IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2130

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

APPELLANT,

vs.

GULFSTREAM PARK RACING ASSOCIATION, INC.

APPELLEE.
_____/

APPELLANT'S REPLY BRIEF

On Appeal from the District Court of Appeal, First District

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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.”

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

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

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

References to the Answer Brief are cited as (A.B. at ___.)

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

REPLY TO APPELLEE'S ANSWER BRIEF

I. The District Court Incorrectly Held that Section 550.615(6), Florida Statutes, is an Unconstitutional Special Law.

A. The classification contained in Section 550.615(6), Florida Statutes, is reasonably related to the purpose of the statute.

"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. *See*, *State, Department of Natural Resources v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA 1992), citing *Department of Business Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155 (Fla. 1989) and *City of Miami v. Magrath*, 824 So. 2d 143 (Fla. 2002). Thus, the standard regarding a classification in a general law is that if the classification is open and is "reasonably related" to the purpose of the statute, the statute can be a general law. *See*, *Classic Mile, Inc.*, 541 So. 2d 1155 and *Magrath*, 824 So. 2d 143. The protection of all pari-mutuel wagering revenue streams is the primary purpose of the statutes governing intertrack wagering in high concentration market areas. To that end, 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). Therefore, Section 550.615(6), Florida Statutes, is reasonably related to the purpose of the pari-mutuel statutes.

Appellees contend that "[t]here 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." [A.B. at 16-17] That conclusion is simply incorrect.

In determining whether the classification contained within Section 550.615(6), Florida Statutes, is reasonably related to the purpose of the statute, the history of the section in question has authoritative significance. Section 550.615(6), Florida Statutes, was created in Chapter 92-348, Laws of Florida. At the time of creation, consent from all permitholders in the 25 mile area was required in order to conduct intertrack wagering. This provision was intended to protect the collective economic viability of all the permitholders, with the practical effect being that intertrack wagering was precluded. [Trans. 55, 109-110, 116] In 1996, 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 "simulcasting" (as defined in Section 550.002, Florida Statutes). Thus, the statute's history clearly demonstrates that the protection of individual revenue streams from various tracks 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. As such, Appellee's conclusion that classification contained in Section 550.615(6), Florida Statutes, is not reasonably related to the purpose of the statute is erroneous.

B. Section 550.615, Florida Statutes is not an unconstitutional special law because the area described is open to replication in other areas of the state.

Despite Appellee's contentions, the actual legal standard to be applied in this case has nothing to do with the relative popularity of any activity authorized by the legislature. In *Biscayne Kennel Club, Inc. v. Florida State Racing Commission* 165 So. 2d 762 (Fla. 1964), this Court found that the standard is the opposite when it held:

> There appears to be nothing in this classification that is inherently offensive to the organic law. But the plaintiff's facts and figures which, they say, establish the great improbability of other race tracks ever falling into this classification.
>
> The validity of legislative classification is not dependent upon the probability of others entering or leaving a class.

Id. at 764.

Further, it is irrelevant whether the legislation intentionally targeted a specific area. In *Department of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879, (Fla. 1983), the Florida Supreme Court stated:

> 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.

In their Answer Brief, Appellee argues that the classification contained in Section 550.615(6), Florida Statutes, is not open to other tracks because, currently, the only area in the state which meets the criteria set forth in Section 550.615(6), Florida Statutes, is an area in Dade and Broward Counties. This argument is erroneous because the potential exists for a similar area developing somewhere else in the State of Florida.

The ability to locate a quarterhorse permit anywhere in the state is fatal to Appellee's special act claim. Indeed, Appellee's Answer Brief acknowledges that quarter horse permits are not subject to the mileage restrictions of section 550.054(2), Florida Statutes. Quarter horse permitholders are within the definition of "horserace permitholder" provided by section 550.002(15), Florida Statutes. Therefore, an area of the state where there are three horserace permitholders within 25 miles of each other can be duplicated in the future because quarter horse permits are not subject to mileage restrictions.

Despite this, Appellee gives quarterhorse permits a cursory analysis in their Answer Brief and merely states that quarterhorse racing is simply not viable since it does not attract enough people. This argument clearly fails in light of the holdings in *Biscayne Kennel Club, Inc.* and *Sanford-Orlando Kennel Club*.

Having recognized this deficiency in its special act argument due to the ability to locate quarterhorse permits without geographic restrictions, Appellee now argues to this Court that it is rather the *totality* of permitholders referenced in section 550.615(6), Florida Statutes, that violates Art. III, Section 10 of the Florida Constitution. However, nothing on the face of section 550.615(6), Florida Statutes, mandates the presence of the other permitholders addressed in the area. The statute addresses the operating conditions for intertrack wagering in such an area and makes provisions for any potential class of permitholder that might exist in such an area. During cross-examination, Appellee's expert cartographer demonstrated that there are other areas of the state where various permitholders are located in close proximity to one another. [Trans. 47-48] This demonstrates that the addition of quarter horse permits in other areas of the state would activate the provisions of the statute in those areas.

There was also evidence presented at trial that 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 own expert in cartography, 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] In demonstrating how a pari-mutuel wagering permit could be removed, it was shown that a permit can be removed through the disciplinary authority conferred upon the Division in the enforcement of pari-mutuel statutes and rules.

Further, 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. In fact, as recently as 2005, the Division revoked a permit. *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).

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, similar to the area in Dade and Broward Counties, in which a combination of other permitholders could be located.

By applying the classification set forth in Section 550.615(6), Florida Statutes, to the standard prescribed by this Court in *Biscayne Kennel Club, Inc.*, and *Sanford-Orlando Kennel Club* (taking into consideration the potential to duplicate the class through the revocation of a permit or the issuance of

quarterhorse permits), Appellee's arguments that Section 550.615(6), Florida Statutes, is unconstitutional must fail.

II. Exhaustion of Administrative Remedies is Applicable to this Case.

A. The Affirmative Defense of Failure to Exhaust Administrative Remedies was Properly Raised and has not been Waived.

Failure to exhaust administrative remedies is a defense that is not subject to the waiver provisions of Fla. R. Civ. P. 1.140(h)(1). The defenses that must be made before pleading other matters are clearly enumerated in Fla. R. Civ. P. 1.140(b). Failure to exhaust administrative remedies is not one of those defenses. The affirmative defense of failure to exhaust administrative remedies was appropriately raised in the Department's Answer. [R. 91]

In *Wilson v. County of Orange*, 881 So. 2d 625 (Fla. 5th DCA 2004), the Fifth District held that dismissal of a complaint should not be granted on the basis of an affirmative defense, except when the face of the complaint is sufficient to demonstrate the existence of that defense, and that failure to exhaust administrative remedies was an affirmative defense that was not apparent on the face of the pleadings. *Id.* at 631. Thus, exhaustion of administrative remedies can be raised as an affirmative defense. Therefore, the waiver provisions of Fla. R. Civ. P. 1.140, do not apply to failure to exhaust administrative remedies.

Fla. R. Civ. P. 1.110(d) provides that "[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained." (Underline added.) Use of the permissive term 'may' demonstrates that the assertion of an affirmative defense such as exhaustion of administrative remedies is permissive, not mandatory, even if the defense appears on the face of the pleading. Thus, failure to exhaust administrative remedies is an affirmative defense that may be raised in the answer.

Further, by failing to object to pleadings, argument, and evidence presented in conjunction with the trial of this matter, Appellee has failed to preserve the issue of whether the Department waived the affirmative defense of failure to exhaust administrative remedies for appellate review. Failure to exhaust administrative remedies was repeatedly argued by the Department without objection by Appellee. The Department raised this issue in its memorandum of law for trial [R. 643-644], opening statement to the trial court [Trans. 13-17], and post trial memorandum [R. 734-740]. The Department also offered into evidence at trial an affidavit of its agency clerk attesting to the authenticity of attached copies of the administrative complaint filed against Appellee and Appellee's request for an

extension of time to file a pleading in response to the administrative complaint. The Department's exhibit was received by the trial court without objection. [Trans. 200-201; Def. Ex. 1] Therefore, Appellee failed to preserve its argument that the defense has been waived by failing to object to either written or legal argument or evidence introduced at trial.

B. Appellee's Complaint was not a Facial Challenge and Should have been Dismissed for Failure to Exhaust Administrative Remedies.

The Appellee's claim that Count III was not tried before the circuit court is an attempt by the Appellee to have it both ways at trial. Despite Appellee's contention in its Answer Brief, Count III was clearly argued before the circuit court. The Department specifically referenced Count III in its opening statement [Trans. 16]. Count III is specifically referenced in the Department's memorandum of law for trial [R. 643-644] and post trial memorandum [R. 736-739]. If Appellee had not wished to try Count III, it should have been dismissed. Instead, Appellee made no attempt to object to questions asked regarding Count III or otherwise attempt to limit the scope of the trial to its three constitutional challenges.

Appellee relies on *Florida Public Employees Council 79, AFSCME v. Department of Children and Families*, 745 So. 2d 487 (Fla. 1st DCA 1999) and *Chrysler Corporation v. Florida Department of Highway Safety and Motor Vehicles*, 720 So. 2d 563

(Fla. 1st DCA 1998), to authorize the trial court to proceed on counts that constitute a facial challenge to the constitutionality of a statute. However, those cases are distinguishable because 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.

Further, application of the permissive standard set forth in *AFSCME* and *Chrysler Corp*. is not supported by the rationale of avoiding duplicative litigation enunciated in *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982). Indeed, the overall record of this case could not have been what this Honorable Court had in mind when it reached the conclusion in *Key Haven* that only a facial constitutional challenge could proceed in circuit court without exhausting administrative remedies.

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.

In this case, Appellee was served with an Administrative Complaint that advised it of its full array of hearing rights under Section 120.57, Florida Statutes. [Def. Ex. 1] Thus, Appellee has been given a clear point of entry into the administrative decision-making process.

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.

Furthermore, the question in this case is the appropriate disposition of Appellee's case when Appellee itself has requested declaratory relief in favor of its own constitutional interpretation of the statute at issue. *AFSCME* and *Chrysler Corporation* offer no instruction on this question. As such, Appellee's reliance upon them is flawed.

In addition to the foregoing, Appellee's Count III does not present a constitutional challenge. Thus, whether Count III would be considered an "as applied" or "facial" challenge to the

Department's interpretation of the statute is irrelevant to the question presented.

A court is required to construe the law in such a way as to uphold it, *Vildibill v. Johnson*, 492 So. 2d 1047 (Fla. 1986); *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981), and accept any reasonable interpretation of the law that would render the statute constitutional, *Department of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815 (Fla. 1983). When presented with competing interpretations of the same statute, the circuit court should have fulfilled its obligation to defer ruling on constitutional challenges when presented with Count III.

The competing interpretations of the statute should have been allowed to proceed in the administrative forum. In *GTECH Corp. v. Dept. of Lottery*, 737 So. 2d 615, 621 (Fla. 1st DCA 1999), the First District made the following observations regarding the administrative process:

> Under the general scheme of the Administrative Procedure Act, the agency makes a decision first and then grants any affected party the right to a hearing in which the validity of the agency's action is tested. The hearing procedures in the Act are designed to ensure that the parties will be afforded due process of law before the agency makes a final decision. *See State Road Dep't v. Cone Bros. Contracting Co.*, 207 So. 2d 489 (Fla. 1st 1968). As we explained in *Department of General Servs. v.Willis*, 344 So. 2d 580, 591 (Fla. 1st DCA 1977), the hearing requirement in the Act "independently serves the

public interest by providing a forum to expose, inform and challenge agency policy and discretion."

Appellee attempted to claim that it was trying a facial constitutional challenge to Section 550.615(6), Florida Statutes, when it was actually challenging the Division's interpretation of the statute. A challenge to an agency's interpretation of a statute should be made through the administrative process.

CONCLUSION

The Division respectfully requests a reversal of the order of the District Court of Appeal finding that Section 550.615(6), Florida Statutes, is an unconstitutional special act, and that this matter be remanded with instruction to the trial court that Appellee's Complaint be dismissed for failure to exhaust administrative remedies.

Respectfully submitted, this _____ day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to CYNTHIA S. TUNNICLIFF, ESQUIRE, and PETER M. DUNBAR, ESQUIRE, at Post Office Box 10095, Tallahassee, Florida 32302-2095; 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 March, 2006.

_____	_____
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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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