

IN THE SUPREME COURT OF OHIO 11-0019

BARTEC, INC. et al.,
Defendants-Appellants,

v.

ALVIN JACKSON,
OHIO DEPARTMENT OF HEALTH

Defendant-Appellee

RICHARD CORDRAY,
ATTORNEY GENERAL

Defendant-Appellee

: ON APPEAL FROM THE
: FRANKLIN COUNTY COURT
: OF APPEALS, TENTH
: APPELLATE DISTRICT

: COURT OF APPEALS
: CASE NO. 10AP-173

: TRIAL COURT
: CASE NO. 09CVH08-12197

APPELLANTS' MOTION FOR RECONSIDERATION OF MAY 23, 2012 SLIP
OPINION NO. 2012-OHIO-2187

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 940-9817
Fax: (614) 365-9564
Email: MThompson@OhioConstitution.org

Counsel for Appellants

Michael DeWine (0009181)
OHIO ATTORNEY GENERAL
Alexandra Schimmer (0075732)
Elisabeth Long (0084128)
Stacy Hannan (0081094)
Robert Moorman (0083773)
Angela Sullivan (0075070)
30 East Broad Street, 17th Floor
Columbus, Ohio 43015
(614) 466-4320
(614) 466-5087 Fax

Counsel for Appellees

FILED
JUN 04 2012
CLERK OF COURT
SUPREME COURT OF OHIO

**APPELLANTS' MOTION FOR RECONSIDERATION OF MAY 23, 2012 SLIP
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Now come Now come appellants, Richard M. Allen and Bartec, Inc. (collectively "Zeno's"), and respectfully requests that this Court reconsider its May 23, 2012 final disposition on Zeno's challenge to the constitutionality of the application of R.C. 3794 ("the smoking ban") to its property: the Court's conclusion that this issues was not before the court overlooks critical facts dictating otherwise, and is thus based on faulty factual conclusion.

Respectfully submitted,



Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State St.
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org

**MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION FOR RECONSIDERATION
OF MAY 23, 2012 SLIP OPINION NO. 2012-OHIO-2187**

This Court's May 23, 2012 decision in this case improperly sidesteps the critical issue of whether the ban is constitutional as applied to bars.

Zeno's challenges the ban as applied to bars such as itself.

First, in its May 23 Decision, this Court indicates that (1) Zeno's argues "that prohibiting smoking in an adults-only liquor licensed establishment, such as Zeno's, is unduly oppressive;" and (2) "It is clear that this is an as-applied challenge. Appellants are not contending that there is no set of circumstances under which the Smoke Free Act would be valid. Again, appellants are contending that, as applied to their particular circumstances, R.C. 3794.02 is unfair and unconstitutional."¹

Secondly, on page 2 of its decision, this Court acknowledges that ODH's Complaint sought to compel Zeno's "comply with the law." This Court further acknowledges that Zeno's "raised the affirmative defenses that R.C. Chapter 3794 is unconstitutional both on its face and as applied to them."²

And indeed, the Court is correct on page 2. ODH's August 13, 2009 Complaint against Bartec explicitly sought "judgment. . . affording the following relief: A. Preliminary and permanent injunctive relief to protect the public health and safety. B. Order requiring Defendants to comply with R.C. 3794. * * *." August 19, 2009 Complaint of Alvin D. Jackson, p. 10 (Trial Court Case No. 09 CV 12197). Simultaneously, ODH's August 13, 2009 "Motion for Preliminary Injunction" explicitly demands that ODH is "entitled to a statutory injunction, pursuant to R.C. 3794.09(D), to order [Bartec] to comply with the Smoke Free Act, or be held in contempt of court for violation of

¹ May 23, 2012 Decision, SLIP OPINION NO. 2012-OHIO-2187, p. 12. (Note: Zeno's never contended that the ban was "unfair.").

² Id., at p. 2.

the injunction.” August 19, 2009 Motion for Preliminary Injunction of Alvin D. Jackson, p. 7 (Trial Court Case No. 09 CV 12197).

To this, Zeno’s, in Paragraph 67 of its September 16, 2009 Answer, explicitly articulated the *affirmative defense* that R.C. 3794 is unconstitutional *as applied to Defendants*, explaining further that Defendants were a liquor-serving tavern deriving almost all of their revenue from the sale of liquor, that did not permit entry to anyone under 21. September 16, 2009 Answer of Bartec and Richard M. Allen, p. 5, 6, Paragraphs 67, 71-77, 124, 128.

Zeno’s argues the ban is unconstitutional as to bars such as itself - - nothing more, nothing less:

- “Inclusion of bars such as Zeno’s in the ban illustrates the conflict between (1) an expansive view of the police power; and (2) the traditional intrinsic and extrinsic limitations on that power: R.C. 3794.02(A) states that “no proprietor of a public place . . . shall permit smoking in the public place.” While R.C. 3794.03 makes a myriad of seemingly arbitrary exemptions, none are for bars, even though alcohol and cigarette consumption tend to run hand-in-hand at such locations, rendering the ability to efficiently allocate the use of one’s indoor air an important feature of property ownership and use.”³
- “A property owner does not commit a nuisance by permitting indoor smoking at an adults-only liquor-licensed establishment.”⁴
- “Use of the state police power to regulate the allocation of indoor air at an adults-only liquor licensed established exceeds the nuisance predicate for the power, is unprecedented, and goes too far.”
- “Forbidding adults-only liquor-licensed establishments such as Zeno’s from permitting smoking within their property is unreasonable, arbitrary, and unduly oppressive.”⁵
- “Next, property rights limit the state from forbidding a private bar owner from permitting patrons to smoke. * * * The subjection of all bars to R.C. 3794.02(A), through R.C. 3794.01(B) and (C) is an arbitrary and unreasonable deprivation of those property owners’ right to use property for an otherwise lawful purpose, and also unduly burdensome upon the rights of bar owners.”⁶

³ Zeno’s Merit Brief, p. 24.

⁴ Id., at p. 34.

⁵ Id., at p. 36.

⁶ Id., at p. 37.

- “Zeno’s presented uncontroverted expert testimony and exhibits demonstrating that the ban goes beyond the necessities of the situation and provides no *substantial* benefits to public health. First, in the absence of smoking bans on bars, there is a robust market for sorting amongst smokers and non-smokers to avoid unwanted subjection to second-hand smoke, both amongst different establishments, and within the same establishments. Secondly, smoking at businesses based on on-premises liquor consumption, such as Zeno’s, does not endanger children, because only those over the age of 21 are admitted, and they do not cater to families, as would a restaurant, and since 90 to 93% of Zeno’s revenue comes from liquor sales, it is starkly dissimilar from a family-oriented restaurant, sports stadium, or government building.”⁷
- “[T]he ban is arbitrary. While it provides no exemptions for easily-avoidable establishments dependent on smoking patrons, it *does* provide exemptions for retail tobacco stores, hotels, motels, family-owned bars, nursing homes, and private clubs. No rationale, such as the harm that second-hand smoke poses in different environments, could justify such distinctions on the basis of any discernable principle. Concomitantly, ODH has been at a loss to identify such a principle.”⁸
- “Consequently, subjection of bars such as Zeno’s to the smoking ban surpasses the public nuisance basis of the police power, unreasonably and arbitrarily invades Zeno’s property right to allocate its indoor air for private gain, and unduly burdens Zeno’s business beyond the necessities of the situation, without providing *substantial* health benefits. Meanwhile, the ban is anything but “necessary” or “clearly required” to benefit the public health - - the right to a pleasant nightlife experience simply cannot trump the property rights that governments are formed to secure. Such subjection thus violates Section 19, Article I of the Ohio Constitution, and must be annulled.”⁹

On page 15, the decision concedes that “[a]lthough appellants are foreclosed from challenging the violations already issued, we agree with appellants that their declaratory judgment/injunction action also sought to prevent future enforcement of the Smoke Free Act. Appellants raised an as-applied challenge and, therefore, must prove by clear and convincing evidence that future enforcement of the act would violate their constitutional rights.”¹⁰ Consequently, this Court was required to adjudicated Zeno’s property rights-based challenge to the ban as applied to bars such as itself.

⁷ Id., at p. 38. Internal citations omitted.

⁸ Id., at p. 39. Internal citations omitted.

⁹ Id., at p. 40.

¹⁰ May 23, 2012 Decision, SLIP OPINION NO. 2012-OHIO-2187, p. 15.

The Court failed to consider Zeno's property rights-based challenge to the ban, as applied to bars such as itself.

Although properly before the Court through, at minimum, its affirmative defense that the ban cannot be enforced against bars such as itself in the future, the Court did not consider this issue.

Instead, the Court only engages in an abridged facial analysis of this issue, suddenly misstating Zeno's argument as "[Appellants] contend that the act exceeds the limits of the state's police powers."¹¹ While this quotes *Appellees* derisive characterization of Zeno's claims in their brief, it is in no way characterizes Zeno's own arguments.

Meeting this challenge, instead of Zeno's actual challenge, the Court moves forward with analyzing the act only, rather than the act as applied to bars. It reasons "[i]n R.C. 3794.04, the state declared the necessity for regulating smoking in public places and places of employment. Our review of the act leads us to conclude that it is neither unduly oppressive nor arbitrary in its restrictions. * * * We therefore hold that the Smoke Free Act is a valid exercise of the state's police power by Ohio's voters."¹² But this is the wrong analysis for an as-applied claim. As the Court itself acknowledges on p. 8 of its decision, the question is not whether *the act* is constitutional in at least one or more of its applications: "a party raising an as-applied constitutional challenge, on the other hand, alleges that "the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative."¹³

The court's decision does not specify its abstention from consideration of this core controversy between the parties. On page 13, it observes that a party must exhaust an available administrative remedy before instituting a declaratory judgment action challenging the

¹¹ Id., at p. 20.

¹² Id., at p. 22-23.

¹³ Id., at p. 8.

constitutionality of an administrative regulation as applied. This does not speak to Zeno's affirmative defense that the ban is unconstitutional as applied to bars such as itself.

Next, the Court states on page 12 of its decision that "however, as discussed above, because appellants did not raise this as-applied constitutional challenge in any of the violations they failed to exhaust their administrative remedies, and this challenge is not properly before the court."¹⁴ In context, this statement would appear to only refer to Zeno's challenges to past citations. But it does not speak to Zeno's affirmative defense that the ban is unconstitutional as applied to bars such as itself. And if it did, it would be mistaken, since Zeno's has consistently presented affirmative defenses to ODH's attempt to enforce the law against Zeno's in the future.

Further, on page 15, the decision states "the original enforcement of the Smoke Free Act against appellants occurred when the Columbus City Health Department, ODH's designee, issued the ten proposed findings of violation and civil fine. These orders became final when they were not challenged on appeal and the time for appeal has passed. * * * Because appellants do not argue either fraud or lack of jurisdiction, their attempt to invalidate the ten violations through a declaratory judgment action is an improper collateral attack. This may speak to any challenge to past citations issue, but it does not speak to Zeno's affirmative defense that the ban is unconstitutional as applied to bars such as itself.

Finally, the Court does not explain why it has not considered Zeno's property-rights based challenge to the ban as-applied to bars such as itself, going forward, in light of its past precedent specifying that "[t]he requirement of exhaustion of administrative remedies is not applicable where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute."¹⁵ This is even though here is entirely identical: Zeno's was sued by ODH in an injunctive action, and defended itself with the affirmative defense that R.C. 3794 and its enforcement are

¹⁴ Id., at p. 12.

¹⁵ See *Johnson's Island*

unconstitutional facially and as applied to Zeno's. Paragraph 67 of Zeno's Answer and Counterclaim plainly states "R.C. 3794 is unconstitutional both on its face and as applied to Defendants." Consequently, *Johnson's Island* governs this matter, and permits Zeno's to challenge the ban, both facially and as applied to Zeno's business and property.

The Court's abstention of as-applied analysis was outcome-determinative.

The Decision's own articulated standards for whether the policy power may diminish property rights reference whether "its exercise is justified by the necessity of the situation," while "the individual case must stand upon its own footing"¹⁶ For the reasons articulated in Zeno's brief, the imposition of the ban on taverns such as Zeno's is neither *necessary* to advance the public health, nor reasonable or non-arbitrary. Consequently, were this Court to have fully analyzed Zeno's property rights-based as-applied challenge to the ban, it would have been required to reach the inverse of the conclusion it reached.

The Court's decision does not resolve the primary controversy between the parties.

In the absence of a judgment as to whether the ban is unconstitutional as applied to bars, the state of the R.C. 3794 remains in flux in (1) the places where it is primarily applied in Ohio: liquor permit-holding establishments; (2) the only places as to which the constitutionality of enactment's application is contended. With numerous cases pending in courts around Ohio, millions of dollars in fines hanging in the balance, and the issue having been placed squarely before the Court, this lack of finality is impermissible.

In conclusion, this Court must reconsider its decision for reasons articulated herein, ordering supplemental briefing if necessary. Appellants further request a written reason the Court's ruling on this motion, as required by Section 2(C), Article IV of the Ohio Constitution.

¹⁶

Id., at p. 20.

Respectfully submitted,



Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State St.
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org

CERTIFICATE OF SERVICE

I certify that a copy of this was served on counsel for appellees on June 4, 2012.



Maurice A. Thompson (0078548)