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**IN THE
DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

CASE NO. _____

HIALEAH RACING ASSOCIATION, LLC,

Petitioner,

v.

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

Respondents.

**Emergency Petition for Writ of Prohibition to
Review and Order of the State of Florida, Division of Administrative
Hearings,**

**Michael M. Parrish, Administrative Law Judge
L.T. Case No. 03-1459**

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DIVISION OF
ADMINISTRATIVE
HEARINGS**

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INTRODUCTION

This matter is before two tribunals, both pre-trial at this stage. The first is an adjudicatory hearing on the merits which is scheduled to be heard on May 24, 2004. The second is a constitutional declaratory challenge to the statute under which the administrative law judge proposes to adjudicate.

The procedure whereby an adjudication on the merits preceeds a determination of whether there is a statutory basis to proceed turns judicial procedure on its head. That is precisely what is happening below. In addition, the petitioner has the unquestioned right to insist that it not be required to undergo the expense of trying the case on the merits before the constitutional challenge is decided. Petitioner has specifically invoked that right. Nonetheless, the administrative law judge intends to proceed and the circuit court refuses to stay that trial.

Petitioner thus requests this Court to order the circuit court below to stay the administrative hearing, or in the alternative to prohibit the administrative law judge from entertaining the final hearing.¹

¹ Concurrently with this Writ of Prohibition, Petitioner is filing a Writ of Mandamus directed at the Circuit Court requesting that the Circuit Judge stay the administrative final hearing.

BASIS FOR INVOKING JURISDICTION OF THE COURT

Petitioner, Hialeah Racing Association, LLC, (“Hialeah”), seeks review of the April 30, 2004 Order Denying Stay, which denied Hialeah’s Motion To Stay the administrative proceedings pending a constitutional determination by the circuit court. As a result, Hialeah invokes the original jurisdiction of this Court pursuant to Art. V§4(b)(3), Fla. Const., Fla. R. App. P. 9.030(b)(3), and Fla. R. App. P. 9.100, because the trial court’s order departs from the essential requirements of law and will cause Hialeah material injury for which there is no adequate remedy by appeal. Writs of Prohibition is a well-recognized method for obtaining review and reversal of an improper denial of a motion to stay of proceedings where, as in this case, there is a circuit court action which challenges the constitutionality of a statute, which is the underlying authority for the determination of the merits in the administrative action between the same parties. *Dyna Span Corporation v. Pollock*, 510 So. 2d 307 (Fla. 4th DCA 1986) (granting writ of prohibition directed towards the administrative judge and ordering a stay of the administrative hearing “until the circuit court disposes of the constitutional issues.”)

FACTS ON WHICH THE PETITIONER RELIES

A. The Parties

Petitioner, Hialeah Racing Association LLC., (“Hialeah”) is a Florida limited liability company that maintains its principal place of business at 2200 East 4th Avenue, Hialeah, Miami-Dade County, Florida. Hialeah holds the pari-mutuel gaming permit that specifically authorizes pari-mutuel wagering on thoroughbred horse races conducted at the race track facility located in Hialeah, Florida, known as Hialeah Park.

Respondent State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“Department”), is an agency of the State of Florida, established pursuant to § 20.165(2)(f), Fla. Stat. The Department is the state agency responsible for the regulation of those persons and entities, including HIALEAH, licensed or permitted by the State of Florida to engage in pari-mutuel wagering activities in this state as more particularly described in Chapter 550, Fla. Stat.

For the purposes of this petition, Administrative Law Judge Michael M. Parrish is also a respondent.

B. Procedural History

On February 14, 2003 the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“Department”) filed an

Administrative Complaint And Notice of Intent To Deny License (“Administrative Complaint”) against Hialeah Racing Association, LLC (“Hialeah”), a copy of which is attached as Exhibit “A”. On April 3, 2003 Hialeah responded to the Administrative Complaint with its Request For A Formal Administrative Proceeding denying any violations and asserting several defenses to the alleged violations, a copy of which is attached as Exhibit “B”.

On November 21, 2003 Hialeah’s co-counsel withdrew from the Administrative Action, a copy of which is attached as Exhibit “C”. Soon thereafter, on November 24, 2003 Hialeah’s lead counsel withdrew from the Administrative Action, a copy of which is attached as Exhibit “D”. That same day, the undersigned counsel were retained by Hialeah and made their appearance. It quickly became apparent to the undersigned that the constitutionality of Chapter 550, and specifically the sections alleged to have been violated by Hialeah was the paramount issue involved and, since an administrative hearing officer could not pass on constitutional issues, Hialeah moved to continue the final administrative hearing, and soon there after, on January 30, 2004, filed a Complaint For Declaratory Judgment And Other Relief² in the Eleventh Judicial Circuit seeking

² The Complaint For Declaratory Judgment And Other Relief was amended on February 4, 2004, which is attached as Exhibit “E”.

declaration that specified sections of Chapter 550, Florida Statutes, are unconstitutional.

The Department moved to dismiss the circuit court Amended Complaint on several grounds, including failure on the part of Hialeah to exhaust administrative remedies. Administrative judge Michael M. Parrish issued an Order Granting Continuance on February 3, 2004 pending a status report of the circuit court action regarding “the constitutionality of the statutes on which the Administrative Complaint in this case is predicated.” A copy of which is attached as Exhibit “F”. Circuit Court Judge Lopez denied the Department’s motion to dismiss and retained jurisdiction over the constitutional claims.

Thereafter, in order to avoid a multiplicity of proceedings, Hialeah requested the Administrative Judge Michael M. Parrish to stay the administrative proceedings, attached as Exhibit “G”. In an about face order from his prior ordering continuing the administrative final hearing, Judge Michael M. Parrish denied Hialeah’s motion to stay on April 30, 2004 (the “April 30, 2004 Order”), and ordered the parties for final hearing on May 24, 2004, attached as Exhibit “H”. Hialeah seeks a stay of those proceedings in this writ of prohibition.

As a result, on May 4, 2004 Hialeah filed in the circuit court an Emergency Motion To Stay Administrative Proceeding, attached as Exhibit “I”. Hialeah’s Motion To Stay Administrative Proceedings was denied on May 7, 2004, (the

“May 7, 2004 Order”), attached as Exhibit “J”. The May 4, 2004 Order is the subject of a writ of mandamus which is being filed concurrently with this petition.

C. The Administrative Action

1. **The Department’s Complaint**

On February 14, 2003 the Department, filed an Administrative Complaint, which was later amended, against Hialeah intending to deny Hialeah’s application for an annual racing license for the 2003-2004 and 2004-2005 thoroughbred racing season.

As alleged, the Department issued Hialeah license permits for the 2001-2002 and 2002-2003 thoroughbred racing season. Each permit required Hialeah to conduct a mandatory amount of thoroughbred performances for each of the racing seasons. By not conducting any of the performances, the Department alleges that Hialeah has violated Section 550.5251(2), Fla. Stat., and has therefore lost the right to retain its permit for subsequent application for thoroughbred performances.

2. **Florida Statute Sections 550.5251(2) and 550.054(9)**

The Department claims that Hialeah has violated Florida Statute Section 550.5251(2) and therefore has lost its right to retain its permit for future thoroughbred performances. Florida Statute Section 550.5251(2) provides as follows:

Each permitholder referred to in subsection (1) shall annually, during the period commencing December 15 of

each year and ending January 4 of the following year, file in writing with the division its application to conduct one or more thoroughbred racing meets during the thoroughbred racing season commencing the following June 1. Each application shall specify the number and dates of all performances that the permitholder intends to conduct during that thoroughbred racing season. On or before, February 15 of each year, the division shall issue a license authorizing each permitholder to conduct performances on the dates specified in its application. Up to March 31 of each year, each permitholder may request and shall be granted changes in its authorized performances; but thereafter, as a condition precedent to the validity of its license and its right to retain its permit, each permitholder must operate the full number of days authorized on each of the dates set forth in its license.

By violating Florida Statutes Section 550.5251(2), the Department claims that Hialeah has lost its right to retain its permit and therefore does not possess all the qualifications prescribed by Chapter 550, Florida Statutes, and is ineligible to receive an annual license to conduct thoroughbred racing under Section 550.054(9)(a), Fla. Stat.

Florida Statutes Section 550.054(9)(a) provides as follows:

After a permit has been granted by the division and has been ratified and approved by the majority of the electors participating in the election in the county designated in the permit, the division shall grant to the lawful permitholder, subject to the conditions of this chapter, a license to conduct pari-mutuel operation under this chapter, and, except as provided in s. 550.5251, the division shall fix annually the time, place, and number of days during which pari-mutuel operations may be conducted by the permitholder at the location fixed in the permit and ratified in the election. After the first license has been issued to

the holder of a ratified permit for racing in any county, all such subsequent annual applications for a license b that permitholder must be accompanied by proof, in such form as the division requires, that the ratified permitholder still possesses all the qualifications prescribed by this chapter and that the permit has not been recalled at a later election held in the county.

3. Hialeah's Request For A Formal Administrative Proceeding

In response to the Administrative Complaint, Hialeah asserted, *inter alia*, that there were events beyond the ability of the permitholder to control. Specifically, some of the events beyond Hialeah's control included the unavailability of a sufficient number of thoroughbred horses to conduct the performances provided in the licenses, and the deliberate actions of third persons taken to prevent the availability of a sufficient number of thoroughbred horses to Hialeah for the conduct of the performances provided for in the licenses.

D. The Circuit Court Action

On January 30, 2004, Hialeah filed a Complaint For Declaratory Judgment And Other Relief, which was later Amended on February 4, 2004. The Amended Complaint alleges that sections of Chapter 550 are unconstitutional on their face, and as applied, because they effect a taking of the Hialeah permits without any compensation, procedural due process, and equal protection. A determination that Chapter 550 of the Florida Statutes is unconstitutional would render the administrative action moot.

NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition for prohibition is an order (1) granting the petition; (2) quashing the April 30, 2004 Order Denying Stay; and (3) directing the administrative judge to stay the administrative proceedings pending resolution of the circuit court action, Case No. 04-02337 CA-31.

ARGUMENT IN SUPPORT OF THE PETITION

I.

The Administrative Judge Departed From The Essential Requirements of Law by Refusing To Stay The Administrative Action

Ordinarily, when a constitutional attack is made upon administrative proceedings, they should be stayed pending resolution of the validity of those proceedings. *E.T. Legg and Company v. Franza*, 383 So. 2d 962, 963 (Fla. 4th DCA 1980); *Dyna Span Corporation v. Pollock*, 510 So. 2d 307, 307-308 (Fla. 4th DCA 1986) (granting petition for prohibition directing circuit court to proceed with determination of the constitutional issue and staying the administrative proceeding.)

The April 30, 2004 Order Deny Stay should be quashed because it ignores the essential requirements of the Florida Supreme Court which have been repeatedly upheld by the District Courts of Appeals: when a party raises a proper constitutional question, the circuit court *should* proceed with the determination of that issue and stay the administrative proceeding. *E.T. Legg*, 383 So. 2d 962, 964-

965 (Fla. 4th DCA 1980) *citing Gulf Pines Memorial Park, Inc., v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1980) (stating that it is “pointless to require applicants to endure the time and expense of full administrative proceedings to demonstrate [the statutory prerequisite] before obtaining a judicial determination as to the validity of that statutory prerequisite.”).

The underlying reason for stay of the administrative proceedings as stated by the Florida Supreme Court and which squarely apply in this case is that the issues before the administrative officer would *never* be reached if the statutes underlying the requirements for the permits in this case are held to be unconstitutional. *See Gulf Pines Memorial Park*, 361 So. 2d 695, 699 (Fla. 1980).

In the proceedings below, Hialeah is challenging in the circuit court the constitutionality of the very same statutes that the Department is asking the administrative judge to enforce against Hialeah. Requiring Hialeah to endure proceedings which advocate a resolution on the merits in advance of a determination of whether a cause of action even exists violates principles of justiciability, case and controversy, logic, and judicial economy.

Accordingly, denial of Hialeah’s Motion To Stay Administrative Proceeding is contrary to the essential requirements of law, and turns every notion of constitutional law and judicial economy on its head.

II.

The Prejudice to Hialeah Caused by the Administrative Judge's Refusal to Stay the Administrative Proceeding Has No Adequate Remedy at law

In the face of the overwhelming weight of authority that requires a trial court to stay the administrative proceedings pending adjudication of the underlying constitutional question, the Administrative Law Judge here denied Hialeah's Motion To Stay Administrative Proceeding. It is clear that a litigant like Hialeah not only has a right to have its constitutional challenge heard by a circuit court,³ but more importantly, that the constitutional determination of the underlying statutory framework must be determined prior to the completion of the administrative proceedings, thus a stay of the proceedings is warranted. A litigant like Hialeah which is being forced to litigate in the administrative forum and in the judicial forum in parallel proceedings is unfairly and irreparably being prejudiced, thereby warranting prohibition relief. Hialeah has a right to challenge the constitutionality of a statute that is being enforced against it in a parallel proceeding. The administrative law judge's order has stripped that right from Hialeah, thus warranting prohibition relief. If the May 24, 2004 Final Hearing is

³ *E.G. Gulf Pines Memorial Park, Inc., v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695, (Fla. 1980); *see also, Florida Public Employees Council 79, AFSCME v. Department of Children and Families*, 745 So. 2d 487 (Fla. 1st DCA 1999).

not prohibited, Hialeah will have lost its right to seek a constitutional determination of the underlying statutory framework in circuit court as is its right.

III.

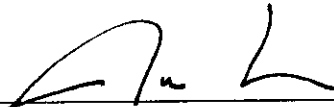
Conclusion

It is against established Florida law to deny Hialeah's Motion To Stay Administrative Proceeding, when it seeks to stay the administrative proceeding pending the constitutionality of the statutes on which the Administrative Complaint in the case is predicated. Accordingly, this Court should grant the petition, quash the April 30, 2004 Order, and stay the administrative action.

Dated: May 10, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via hand delivery and/or FedEx on this 10th day of May, 2004, upon the following:

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CERTIFICAT OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font requirements of Rule. 9.100(1).

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