

SUPREME COURT OF KENTUCKY
FILE NO.: 2012-SC-000416-DG

KENTUCKY HORSE RACING COMMISSION

APPELLANTS

v.

THE FAMILY TRUST FOUNDATION OF
KENTUCKY, INC., d/b/a THE FAMILY
FOUNDATION, ET AL.

APPELLEES

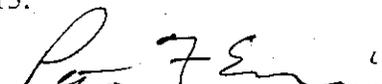
REPLY BRIEF FOR KENTUCKY HORSE RACING COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via U.S. mail on the following: Stanton L. Cave, Esq., Law Office of Stan Cave, P.O. Box 910457, Lexington, KY 40591-0457, Counsel for the Family Trust Foundation of Kentucky, Inc. d/b/a The Family Foundation; Laura M. Ferguson, Esq., and Douglas M. Dowell, Esq., Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40601-0423, and E. Jeffrey Mosley, Esq., Finance and Administration Cabinet, 702 Capitol Avenue, Rm 392, Frankfort, KY 40601, Counsel for Kentucky Department of Revenue; William A. Hoskins, Esq., Jay Ingle, Esq., Jackson & Kelly PLLC, 175 East Main St., Ste 500, Lexington, KY 40507, Attorneys for Appalachian Racing, LLC, Lexington Trots Breeders Association, LLC and Kentucky Downs, LLC; William M. Lear, Jr., Shannon Bishop Arvin, Christopher L. Thacker, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801, Counsel for Keeneland Association, Inc., Players Bluegrass Downs, Inc., and Turfway Park, LLC; Sheryl G. Snyder, Jason P. Renzelmann, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202, Counsel for Churchill Downs Incorporated and Ellis Park Race Course, Inc.; Hon. Thomas Wingate, Judge, Franklin Circuit Court, 669 Chamberlin Ave., Frankfort, KY 40601, and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 on this the 28 day of May, 2013.


Peter F. Ervin

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES i

INTRODUCTION 1

KRS 418.020. 1

I. THE REQUIREMENTS OF KRS 418.020 WERE SATISFIED AND NO DISCOVERY WAS NECESSARY TO RESOLVE THE QUESTIONS PRESENTED...... 1

KRS 418.020. 1, 2, 3, 4

KRS Chapter 230. 2, 3

KRS Chapter 230.215(2). 2

810 KAR 1:011 Section 1. 3

810 KAR 1:120. 3

810 KAR 1:120 Section 4. 3

Matthews v. Ward, 350 S.W.2d 500 (Ky. 1961) 3

McConnel v. Commonwealth, 655 S.W.2d 43 (Ky. App. 1983) 4

II. THE REGULATIONS ARE WITHIN THE COMMISSION'S STATUTORY AUTHORITY. 4

Flying J Travel Plaza v. Commonwealth of Kentucky, Transportation Cabinet,
928 S.W.2d 344 (Ky. 1996) 4

KRS Chapter 230. 4

KRS 230.215. 4

KRS 230.225. 4

KRS 230.215(2) 4

Commonwealth ex rel. Beshear v. Kentucky Utilities Co.,
648 S.W.2d 535 (Ky. App. 1982) 5

Board of Trustees of Judicial Form Retirement System v. Attorney General of the Commonwealth, 132 S.W.3d 770 (Ky. 2003) 5

III. THE FOUNDATION'S FACTUAL CONTENTIONS ARE NOT ONLY IRRELAVENT, BUT MISLEADING. 5

Commonwealth v. Simonds, 79 Ky. 618 (Ky. 1881) 6

Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W.2d 987 (Ky. 1931) 6

810 KAR 1:011 Section 2(1) 6

810 KAR 1:001 Section 1(30) 7

KRS 418.020. 8

CONCLUSION. 8

This Reply is submitted, by counsel, on behalf of the Appellant, Kentucky Horse Racing Commission ("Commission").

INTRODUCTION

The response brief filed on behalf of the Appellee, The Family Trust Foundation of Kentucky, Incorporated ("Foundation"), is illustrative only of its continued effort to obfuscate controlling legal issues with immaterial questions of fact. The Complaint filed in this action pursuant to KRS 418.020 clearly and specifically defined the legal issue of whether the Commission has statutory authority to adopt regulations permitting pari-mutuel wagering on historical horse races. Because it is apparent the question should be answered in the affirmative, the Foundation attempts, without pleading any claim, to reframe the lawsuit to question whether wagering systems and machines that were implemented post judgment comply with the requirements of the regulations.

The question of whether instant racing wagering or a wagering machine, meets the pari-mutuel requirements of the regulation is *not* before this Court. The sole question before this Court is a legal one-whether the Commission has the statutory authority to adopt regulations permitting pari-mutuel wagering on historical horse races.

I. THE REQUIREMENTS OF KRS 418.020 WERE SATISFIED AND NO DISCOVERY WAS NECESSARY TO RESOLVE THE QUESTIONS PRESENTED.

KRS 418.020 provides:

418.020. Agreed case may be submitted to court – Affidavit – Proceedings.

Parties to a question which might be the subject of a civil action may, without action, state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending.

Arguing that KRS 418.020 was not satisfied in the circuit court, the Foundation seeks to manipulate the statute to a desired end. The Foundation isolates the requirement that parties to a question state “the facts upon which it depends” and misstates the issue as “whether the activity, conduct and devices described by the joint petition and in the Regulations, constitute pari-mutuel wagering on legitimate horse racing under Chapter 230, ..., so as to be within the exception to the prohibition in Chapter 528 against gambling”¹ In an effort to further obscure the legal issue, the Foundation attempts to convert the procedure contemplated by KRS 418.020 into an adversarial proceeding in the nature of tort or contract which requires application of a summary judgment standard of review after unfettered discovery. The Foundation is mistaken on both the question and application of the statute.

First, the question of an agency’s statutory authority to regulate a matter is one of law only. In this case, the question presented *depends* entirely on the authority conferred on the Commission in KRS Chapter 230. No facts can be discovered on whether the Commission may regulate pari-mutuel wagering on legitimate horse racing. The Commission has that authority as a matter of law² and the only facts necessary to determine whether the Regulations are an appropriate exercise of that authority are contained within the Regulations themselves. It was neither necessary nor appropriate to develop a further factual record to answer the questions presented by this action. The Foundation’s intervention did not change this.

¹ Appellee’s Brief, p. 21.

² “It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth....” KRS 230.215(2).

The Regulations do not create a new form of wagering. 810 KAR 1:011 Section 1 provides in relevant part: "The only wagering permitted on a live or historical horse race shall be under the pari-mutuel system of wagering. All systems of wagering other than pari-mutuel shall be prohibited." Rather, the effect of the Regulations is to recognize a new *medium* through which to wager that is both pari-mutuel and dependent on the outcome of a legitimate horse race.³ The Regulations provide the legal framework to offer wagering on historical horse races, just as they do for offering wagering on traditional live races. *See generally* 810 KAR 1:011; 810 KAR 1:120. The Regulations do not recognize a specific manufacturer, make, or model of terminal. *See* 810 KAR 1:120 Section 4. Therefore, neither a statement of fact nor discovery of a specific machine can resolve the legal question. Answering these questions would do nothing to aid the court in determining whether the Regulations are authorized by KRS Chapter 230.

Second, the procedure provided for in KRS 418.020 does not contemplate adversarial proceedings with discovery that may be used to stymie the process by application of summary judgment standards of review. The very title of the statute contemplates that it is an "**Agreed case.**" The plain language of the statute does not contemplate litigation in the traditional sense. It provides a procedure for adjudication "without action," as "if an action had been brought," and permits the court to "render judgment as if an action were pending." In an agreed case, the legal question for review under KRS 418.020 should be "clear and specific." *Matthews v. Ward*, 350 S.W.2d 500, 501-502 (Ky. 1961).

³ 810 KAR 1:001 Section 1(30) defines historical horse race as "any horse race that: (a) Was previously run at a licensed pari-mutuel facility located in the United States; (b) Concluded with official results; and (c) Concluded without scratches, disqualifications, or dead-heat finishes."

In the case *sub judice*, the legal questions were clearly and specifically defined. The legality of the regulations was not subject to fact-based questions on specific terminals.⁴ There was no counterclaim asserting any cause of action. The Court of Appeals unanimously agreed that the circuit court properly exercised jurisdiction under KRS 418.020⁵, but the majority errantly broadened the scope of the practice of this agreed case. Because the circuit court correctly concluded that discovery was unnecessary to resolve the legal questions, the Court of Appeals should be reversed and the judgment of the circuit court should be reinstated.

II. THE REGULATIONS ARE WITHIN THE COMMISSION'S STATUTORY AUTHORITY.

The Foundation argues that the Regulations exceed the Commission's statutory authority. Relying on *Flying J Travel Plaza v. Commonwealth of Kentucky, Transportation Cabinet*, 928 S.W.2d 344 (Ky. 1996), it argues that the Regulations are "outside the policy framework embodied by the statute." To make this argument, the Foundation must consciously ignore the plain and express breadth of the *policy framework embodied by KRS Chapter 230*.

First, the Regulations fall squarely within the statutory authority of the Commission. Nowhere has the General Assembly given greater rule making authority to a body than that conferred on the Commission in KRS 230.215 and KRS 230.225. Kentucky Revised Statute 230.215(2) requires the Commission "to foster and to encourage the business of legitimate horse racing and pari-mutuel wagering thereon" and

⁴ The Foundation incorrectly attempts to correlate the factual inquiry into the workings of the breathalyzer in the *McConnell v. Commonwealth*, 655 S.W.2d 43 (Ky. App. 1983), with what it argues is necessary in this case. But in this case there is no machine to analyze. The question presented is conceptual in relationship to legal authority.

⁵ Opinion Vacating and Remanding, p. 6.

to exercise "plenary power to promulgate administrative regulations prescribing the conditions under which all legitimate horse racing and wagering thereon is conducted." The Regulations fulfill this mandate simply by recognizing a new medium through which to wager, which is both pari-mutuel and based on legitimate horse racing. There is neither deviation from nor expansion of the statutory mandate.

Second, and given the breadth of the Commission's statutory authority, the Court should strictly adhere to its policy of deference afforded to agency interpretation of its compliance with statutory authority. "Great deference is always given to an administrative agency in the interpretation of a statute which is within its specific province." *Commonwealth ex rel. Beshear v. Kentucky Utilities Co.*, 648 S.W.2d 535, 537 (Ky. App. 1982). No one should be heard to argue that the Regulations are not within the province of the Commission's statutory authority. This Court should defer to the Commission's "construction of a statute that it is charged with implementing," so long as the Commission's "interpretation is in the form of an adopted regulation or formal adjudication." *Board of Trustees of Judicial Form Retirement System v. Attorney General of the Commonwealth*, 132 S.W.3d 770, 786-87 (Ky. 2003).

In this case, the Commission has followed its express mandate by adopting conforming regulations. The Foundation's argument that it exceeded its authority should be dismissed out-of-hand.

III. THE FOUNDATION'S FACTUAL CONTENTIONS ARE NOT ONLY IRRELAVENT, BUT MISLEADING.

The Foundation attempts to advance several factual questions that are both irrelevant and misleading. Because the Court of Appeals was apparently misled to believe discovery was necessary⁶, it is important that any need be dispelled here.

First is the touted "trivial pool of one." Whether a pool is mutual does not depend on how many bettors play into the pool. Pari-mutuel wagering is as much defined by what it is not—it is not wagering against the house.⁷ How many people play into a pool affects the payout. If only one person plays into a pool, it is still pari-mutuel wagering because the bettor is not playing against the house. In addition, as with live racing, the Regulations require the use of a totalizator machine in order to pool the bets. "Pari-mutuel wagering on live and historical horse races shall only be conducted through the use of a totalizator or other similar mechanical equipment approved by the commission..." 810 KAR 1:011 Section 2(1). At the county fairs and small tracks that do not sell their signal for simulcasting, there are pools that only one bettor plays into. If that happens, the race is not scratched because the bet is still a pari-mutuel wager.

The second red herring is the question of odds calculation. Odds are irrelevant to the question of whether or not something is pari-mutuel. Morning line odds are set by track handicappers before any wagering occurs. Bookies give odds based on their own analyses of races. In pari-mutuel wagering, odds are determined by the bettors—as provided in the Regulations.

⁶ Opinion Vacating and Remanding, p. 9.

⁷ See, *Commonwealth v. Simonds*, 79 Ky. 618 (Ky. 1881); and *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987 (Ky. 1931).

Third, the question of handicapping is likewise irrelevant. With respect to traditional live racing, there is no requirement in the statutes or regulations that people have access to handicapping information. The Regulations permit those wagering on historical horse races access to prior performances, just as people who bet on traditional live races do. But bettors have a multitude of ways to choose a horse – from lucky numbers to the colors of silks - many of which do not include the horse's past performance. The question is not relevant.

Fourth, and last is the question of whether a horse race that is not run in real time is a legitimate horse race. No discovery will help to answer this question, but the Regulations themselves do. To qualify as a historical horse race, it must be a legitimate horse race. 810 KAR 1:001 Section 1(30) defines "historical horse race" as "any horse race that: (a) Was previously run at a licensed pari-mutuel facility located in the United States; (b) Concluded with official results; and (c) Concluded without scratches, disqualifications, or dead-heat finishes."

In the past, a wager could only be placed on a live race at a track. Pools were comprised of wagers made by only those bettors in personal attendance. Over time, many types of exotic, but pari-mutuel, wagers have developed. Simulcasting and the use of technology such as the self-service tote have come to fruition. Today, what is pari-mutuel wagering on horse racing? It is not a pool comprised of people betting on the same race. It is not a pool comprised of people betting on the same day. It is not pools comprised of people betting from the same location. It is not pools comprised of people betting through a certain medium. Pari-mutuel wagering is a form of betting where a person is not betting against the house—wagers are pooled, and whether or not a bettor

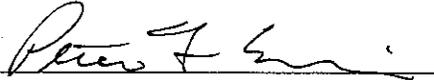
wins is contingent upon the outcome of a horse race. This essential fact has not changed over time and is required by the Regulations.

The so called factual questions identified by the Foundation are not issues relevant to the Court's determination of the Commission's authority. Discovery of post judgment facts related to these issues would not only complicate the court's task but also frustrate the purpose of the agreed case under KRS 418.020. The only relevant factual study in this case begins and ends with the content of the regulations.

CONCLUSION

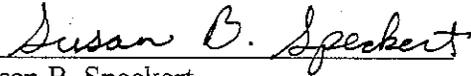
For the foregoing reasons, the Court of Appeals Opinion should be REVERSED and the Circuit Court Judgment should be reinstated and AFFIRMED.

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