No. 35632 - Fountain Place Cinema 8, LLC v. Christopher G. Morris, as State Tax Commissioner of West Virginia

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OF WEST VIRGINIA

Davis, J., dissenting:

In this proceeding, the majority affirmed the trial court's ruling finding that Fountain Place Cinema was entitled to a tax credit of $393,176.30 because it engaged in "destination-oriented recreation and tourism." The majority opinion broadly defined this phrase to mean that any business in the State, to which people travel, and that provides "some pastime, diversion, entertainment or amusement," is entitled to a tourism tax credit. According to the majority opinion, the Legislature intended such a result. However, the majority's incorrect decision has far-reaching negative consequences for the State's financial stability. Consequently, for the reasons set out below, I respectfully dissent.

The Majority Opinion Ignored Basic Principles of Statutory Construction

The parties involved in this proceeding agree that the phrase "destination-oriented recreation and tourism" is not defined by W. Va. Code § 11-13Q-19(a)(5) (2002) (Repl. Vol. 2008) of the Economic Opportunity Tax Credit Act. There also was no disagreement that the phrase "destination-oriented recreation and tourism" is ambiguous as it is set out under the statute. As pointed out in the majority opinion, our cases have held that "[j]udicial interpretation of a statute is warranted only if the statute is ambiguous and the

initial step in such interpretative inquiry is to ascertain the legislative intent." Syl. pt. 1, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983). Yet the majority ignored this principle of law because it failed to attempt to ascertain the legislative intent behind the phrase "destination-oriented recreation and tourism."

The majority opinion limited its analysis to looking at the broad definition of each term in the phrase "destination-oriented recreation and tourism." After setting out the broad definitions of those terms, the majority ended its analysis. By ceasing its analysis of legislative intent with a scant examination of the terms and then adopting broad definitions for the phrase in question, the majority opinion ignored the principle of law statutory holding that a court has a duty "'to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.'" Syl. pt. 3, in part, *Powell v. Wood Cnty. Comm'n*, 209 W. Va. 639, 550 S.E.2d 617 (2001) (quoting Syl. pt. 2, in part, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925)).

The majority had a duty to examine the phrase "destination-oriented recreation and tourism" in the context of other statutory provisions related to the same subject. This Court has long held that "'[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.'" *Clower v. West*

Virginia Dep't. of Motor Vehicles, 223 W. Va. 535, 539, 678 S.E.2d 41, 45 (2009) (quoting Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975)). The majority opinion ignored this principle of law by failing to examine any other statutory provision that would have shed light on the legislative intent of the phrase "destination-oriented recreation and tourism." An examination of other statutory provisions was mandated because of the context in which the phrase is found.

The phrase "destination-oriented recreation and tourism" found in W. Va. Code § 11-13Q-19(a) is only one of six items set out under the statute. The statute provides, in relevant part:

> (a) Notwithstanding any other provision of this article to the contrary, except as provided in section five [§ 11-13Q-5] of this article, no entitlement to the economic opportunity tax credit may result from, and no credit is available to any taxpayer for, investment placed in service or use except for taxpayers engaged in the following industries or business activities:
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> (1) Manufacturing, including, but not limited to, chemical processing and chemical manufacturing, manufacture of wood products and forestry products, manufacture of aluminum, manufacture of paper, paper processing, recyclable paper processing, food processing, commercial hydroponic growing of food crops, manufacture of aircraft or aircraft parts, manufacture of automobiles or automobile parts, and all other manufacturing activities, but not timbering or timber severance or timber hauling, or mineral severance, hauling, processing or preparation, or coal severance, hauling, processing or preparation or synthetic fuel manufacturing taxable under section two-f [§ 11-13-2f], article thirteen of this chapter;

> (2) Information processing, including, but not limited to, telemarketing, information processing, systems engineering, back office operations and software development;
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> (3) The activity of warehousing, including, but not limited to, commercial warehousing and the operation of regional distribution centers by manufacturers, wholesalers or retailers;
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> (4) The activity of goods distribution (exclusive of retail trade);
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> (5) *Destination-oriented recreation and tourism*; and
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> (6) Research and development, as defined in section three [§ 11-13Q-3] of this article.

(Emphasis added). In looking at the various types of businesses set out under this statute, it is clear that a determination of whether a movie theater classifies as a "destination-oriented recreation and tourism" business necessitates an examination of other statutory provisions addressing this type of activity.

As pointed out in the brief of the Tax Commissioner, pursuant to W. Va. Code § 5B-2E-1 (2004) (Repl. Vol. 2010) of the West Virginia Tourism Development Act, the Legislature has provided a specific type of tax credit for tourist businesses.[1] Under W.Va. Code § 5B-2E-3(14) (2007) (Repl. Vol. 2010), the Legislature defined "tourism attraction"

[1]The Tax Commissioner's brief correctly pointed out that the tax credit set out under the West Virginia Tourism Development Act is different from that set out under the Economic Opportunity Tax Credit Act.

to mean "a cultural or historical site, a recreation or entertainment facility, an area of natural phenomenon or scenic beauty, a West Virginia crafts and products center or an entertainment destination center . . . ."[2] Under W. Va. Code § 5B-2E-3(9), the Legislature specifically defined an "entertainment destination center" as being a business that is composed of a multiplex theater and other facilities. The statute states:

> "Entertainment destination center" means a facility containing a minimum of two hundred thousand square feet of building space adjacent or complementary to an existing tourism attraction, an approved project, or a major convention facility and which provides a variety of entertainment and leisure options that contain at least one major theme restaurant and at least three additional entertainment venues, including, but not limited to, live entertainment, multiplex theaters, large-format theaters, motion simulators, family entertainment centers, concert halls, virtual reality or other interactive games, museums, exhibitions or other cultural and leisure time activities. Entertainment and food and drink options shall occupy a minimum of sixty percent of total gross area, as defined in the application, available for lease and other retail stores shall occupy no more than forty percent of the total gross area available for lease.

W. Va. Code § 5B-2E-3(9).

Thus, it is clear that, under W.Va. Code § 5B-2E-3(9), a movie theater, standing alone, would not be considered a tourist entertainment destination center.[3]

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[2]This statute further provides, at subsection (14) (c), that a tourism attraction *does not include* "[a] recreational facility that does not serve as a likely destination where individuals who are not residents of the state would remain overnight in commercial lodging at or near the . . . existing attraction." W. Va. Code § 5B-2E-3(14)(c).

[3]Obviously, because the Legislature included a movie theater as being one type of business that could help establish an "entertainment destination center," the Legislature did

Under this statute, a movie theater is merely one of several types of businesses that could qualify collectively as an entertainment destination center. The Tax Commissioner's brief indicates that Fountain Place Cinema is located in a strip mall that includes WalMart, Lowe's Home Improvement Center, and other retail businesses. Jointly, these businesses could not make the strip mall an entertainment destination center.[4]

If the majority opinion had not ignored the rules of statutory construction, and had instead, examined the West Virginia Tourism Development Act, it would have reached the logical conclusion that the Legislature did not intend for the phrase "destination-oriented recreation and tourism" to include a movie theater standing alone. The majority's construction of the phrase is simply wrong because every movie theater in the State now qualifies as a "destination-oriented recreation and tourism" facility. Clearly, the Legislature did not intend this financially crippling definition. Moreover, the majority's interpretation of the phrase "destination-oriented recreation and tourism" makes it possible for an untold number of diverse businesses to qualify as tourist destinations merely because, under

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not intend for the phrase "entertainment facility" found in W. Va. Code § 5B-2E-3(9) to mean a movie theater. The Tax Commissioner has pointed out that, by regulation, the West Virginia Division of Tourism has indicated that an entertainment facility includes "pari-mutuel gaming establishments, live performing art centers, sporting organizations or arenas, vineyards or wineries." W Va. CSR, § 144-1-2.4.2.

[4]Further, under W. Va. Code § 5B-2E-3(14), a movie theater would not be considered a tourist recreational facility, because it is not the type of business where individuals who are not residents of the State would remain overnight in commercial lodging at or near the theater.

Syllabus point 4 of the majority opinion, they qualify as facilities that people travel to which provide "some pastime, diversion, entertainment or amusement." For example, under Syllabus point 4, every qualified bar[5] in the State that has a pool table or any other type of "diversion" now qualifies for the tax credit under the Economic Opportunity Tax Credit Act. Taken to its extreme, every qualified gas station in the State that has an arcade style game will drain the State's budget by claiming a tax credit under the Economic Opportunity Tax Credit Act.

For the foregoing reasons, I respectfully dissent.

[5]I say qualified because there are other factors that must be met under the Economic Opportunity Tax Credit Act.