

In the  
**Supreme Court of Ohio**

WCI, INC., d.b.a. CHEEKS,	:	Case No. 2006-1360
	:	
Appellee,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
OHIO LIQUOR CONTROL	:	Tenth Appellate District
COMMISSION,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 05AP-896
	:	

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**REPLY BRIEF OF APPELLANT  
OHIO LIQUOR CONTROL COMMISSION**

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CHRIS O. PAPARODIS\* (0001703)  
*\*Counsel of Record*

GARY A. GILLET (0029529)  
Buckley King, LPA  
10 West Broad Street, Suite 1300  
Columbus, Ohio 43215  
614-461-5600  
614-461-5630 fax

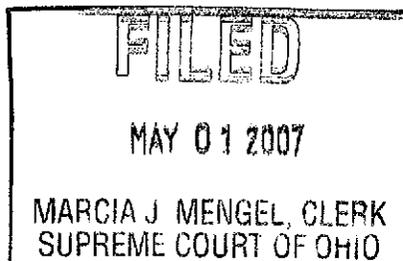
Counsel for Appellee  
WCI, Inc.

MARC DANN (0039425)  
Attorney General of Ohio

ELISE PORTER (0055548)  
Acting Solicitor General  
STEPHEN P. CARNEY\* (0063460)  
Deputy Solicitor  
*\*Counsel of Record*

HILARY R. DAMASER (0059190)  
Assistant Solicitor  
CHARLES E. FEBUS (0063213)  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 fax  
scarney@ag.state.oh.us

Counsel for Appellant  
Ohio Liquor Control Commission



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## INTRODUCTION

As our opening brief explained, R.C. 4301.25(A), which authorizes the Liquor Control Commission to “suspend or revoke any permit” to sell liquor for “[c]onviction of the holder or the holder’s agent or employee . . . for a felony,” must be read our way, or the Commission is left with no power at all to use *this statute* to hold permit holders responsible, when appropriate, for their employees’ acts. In our view, this law applies if a person committing a felony was a permit holder’s employee at the time of the *activity* that led to a conviction, even if management fires the employee between the time of the activity and the date of conviction. The problem with the contrary view—i.e., that the Commission can invoke this statute only when management keeps an employee on the payroll through the date of conviction—is that savvy managers will of course *always* fire the employee before conviction, so this statute could never be invoked to hold permit holders responsible.

In response, Appellee WCI, the permit holder here, essentially admits that their view renders this statute toothless for penalizing permit holders, and it offers two reasons why this is not a problem—but neither is persuasive. First, WCI says that it is not a problem if the statute is never used to hold permit holders responsible, because the statute is only meant as a fire-the-felon mandate. In other words, WCI says that the statute’s sole purpose is to get felons fired, or not hired to begin with, so that purpose is met as long as the permit holder is nudged to act, and the permit holder need not be penalized. Second, WCI points to *other provisions* that the Commission could invoke instead of R.C. 4301.25(A), and WCI says that the Commission can and should use those other laws to try to hold liquor permit holders responsible if their employees sell drugs, as a WCI employee did here.

Not only are WCI’s arguments unpersuasive, but properly understood, its arguments further demonstrate why the Court should adopt the Commission’s view. First, WCI, by focusing on

other laws, and by claiming that the statute at issue is meant only to hold the offending employee responsible by triggering her being fired, is plainly conceding that their view leaves this statute meaningless in terms of holding the permit holder liable in *any* circumstances. So if the Court agrees, as it should, that this statute is structured to address permit holders' responsibility, then WCI's entire argument collapses. That is, WCI offers no backup argument to salvage any meaning of the statute other than its view that it must be aimed solely at firing employees.

Second, WCI's focus on other laws is equally telling. Even if WCI were right that these other laws might work in some cases, that still leaves us wondering why the General Assembly passed *this law* as well. The Court presumes that all statutes are passed for a reason, and that rule does not have an exception saying that we can reduce a statute to nothing simply because other laws may overlap and provide a workable substitute. Moreover, as detailed below, the other laws that WCI points to are not a full substitute for R.C. 4301.25(A).

For these reasons, the Court should reject WCI's view and reverse the court below, and it should hold that R.C. 4301.25(A) allows the Liquor Control Commission to hold permit holders responsible when their employees commit on-the-job felonies, even if the employee is fired by the conviction date.

## ARGUMENT

- A. WCI concedes that their view renders R.C. 4301.25(A)(1) useless for holding permit holders responsible for their employees' illegal acts, and they admit that their view reduces the statute to a mandate to fire offending employees.**

WCI's concedes the main point that the Commission made in our opening brief: that under WCI's view, as long as a permit holder fires an employee before her conviction date, the Commission is completely unable to invoke R.C. 4301.25(A)(1) to penalize a permit holder, no matter how egregious the circumstances. The full reach of this concession is critical: WCI does not say that the Commission may invoke the statute in certain egregious fact patterns, such as if the evidence shows that management tolerated or encouraged the felonious acts, or if the felony in question were murder, or if any other such extreme scenario arises. WCI admits that their view provides a 100% safe harbor, at least as to *this statute*, to every permit holder that fires an employee in time. WCI stresses that the Commission should use *other* provisions instead, and we respond to the details of that argument in Part B below. But the mere fact that WCI leans so heavily on other provisions is quite telling, as the question at issue is not whether other laws might help in this or that fact pattern, but whether *this statute* has any concrete meaning or effect. Thus, the Commission suggests WCI's concession is enough to resolve the case, as the Court should not read the statute to leave *no circumstances* in which the Commission can carry out the General Assembly's intent to hold permit holders responsible for their employees' acts. See *State ex rel. Asti v. Ohio Dept. of Youth Serv.*, 107 Ohio St.3d 262, 2005-Ohio-6432, at ¶ 22 (explaining that, in interpreting statutes, a court's "paramount concern is legislative intent"); *State ex rel. Gemienhardt v. Delaware Cty. Bd. of Elections*, 109 Ohio St.3d 212, 2006-Ohio-1666, at ¶ 35 (explaining that a court may not interpret a statute so that it results in an absurd and unreasonable meaning).

WCI provides only one suggestion for preserving some meaning for the statute—namely, that the statute is meant *only* to encourage permit holders to fire (or not hire) employees who commit felonies, not to actually hold permit holders responsible—but WCI’s suggestion is not persuasive. See WCI Br. at 6 (“The Legislature intended this statute as a means of precluding liquor permit holders from hiring or retaining as employees persons with a conviction.”). This reading is not persuasive because it does not track the structure or wording of the statute; in particular, it does not read the way one would expect if the General Assembly set out to draft a mandate to fire (or not hire) felons. If the Assembly meant to enact a “fire-a-felon” mandate, that would have been simple. It could have said, “If an employee is convicted of a felony, the permit holder shall terminate the individual’s employment immediately, or the Commission may penalize the permit holder for failure to fire the employee.” It seems unlikely that the Assembly would have used the indirect approach of *avoiding* any direct mandate-to-fire language, while instead using language aimed only at suspending or revoking the permit holder’s license, but with the “true aim” of nudging management to fire the employee. And if the Assembly wanted only to nudge firing the employee, with a focus on when to do so or not, it seems most logical to expect that it would have called for such action immediately *after* a conviction, rather than encouraging the eve-of-*potential*-conviction firing strategy that WCI’s view calls for.<sup>1</sup>

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<sup>1</sup> WCI also errs in misreading the Commission’s explanation of how, under their reading, a permit holder ought to always fire the employee when charges are filed, as it can always rehire the employee if charges are dropped or if the employee is *acquitted*. See Commission Br. at 7-8; WCI Br. at 11-12. After first noting, correctly, that the Commission was explaining a post-*acquittal* scenario, WCI inexplicably changes course and objects that our scenario “is incorrect,” WCI Br. at 11, because a “permit holder could not rehire an ex-employee following a *conviction* in order to circumvent” the statute. WCI Br. at 12 (emphasis added). Of course, an employee cannot be rehired immediately after *conviction*, as the law forbids that (and a newly-convicted felon would presumably be in prison, and thus unable to work). The point is that firing pre-trial is a safe strategy, and it saves the permit if the employee is convicted, while *on the other hand*, the employee could be rehired if acquitted.

Not only does the statute differ markedly from the structure that one might expect for a true “fire-the-felon mandate,” but the statute is, to the contrary, strongly written in terms of holding permit holders responsible. First, the context shows this, as all of the other provisions in R.C. 4301.25 are structured to reflect penalizing the permit holder for *its* actions. The statute says that the Commission may suspend or revoke a permit “for the violation of” anything in the chapter “and for the following causes.” R.C. 4301.25(A). The first listed cause is the one at issue here, which includes in one unitary clause the commission of a felony (or any violation of Chapters 4301 or 4303, even if a misdemeanor) by the *permit holder himself*, as well as commission by an employee or agent. That unitary clause shows that this is about holding the *permit holder* responsible, not about nudging the permit holder to punish the employee by firing her. Further, the remaining clauses go on to cover other acts that the permit holder might commit, such a making a false statement on a permit application, failure to pay excise taxes on liquor, and so on. See R.C. 4301.25(A)(2)-(6). Finally, after the offenses are defined in R.C. 4301.25(A), and another permit-losing scenario is listed in subpart (B), the statute’s subpart (C) directs the Commission to consider, in deciding a penalty, factors such as the volume of the permit holder’s business, and its relation to the seriousness of the offense. All that makes sense if this entire scheme is aimed at penalizing the *permit holder* when circumstances warrant. None of this makes much sense if the purpose is solely to hold the *employee* responsible, by getting the employee fired, with no real purpose or goal of holding the permit holder responsible. Aiming a penalty at the permit holder, as a roundabout way of encouraging it to fire an employee, is too convoluted a reading to be plausible, especially when a straightforward reading allows the Commission to effect the Assembly’s intent by holding the permit holder responsible for its employees’ acts.

In sum, this statute cannot plausibly be read as a mere fire-the-felon mandate; instead, the statute is plainly aimed at holding permit holders responsible when appropriate. And if the statute is aimed at holding permit holders responsible, then the statute cannot be read in a way that leaves *no circumstances* in which the Commission can invoke the statute against a permit holder. Consequently, the Court should reject WCI's reading of the statute, and it should instead adopt Commission's common-sense view. The Court should hold that an employee's status as an employee is tied to the date of the illegal act, not the date of conviction.

**B. The existence of other laws that penalize permit holders for illegal activity cannot be used as a basis for rendering R.C. 4301.25(A)(1) toothless as an independent source of authority to penalize permit holders.**

WCI makes much of the availability of *other laws* that the Commission should have used, in WCI's view, if it wished to penalize WCI for its employee's on-the-job drug sales. Not only does WCI's emphasis on other laws fail to help its cause, but equally important, WCI's strong reliance on other laws shows precisely why its view of R.C. 4301.25(A) is mistaken. The principle at stake is whether *this statute* should be rendered meaningless, and WCI's challenge was to come up with some reading that preserves a plausible purpose and effect for *this* statute. Instead, WCI's citation of *other laws* is essentially an argument that the Court can and should let this law be reduced to nothing, as other laws are waiting in the wings to do the job. That is wrong on principle, and that is enough to reject WCI's other-laws arguments. But even if the Court looks to the other laws that WCI cites, it should find that neither law is a true substitute for R.C. 4301.25(A).

First, WCI relies on an administrative rule that authorizes the Commission to penalize a permit holder for allowing drug sales, Ohio Adm.Code 4301:1-1-52, but that drug-focused rule is far too narrow in scope to be a substitute for R.C. 4301.25(A), which covers all felonies (as well as misdemeanor violations of Chapters 4301 or 4303). WCI's broad fire-the-employee safe

harbor would insulate a permit holder regardless of the felony, e.g., even if a bouncer committed murder, or if an employee was guilty of promoting prostitution (a felony under 2907.22), or all sorts of non-drug crimes. An administrative rule aimed at drug sales, even if it could be used for fact patterns such as this, does nothing to address the broader problem that their view undercuts the Assembly's decision that *all* felonies may potentially trigger the Commission's need to act.

In addition, the drug-sales rule require the Commission to prove the act, and although WCI portrays this as a lighter burden, see WCI Br. at 11, the rule expressly ties the penalty only to cases in which a permit holder “knowingly or willfully allow[s]” drug sales on the premises. Showing the permit holder's knowledge or willfulness is not required under R.C. 4301.25(A). And if the Commission instead bases the penalty on the *employee's* allowance of drug sales, it is not impossible to expect that, if the Court adopts WCI's date-of-conviction approach for R.C. 4301.25(A), we will next see permit holders urge a date-of-hearing approach for the administrative rule, so that the fire-the-employee loophole will arise there as well.

WCI is equally mistaken in suggesting that the Commission can always turn to R.C. 4303.292(A)(1)(b), which empowers the Commission to deny renewal or transfer of a license if the permit holder (or related persons such as managers or significant stockholders) “demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state[.]” See WCI Br. at 10. This catchall “disregard for law” provision suffers two flaws in comparison to R.C. 4301.25(A). First, it requires an entirely different proof, as it is based on the permit holder's conduct, not on employee conduct. The whole purpose of R.C. 4301.25(A) is to provide for derivative responsibility without having to prove the permit holder's knowledge. Such knowledge or approval may be relevant to the Commission's decision regarding the extent of a penalty, or even whether to impose any penalty at all, but is not relevant to the baseline

availability of R.C. 4301.25(A). Second, R.C. 4303.292 can be used only to block an annual renewal (or a transfer if the holder seeks one), so it cannot be used to respond to a situation that warrants immediate action.

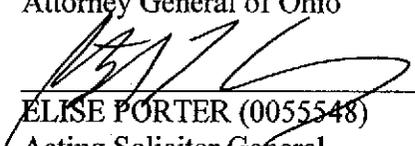
For these reasons, the other laws that WCI cites are no substitute for R.C. 4301.25(A) as a way to hold permit holders responsible for their employees' criminal acts. And again, even if those laws were a good substitute in some or most cases—or even, somehow, in all cases—that is no justification for reducing a separate statute to meaninglessness. Every statute is enacted to do *something*, and the Court ought not to adopt a new rule that allows a law to be ignored merely because other laws seem to cover the same ground.

### CONCLUSION

For the above reasons, the Court should reverse the judgment below, and it should instead the affirming the decisions of the Court of Common Pleas and the Commission.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



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ELISE PORTER (0055548)

Acting Solicitor General  
STEPHEN P. CARNEY\* (0063460)  
Deputy Solicitor

*\*Counsel of Record*

HILARY R. DAMASER (0059190)

Assistant Solicitor

CHARLES E. FEBUS (0063213)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

scarney@ag.state.oh.us

Counsel for Appellant

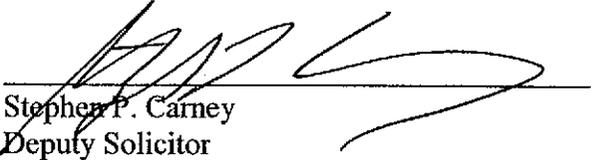
Ohio Liquor Control Commission

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Appellant Ohio Liquor Control Commission was served by U.S. mail this 1st day of May, 2007, upon the following counsel:

Chris O. Paparodis  
Gary A. Gillett  
Buckley King, LPA  
10 West Broad Street, Suite 1300  
Columbus, Ohio 43215

Counsel for Appellee  
WCI, Inc.

  
\_\_\_\_\_  
Stephen P. Carney  
Deputy Solicitor