

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-02-00259

Appellate Case No. 2014-002728

Retail Services & Systems, Inc., dba Total Wine &
More,

Appellant,

v.

South Carolina Department of Revenue and ABC Stores
of South Carolina,

Respondents.

Final Reply Brief of Appellant

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S.C. Supreme Court

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ARGUMENT

In this appeal, Retail Services & Systems, Inc. (“Retail Services”) is narrowly challenging the constitutionality of South Carolina Code Ann. sections 61-6-140 and -150 (the “Statutes”) of the Alcoholic Beverage and Control Act (“ABC Act”). Retail Services is not challenging any other provision of the ABC Act, and it does not dispute that the General Assembly has broad powers when it comes to the regulation of alcoholic liquors. The General Assembly’s power in this field, however, is not unlimited. Under the Constitution of the State of South Carolina, all legislation regulating the sale and retail of liquor must fall within the scope of the General Assembly’s police powers. The Statutes do not fall within this scope. Nevertheless, Appellant Department of Revenue (“DOR”) asks the Court to uphold the Statutes because the ABC Act as a whole contains *other* provisions that fall within the General Assembly’s police powers. The Court should not be distracted by the DOR’s arguments concerning other provisions of the ABC Act. Instead, its focus should remain on the two Statutes at issue. Because those Statutes are not within the General Assembly’s police powers, and because they also violate the Equal Protection and Due Process clauses, the Court should reverse the circuit court and strike the Statutes for being unconstitutional.

I. THE STATUTES ARE NOT WITHIN THE SCOPE OF THE GENERAL ASSEMBLY’S POLICE POWERS.

The DOR acknowledges that State ex rel. George v. Aiken, 42 S.C. 222, 20 S.E. 221 (1894) is the guiding authority on whether the Statutes are a valid exercise of the General Assembly’s police powers. (See DOR Resp. Br. p. 7.) Nevertheless, the

DOR ignores the State ex rel. George Court’s edict that if the object of a statute concerning liquor is to impact “commercial enterprise . . . [w]e have no doubt . . . it would be unconstitutional As we have said, if the act is not a police measure, it is unconstitutional.” State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230; see also McCullough v. Brown, 41 S.C. 220, 247-48, 19 S.E. 458, 472-73 (1894), *overruled on other grounds by State ex rel. George*, 41 S.C. at 254, 20 S.E. at 233 (holding that if a statute regulating alcoholic liquors is enacted for economic purposes rather than “as a police regulation of the business of selling intoxicating liquors,” it is unconstitutional). Likewise, the Supreme Court of the United States has held “[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.” Bacchus Imports v. Dias, 468 U.S. 263, 276 (1984).

A. The Statutes do not promote the morals, good health, or safety of the State of South Carolina.

Retail Services’ opening brief explains in detail how the plain text and legislative history of the Statutes establishes that they do not promote the public welfare. (Retail Services’ Br. pp. 10-15.) Indeed, the Statutes do not regulate the number, location, quality, or concentration of stores in a given area. See S.C. Code Ann. §§ 61-6-140 and -150. They merely place an arbitrary restriction on how many stores in which a person, who the DOR has already deemed fit to participate in the retail liquor market, may have a financial interest. (See id.) The General Assembly did not provide any indication in the enabling statutes or subsequent amendments that the Statutes were intended to promote the morals, good health, or safety of the State of

South Carolina. (See Retail Services' Br. pp. 4-5 & 14.) Furthermore, the carve-out provision in section 61-6-150 demonstrates that the statute was intended to protect the economic interests of existing retail liquor stores by limiting the growth of businesses that entered the market after 1978. See S.C. Code Ann. § 61-6-150.

B. The DOR's reliance on other provisions of the ABC Act does not cure the Statutes' Constitutional deficiencies.

The DOR has not provided any counter-argument or rationale as to how the Statutes promote the public welfare. Unable to do so, it instead asks the Court to uphold the Statutes because the "General Assembly[] intent[ed] for the ABC Act *as a whole* to govern the sale, manufacturing, distribution and licensing of alcoholic beverages in this State." (DOR Resp. Br. p. 9 (emphasis added).)

For instance, the DOR cites Judge Geathers' treatise, The Regulation of Alcoholic Beverages in South Carolina, to support its proposition that "[t]he General Assembly has utilized its police power to enact the ABC Act, *in its entirety*, to meet its constitutional obligation." (ABC Resp. Br. pp. 5-6 (emphasis added).) Citing Pendarvis v. Berry, the DOR further argues that "the regulation of alcoholic beverages is designed for the welfare and protection of the public and therefore, well within the State's police power." (Id. at p. 8.)

As explained in Retail Services' opening brief, Judge Geathers' treatise and the Pendarvis case, including the Davis case discussed therein, only addressed the ABC Act as a whole. (Retail Services' Br. pp. 15-18.) Neither authority addressed whether the individual Statutes before the Court are a valid exercise of the police powers. (Id.) As also explained in Retail Services' initial brief, the statutes considered by the Pendarvis

court did not even limit the number of licenses in which a person could have a financial interest or that could be issued for a corporation's use, and they did not include a carve-out provision like the one in S.C. Code section 61-6-150. (See id.) The DOR does not refute that these authorities are distinguishable from the instant case, and it has failed to explain how they establish that the Statutes before the Court, as opposed to the ABC Act in general, are within the scope of the General Assembly's police powers.

The DOR next quotes the following passage from American Jurisprudence:

As a general rule, a state may, without impairing constitutional rights, limit the number of liquor licenses that may be issued within a given area or political subdivision when the public good seems to so require. Placing a limitation on the number of licenses which will be issued for the sale of intoxicants within a given area is not in itself prohibitory, and is recognized as a legitimate regulation tending to promise public health, safety, and welfare within the police power.

(DOR Resp. Br. p. 10 (quoting 45 AM. JUR. 2d *Intoxicating Liquor* § 102) (emphasis added).) Contrary to the DOR's assertion, the Statutes do not limit the number of retail liquor licenses that can be issued in a "given area or political subdivision." See S.C. Code Ann. §§ 61-6-140 and -150. Rather, they merely limit the number of stores in which one person or company can have an interest. Id. To the extent the General Assembly wanted to control market concentration, it did so in S.C. Code Ann. section 61-6-170, which gives the DOR the discretion to "limit the further issuance of retail dealer licenses in a political subdivision if it determines that the citizens who desire to purchase alcoholic liquors therein are more than adequately served" based on a number of factors, including the number and location of stores in the area. Id. Thus, the

DOR's reliance on authorities that approved regulations on market concentration is misplaced because the Statutes before the Court do not serve such a purpose.

Furthermore, the mere fact that other provisions of the ABC Act promote the public welfare does not cure the constitutional deficiencies of the Statutes before the Court. South Carolina law recognizes that a single act may contain constitutional statutes and unconstitutional statutes. Curtis v. State, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001) ("A statute may be constitutional and valid in part and unconstitutional and invalid in part."). The unconstitutional statutes may be severed from the act if the constitutional portion of the act "remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." See id.; see also Thayer v. S.C. Tax Comm'n, 307 S.C. 6, 413 S.E.2d 810 (1992) (same). Here, Retail Services is only challenging two specific statutes as being beyond the General Assembly's police powers. It is not challenging the ABC Act as a whole. The DOR conceded in the court below that if the Statutes are unconstitutional they could be severed from the remainder of the ABC Act. (Tr. p. 35, lns. 1-6; R. 256.) Moreover, no party contends that the Statutes are ambiguous such that consideration of other provisions of the ABC Act is necessary to construe the Statutes meaning. Rather, the DOR is simply asking the Court to uphold the Statutes because other, independent provisions of the ABC Act promote the public welfare. The DOR's position is unsupported by South Carolina law. Therefore, the Court should hold that the trial court erred in denying Retail Services' motion for summary judgment.

II. THE STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE.

The Equal Protection clause prohibits the General Assembly from creating “arbitrary” classifications of its citizens. Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978). Instead, all classifications must bear a reasonable relation to a *legitimate* legislative purpose. *Id.* Here, the Statutes arbitrarily treat Retail Services differently than two similarly situated groups of people.

First, the Statutes treat retail liquor store owners who sell alcoholic liquors for “off-site consumption” differently from individuals who sell alcoholic liquors for “on-site consumption,” such as bar owners. *See* JUDGE JOHN D. GEATHERS, *THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA* 135. The DOR did not dispute this arbitrary and disparate treatment or offer any justification for it in its Response Brief. (See DOR Resp. Br. pp. 12-15.) Again, it is important to remember that the Statues do not regulate the quality, market concentration, or amount of product sold by a retail liquor store. See S.C. Code Ann. §§ 61-6-140 and -150. All they do is prevent a person, who the DOR has already deemed fit to hold retail liquor licenses, from having an interest in more than three stores. See id. There is no legitimate legislative purpose served by placing different restrictions on the commercial enterprises of a retail liquor store owner than those placed on a bar owner. See Broome, 270 S.C. at 231, 241 S.E.2d at 739 (noting there is no basis for treating architects, engineers, and contractors differently when they “are not the only persons whose negligence in the improvement of real property may cause damage or injury to others”).

Additionally, the Statutes discriminate against new, expanding retail liquor store owners in order to protect the economic interests of small retail liquor store owners and owners that had an interest in a retail liquor store prior to July 1, 1978. The DOR responds to this argument by claiming that the Statutes, on their face, treat all current retail liquor store owners the same. The DOR ignores, however, that on its face, section 61-6-150 allows a person who had an interest in a single retail liquor store prior to July 1, 1978 to have an interest in an unlimited number stores while a person new to the market cannot. See S.C. Code ann. § 61-6-150. The DOR also ignores that in their application, the Statutes discriminate against retail liquor store owners who have the ability to open multiple stores across South Carolina in order to protect retail liquor store owners who want to keep state-wide competition out of their local market. See Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. at 471-73, 229 S.E.2d at 722-23 (looking at the application of the Uniform Alcohol and Intoxication Treatment Act to identify the classifications it created and how it treated them); see also Bacchus Imports, 468 U.S. at 276 (holding that where the purpose of a liquor regulation was “to promote the local industry,” it was unconstitutional).

Indeed, the DOR and the circuit court’s only justification for the Statute’s disparate treatment is that they are needed to protect “[s]mall single-location licensees [who] have found it difficult to survive and, in some instances, have been driven out of business” by multiple-location retail liquor store owners. (11/21/14 Order p. 10; R. 18.) This justification, however, is prohibited by South Carolina’s Constitution. Liquor regulations must promote the public welfare—not the economic interests of a select group. State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230. Because the

Statutes' disparate treatment does not bear a reasonable relation to a legitimate legislative purpose, they violate the Equal Protection clause and should be declared unconstitutional.

III. THE STATUTES VIOLATE THE DUE PROCESS CLAUSE.

"[T]he standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any *legitimate* interest of government." Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) (emphasis added). The DOR argues that Retail Services' due process challenge fails because the General Assembly has the power to completely prohibit the sale of liquor in South Carolina. Retail Services acknowledges that the General Assembly may heavily regulate the sale of alcoholic liquors. However, the General Assembly can only enact such legislation if it acts within the scope of its police powers. See S.C. Const. Art. VIII-A; see also State ex rel. George, 42 S.C. at 238, 20 S.E. at 227.¹ Because these statutes promote economic protectionism rather than the public welfare, they are not within the scope of the General Assembly's police powers and, therefore are not reasonably related to a *legitimate* government interest. See Sloan, 370 S.C. at 484, 636 S.E.2d at 615 (holding that a statute may only interfere with an individual's right to

¹ The DOR cites Feldman v. S.C. Tax Commissioner, 203 S.C. 49, 26 S.E.2d 22 (1943) in support of its due process argument. (DOR Resp. Br. p. 12 n. 3 (also citing Mibb, Inc. v. S.C. DOR, which is inapplicable because it dealt with a claim for loss revenue caused by a ban on video poker and did not concern liquor or any due process challenges).) Feldman dealt with a statute that promoted the morals, good health, and safety of South Carolina by outlawing the sale of liquor to minors. See Feldman, 203 S.C. at 52, 26 S.E.2d at 24. Unlike the statute in Feldman, the Statutes are not a valid exercise of the General Assembly's police powers. Therefore, the DOR's reliance on Feldman is misplaced and should be ignored.

pursue his trade if it is within the legislature's police power and enhances the public welfare). As such, the Statutes violate the Due Process Clause, and the Court should reverse the circuit court and declare the Statutes unconstitutional.

IV. THERE IS A JUSTICIABLE CONTROVERSY.

In passing, the DOR suggests there is no justiciable controversy because Retail Services has not wasted the time and resources to apply for an additional retail dealer license so that the DOR can formally deny it. (DOR Resp. Br. p. 2 n. 1.) The DOR's position is contrary to the purpose of the Declaratory Judgments Act.

"The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (holding that developer did not have to waste time and resources applying for extension of a sewer line when a city ordinance unambiguously stated that the extension would not be granted). "The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights." Id. "The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship." Id.

Importantly, parties are "not required under the Declaratory Judgments Act to spend time and money complying with what allegedly is an invalid or unconstitutional [law]." Id. at 424, 593 S.E.2d at 467; see also Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 455, 415 S.E.2d 801, 805 (1992)

(finding a justiciable controversy in a pre-election review of a voter-initiated ordinance alleged to be facially defective because “it is wholly unjustified to allow voters to give their time, thought, and deliberation to the question . . . and thereafter, . . . confront them with a judicial decree that their action was in vain”).

Here, there is no dispute that because Retail Services already has the use of three retail dealer licenses, the DOR cannot issue a license to another store that will also hold the license for Retail Services’ use. S.C. Code Ann. §§ 61-6-140 & 61-6-150; (see also DOR Resp. Br. p. 3.) Nevertheless, the DOR argues that Retail Services should be forced to spend substantial time and hundreds of thousands of dollars setting up a business and applying for a license that cannot be issued. For instance, Retail Services would have to, among other things, incorporate a new business, purchase real estate, run newspaper advertisements once a week for three consecutive weeks, post notice at the proposed business site for fifteen days, pay a \$200, non-refundable fee, and provide criminal background information. See S.C. Code Ann. § 61-6-180; (see also Retail Liquor Store License Application Requirements; R. 96.) In addition to all these costs, the DOR also contends that Retail Services must wait to have its rights violated before challenging the Statutes’ constitutionality.

Under Sunset Cay, LLC, the DOR’s arguments are without merit. Because the Statutes are preventing Retail Services from opening a retail liquor store in Aiken County there is a justiciable controversy that will be resolved by this Court’s determination.

CONCLUSION

Based on the foregoing and prior briefing, the Court should: (1) reverse the circuit court and (2) declare the Statutes unconstitutional because they are not a valid exercise of the General Assembly's police powers and because they violate South Carolina's Equal Protection and Due Process Clauses.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Retail Services & Systems, Inc., dba Total Wine & More, do hereby certify that they have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same United States Mail, prepaid, to the following address(es):

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