SCV: Submitted on 11-27-2017 15:34:48 EST for filing on 11-27-2017

IN THE

Supreme Court of Virginia

RECORD NO. 161777

NATHAN OSBURN,

Appellant,

v.

VIRGINIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,

Appellee.

REPLY BRIEF OF APPELLANT

James J. O'Keeffe, IV (VSB 48620)
JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue, SW
Roanoke, Virginia 24011
(540) 491-0634
Fax: (888) 500-0078
okeeffe@johnsonrosen.com

Dale W. Webb (VSB 26359)
FRANKL, MILLER, WEBB & MOYERS, LLP
Post Office Box 4126
1711 Grandin Road
Roanoke, Virginia 24015
(540) 527-3500
Fax: (540) 527-3520
webb@fmwm.law

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

Table of Contents

Table of Contents i

Table of Authorities ii

Introduction 1

Argument & Authorities 1

1. ABC agrees with Osburn on key points. 1

2. ABC's statutory-interpretation arguments are unpersuasive. 4

3. ABC's resort to legislative history is unwarranted and unconvincing. 10

4. Swim consented to Osburn's search of the office. 13

Conclusion 15

Certificate 16

Table of Authorities

STATUTES

Va. Code § 4.1-100 7-8

Va. Code § 4.1-204 ..... passim

Va. Code § 4.1-222 14

Va. Code § 6.2-1530 2

2003 Va. Acts ch. 1029. 12

2003 Va. Acts ch. 1030. 12

2007 Va. Acts ch. 99. 12

2007 Va. Acts ch. 798. 12

CASES

Adams v. McIntyre, No. 4:97cv210, 1999 U.S. Dist. LEXIS 5641 (W.D.N.C. March 4, 1999). 9

Barr v. Town & Country Properties, Inc., 240 Va. 292 (1990)..... 5-6

Brown v. Lukhard, 229 Va. 316 (1985). 11

Butler v. Fairfax Cnty. Sch. Bd., 291 Va. 32 (2015) 5, 10

Evans v. Evans, 280 Va. 76 (2010) 5

Hill v. Commonwealth, 47 Va. App. 442 (2006)..... 8-9

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 9

Nielsen Co., LLC v. Cnty. Bd. of Arlington Cnty., 289 Va. 79 (2015) .. 10

Tvardek v. Powhatan Vill. Homeowners Ass'n, 291 Va. 269 (2016) .. 5, 6

REGULATIONS

3 Va. Admin. Code § 5-50-70 10

Introduction

Nathan Osburn's Opening Brief shows that the judgment below rests on a misinterpretation of the controlling statute, Code § 4.1-204(F). ABC agrees. The agency also concedes that, if Linda Swim had held an ABC license, Osburn's search would have been fully authorized and completely constitutional. But it insists that the search was rendered unconstitutional—and that Osburn's termination was justified—because Swim was a license applicant, not a licensee. Code § 4.1-204(F) draws no such distinction. Rather than read the statute as written, ABC asks the Court to look past its unambiguous language, grammar, and structure, and to interpret it based on statutory history and a posited legislative intent. This judicial "construction" would rewrite the text, usurping the legislature's role and upsetting basic norms of statutory interpretation.

Argument & Authorities

1. ABC agrees with Osburn on key points.

ABC and Osburn agree on some of the central issues in this appeal. The facts are largely undisputed. Both the Appellant and the

Appellee recognize that the Court of Appeals misinterpreted Code § 4.1-204(F).

ABC observes that "[t]he decision below also disrupts long-standing practice, nullifying ABC's streamlined procedures for conducting searches and requiring a host of changes to its operations." Br. of Appellee 21 & n.71 [hereinafter Br.]. The agency reports that it has resorted to securing "written consent forms" from licensees.[1] Br. 21 n.71. It cites no record support for this statement, which is understandable given the timing. If the Court is inclined to go outside the record to consider this matter, however, it should recognize that the agency's account may be incomplete. Osburn understands that ABC has begun securing written consent forms from applicants as well as

[1] ABC is not the only agency that will be affected by the judgment below. That decision will also impede the inspection regimes of other agencies that rely on statutes with similar language. For example, Code § 6.2-1530 authorizes the State Corporation Commission to investigate, among others, any person who seems to be violating the laws governing consumer-finance companies. In furtherance of that investigation, the Commission "shall have and be given free access to the offices, places of business, books, papers, accounts, records, files, safes, and vaults of all such persons." Va. Code § 6.2-1530 (cleaned up). If the ruling below stands, this search would be made contingent on the violator's consent—a contingency that would render the statute all but useless in critical applications.

licensees. These forms memorialize the applicant's consent for the agency "to conduct, as a pre-requisite to licensure, a complete site visit of . . . the premises to include examining and evaluating such place, inventory, records, and all applicable qualifying items." ABC Form 805-31 (revised May 2017). This shows that ABC's applicant site visits are much more thorough than the cursory scan for "qualifying items" that the agency describes on brief, Br. 40-41, and that they include exactly the sort of inspection that got Osburn fired. What is more, if ABC's theory of the case were correct, the agency would always have needed such consent to search an applicant's premises. It would have had no reason to promulgate a new consent form in the wake of the decision below.

Finally, ABC concedes that if Swim had held an ABC license, Osburn's inspection would have been fully consistent with both Code § 4.1-204(F) and the Fourth Amendment. Br. 22. In fact, ABC claims that the statute allows "*unfettered access* by ABC and its agents to licensees…." Br. 17 (emphasis added). Yet it insists that the same language that grants it blanket access to licensees silently denies it that access to applicants.

2. ABC's statutory-interpretation arguments are unpersuasive.

The statute draws no such distinction. Code § 4.1-204(F) states, in relevant part:

> Inspection. -- The Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or any applicant for such license or permit.

Ibid. ABC urges a reading of this statute in which the modifier "where alcoholic beverages are manufactured, bottled, offered for sale or sold" applies to each of the three enumerated locations—(1) every place in the Commonwealth, (2) the premises of every wine-shipper and beer-shipper licensee, and (3) the premises of every delivery permittee. Br. 23-25.

This reading is unpersuasive. ABC does not explain the General Assembly's use of romanettes to differentiate its treatment of premises (i) and (ii). It does not explain why the legislature chose to put a comma

after "sold," but not after "permittee" or "located." Indeed, ABC categorically dismisses Osburn's uses of grammar, structure, and statutory definition as "interpretive gymnastics" that can easily "be overcome by other indicia of meaning." Br. 26, 33. They are nothing of the sort. These are the basic tools of statutory interpretation.

ABC declines to deploy them. The agency does not (and cannot) dispute that its reading violates the rule of the last antecedent, see Br. 25-26—a basic principle of English grammar, and one that applies to unambiguous statutes. *Butler v. Fairfax Cnty. School Bd.*, 291 Va. 32, 37-38 (2015). Instead, it urges the Court to adopt a reading that looks beyond the statute's text to its purported object. Br. 26.

This gets the inquiry backwards. Statutory interpretation starts with the text, not the legislature's intent. The Court determines that intent based on the words the legislature used, unless a literal reading would compel an absurd result. *Evans v. Evans*, 280 Va. 76, 82 (2010). When the text's plain meaning is clear, that is the end of the inquiry. *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 277 (2016). The Court cannot adopt an interpretation that amounts to a holding that the General Assembly did not mean what it said. *Barr v. Town &*

Country Properties, Inc., 240 Va. 292, 295 (1990). These rules govern the construction of unambiguous statutes. *Ibid.*

To defend its reading, ABC claims that giving the text its plain meaning would lead to an absurd result: It would allow ABC to inspect any place listed in a license application whenever it wanted, irrespective of whether it decided to grant the applicant a license. Br. 27.

While that might be questionable policy, it is not an absurd result.[2] "[T]he anti-absurdity principle—understood in its legal sense—serves only as an interpretative brake on irrational literalism." *Tvardek,* 291 Va. at 280. It "applies in situations in which a purely literal reading forces the statutory text into an internally inconsistent conflict or renders the statute otherwise incapable of operation." *Ibid.* (internal quotation marks omitted).

---

[2] Policy determinations, of course, are reserved for the legislature, not the judiciary. *Tvardek*, 291 Va. at 279-80. Even on ABC's account, the agency could avoid any problem by declining to harass unlicensed former applicants with unnecessary searches. When the General Assembly granted ABC inspection authority, the legislature presumably understood that ABC would use that authority responsibly, to further its regulatory mission. The fact that ABC might abuse its power does not render the original grant of that power absurd.

Osburn's reading of the statute poses no such threat. The General Assembly might well have felt that it was worth keeping an eye on unsuccessful ABC applicants, on the theory that they might continue their efforts to sell alcohol with or without State sanction. Even in ABC's nightmare scenario, if the agency arbitrarily tried to inspect a place listed in an application years after denying that application, either (1) the owner would consent to the search, in which case the statute would do no work whatsoever, or (2) the owner would decline consent, in which case ABC would have no further recourse because the owner was neither an applicant nor a licensee. In neither case would Code § 4.1-204(F) collapse under its own weight.

The agency also hypothesizes that if the General Assembly had intended Code § 4.1-204(F) to apply to applicants, it could have allowed inspections where alcoholic beverages "will be" or "could be" sold. Br. 24-25. In fact, it did just that: The General Assembly authorized searches of "every place in the Commonwealth," Code § 4.1-204(F), and then defined "place" as "the real estate . . . designated in the application for a license as the place at which the manufacture, bottling,

distribution, use or sale of alcoholic beverages *shall be performed*," Code § 4.1-100 (emphasis added).

ABC also makes much of the statute's heading, which reads: "Records of licensees; inspection of records and places of business." Br. 35-36. As Osburn pointed out in his Opening Brief, this header is not part of the statute, and it is not controlling. It's not even particularly helpful to ABC. Although the header mentions licensees, it does so in the context of "[r]ecords," not "inspections." That's hardly surprising, because the bulk of the statute addresses the recordkeeping obligations of various types of licensees. The statute indisputably applies to shippers, delivery permittees, and applicants for such licenses or permits. Yet none of those words appears in the heading. Even worse for ABC's position, the heading expressly refers to "inspection of records and places of business"—which is exactly what got Osburn fired.

ABC also misunderstands the closely regulated industry exception itself, claiming—without authority—that the exception applies only to licensed participants in the regulated industry. Br. 22. This is incorrect. The exception applies to industry participants irrespective of whether they are formally licensed. In *Hill v. Commonwealth*, 47 Va. App. 442,

445-46 (2006), for example, the Court of Appeals held that the exception authorized the warrantless search of an unlicensed goat-cheese manufacturing facility. Likewise, in *Adams v. McIntyre*, No. 4:97cv210, 1999 U.S. Dist. LEXIS 5641 (W.D.N.C. March 4, 1999), *aff'd* 1999 U.S. App. LEXIS 23486 (4th Cir. Sept. 27, 1999), the federal courts upheld a warrantless search of the premises of a nightclub that was operating without an ABC license.

These results only make sense. The closely regulated industry exception is based on the principle that "when an entrepreneur embarks upon" a business in such an industry, "he has voluntarily chosen to subject himself to a full arsenal of government regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). This implicit consent and its concomitant reduced expectation of privacy do not depend on formal licensure. After all, an entrepreneur "embarks upon" a business selling alcohol by applying for an ABC license (and submitting an application for investigation), not by receiving one. ABC itself asserts the ability to conduct warrantless searches of *applicants* for shipping licenses and delivery permits. Br. 31-33. That is inconsistent with the reading of the Fourth Amendment that it asks the Court to adopt.

Finally, ABC relies on its own regulation, 3 Va. Admin. Code § 5-50-70, which allows the agency to inspect the premises of retail licensees. Its reliance is misplaced for three reasons. First, Swim was not a retail licensee, so the regulation does not apply to her. Second, the regulation embodies the agency's own interpretation of an unambiguous statute, which is not entitled to any deference or weight. See *Nielsen Co. (US), LLC v. Cnty. Bd. of Arlington Cnty.*, 289 Va. 79, 87-89 (2015). Third, the regulation supports Osburn's point: If ABC's interpretation of Code § 4.1-204(F) were correct, the statute would read like the regulation. It doesn't.

3. ABC's resort to legislative history is unwarranted and unconvincing.

Unable to gain any traction with the text, ABC looks past the statute to its legislative history. Br. 28-33. This gambit fails for two reasons.

First, ABC's resort to legislative history is unwarranted. Courts look to legislative history only when the statutory text is ambiguous. *Butler v. Fairfax Cnty. School Bd.*, 291 Va. 32, 37 n.2 (2015). Text is ambiguous when it can be understood in more than one way, is difficult to parse, or refers to two or more things simultaneously. *Id.* at 37. Here,

there are not multiple equally reasonable interpretations of Code § 4.1-204(F), so the statute is not ambiguous. The legislative history behind an unambiguous statute can't be used to create an ambiguity and then remove it. *Brown v. Lukhard*, 229 Va. 316, 321 (1985).

To justify its use of legislative history, ABC mistakenly contends that Osburn himself claims that the statute is ambiguous. Br. 25. In fact, Osburn takes the opposite position. E.g., Opening Br. 31 (language in Code § 4.1-204(F) "does not create an ambiguity."). Both Osburn and ABC argue the statute's plain meaning, which is inconsistent with the notion that the statute is somehow ambiguous. Compare Opening Br. 24-26 with Br. 23-24.

Second, even if ABC's use of legislative history were permissible, the story that it tells is not compelling. ABC argues that, for decades, Code § 4.1-204 allowed searches only of places where alcohol was manufactured, bottled, stored, or sold. Br. 28-30. But the statute was amended in 2003, and then again in 2007. Br. 30-32. ABC speculates that each amendment was intended to effect only a single change—the 2003 amendment, to create wine shipper and beer shipper licenses, and the 2007 amendment, to create a delivery-permit system.

ABC has no support for this narrative aside from its own say-so. The 2003 amendments don't tell us much because they leave the text susceptible to the series-qualified canon; the modifier may continue to limit "every place in the Commonwealth." See 2003 Va. Acts chs. 1029, 1030. As for the 2007 amendments, ABC does not explain why it's not equally likely that the General Assembly meant both to broaden the agency's inspection authority and to create a delivery permit system. The 2007 amendments allow ABC to enlist out-of-state authorities "to assist with the inspection of the premises of a wine shipper licensee or a beer shipper licensee *or any applicant for such license*." 2007 Va. Acts chs. 99, 798 (emphasis added). ABC suggests no reason why the legislature couldn't have intended a coordinate expansion of in-state inspection authority. Nor does it offer any reason why the General Assembly might want to give ABC full access to out-of-state applicants for shipping licenses and delivery permits, but no access to in-state applicants for retail licenses.

4. Swim consented to Osburn's search of the office.

ABC is also wrong to argue that Swim did not consent to Osburn's search. Br. 37-41. Swim submitted an application for inspection, and

the search was scheduled in advance; Agent Scott even called her the day of the inspection to warn her that the ABC agents were running late. JA 98, 388-94, 501, 507-08, 512. Swim had been through earlier site inspections with Osburn. He conducted those site visits the same way that he conducted this one, down to his inspection of business offices and records. JA 704, Day 2, Part 1, 4:10:49-4:12:27. A reasonable person in Swim's position, with experience of those earlier site inspections, would have understood that she was agreeing to a search of similar scope.

ABC counters that the hearing officer found as fact that there was no evidence that Swim even knew that Osburn was in the office. Br. 38. Set aside for a moment the fact that Osburn was scheduled to be there. JA 98, 501, 507-08, 512. The language that ABC quotes appears in the hearing officer's report at page JA 113, as part of his "CONCLUSIONS"—not his "FINDINGS OF FACT," which are recited at JA 98-102. Even if the hearing officer had made such a fact-finding, it would be plainly wrong because there was such evidence: Agent Scott stated that he told Swim during the site visit that Osburn was looking around in the back of the restaurant. JA 530. Further, the second part

of the site visit was recorded by Osburn's point-of-view camera. JA 453. That footage shows Osburn and Swim discussing his search of the office and records. When Osburn told Swim that he couldn't find the Bistro's checkbook in the office, she retrieved it for him. JA 558 12:27-14:28.

ABC also misreads OM-03, insisting that Osburn cannot dispute that the policy allows for only a high-level search for qualifying items. Br. 40. He can, and he does. Nothing in the policy limits an agent to a cursory inspection. Just the opposite, OM-03 requires agents to "conduct a thorough investigation of all applicants." JA 348. This thorough investigation includes verifying ownership and compliance with the ABC Act. JA 336, 348-50. Code § 4.1-222(n) allows ABC to deny a license application if the applicant is "violating or allowing the violation of any provision of this title in his establishment at the time his application for a license is pending." It thus subjects applicants to the full range of the Act's requirements. On top of all this, OM-03 also instructs agents that "[b]efore a license is issued the agent should conduct a site visit to ensure sufficient inventory of qualifying items." Whatever this is supposed to mean, it plainly does not limit the scope of

the whole investigation. Nothing in the Act or OM-03 restricts a site inspection to a cursory walk through.

Conclusion

The Court should reverse the judgment of the Court of Appeals and remand this case for further proceedings.

/s/ James J. O'Keeffe, IV
James J. O'Keeffe, IV (VSB# 48620)
Johnson, Rosen & O'Keeffe LLC
131 Kirk Avenue SW
Roanoke, Virginia 24011
540-491-0634
Fax: 1-888-500-0078
okeeffe@johnsonrosen.com

Dale W. Webb (VSB# 26359)
FRANKL, MILLER, WEBB & MOYERS, LLP
1711 Grandin Road
Roanoke, Virginia 24015
540-527-3500
Fax: 540-527-3520
webb@fmwm.law

Certificate

I certify that on this 27th day of November, 2017, pursuant to Rules 5:26 and 5:29, three paper copies of this Reply Brief were hand-filed with the Clerk of the Supreme Court of Virginia, and electronic copies of the Brief were filed via VACES. On the same day, copies were served by U.S. Mail and email on:

Mark R. Herring, Attorney General of Virginia
Trevor S. Cox, Acting Solicitor General
Matthew R. McGuire, Acting Deputy Solicitor General
James M. Flaherty, Assistant Attorney General
Ryan S. Hardy, Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax: 804-786-1991
TCox@oag.state.va.us
MMcGuire@oag.state.va.us
RHardy@oag.state.va.us

/s/ James J. O'Keeffe, IV
James J. O'Keeffe