phrase “three or more horserace permitholders within 25 miles of each other.”

For the foregoing reasons, there is rational basis for the classification of the area described in Section 550.615(6), Florida Statutes. Thus, thus the classification contained in Section 550.615(6), Florida Statutes, is not an unconstitutional special act.

B. The First District Court of Appeal Erred in Applying a Reasonableness Standard in its finding that Section 550.615(6), Florida Statutes, was an Unconstitutional Special Act.

The First District Court of Appeal erred when it applied a standard of reasonableness in determining whether Section 550.615(6), Florida Statutes, was enacted as a general law. However, in *Schrader v. Florida Keys Aqueduct Auth.*, 840 So. 2d 1050 (Fla. 2003), this Court stated that whether a law is special or general is a pure question of law, subject to *de novo* review.

The reasonableness standard recently enunciated by First District below is one that has never been adopted by any Florida court interpreting Article III, Section 10. Rather, Florida courts have consistently found a statute to be a special law only when there was no possibility of the statute applying to others. *See, e.g.*, *Classic Mile*, 541 So. 2d at 1158,("Section 550.355(2) is clearly a special law because it applies only to Marion County and there is no possibility that it will ever apply to any other county.); *State ex rel. Coleman v. York*, 190 So. 599, 601 (Fla. 1939) ("There is no possibility of any other county falling in the classification because it is anchored to one particular census."); *Martin Memorial Med. Ctr v. Tenet Healthsystem Hosps., Inc.*, 875 So. 2d 797, 802 (Fla. 1st DCA 2004) ("Although passed as a general law, by its express terms chapter 2003-289 creates an exemption that is available only to hospitals located in five counties, and there is no possibility of its applying to hospitals in any other counties."); *Alachua County v. Florida Petroleum Marketers Ass'n*, 553 So. 2d 327, 329 (Fla. 1st DCA 1989) ("Chapter 88-156 is clearly a special law because it affects only Alachua County and there is no possibility that it will ever affect or apply to any other county since no other county meets the statutory criteria nor can any other county meet it in the future.").

Had a reasonableness standard applied to other cases

regarding pari-mutuel statutes, a number of those cases would clearly have been decided differently.

In finding that it is irrelevant whether the legislation intentionally targeted a specific area, this Honorable Court stated as follows in *Department of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879, (Fla. 1983):

> It matters not at all when the legislation was wending its way through the house and senate that the members where aware that it would benefit Seminole.
>
> * * *
>
> Neither does it matter that, once a law was passed, Seminole was the only track to benefit from it. The controlling point is that even though this class did in fact apply to only one track, it is open and has the potential of applying to other tracks.

The classification in *Sanford-Orlando Kennel Club* was as limited, if not more, that the classification at issue here. The statute at issue in that case allowed for conversion of a ratified harness racing permit into a greyhound racing permit. In that case the trial court and the Fifth District Court of Appeal held that the statute would not in fact permit any other track to be converted. *Id.* at 881. Had a reasonableness standard applied, the result in *Sanford-Orlando Kennel Club* would surely be different.

In *Biscayne Kennel Club v. Florida State Racing Comm'n*, 165 So. 23d 762, 764 (Fla. 1964), this Honorable Court addressed

restrictions in a pari-mutuel wagering statute challenged as a special act when it held as follows:

> But plaintiffs insist that these restrictions, spelled out in this statute, are such that they serve to make the statute special and local because *when viewed in the light of present conditions* they make the future transfer of any other track practically impossible. They point out that the number of counties which have *presently* voted twice in favor of pari-mutuel betting on races is limited, and that most of these counties are eliminated as future locations for tracks moving their locations under Chapter 63-130 because of the other limitations of the act. But present conditions are not the criterion. It is the prospective application to future conditions that renders a classification constitutional if otherwise reasonable. (Underline added.)

The facts underlying this finding in *Biscayne Kennel Club, Inc.*, belie any contention that a standard of reasonableness can be found to apply to an evaluation of whether a general law is an improperly enacted special act. In that case the statute at issue allowed a transfer of an existing racing permit to allow the establishment of a harness racing permit in a county that had previously approved operation of a pari-mutuel race track, excluding those having more than one horse track permit or one with an average daily pari-mutuel pool of less than $20,000. If reasonableness were the standard under *Biscayne Kennel Club*, this Court would have reversed based upon the trial court's statements regarding of practical impossibility of a future transfer.

The area defined by Section 550.615(6), Florida Statutes, can be duplicated in other areas of the state. Whether a law is special or general depends in part on whether the class it creates is open. If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law as prohibited by Article III, Section 10 of the Florida Constitution. *Ocala Breeder's Sales*, 731 So. 2d at 25. A facial review of the statutes demonstrates that the area of the state where there are three or more horserace permitholders within 25 miles of each other could be created. Therefore, the trial court erred in ruling that Section 550.615(6), Florida Statutes, is an unconstitutional special act.

The First District and Circuit Court focused on the geographic restrictions and election requirements found in Section 550.054(2), Florida Statutes, to the exclusion of any analysis of other relevant provisions of Chapter 550, Florida Statutes, to determine what might happen in the future. To support its finding that the classification is not reasonably open ignores the exemption from mileage restrictions and election requirements for the issuance of a quarter horse permit by deeming quarterhorse racing a thing of the past.

The First District and Circuit Court orders also presume that once a pari-mutuel wagering permit has been issued, it

cannot be revoked for a violation of pari-mutuel statutes or rules. However, the Division has revoked a thoroughbred permit as recently as last year. *See, Hialeah Racing Ass'n, Inc. v. Department of Bus. and Prof'l Reg., Div. of Pari-Mutuel Wagering*, 907 So. 2d 1235 (Fla. 5th DCA 2005).

Quarter horse permits are within the definition of "horserace permitholder" provided by Section 550.002(15), Florida Statutes. Indeed, the trial court found, and Appellee has previously admitted in its Amended Motion for Summary Judgment, that mileage restrictions and election requirements contained in Section 550.054, Florida Statutes, do not apply to the issuance of permits to conduct quarterhorse racing. *See,* Section 550.334(4), Florida Statutes. Thus, there is really no dispute that an area of the state described in Section 550.615(6), Florida Statutes, could be created by the addition of two or three quarterhorse permits in other areas of the state. Indeed, the First District acknowledged the class is not closed *Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616 at 622.

Given the holdings in cases such as *Sanford-Orlando Kennel Club* and *Biscayne Kennel Club Inc.*, there was no reason upon appeal below to even consider a request for a remand to demonstrate the potential viability of a quarterhorse permit. However, the District Court of Appeal again made improper

findings of fact relying on the testimony of Mr. Donn. Those findings of fact cannot be refuted after the fact, due to its post-trial establishment of a new standard.

The First District's conclusion that the area described by Section 550.615(6), Florida Statutes, is closed also disregards the disciplinary authority conferred upon the Division in the enforcement of pari-mutuel statutes and rules. Pari-mutuel wagering permits are subject to strict regulation and can be revoked for violations of Chapter 550, Florida Statutes. Sections 550.0251(10) and 550.054(9)(b), Florida Statutes, provide that an existing permit may be revoked for violations of the pari-mutuel statutes and rules.

Evidence presented at trial showed that there is at least one area of the state where revocation of one existing permit would open an area free of geographic restrictions against the issuance of a pari-mutuel permit. The testimony of Mr. Cross, Appellee's cartography expert, demonstrated such an example where the removal of one pari-mutuel permit (Jefferson County Kennel Club) could open another area of the state for issuance of a pari-mutuel wagering permit that would not be subject to the mileage restrictions of Section 550.054(2), Florida Statutes. [Trans. 39-40]

Once an area of the state is opened for issuance of a new pari-mutuel permit, it is possible that more than one permit

could be issued in the newly opened area. Section 550.054(2), Florida Statutes, prohibits the Division from issuing a new permit for "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." (Underline added.) A "pari-mutuel facility" is defined by Section 550.002(23), Florida Statutes, as a "racetrack, fronton, or other facility used by a permitholder for the conduct of pari-mutuel wagering." Until a permit is issued, and the new permitholder has constructed and used its facility, the area would remain open for other new permits because the statute only prohibits issuance of a new permit within the mileage areas of an existing pari-mutuel facility. Therefore, it is clear that the statutes create the future potential of an area that in which a combination of other permitholders could be located.

Finally, the trial court's finding that there was and could be no other area of the state as defined by Section 550.615(6), Florida Statutes, stands in stark contrast to the testimony of Appellee's cartography expert that there were in fact two areas of the state in 1996. Pompano and Hialeah are not within 25 miles of each other. Thus, in 1996 there were actually two Section 550.615(6), Florida Statutes, 25-mile areas. [Trans. Page 44-45] There is no evidence in the record to the contrary.

Imposing a reasonableness standard impermissibly alters the legal burden of proof required to be shown before a law will be declared unconstitutional. The party challenging the validity of a statute must show, beyond a reasonable doubt, that the statute is unconstitutional. *Metropolitan Dade County v. Bridges*, 402 So. 2d 411 (Fla. 1981). The same legal burden of proof applies when one alleges that a statute is unconstitutional as a special law. *See, e.g.*, *State v. Rose*, 876 So. 2d 1240, 1241 (Fla. 2d DCA 2004) (holding a law general and constitutional pursuant to *Sanford-Orlando* and because "all reasonable doubts as to [a statute's] validity are resolved in favor of [its] constitutionality."). A reasonableness standard is unalterably opposed to the well-established principle that laws are constitutional unless and until a challenger proves otherwise beyond a reasonable doubt.

Use of a reasonableness standard, as applied by the First District, clearly implicates a factual analysis of the circumstances as they existed at the time of the enactment of the legislation. Reasonableness is an issue of fact. *See, Sanchez v. Busch*, 907 So. 2d 662 (Fla. 5th DCA 2005)(it is normally a decision for the fact finder to determine what a reasonable person hearing a statement would likely have understood it to mean); *Kornegay v. State*, 826 So. 2d 1081 (Fla. 1st DCA 2002)(where trial court failed to make any factual

findings that defense counsel's failure to move for judgment of acquittal and for mistrial fell below an objective standard of reasonableness, claim of ineffective counsel remanded for trial court to make necessary findings); *Rivers v. Dillards Dep't Store, Inc.*, 698 So. 2d 1328, 1333 (Fla. 1st DCA 1997)(whether detention in unlawful detention action is reasonable and warranted is a question of fact that cannot be decided on summary judgment); *Segall v. Segall*, 708 So. 2d 867, 870 (Fla. 4th DCA 1998)(reversing permanent alimony award where, in the absence of sufficient factual findings concerning the statutory factors, it was impossible for the court to assess the reasonableness of the permanent periodic alimony).

The fact that First District's ruling relies upon "facts" picked out of the record to support its findings demonstrates the factual intensity of a reasonableness standard. However, there is no indication that the "facts" relied upon by the First District were deemed to be credible. Thus the opinion violates one of the most basic tenants of appellate law that an appellate court is not a finder of fact and is not in a position to evaluate and weigh the credibility of witnesses.

In *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976), this Honorable Court stated "[i]t is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon

its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause."

Dr. Thalheimer's assumptions were vigorously contested during cross examination. Questioning showed that his projection was based upon the assumption that the two thoroughbred permitholders in the area would participate in unlimited simulcasting. [Trans. 185-186]. However, he admitted he made no inquiry as to whether Tropical Park or Calder would participate. [Trans. 187] Mr. Dunn testified that he had no authorization to speak at trial on behalf of Calder Racetrack or Tropical Park. [Trans. 101, 138] Section 550.615(5), Florida Statutes, provides that "[n]o permitholder within the market area of a host track shall take an intertrack wager on the host track without the consent of the host track." Therefore, Dr. Thalheimer's assumptions regarding an unrestricted exchange of signals is unsupported by the facts presented at trial and the statutes regulating intertrack wagering. An expert's conclusions cannot constitute proof of the existence of facts when they are based on facts or inferences not supported by the record. *See, Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557 (Fla. 1957)

However, without regard to the thorough cross-examination of Dr. Thalheimer by attorneys for both the Division and the Intervenors which significantly challenged the assumptions

underlying his projections, the First District made specific findings regarding his testimony on revenue generation which, until the issuance of the District Court's opinion presently under appeal, could only have related to the Appellee's contention below that the statutes were a violation of Equal Protection. The Fist District inexplicably found that the statute prohibited a revenue stream of approximately three million dollars to the state without any indication in the record through the Circuit Court's Order that it found Dr. Thalheimer's testimony to be credible after a thorough cross examination.

Indeed, if there is any indication in the record regarding the credibility of Dr. Thalheimer's testimony, it is that it was not credible. The Circuit Court expressly found that Section 550.615(6), Florida Statutes, does not violate the Equal Protection Clause. The lack of any mention of Dr. Thalheimer's testimony in regard to this issue is a clear indication the trial court found Dr. Thalheimer's testimony was not credible.

II. The First District Court of Appeal Erred in not reversing the Circuit Court for Appellee's Failure to Exhaust Administrative Remedies when the Appellee's Complaint disputed the Division's interpretation of that statute and there was an adequate administrative remedy.

Rather than reach the constitutional question itself, the First District Court of Appeal should have reverse the Circuit

Court under the principles set forth in this Honorable Court's decision in *Key Haven*, 427 So. 2d 153, only a facial challenge to the constitutionality of a statute may proceed in circuit court prior to the requirement that the complainant exhaust its administrative remedies. Appellee's Complaint does not actually challenge the facial constitutionality of Section 550.615(6), Florida Statutes. The Appellee's Complaint repeatedly complains of the Division's interpretation of the statute. The First District erred by making a constitutional ruling rather than following basic constitutional tenets and not providing deference to the administrative process.

A *de novo* review of the circuit court's ruling should have begun under the established principles of Florida law regarding the interpretation of statutes challenged as unconstitutional which demonstrated that the lower court erred in ruling that Section 550.615(6), Florida Statutes, was unconstitutional when the Appellee presented its own interpretation that would preserve the constitutional integrity of the statutory scheme.

In determining the validity of a statute, the courts must give it a construction that will uphold the act if at all possible. *Miami Dolphins, Ltd.*, 394 So. 2d 981. If any doubt exists about the validity of the act, all doubt will be resolved in favor of the constitutionality of the statute. *Falco v. State*, 407 So. 2d 203 (Fla. 1981). To this end, the court's

"clear obligation is to interpret statutes in a manner consistent with constitutional rights wherever possible." *Tal-Mason v. State*, 515 So. 2d 738, 740 (Fla. 1987). Courts must "interpret statutes so as to uphold them rather than invalidate them." *Dawson v. Saada*, 608 So. 2d 806, 809 (Fla. 1992).

Since there is the presumption in favor of the validity of a statute, the burden of proving that a statute is unconstitutional is upon the party challenging the act. *Peoples Bank of Indian River County v. State, Dep't of Banking & Fin.,* 395 So. 2d 521 (Fla. 1981). It is not up to the State to prove that a law is constitutional. The challenging party, who bears the burden of proof, has to prove "beyond all reasonable doubt" that the challenged act is in conflict with some designated provision of the Constitution. *Bridges*, 402 So. 2d 411.

On appeal the Division demonstrated that Appellee's Complaint based upon Appellee's interpretation of Section 550.615(6), Florida Statutes, contained in Count III of the Complaint. Count III – Statutory Construction Claim, found on pages 8 and 9 of the Complaint, offers a construction of the statutory provisions relied upon by the Appellant in its conduct of intertrack wagering with Pompano. While the Division is not in agreement with the interpretation offered in Count III of Appellee's Complaint, the interpretation is nonetheless an alternative that would preserve the constitutionality of the

statutory scheme. During the trial of this matter, Appellee continued to assert that its interpretation of Section 550.615(6), Florida Statutes, was the correct interpretation.

The allegations that the statute is unconstitutional and that Appellee's interpretation of the statute is correct are hopelessly inconsistent theories of relief. A party should not in the course of litigation be permitted to occupy inconsistent positions. *Encore, Inc. v. Olivetti Corp. of Am.*, 326 So. 2d 161, 163 (Fla. 1976). Appellee cannot have proven the unconstitutionality of Section 550.615(6), Florida Statutes, beyond a reasonable doubt while continuing to assert its own interpretation of the statute as a reasonable authorization of the exchange of intertrack wagering complained of in the Administrative Complaint.

Given any court's affirmative obligation to give a statute a construction that will uphold the act if at all possible, the First District erred in ruling that Section 550.615(6), Florida Statutes, is unconstitutional when presented with Appellee's preferred interpretation of the statute. These inconsistent theories of relief must be resolved in favor of the constitutionality of the statute.

In *Key Haven*, 427 So. 2d 153, this Honorable Court ruled that, in appropriate circumstances, only a facial constitutional challenge would be allowed to proceed in circuit court prior to

the requirement that administrative remedies be exhausted. A constitutional challenge to an interpretation of a statute by the governing administrative agency has not been excused from the doctrine of exhaustion of administrative remedies by *Key Haven*.

A challenge to an agency's interpretation of the statutes or rules that it governs should be raised in an administrative proceeding. In *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160 (Fla. 5th DCA 2003), the Fifth District ruled that if Galaxy Fireworks wished to challenge the city's Fire Code as unconstitutionally vague, as applied to its business, or the Fire Marshall's action interpreting or applying the Code to its business, the issue should first be raised in an administrative proceeding. *Id.* at 167-68.

The Division pointed out to the First District that the Appellee's Complaint challenged the Division's interpretation of Section 550.615(6), Florida Statutes, as applied to the Appellee's conduct in the Administrative Complaint. The Division's interpretation of the statute was challenged in every count of the Complaint through the incorporation of Paragraph 9 of the Complaint through every count. Appellee continued its complaints regarding the Division's interpretation at trial. As indicated earlier, Appellee continued to maintain that the exchange of intertrack wagering signals with Pompano was

authorized under Section 550.615(6), Florida Statutes. Under *Galaxy Fireworks*, Appellee's challenge to the Division's interpretation of Section 550.615(6), Florida Statutes, as unconstitutional as applied in the Administrative Complaint, should first be raised in the administrative forum and the First District should have imposed that requirement on the Appellee.

The subject of this appeal, intertrack wagering, is also a specialized area that is within the expertise of the Division. In *State, Dep't of Envtl. Protection v. P Z Constr. Co.*, 633 So. 2d 76 (Fla. 3rd DCA 1994), the Third District found that the Circuit Court should have dismissed a matter involving highly technical evidence dealing with soil contamination for the Plaintiff's failure to exhaust remedies. In that case the Third District stated:

> The record of the hearings before the Circuit Court presents the quintessential reason why parties who wish to contest agency action are required by Chapter 120 to exhaust their administrative remedies before seeking judicial relief. The Circuit Court is not an "appropriate forum for resolution of disputes which are particularly within the administrative agency's expertise."
>
> *Id.* at 79, quoting in part from *Communities Financial Corporation v. Department of Environmental Regulation*, 416 So. 2d 813 (Fla. 1st DCA 1982)

In *Key Haven,* 427 So. 2d at 158, this Court stated that "the basis of this judicial policy is the avoidance of a multiplicity of actions on issues involving administrative

decision-making. The executive branch has the duty, and must be given the opportunity to, correct its errors in drafting a facially unconstitutional rule." By failing to reverse for failure to dismiss Appellee's Complaint contesting the Division's interpretation of Section 550.615(6), Florida Statutes, as applied to Appellee's conduct in the Administrative Complaint, the First District's ruling will precipitate the exact multiplicity of actions within the agency's expertise that this Honorable Court sought to avoid through its ruling in *Key Haven.*

Appellant acknowledges the First District Court of Appeal's rulings in cases such as *Florida Public Employees Council 79, AFSCME v. Department of Children and Families*, 745 So. 2d 487 (Fla. 1st DCA 1999) and *Chrysler Corp. v. Florida Dep't of Highway Safety and Motor Vehicles*, 720 So. 2d 563 (Fla. 1st DCA 1998), which authorize the trial court to proceed on counts that constitute a facial challenge to the constitutionality of a statute. However, application of this permissive standard allowing claims does not appear to be supported by rationale of avoiding duplicative litigation enunciated in *Key Haven*, 427 So. 2d 153. Further, none of the counts enumerated by the Complaints in *AFSCME* or *Chrysler Corp.* presented the trial court with a request for declaratory relief based upon an interpretation of the statute at issue that maintained its

constitutional validity.

Appellee's interpretation of the statutes could be considered within the administrative forum with appropriate judicial review. In *Key Haven*, 427 So. 2d at 159, the Court stated:

> We also agree with the instant district court decision that, sitting in their review capacity, the district courts provide a proper forum to resolve
>
> this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final agency order constitutional.

Appellee was served with an Administrative Complaint that advised it of its full array of hearing rights under Section 120.57, Florida Statutes. Thus, Appellee has been given a clear point of entry into the administrative decision-making process. The Appellee has, throughout its Complaint and at trial, taken issue with the Division's interpretation of the statute at issue. The Division has an obligation under Chapter 120, Florida Statutes, to provide the Appellee a full opportunity to offer its interpretation and formally advise the Division of its contention that the Division's interpretation results in an unconstitutional application of the statute.

The First District erred in not reversing the trial court's failure to dismiss for Appellee's failure to exhaust its administrative remedies. The case should have dismissed upon

the Division's Motion to Dismiss for Failure to Exhaust Administrative Remedies or upon conclusion of the evidence which established that Appellee continued to assert that the intertrack wagering it conducted with Pompano was permissible under Appellee's favored interpretation of the statute.

CONCLUSION

The First District Court of Appeal erred by applying a reasonableness standard to the question of whether Section 550.615(6), Florida Statutes, which was first passed in 1992 then amended in 1996, was an unconstitutional special act. The area defined by Section 550.615(6), Florida Statutes, can be duplicated in other areas of the state. Whether a law is special or general depends in part on whether the class it creates is open. If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law. *See, Ocala Breeder's Sales,* 731 So. 2d 21. Therefore, the court erred in ruling that Section 550.615(6), Florida Statutes, is an unconstitutional special act.

In *Key Haven,* 427 So. 2d 153, this Honorable Court ruled that, in appropriate circumstances, only a facial constitutional challenge would be allowed to proceed in circuit court prior to the requirement that administrative remedies be exhausted. Appellee's Complaint challenges the Division's interpretation of

Section 550.615(6), Florida Statutes, and included a count that presented Appellee's favored constitutional interpretation of Section 550.615(6), Florida Statutes. Given the trial court's affirmative obligation to construe a statute in a manner that preserves its constitutional integrity, Appellee's Complaint should have been dismissed because it was not simply a facial constitutional challenge. Appellee contested the Division's interpretation of Section 550.615(6), Florida Statutes, and presented its own interpretation of the statute, which Appellee claims authorized an intertrack wagering exchange with Pompano. Such differing interpretations should be heard in the administrative forum.

Therefore, the Division respectfully requests a reversal the order of the trial court finding Section 550.615(6), Florida Statutes, is an unconstitutional special act and a remand of this matter instructing the trial court to dismiss Appellee's Complaint for failure to exhaust administrative remedies.

Respectfully submitted, this 5th day of January, 2006.

_____
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CERTIFICATE OF SERVICE

I hereby certify that this Initial Brief has been provided by U.S. Mail to Cynthia S. Tunnicliff, Esquire, William H. Hughes, Esquire and Marc W. Dunbar, Esquire, at Post Office Box 10095, Tallahassee, Florida 32302-2095, Harold F.X. Purnell Esquire, at Post Office Box 551, Tallahassee, Florida 32302-0551, Wilbur E. Brewton, Esquire at 225 South Adams Street, Suite 250, Tallahassee, Florida 32301, and Bruce David Green, Esquire at 1313 South Andrews Avenue, Fort Lauderdale, Florida 33316, this 5th day of January, 2006.

_____
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Assistant General Counsel

CERTIFICATION OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief is written in Twelve Point Courier New Font in compliance with Fla. R. App. P. 9.210(a)(2).

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Assistant General Counsel