CASE NO. SC05-251

IN THE
SUPREME COURT OF FLORIDA

GULFSTREAM PARK RACING ASSOCIATION, INC.
Appellant/Cross-Appellee

vs.

TAMPA BAY DOWNS, INC.
Appellee/Cross-Appellant

ON REVIEW FROM A QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No. 03-16272

On Appeal from the U.S. District Court for the Middle District of Florida
Case No. 03-00135-CV-5-17-EAJ

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE GULFSTREAM PARK RACING ASSOCIATION, INC.

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THE PLAIN MEANING OF APPLICABLE PROVISIONS OF THE WAGERING ACT DOES NOT PROHIBIT GULFSTREAM'S EXCLUSIVE AGREEMENTS.

I. THE DISTRICT COURT ERRED IN INTERPRETING SUB-SECTIONS 550.615(3) AND 550.6305(9)(g)1, FLA. STAT., AS PROHIBITING GULFSTREAM'S EXCLUSIVE AGREEMENTS.

A. Introduction.

The question which the United States Court of Appeals for the Eleventh Circuit certified to this Court presents pure issues of law: Does the Florida Pari-Mutuel Wagering Act ("Wagering Act") prohibit an agreement between a Florida thoroughbred racetrack and an out-of-state racetrack that grants the Florida race-track the exclusive right to disseminate the out-of-state track's simulcast signal?

In its Initial Brief ("GB"), Gulfstream demonstrated that the unambiguous language of relevant provisions of the Wagering Act does not prohibit such exclus-ive contracts. GB at 20-38. Gulfstream's tight analyses of the text of the Wagering Act revealed that a fundamental flaw in the District Court's interpretation of two provisions of the Wagering Act, subsections 550.615(3) and 550.6305(9)(g)1, Fla. Stat., was implying into a provision that applies only to interstate wagering on broadcasts of out-of-state horseraces – subsection 550.6305(9)(g)1 – a sentence from a provision that applies only to intrastate wagering on broadcasts of in-state pari-mutuel events – subsection 550.615(3).

In its Answer Brief ("AB"), Tampa Bay Downs attempts to blur and erase the distinctions which the Florida legislature carefully drew regarding intrastate wagering on broadcasts of in-state pari-mutuel events and interstate wagering on broadcasts of out-of-state horseraces, by making several fact-based antitrust arguments, which were found insufficient to raise a jury issue below (R161, 32-33), and which, in any event, are not relevant to the legal issues in this appeal.

Tampa Bay Downs' arguments also emphasize the Department of Pari-Mutuel Wagering's ("DPW") interpretations of subsections 550.615(3) and 550.6305(9)(g)1 in the Declaratory Statement, for which Tampa Bay Downs was responsible and upon which the District Court improperly relied. In relying on the DPW's clearly erroneous interpretations as authority for its erroneous legal conclusions, without first having found an ambiguity in either provision, the District Court violated an unequivocal mandate of the Eleventh Circuit.[1] *See CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193, 1212 (11th Cir. 2001) ("This Circuit's decisions ... mandat[e] that ambiguity in statutory language be shown *before* a court delves into extrinsic matter.") (citations and internal quotations omitted) (emphasis in original).

[1] Although not expressed as a "mandate," this Court's direction to lower Florida courts is equally unequivocal: "Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered *only in the construction of a statute of doubtful meaning*." *Donato v. American Telephone and Telegraph Co.*, 767 So. 2d 1146, 1153 (Fla. 2000) (citations omitted; emphasis in original).

B. In the Wagering Act, the Florida Legislature Exercised Limited Power in Regulating Interstate Wagering on Out-of-State Horseraces.

Gulfstream does not question the broad police power of the Florida legislature to enact legislation regulating gambling in Florida. The Wagering Act represents an exercise of that power. Nevertheless, in the Wagering Act, the legislature recognized that its power to regulate intrastate wagering on purely in-state events was broader than its power to regulate interstate wagering on out-of-state horseraces.[2]

Thus, in subsections 550.615(1), (2), and (3), Fla. Stat., the legislature exercised broad police power in granting Florida pari-mutuel permitholders eligible to conduct intertrack wagering virtually unqualified rights to send, receive and accept wagers on **intrastate** broadcasts of pari-mutuel events. The legislature did not, and had no reason to, require thoroughbred permitholders to comply with requirements of the Interstate Horseracing Act of 1978 ("IHA") as a condition of sending, receiving or wagering on intrastate broadcasts of horseraces.

In contrast, the legislature required "any horse track licensed under this chapter" to "comply with the provisions of the Interstate Horseracing Act" as a

[2] "Under the [Interstate Horseracing] Act, each state may prohibit interstate off-track wagering within its borders, and may prohibit a resident racetrack from contracting with an off-track wagering facility in another state." *Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1414 (6th Cir. 1994). "The Act merely gives the State a limited power to preempt the general federal prohibition of interstate off-track wagering." *Id.* at 1416.

condition of **sending** broadcasts of horseraces to locations outside Florida [subsection 3551(2)(a)] and **receiving** broadcasts of horseraces from locations outside Florida [subsection 3551(3)(a)]. The legislature allowed an in-state horse track to conduct "all forms of pari-mutuel wagering" on out-of-state horseraces only if it complied with the requirements of the IHA.[3] Section 550.3551(3)(c), Fla. Stat. (2003).

C. The District Court's Interpretations Rendered Meaningless and Superfluous Provisions of the Wagering Act that Distinguish Between Intrastate Wagering on In-State Pari-Mutuel Events and Interstate Wagering on Out-of-State Horseraces.

The District Court's interpretations of subsections 550.615(3) and 550.6305(9)(g)1 rendered meaningless and superfluous several provisions of the Wagering Act in which the legislature (1) recognized that its power to regulate wagering on broadcasts of out-of-state horseraces in Florida was narrower than its power to regulate wagering on intrastate broadcasts of pari-mutuel events; and (2) required thoroughbred permitholders to comply with the requirements of the IHA as a condition of receiving and accepting wagers on broadcasts of out-of-state horseraces. The District Court thereby violated voluminous precedent of this Court requiring that statutes be construed to give effect to every word, phrase, sentence and part. *See, e.g.*, *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993,

[3] Section 3003 of the IHA, 15 U.S.C. § 3003, states: "No person may accept an interstate off-track wager except as provided in this chapter."

996 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence and part of a statute if possible, and words in a statute should not be considered as mere surplusage.")

Although the statutes involved are very different, the issues of statutory interpretation in this case resemble those in this Court's recent decision in *Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954 (Fla. 2005). In *New Sea Scape*, this Court rejected the Department of Revenue's ("DOR") attempt to characterize "cruise-to-nowhere" operations as purely "intrastate" in nature, in order to tax consumption occurring outside Florida's territorial boundaries as "Florida mileage."

Without according the DOR's statutory interpretation *any deference whatsoever* in interpreting *de novo* Florida's sales and use tax statute, this Court found:

> This [DOR's] interpretation contravenes the plain meaning of the term "intrastate" and fails to give effect to the proration provision, which creates an allocation factor.... Interpreting the statute in this manner would also render meaningless the provision exempting vessels and parts thereof used *exclusively* in intrastate commerce meaningless against well-established rules of statutory interpretation.

Id. at 962 (citations omitted) (emphasis in original).

In the instant case, the District Court first ignored the Wagering Act's distinctions between wagering on intrastate broadcasts of pari-mutuel events and wagering on broadcasts of out-of-state horseraces when the court concluded that

subsections 550.6305(9)(g)1 and 550.615(3), when read together,[4] prohibit Gulfstream's exclusive agreements. On its face, subsection 550.6305(9)(g)1 applies only to interstate broadcasts of out-of-state horseraces; on its face, subsection 550.615(3) applies only to intrastate broadcasts of in-state pari-mutuel events. Clearly, the legislature intended to treat these subjects separately, but the court's interpretation rendered this separate treatment meaningless.

Moreover, the District Court compounded its error by implying into subsection 550.6305(9)(g)1 the prohibition which the legislature included only in subsection 550.615(3). The legislature unquestionably knew how to provide such a prohibition in 550.6305(9)(g)1 if it had intended one there: "[W]hen the legislature includes a provision in one section of a statute but excludes it in another, courts will deem the difference intentional and will assign meaning to the omission." *Bell South Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 291 (Fla. 2003). Quite simply, "we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (citation omitted).

The District Court disregarded the plain meaning of subsection 550.615(3) and rendered meaningless language which restricted its application to purely intrastate broadcasts of pari-mutuel events in concluding that "[t]he *plain meaning*

[4] "While Section 550.6315(9)(g)1[sic], *by itself*, does not directly prohibit an exclusive dissemination agreement, *it must be read together with Section 550.615(3)*, which by its *plain language* does prohibit such arrangements." (R161, 13; emphases added)

of [the third sentence[5] of 550.6515(3)] makes it unlawful for anyone to restrain a permitholder (TBD) from *licensing or sub-licensing another permitholder (an ITWS site) the right to receive by satellite transmission an out-of-state racetrack's signal* to conduct intertrack wagering." (R161, 15) (emphases added).

A simple comparison of the language used by the legislature with the District Court's statement of its "plain meaning" demonstrates that the District Court rewrote the sentence and changed its meaning entirely. In doing so, the District Court violated the following principles of statutory construction and, thereby, infringed on the power of the Florida legislature:

1. "It is not the function of courts to amend statutes under the guise of 'statutory construction.'" *CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193, 1213 (11th Cir. 2001) (quoting *Federenko v. United States*, 449 U.S. 490, 514 n.35 (1981)).

2. "[I]t is a basic principle of statutory construction that courts are not at liberty to add words to statutes that were not placed there by the Legislature." *Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001) (citations and internal quotations omitted).

[5] This sentence states: "A person may not restrain or attempt to restrain 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."

3. "[T]he courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001) (citations and internal quotations omitted); *see also State v. Burris*, 875 So. 2d 408, 410, 413-14 (Fla. 2004).

II. TAMPA BAY DOWNS' CONTENTION THAT GULFSTREAM'S EXCLUSIVE AGREEMENTS VIOLATE SUBSECTION 550.6305(9)(g)1 CONFLICTS WITH THE WAGERING ACT'S EXPLICIT REQUIREMENT OF COMPLIANCE WITH THE IHA AS A CONDITION OF ACCEPTING WAGERS ON OUT-OF-STATE HORSERACES.[6]

Subsection 550.6305(9)(g)1 states:

> Any thoroughbred permitholder which accepts wagers on a simulcast signal must make the signal available to any permitholder that is eligible to conduct intertrack wagering under the provisions of ss. 550.615 - 550.6345.

Tampa Bay Downs' argument that 550.6305(9)(g)1 prohibits Gulfstream's exclusive agreements focuses on the words "must make the signal available."[7] This

[6] Contrary to Tampa Bay Downs' mischaracterization and misstatement of Gulfstream's argument, Gulfstream has not argued preemption. Instead, the Florida legislature harmonized the Wagering Act with the IHA.

[7] In contrast with the immediately following subparts (g)2 and (g)3, the legislature did not authorize eligible permitholders to accept wagers on such simulcast signals in subpart (g)1. Insofar as the legislature granted eligible permitholders authority to

argument ignores the immediately preceding words "any thoroughbred permit-holder which accepts wagers on the simulcast signal," which necessarily qualify and limit the words that follow them.

Notably, in contrast with 550.615(1), (2) and (3), subsection 550.6305(9)(g)1 does not contain an authorization for a thoroughbred permitholder to accept wagers on simulcast signals of out-of-state horseraces. That authority is found in subsection 550.3551(3)(c), in which the legislature authorized acceptance of pari-mutuel wagers on broadcasts of out-of-state horseraces on the express condition that receipt of such broadcasts "comply with the requirements of the Interstate Horseracing Act." Section 550.3551(3)(a), Fla. Stat. (2003).

Thus, "any permitholder which accepts wagers on the simulcast signal" of an out-of-state racetrack under 550.6305(9)(g)1 must obtain a contract with the out-of-state track (the "host racing association") which satisfies the requirements of Section 3004(a)(1) of the IHA, 15 U.S.C. § 3004(a)(1). Section 3004(a)(1), in turn, requires that the host racing association have a written agreement with its horsemen's group "setting forth the terms and conditions relating thereto."

To comply with section 3004(a)(1), an agreement between the Florida thoroughbred track and the host racetrack must have the consent of **both** the out-of-state track and its horsemen, either of which may withhold that consent for

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wager on signals of out-of-state horseraces received pursuant to subpart (g)1, that authority is contained in section 550.3551(5).

purely "selfish motives" unrelated to allocation of revenue. *See Kentucky Division, Horsemen's Benevolent & Protective Ass'n*, 20 F.3d at 1415.

In requiring the consents of both the host racetrack and its horsemen's group to each contract with "off-track wagering facilities," such as Gulfstream and Tampa Bay Downs, Congress intended that racetrack owners and racehorse owners have an equal voice in approving the expansion of legal off-track betting and the reduction of live horseracing resulting from the closure of "weak" tracks:

> Whereas individual racetracks benefit by contracting with numerous off-track wagering facilities, the horsemen have a strong interest in limiting off-track betting to ensure continued demand for their services. Accordingly, the horsemen's veto affords the horsemen an important means of protecting the entire sport of horseracing.... The horsemen, more than any other affected group, have a substantial interest in maintaining the balance that Congress sought to achieve – the horsemen want the additional money that off-track wagering provides while preserving the horseracing industry.

Id.

By requiring compliance with the requirements of the IHA as a condition of a Florida thoroughbred racetrack's accepting wagers on broadcasts of out-of-state races, the Florida legislature embraced the goals and the balance of interests that Congress sought to achieve in the IHA. Contrary to Tampa Bay Downs' argument, these goals cannot be furthered by treating the requirement that the host racetrack and its horsemen's group consent to each contract simply by assuring that they are "adequately compensated." AB at 42.

Tampa Bay Downs' interpretation of 550.6305(9)(g)1 necessarily assumes that the Florida legislature intended to regulate the process by which out-of-state racetracks and their horsemen consent to acceptance of wagers on their races at Florida thoroughbred racetracks. On the contrary, "[t]he contractual process" of negotiating terms and conditions acceptable to the host racing association and the horsemen's group "is not one that can be regulated." *Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n, Inc.*, 767 F. Supp. 1573, 1579 (M.D. Fla. 1991).

Further, contrary to the arguments of Tampa Bay Downs and the First Intervenors,[8] in section 3002(22) of the IHA, Congress expressly contemplated that acceptable "terms and conditions" of an agreement between an out-of-state racing association and a Florida thoroughbred track may include an "arrangement as to the exclusivity between the host racing association and the off-track betting system":

[8] The word "exclusivity" appears only in section 3002(22), which defines "terms and conditions" of agreements entered pursuant to section 3004(a)(1). It explicitly provides for "arrangements as to the exclusivity between the host racing association and an off-track betting system." Congress could hardly have been more clear that exclusivity provisions like those in Gulfstream's contracts are permitted. Nevertheless, in their Initial Brief ("FIB"), the "First Intervenors" argue that the word "exclusivity" relates to the sixty-mile approval requirement in section 3004(b). FIB at 6-7 The words "exclusive" and "exclusivity" do not appear in section 3004(b). Further, that provision does not involve contracts between a host racing association and its horsemen or contracts between a host racing association and an off-track betting system, which are the only contracts to which section 3002(22) applies.

> It is the legislative intent of the IHA that host racing associations and/or horsemen's groups give consent in exchange for acceptable "terms and conditions"–agreements as to money and exclusivity. Consent is not to be negotiated as a separate issue but concurrently with those issues.

Alabama Sportservice, Inc., 767 F. Supp. at 1573.

When it required a Florida permitholder to comply with the requirements of the IHA as a condition of receiving and accepting wagers on simulcasts of out-of-state horseraces, the legislature did not except arrangements as to exclusivity, which are permitted in the IHA; and, indeed, the legislature did not address exclusive arrangements anywhere in the Wagering Act. Because the legislature prohibited exclusive arrangements in subsection 550.615(3), which applies only to intrastate wagering on broadcasts of in-state pari-mutuel events, ample precedent of this Court precludes interpreting the legislature's silence in 550.6305(9)(g)1 as prohibiting such provisions.

CONCLUSION

The District Court rewrote, and significantly extended the scope of, unambiguous language of the Wagering Act in concluding that the "plain meaning" of subsections 550.615(3) and 550,6305(9)(g)1, Fla. Stat., prohibits exclusive dissemination agreements between in-state thoroughbred racetracks and out-of-state racetracks. On the contrary, other than requiring strict compliance with the Interstate Horseracing Act, the plain meaning of relevant provisions of the Wagering Act does not purport to regulate relationships between in-state

thoroughbred tracks and out-of-state tracks. The District Court, thus, usurped the power of the legislature and violated its constitutional obligation to respect the separate power of the legislature.

Since its opinion in *Van Pelt v. Hilliard*, 75 Fla. 792, 798-99, 78 So. 693, 694-95 (Fla. 1918), this Court has vigilantly and consistently protected the legislature's power against judicial incursions that were less extensive and less flagrant than the District Court's here. In this case, giving effect to the unambiguous language of the Wagering Act and giving due respect for the legislature's limited police power to regulate acceptance of interstate wagers on out-of-state horseraces within Florida requires that the question certified by the Eleventh Circuit be answered in the **negative**.

Respectfully submitted,

Dated: April 14, 2005.

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The undersigned hereby certifies that this brief complies with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure and utilizes Times New Roman 14-point font.

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