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No. 94626-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC FORBES et al.,

Appellants,

vs.

PIERCE COUNTY et al.,

Respondents.

APPELLANTS' REPLY BRIEF

Judgment of the Pierce County Superior Court in Cause No. 15-2-06771-6
Honorable Susan Serko, Presiding

Gilbert H. Levy, WSBA No 4805
Attorney for Appellants
Suite 330, Western Triangle Bldg.
2125 Western Ave., Seattle, WA 98121
(206) 443-0670
gilbert.levy.atty@gmail.com

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I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

This case comes on appeal from the Trial Court's order granting summary judgment in favor of the County. As such, all facts and inferences are required to be construed in favor of the non-moving party, in this case the Appellants Eric Forbes et al. *Keck v. Collins*, 184 Wash. 2d 358, 368, 357 P. 3d 1080 (2015); *Ranger Insurance Co. v. Pierce County*, 164 Wash. 2d 545, 551, 192 P. 3d 886 (2008). In addition, the County concedes in its Answering Brief that there is no material dispute as to the facts. Answering Brief at p. 4. Thus, for purposes of this appeal, the Court should assume that the following facts are true:

When the County amended its erotic dance studio ordinance in 1994 and adopted PCC § 5.14.230 – the license suspension / revocation provision – the County Council gave no thought to the question of whether strict liability for license suspension was necessary to accomplish the legislative goals. PCC § 5.14.230 remains unchanged from the time that it was adopted in 1994. Both the Hearing Examiner and the Superior Court ruled in this case that PCC § 5.14.230 does not contain a *mens rea* requirement. CP 219, 260, 825. Chapter 5.14, as enacted in 1994, did not impose a duty on managers to require entertainers or the business to comply with the standards of conduct. Between 1994 and 2012, when the ordinance was amended again, managers were under no obligation to

police the entertainers, which was the defect in the ordinance that the County Council was attempting to address when it adopted the 2012 amendment. CP 675. Prior to 2012, Pierce County had no experience with a provision that called for license revocation on the basis of a “knew or should have known” standard - one that is commonly featured in similar regulations throughout the State. CP 677-686. When the County Council adopted the amendment in 2012, it gave no consideration to whether a “knew or should have known” standard would be insufficient to accomplish the legislative goal of requiring managers and operators to be more diligent in compelling compliance with the Ordinance. CP 675. In Responding to the Plaintiff’s Motion for Summary Judgment and in support of its own summary judgment motion, the County presented no evidence that a “knew or should have known” standard was inadequate to accomplish the legislative goals. CP 687-787.

Under PCC § 5.14.230, a manager’s license can be suspended for up to one year, if a dancer violates any one of the standards contained in PCC § 5.14.190 regardless of whether the manager knew or should have known of the violation, or had previously taken reasonable measures to prevent the violation from taking place. Likewise, the business can be closed for up to one year if a dancer violates any one of the standards of conduct, regardless of whether the business operator knew or should have

known of the violation, or had taken reasonable measures to prevent it from taking place. Plaintiffs maintain that these draconian measures constitute an impermissible prior restraint – one that has a chilling effect on protected expression and affords a pretext for censorship. As the Court observed in *JJR*:

Licensing of constitutionally protected expression places censorship in the hands of government, and government officials who attempt to control future expression through license revocation and suspension engage in a prior restraint. This is inimical to protection of free expression under Const. art. I, § 5.

JJR, Inc. v. City of Seattle, 126 Wash. 2d 1, 6, 891 P. 2d 720 (1995).

Finally, it is important to mention what is not at issue in this case. Plaintiffs are not challenging the standards of conduct in PCC § 5.14.190, nor are they challenging the 2012 amendment to PCC § 5.14.180, which makes managers responsible for the conduct of entertainers. With a “knew or should have known” standard for license suspension, the County would nevertheless have a perfectly adequate scheme to compel compliance with the Ordinance. Under what is essentially no more than a negligence standard, managers and operators cannot hope to escape liability by ignoring the obvious.

II. REPLY TO THE ARGUMENT THAT THE LICENSE REVOCATION PROVISIONS DO NOT IMPOSE STRICT LIABILITY

In the memorandum it filed in the license appeals of Blakeway and Richardson, the County argued, “There is no requirement that the County prove their mental state at the time that time the violation was committed.” CP 227. The County submitted proposed findings of fact and conclusions of law in Superior Court to the same effect. CP 825. As argued in the Appellant’s Opening Brief, strict liability is synonymous with the County not having to prove a culpable mental state in order to establish grounds for license suspension. In arguing that PCC § 5.14.230 does not call for strict liability, the County fails to recognize the obvious inconsistency in its position.

Cases cited by the County have nothing to do with the issue of whether the Pierce County Ordinance imposes strict liability or with the constitutional claim raised in this case. In *D.K. Entertainment LLC v. Oregon Liquor Control Commission*, 249 Or. App.659, 278 P. 3d 11 (2012), the only issue was whether the Oregon statute imputed an employee’s knowing misconduct to the owner of the business and no constitutional claim was raised in the appeal. In *DLH, Inc. v. Nebraska Liquor Control Commission*, 266 Nebraska 261, 665 N.W. 2d 629 (2003), the only issue raised on appeal was whether the State liquor board had authority under the applicable statute to adopt a strict liability regulation and the appeal did not involve a constitutional claim. In *State Ex. Rel.*

Richardson v. Pierendozzi, 117 Idaho 1, 784 P. 2d 331 (1989), the issues raised were whether the statute permitted liquor license suspension on the basis of strict liability, and whether the State had the power under the First Amendment to regulate nude dancing by suspending a liquor license. There was no issue in that case as to whether strict liability license suspension was constitutional under the First Amendment. All three of these cases are liquor board cases where the business was left free to engage in protected expression but could no longer do so with a liquor license. In contrast, license suspension or revocation in this case requires the complete cessation of protected speech.

III. REPLY TO ARGUMENT THAT LICENSE / SUSPENSION REVOCATION DOES NOT CONSTITUTE A PRIOR RESTRAINT

In the Answering Brief, the County acknowledges that license denial is a prior restraint and “receives the most stringent review”. Answering Brief at p. 24. The County nevertheless claims that license suspension does not constitute a prior restraint because it is merely an “after-the-fact penalty for a violation”. *Id.* According to *JJR*, this argument fails:

Although *O’Day* recognized that license revocation differs from license denial because revocation implies the licensee violated the terms of the license, (cite omitted), both license denial and revocation lead to future expression of constitutionally protected speech and as a result constitute a prior restraint. Seattle relies on the

argument that license revocation and suspension differ from outright license denial because they occur “*after* the licensee has violated the Ordinance, *not* prior to the licensee’s dance.” (Cite omitted). However, the relevant issue is whether license revocation and suspension prohibit future expression under Const. art. I, § 5.

JJR, supra, at 6.

Suspension or revocation of an adult entertainment license is a prior restraint because it restrains future expression and because it amounts to a County-wide ban. In *Kitsap County v. KEV, Inc.*, 106 Wash. 2d 135, 720 P. 2d 818 (1986), the Court upheld a nuisance abatement order closing an adult-only nightclub at its present location, based on the County’s showing that multiple illegal activities had taken place on the premises and that abatement was the only way to stop the illegal activity. However, the portion of the trial court’s order that imposed a County-wide ban was vacated by the Court on the grounds that it constituted an invalid prior restraint. *Id.* at 143, 823

IV. REPLY TO ARGUMENT THAT THE COUNTY’S LICENSE SUSPENSION SCHEME CONTAINS ADEQUATE SAFEGUARDS

The County claims that its ordinance contains adequate safeguards because it provides for a stay of license suspension pending judicial review. Answering Brief at p. 26. This misperceives prior restraint doctrine and the extent its protections. Under the First Amendment, prior restraints are not per se unconstitutional, but they come into court bearing

a heavy presumption against their constitutional validity. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, 1246 (1975). Article I, Section 5 of the Washington Constitution is even less tolerant of prior restraints. *O'Day v. King County*, 109 Wash. 2d 796, 804, 749 P. 2d 142, 147 (1988). “A prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.” *Southeastern Promotions, Supra* at 559, 1247. Two evils are commonly associated with prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224, 110 S. Ct. 596, (1990). A scheme that places unbridled discretion in the hands of a governmental official constitutes a prior restraint and may result in censorship. *Id.* at 226. Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. *Id.* Additional defects may include failure to provide for issuance of a temporary license pending final review of the license application and failure to provide a stay of license suspension pending judicial review. *Ino Ino., Inc. v. City of Bellevue*, 132 Wash. 2d 103, 123, 937 P. 2d 154 (1997); *JJR. Inc. v. City of Seattle, supra* at 6.

License suspension on the basis of strict liability is species of unfettered discretion. While there are standards governing when license suspension may be imposed, license officials are free to close the business

for a year on the basis of minor technical violations regardless of fault on the part of the manager or the business operator. The fact that the County has not seen fit to exercise such powers of censorship in the past is no guarantee that it may not seek to do so in future. “We cannot depend on the individuals responsible for enforcing the ordinance to do so in a manner that cures it of constitutional infirmities.” *Redner v. Dean*, 29 F. 3d 1495 (11th Cir. 1994). Failure to include a *mens rea* requirement in license suspension/revocation provision means that an essential safeguard is lacking “to obviate the dangers of a censorship system”.

V. REPLY TO ARGUMENT THAT THE ORDINANCE SATISFIES MID-LEVEL SCRUTINY

The County claims that the license suspension and criminal penalty provisions are constitutional under mid-level scrutiny. Answering Brief at pp. 35, 36. Appellants maintain that since the regulations at issue impose a prior restraint, strict scrutiny is required. In *Ino Ino*, the Court held that the State Constitution calls for enhanced protection against prior restraints on sexually-explicit dance but held that time, place and manner regulations are to be analyzed under less protective federal standards. *Ino Ino, supra*, at 122, 166. The Court then employed mid-level scrutiny – the four-part test of *United States v. O’Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968) – to analyze sections of the city’s ordinance that did not amount to

a prior restraint. If mid-level scrutiny is appropriate for run of the mill time, place and manner regulations, it necessarily follows that strict scrutiny applies in those instances where the State Constitution mandates enhanced protection for prior restraints.

The First Amendment likewise requires strict scrutiny for prior restraints. Recently, in *Twitter, Inc. v. Sessions*, 203 F. Supp. 3d, 803, 808 (N.D. Cal. 2017), the district court noted that “Our Supreme Court has repeatedly held that that both prior restraints and content based restrictions are subject to strict scrutiny”. The district court went on to observe that prior restraints are “the most serious and least tolerable infringement on First Amendment rights”. *Id.*, quoting from *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976).

Even if mid-level scrutiny is mandated, the strict liability provisions at issue here are nevertheless invalid. Under the fourth prong of the *O'Brien* test, a regulation is valid only if the incidental restriction on First Amendment freedoms is “no greater than essential in furtherance of a substantial governmental interest”. *United States v. O’Brien, supra* at 377. Here the restrictions on freedom of expression are greater than essential. The ordinance punishes owners and managers who make good faith efforts to comply with the regulation and the goals of the regulation can be accomplished by less burdensome means. As the district court observed in

Millennium Restaurant Group, Inc. v. City of Dallas, Texas, 191 F. Supp.

2d 802, 808 (N.D. Texas 2002):

Revocation of a business license based on two convictions of employees for public lewdness over a one year period, without requiring any knowledge on the part of management, is a greater restriction on free expression than is essential to furtherance of the governmental interest because the predicate offenses do not tend to show that management is careless, reckless, or incompetent.

VI. REPLY TO THE ARGUMENT THAT THE CRIMINAL PENALTY PROVISION IS VALID

The criminal penalty provision – PCC § 5.14.250 – provides that, “the person, firm, or corporation shall be deemed guilty of a separate offense for each and every day during which any violation is committed...”. It goes on to provide that, “The manager on duty and/or licensee shall be strictly liable for any violation of the requirements set forth in PCC § 5.14.180 and / or 5.14.190. The term “licensee” is undefined in the ordinance so that it appears to cover both the studio license and the dancer’s license. Under the County’s general license provisions, a person previously convicted of a misdemeanor such as violation of PCC § 5.14.250 is ineligible for license renewal for a period of three years. PCC § 5.02.030 provides in part:

No license shall be issued pursuant to the provisions of this Title to the following persons:

(B) Any person who has been convicted of a felony or misdemeanor, excluding minor traffic violations, if:

1. the felony or misdemeanor for which he was convicted directly relates to the license sought, and
2. the time elapsed since the felony is less than three years, or
3. the time elapsed since the misdemeanor is less than three years.

Under PCC § 5.14.250 a dancer, manager or studio license holder could be sent to jail for up to 90 days or longer in the case of multiple violations. In the event of a conviction, the dancer, manager or studio operator then becomes ineligible for license renewal for a period of three years. These penalties are imposed in the event of “any violation” including a violation committed by others on the premises and regardless of fault.

Appellants maintain that the criminal penalty provision is invalid under the free speech and due process clauses of the Washington Constitution. As argued in the opening brief, strict liability is disfavored in the case of regulations applicable to expression. Strict liability furthermore violates due process because it creates a conclusive presumption of knowledge and punishes the innocent along with the guilty. Appellants’ arguments are supported by cases from other jurisdictions cited in the opening brief. On the other hand, the County has

failed to cite a single case to support its position. As argued above, the liquor board cases that it cites do not address the constitutional issues raised in this case. Another case that the County cites – *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F. 3d 1358, 1367 (11th Cir 1991) – actually undercuts its position. There the Eleventh Circuit held that under the Due Process clause, the doctrine of *respondeat superior* could not be employed to hold the owners of adult entertainment establishments criminally liable for acts committed by their servants, agents, and employees **if a jail sentence was involved**.¹ The other case cited by the County – *Genusa v. City of Peoria*, 619 F. 2d 1203 (7th Cir. 1980) – does not deal with the issue at all.

VII. REPLY TO COUNTY’S ARGUMENT ON STANDING

The County makes a half-hearted suggestion that the manager and studio licensee lack standing. Answering Brief at 36. The County never raised the issue below nor in the findings of fact and conclusions of law that it submitted to the Superior Court. CP 686-711, 788-803, 820-828. Therefore, the issue is waived. However, to the extent that the Court may wish to take up the issue on its own, the following precedents apply.

Appellants have standing to make a facial challenge to the licensing ordinance on the grounds that it constitutes a prior restraint.

¹ The holding in *Lady J* was followed by the district court in *Blue Moon Enterprises, Inc. v. Pinellas County*, 97 F. Supp. 2d 1134, 1144-1146 (M.D. Fla. 2000).

FW/PBS Inc. v. City of Dallas, supra, at 596, 604. Specifically, they have standing to challenge the provisions for suspension and revocation of the license. *4805 Convoy, Inc. v. City of San Diego*, 183 F. 3d 1108, 1112 (9th Cir. 1999) and see *JJR, Inc. v. Seattle, supra*. The business operator has standing to challenge these provisions on behalf of managers and dancers. *Clark v. City of Lakewood*, 259 F. 3d 996, 1009 (9th Cir. 2001). All of the Appellants have standing to challenge the criminal penalty provision on the grounds that they intend to engage in a future course of conduct with a constitutional interest and there is a credible threat of future prosecution. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301 (1979). As indicated in the attachments to the County’s motion for summary judgment, there have been numerous arrests and prosecutions in the past for violations of the standards of conduct and such arrests and prosecutions could easily happen again. CP 732. It is reasonable to assume that when the County Council amended PCC § 5.14.250 in 2012, it intended that it would be enforced.

VIII. CONCLUSION

The County makes the argument in its brief that, “There are an infinite possibility of ways in which an establishment might operate and manage its activities in order to ensure compliance with the ordinance.”

Answering Brief at p. 30. The County is wrong on this point. Under the strict liability system, everyone on the premises and the operator is the absolute guarantor of compliance on the part of everyone else on the premises regardless of fault and good faith efforts to comply. Licensees are therefore saddled with an impossible task. Somewhere along the line, someone on the premises is likely to violate the ordinance in some way and this can then lead to closure of the business if the County is so inclined. Other courts have recognized that this arrangement constitutes an impermissible prior restraint on freedom of expression and a violation of due process. In as much as freedom of expression is a paramount right under our State Constitution, this Court should conclude no less.

DATED: January 17, 2018.

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA #4805
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on January 17, 2018, I caused to be electronically filed the foregoing document with the Clerk of Court using the Washington State Court's Secure Access eFiling Portal system, which will send notification of such filing to the attorney(s) of record.

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA #4805
Attorney for Appellants

LAW OFFICE OF GILBERT H. LEVY

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