

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Howard P. King, Circuit Court Judge

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Case No. 2004-CP-15-347

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Palmetto Princess, LLC,

Respondent,

v.

Town of Edisto Beach,

Appellant.

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FINAL BRIEF OF APPELLANT

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BOGOSLOW, JONES,  
STEPHENS & DUFFIE, P.A.

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT BELOW ERR IN CONCLUDING THAT TOWN OF EDISTO BEACH ORDINANCE § 58-138 VIOLATED ARTICLE VIII SECTION 14 OF THE CONSTITUTION OF STATE OF SOUTH CAROLINA, THE ERROR BEING THAT THE ORDINANCE IS WITHIN THE PLENARY POWER DELEGATED TO MUNICIPALITIES UNDER HOME RULE, AND DOES NOT PROHIBIT ANY ACTIVITY PROTECTED BY THE GENERAL LAW OF THE STATE OF SOUTH CAROLINA.

## STATEMENT OF THE CASE

This suit for declaratory judgment was commenced by Respondent Palmetto Princess, LLC (hereinafter “Palmetto Princess”) by the filing and service of a Summons and Complaint on or about March 26, 2004. The action sought to set aside Town of Edisto Beach (hereinafter “Edisto” or “Town”) Ordinance § 58-138<sup>1</sup> on the grounds that the municipal ordinance exceeded the authority of the Town of Edisto Beach granted to it pursuant to Code of Laws of South Carolina § 5-7-30 (1976, as amended) and that the Ordinance was in violation of Article VIII, Section 14 of the South Carolina Constitution. The Respondent had filed an application for a business license on or about February 23, 2003 to operate a gambling cruise ship that would have its port of embarkation and debarkation within the Town’s jurisdiction. Based upon Code of Ordinances of the Town of Edisto Beach § 58-138, the Town rejected the license application. Edisto responded to the complaint by way of an Answer setting forth a general denial and the affirmative defense that Palmetto Princess had failed to state a claim upon which relief could be granted.

The matter appeared for hearing at the regularly scheduled non-jury and motions

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<sup>1</sup> Record on Appeal, page 35-36.

term of the Court of Common Pleas for Colleton County on November 4, 2004, the Honorable Howard P. King presiding. Appellant and Respondent had filed cross motions for summary judgment based on stipulated facts supplemented by affidavits and responses to requests for admissions.<sup>2</sup>

The Honorable Howard P. King issued his Order of March 28, 2005 which was subsequently filed with the Clerk of Court for Colleton County on March 29, 2005. Judge King identified two issues before him, first as to whether or not the Johnson Act<sup>3</sup> preempted the subject matter of the Town's Ordinance § 58-138 and second as to whether or not § 58-138 was constitutional by virtue of South Carolina Constitution Article VIII, Sec. 14<sup>4</sup> and general state law. Relying largely on Casino Ventures v. Stewart,<sup>5</sup> Judge King concluded that there was no federal preemption. However, the Court found that the "cruise to nowhere" was "legal" in South Carolina under Stardancer Casino Inc. v. Stewart,<sup>6</sup> and Diamonds v. Greenville County.<sup>7</sup> On this basis, the Court granted Summary Judgment to Palmetto Princess.

Appellants received service of the Order on May 9, 2005 and filed a Notice of Appeal on May 19, 2005.

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2 Stipulations, Responses to Requests for Admissions, Affidavit of Joseph F. Mole, Jr., and Affidavit of Burley L. Lyons. Record on Appeal, page 28-29; 37-40.

3 15 U.S.C.A. § 1171, et seq.

4 South Carolina Constitution Article VIII, Section 14 (5) provides as follows: In enacting provisions required or authorized by this Article, general law provisions applicable to the following matters shall not be set aside [. . .] (5) criminal laws and the penalties and sanctions for the transgression thereof.

5 183 F.3d 307 (4<sup>th</sup> Cir. 1999).

6 347 S.C. 377, 556 S.E.2d 357 (S.C. 2001).

7 325 S.C. 154, 480 S.E.2d 718 (S.C. 1997).

## STATEMENT OF FACTS

As previously indicated, the case went to Judge King on facts largely agreed to between the parties. Thus, the question presented to the court below as well as to the Court is a question of law. Nevertheless, a brief recitation of those facts is necessary.

On February 23, 2003, Palmetto Princess, LLC., a limited liability company organized under the laws of the State of South Carolina, applied for a business license from the Town of Edisto Beach.<sup>8</sup> Palmetto Princess intended to operate one or more gaming vessels on cruises originating within the waters and municipal boundaries of Edisto. The plan was for the vessel to travel beyond the three mile territorial waters of the State of South Carolina, at which point games such as black jack, roulette, and craps – games that are illegal on the South Carolina mainland – would be hosted for Palmetto Princess' customers. Such gambling cruises are commonly known as “cruises to nowhere.” The cruise would conclude, and debarkation take place, within the municipal boundaries of the Town of Edisto Beach.<sup>9</sup>

Edisto denied Palmetto Princess' application for a business license. The Town based the license denial on the Town of Edisto Beach Code § 58-138.<sup>10</sup> This municipal code section specifically prohibits the possession of a gambling device on a vessel within the waters of the municipal boundaries of Edisto Beach. The Court will see that the Stipulations of Fact<sup>11</sup> clearly bring the business proposal of the Respondent within the prohibition of the Ordinance.

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<sup>8</sup> See Application for Business and Professional License dated February 23, 2003. Record on Appeal page 34.

<sup>9</sup> Id.

<sup>10</sup> Record on Appeal, page 35-36.

## ARGUMENT

- I. THE COURT BELOW ERRED IN CONCLUDING THAT TOWN OF EDISTO BEACH ORDINANCE § 58-138 VIOLATED ARTICLE VIII SECTION 14 OF THE CONSTITUTION OF STATE OF SOUTH CAROLINA, THE ERROR BEING THAT THE ORDINANCE IS WITHIN THE PLENARY POWER DELEGATED TO MUNICIPALITIES UNDER HOME RULE, AND DOES NOT PROHIBIT ANY ACTIVITY PROTECTED BY THE GENERAL LAW OF THE STATE OF SOUTH CAROLINA.

This case presents an important question as to the breadth of authority extended to local government by the General Assembly when it adopted home rule legislation in 1978.<sup>12</sup>

Specifically, the legislature has provided that a “municipality of the State, in addition to the powers conferred to it’s specific form of government, may enact regulations, resolutions, and ordinances . . . which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government . . .”<sup>13</sup> Home rule must be read within the contours of the Constitution of the State of South Carolina, Article VIII, Section 14. Section 14 prohibits counties or municipalities from enacting ordinances inconsistent with state criminal statutes stating that “general law provisions applicable to [criminal laws and the penalties and sanctions for the transgression thereof] shall not be set aside.” Thus, further refined, the question before this Court is whether or not application of Edisto Beach Ordinance § 58-138 under the facts of this case “sets aside” the general law of the State.

Generally, municipal or county ordinances run afoul of the general law in one of two

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11 Record on Appeal, page 31-33.

12 1978 Acts and Joint Resolutions of the State of South Carolina No. 409.

13 Code of Laws of South Carolina § 5-7-30 (1976, as amended).



ways. In the context of this case, first, if the legislature provides by statute that it is unlawful to operate a gaming vessel within the territorial waters of the State of South Carolina and a municipality adopts an ordinance that allows such vessels to operate within its boundaries, Article VIII, Section 14 would apply and the ordinance would be unconstitutional as an attempt to set aside the general law.<sup>14</sup> In a sense, nothing made illegal by the legislature can be made legal by a municipality. Second, if the law of the State gives an affirmative right to own and operate a gaming vessel within its boundaries and a municipal ordinance abridges this right, once again the ordinance runs afoul of Article VIII Section 14.<sup>15</sup> Respondent argues that the second model applies to § 58-138 but is unable to cite to any statutory authority that grants Palmetto Princess the right to conduct a gambling operation of the type proposed. To the contrary, state law addressing gambling clearly manifests the legislature's general disapproval of these types of establishments.<sup>16</sup> Indeed, the legislature has been found by the Supreme Court to be silent as to the issue of the legality of gaming vessels in South Carolina's waters. Stardancer Casino, Inc. v. Stewart, 343 S.C. 377, 556 S.E.2d 357 (S. Ct. 2001).

In arriving at its conclusion, the court below erred in two respects. First, it extended the holding in Stardancer Casino v. Stewart<sup>17</sup> well beyond its holding, and failed to recognize the inapplicability of Diamonds v. Greenville County.<sup>18</sup>

What is the breadth of the plenary power of local government under home rule? As a general proposition, "[W]here there is no relevant statewide criminal law, local

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14 Daniel v. Cruz, 268 S.C. 11, 231 S.E. 2d 293 (S.C. 1977).

15 Denene, Inc. v. Charleston, 352 S.C. 208, 596 S.E.2d 917 (S.Ct. 2004).

16 Code of Laws of South Carolina § 16-19-40, § 16-19-30, § 12-21-2710, and § 12-21-2712 (1976, as amended).

government may regulate conduct consistent with its constitutional and statutory authority.”<sup>19</sup> When the court below correctly concluded that that the cruise to nowhere did not violate a state criminal statute, it also incorrectly concluded that the General Assembly had affirmatively determined that the legislature had extended an affirmative right to operate gambling vessels.

In Stardancer Casino v. Stewart,<sup>20</sup> the Court identified “the issue in this case . . . [as] whether respondent’s operations [“cruises to nowhere”] violate any existing state criminal statutes.”<sup>21</sup> The Court noted that South Carolina has nine criminal statutes related to gambling. Four of these were manifestly inapplicable to the case sub judice. Two of the others provided for seizure and destruction of devices otherwise determined to be “unlawful.” Thus, the court was left to determine if Code of Laws of South Carolina § 16-19-40, or § 12-21-2710 and § 16-19-50 prohibit the cruise to nowhere. The Court found that § 16-19-40 was inapplicable because the section prohibited gambling activities at various specific locations, none of which were vessels.<sup>22</sup> Likewise, the Court held that it was not the intention of the Legislature in enacting § 12-21-2710 and § 16-19-50 to address “day cruises.”<sup>23</sup> In short, “Respondent is not subject to criminal prosecution under any **existing** criminal statute. . .”<sup>24</sup> However, a careful reading of Stardancer reveals that the Court never made the determination that the “cruise to nowhere” was an affirmative right.

In fact, the relevant statute enacted by the legislature in the field is the recent

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17 347 S.C. 377, 556 S.E.2d 357 (S.Ct. 2001).

18 325 S.C. 154, 480 S.E.2d 718 (S.Ct. 1997).

19 Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 at 276 (S.C. 1996).

20 Id.

21 556 S.E.2d at 359.

22 556 S.E.2d at 360.

23 556 S.E.2d at 361.

enactment, signed by Governor Sanford on June 1, 2005, which amends Title 3 of the South Carolina Code to grant municipalities the authority to prohibit these gaming establishments in precisely the manner in which the Town of Edisto Beach has attempted to do.<sup>25</sup>

In ruling in favor the Respondent, the court below also relied on the decision of this Court in Diamonds v. Greenville County.<sup>26</sup> The Diamonds case centered around a violation of a local Greenville ordinance which prohibited public nudity. This Court found in Diamonds that Greenville County had exceeded its authority under the county version of the Home Rule Act, S.C. Code Ann. § 4-9-25.

However, the meaning of Diamonds is clarified by this Court in Quality Towing, Inc. v. City of Myrtle Beach.<sup>27</sup> Quality Towing involved a suit by a towing service operator who complained that the City of Myrtle Beach had enacted an ordinance which imposed maximum rates which a wrecker service could charge for tows of unauthorized vehicles from private property. In essence, the towing service operator's argument was that Code of Laws of South Carolina § 16-11-760 (1976, as amended) controlled the service operator's rights in regard to fees that could be charged for their service. In a footnote to Justice Burnett's opinion, he states that the "Appellant relies on Diamonds v. Greenville County,<sup>28</sup> for its argument that the ordinance is invalid because it makes conduct unlawful in Myrtle Beach that is lawful in the rest of the State. Diamonds addresses ordinances which implicate First Amendment rights. We do not interpret our opinion in Diamonds to

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24 556 S.E.2d at 362 (emphasis supplied by the Court).

25 See S.C. Act of June 1, 2005 (R.131, H.3694) to be codified in Code of Laws of South Carolina § 3-11-100, et. seq. (1976 as amended).

26 325, S.C. 154, 480 S.E.2d 718, 720 (S.C. 1997).

eviscerate home rule.”<sup>29</sup> Thus, Diamonds is limited to cases involving an effort to restrict fundamental rights. This is not that type of case.

The trial judge’s broad conclusion that Edisto Beach Ordinance § 58-138 violates the Constitution because it prohibits activity that is legal within the State of South Carolina does not consider the purpose of the Home Rule Act. Under the trial judge’s analysis, any action taken pursuant to the county or the municipality version of the Home Rule Act would be found unconstitutional on the basis that it conflicted with State law. It is hard to imagine a situation in which the court’s analysis would apply to uphold the constitutionality of an ordinance if by being silent on an issue, the legislature has given its blessing. There is clearly no law which grants the authority of an individual or corporation to operate a day cruise within the boundaries of South Carolina. As has been discussed by this Court in Stardancer,<sup>30</sup> the general law simply does not address the cruise to nowhere. This is the kind of circumstance contemplated by the Legislature when it granted the authority to municipalities to enact ordinances to protect the security, general welfare, and convenience of the municipality or preserving health, peace, order, and good government.<sup>31</sup>

## CONCLUSION

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27 340 S.C. 29, 530 S.E.2d 369 (S.C. 2000).

28 325, S.C. 154, 480 S.E.2d 718, 720 (S.C. 1997).

29 530 S.E. 2d 369 at 373.

30 Supra.

31 1978 Acts and Joint Resolutions of the State of South Carolina No. 409.

For the reasons stated, this Court should reverse the decision of the trial judge and uphold the constitutional challenge to Town of Edisto Beach Code of Ordinance § 58-138.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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