COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2009AP599 **Cir. Ct. No. 2007CV2226**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RAJ BHANDARI,

PLAINTIFF-APPELLANT,

V.

ROD NILSESTUEN AND WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. Retail motor vehicle fuel station owner Raj Bhandari appeals a circuit court order denying his motion for summary judgment and granting summary judgment to the Wisconsin Department of Agriculture,

Trade and Consumer Protection (DATCP) on Bhandari's constitutional challenge to mandatory minimum markup provisions in Wisconsin's Unfair Sales Act (the Act). These provisions require retail sellers such as Bhandari to sell motor vehicle fuel at prices above defined rates. Bhandari argues that the court's entry of summary judgment in favor of DATCP improperly ignored "unrebutted expert testimony demonstrating that there [is] no connection" between the Act's minimum markup requirement and the state's "concerns about 'sales below cost.'" We conclude that DATCP offered expert opinion establishing plausible policy reasons for the classification established by the Act that are not arbitrary in relation to the legislative goals, and Bhandari's expert opinion does not show that DATCP's expert opinion is entirely speculative or without merit. We therefore affirm the order.

BACKGROUND

¶2 Aside from the parties' differing expert opinions about justifications for, and effects of, enforcement of the challenged statutory provisions, the relevant facts are undisputed. Bhandari is an owner of a motor vehicle fuel station. As a promotion, he offered discounts on motor vehicle fuel to two types of consumers: senior citizens and people who donated to a local youth hockey association.[1]

¶3 After beginning this practice, Bhandari received a letter from DATCP informing him of "legal requirements that apply to motor vehicle fuel

[1] Bhandari pursues this litigation in his individual capacity as a station owner. For ease of reference, and because the parties draw no distinctions between Bhandari on the one hand and the station as an entity or any other owner or employee of the station on the other hand, we use Bhandari's name as shorthand for all relevant actions and practices of the station.

discount programs" under the Act, WIS. STAT. § 100.30 (2009-10).[2] Bhandari interpreted this letter as a warning that if he continued offering the fuel discounts he would be fined under the Act, because those sales would be deemed illegal "loss leaders" at prices below his statutorily defined "cost" for fuel as set forth in the Act. A violation of the Act subjects him to a forfeiture of between $50 and $500 for the first violation, and between $200 and $2500 for any subsequent violation. *See* § 100.30(4). In response to the letter, Bhandari ceased offering the fuel discounts.

¶4 There is no dispute that Bhandari is engaged in "the retail sale of motor vehicle fuel" and is not "a refiner or a wholesaler of motor vehicle fuel," and therefore is subject, under the terms of the Act, to the minimum markup provisions that apply to such a retailer. *See* WIS. STAT. § 100.30(2)(am)1m.c. Failure to sell motor vehicle fuel at his "cost to retailer," or "cost," constitutes "prima facie evidence" of a violation of the Act. *See* ***id.*** (defining "cost to retailer"); § 100.30(3) (providing that sale at less than defined "cost" creates "prima facie evidence" of prohibited "intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor").

¶5 The "cost to retailer" for a retail fuel seller such as Bhandari is defined as the greater of one of two categories. *See* WIS. STAT. § 100.30(2)(am)1m.c.[3] The first category is the lower of: (1) the retailer's invoice

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] WISCONSIN STAT. § 100.30(2)(am)1m.c. provides:

(continued)

cost within ten days prior to the sale; and (2) the retailer's replacement cost. ***Id.*** This category includes adjustments for trade discounts, taxes, transportation and other costs, plus a markup of six percent "to cover a proportionate part of the cost of doing business." ***Id.***

¶6 The second category is "the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business." ***Id.*** "Average posted terminal price" is "the average posted rack price, as published by a petroleum price reporting service," plus tax and any other charges not otherwise included. WIS. STAT. § 100.30(2)(a).

¶7 In the circuit court, Bhandari made three claims for relief: two based on the equal protection clause and one based on substantive due process. The circuit court rejected each claim, concluding that Bhandari failed to show that the

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> 1m. With respect to the sale of motor vehicle fuel, "cost to retailer" means the following:
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> ….
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> c. In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 6% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

Act is unconstitutional. Bhandari appeals the resulting summary judgment order. As explained below, Bhandari renews only one of his equal protection claims in this appeal. We reference additional facts as necessary below.

DISCUSSION

¶8 An appellate court reviewing summary judgment applies de novo review, following the same methodology as the circuit court. *See* ***Apple Valley Gardens Ass'n. v. MacHutta***, 2009 WI 28, ¶12, 316 Wis. 2d 85, 763 N.W.2d 126; *see also* WIS. STAT. § 802.08.

¶9 The parties agree that the only issue in this appeal is whether the circuit court correctly concluded that Bhandari failed to demonstrate that the minimum markup provisions are unconstitutional. The constitutionality of a statute is a legal question determined without deference to the circuit court decision. *See* ***State v. Johnson***, 2001 WI 52, ¶10, 243 Wis. 2d 365, 627 N.W.2d 455.

¶10 When addressing the constitutionality of a statute, "the party challenging the statute must prove it unconstitutional beyond a reasonable doubt." ***Northwest Airlines, Inc. v. DOR***, 2006 WI 88, ¶26, 293 Wis. 2d 202, 717 N.W.2d 280. The party making this challenge "carries a heavy burden of persuasion." ***Chappy v. LIRC***, 136 Wis. 2d 172, 184, 401 N.W.2d 568 (1987).

¶11 On appeal, Bhandari has limited his constitutional challenge to a single theory: the Act violates equal protection by dividing all Wisconsin retailers into two classes—those who sell motor vehicle fuel, who are subject to minimum markup provisions on sales of that fuel, and those who sell products *other* than

motor vehicle fuel, who are favored because they are not subject to the provisions.[4]

¶12 Then, based on this characterization of the classification created by the statute, Bhandari makes what is in essence a single substantive argument: The classification is unconstitutional because it is undisputed that the minimum markup provisions on fuel bear "no relationship to" the state's goal of prohibiting sales at levels that fall below the actual cost of the fuel to retailers. That is, Bhandari contends that, while the purported goal of the statute is to avoid sales below the actual cost of fuel to retailers, in actuality the markups required by the statute are set without regard to actual retailer costs, and thus there is a complete disconnect between the purported justification for the statute and its definition of "cost." As he now states the alleged constitutional defect, "If Bhandari sold goods other than gasoline, he would be allowed to compete on price as long as he did not sell his merchandise for less than it cost him. Because he sells gasoline, he is subject to an arbitrary and inflexible price floor." We are not persuaded by this argument for the following reasons.

[4] In his brief in support of summary judgment to the circuit court, Bhandari alleged that the Act, on an arbitrary basis, created two classifications: (1) "those [retailers who] sell gasoline and those [retailers who] do not," and (2) "established, larger businesses … and newer, smaller businesses." The court concluded that only the first of those classifications was created by the legislature, and this is the sole classification that Bhandari now advances.

We note that the classification Bhandari advances is imprecise, at least to the extent that the Act also imposes a minimum markup on "cigarettes or other tobacco products, fermented malt beverages or intoxicating liquor or wine." *See* WIS. STAT. § 100.30(2)(am)1. However, the minimum markup on those products is different from the minimum markup imposed on motor vehicle fuel and neither party develops any argument in this appeal based on these separate provisions.

¶13 The first step in an equal protection challenge is determining which level of scrutiny applies to court review of the challenge. ***Ferdon v. Wisconsin Patients Comp. Fund***, 2005 WI 125, ¶59, 284 Wis. 2d 573, 701 N.W.2d 440. The parties in this case agree, correctly, that the Act as Bhandari challenges it does not involve a suspect classification or a fundamental right. Therefore, the proper standard is rational basis scrutiny, as opposed to intermediate or strict scrutiny. *See* ***State v. Smith***, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90.

¶14 Applying the rational basis test to a statute subject to an equal protection challenge involves determining whether "a plausible policy reason exists for the classification" created by the statute, "and the classification is not arbitrary in relation to the legislative goal" of the statute. ***Ferdon***, 284 Wis. 2d 573, ¶73. If the court identifies a rational basis for the law, it "must assume the legislature passed the act on that basis." ***Id.***, ¶75. The question under equal protection analysis is "whether there are any real differences to distinguish the favored class ... from other classes ... who are ignored by the statute …." ***Id.***, ¶72 (citation omitted).

¶15 In considering whether there is a plausible policy reason for the Act, we may turn to its stated legislative purposes. The Act includes a section entitled "Policy," which states the legislature's policy goals in enacting the statute. WIS. STAT. § 100.30(1). This is a sound source of legislative intent. *Cf.* ***Ferdon***, 284 Wis. 2d 573, ¶86 (in the absence of an explicit statement of legislative objectives in act under review, "legislative findings" in act "give a strong indication of the legislature's objectives"). The "Policy" section reads:

> **(1)** POLICY. *The practice of selling certain items of merchandise below cost in order to attract patronage* is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes

> commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and *diverts business from dealers who maintain a fair price policy*. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.

Section 100.30(1) (emphasis added).

¶16 In addition, in evaluating whether Bhandari has carried his burden of persuasion we are not limited to these express legislative statements of purposes, as the court explained in ***Ferdon***: "In evaluating whether a legislative classification rationally advances the legislative objective, we are obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination." ***Ferdon***, 284 Wis. 2d 573, ¶74 (quotation marks and footnotes omitted).

¶17 The expert witness relied on by DATCP, James Peltier, a professor of marketing, reviewed various studies and concluded that the Act "is designed to prevent" "high market concentration (fewer competitors)," with the effect of the Act being that it "strengthens competition to the benefit of consumers," such as producing "lower prices and margins." As an example of this "design" purportedly having its intended effect, Peltier pointed to a study revealing a 1.88-cent price per gallon disadvantage for Minnesota motor vehicle fuel purchasers when compared to Wisconsin purchasers after Minnesota lawmakers repealed that state's sales-below-cost law in 1995. This study, and other data relied on by the DATCP expert, specifically address the effect of the Act on the sale of gasoline in Wisconsin.

¶18 To summarize so far, the legislature stated that the Act is intended to prevent below-cost sales in order to, among other goals, encourage the survival of businesses that maintain "fair price polic[ies],"[5] and DATCP's expert opinion provides evidence that the Act fulfills this design of maintaining a reasonable number of competitors in this market, with the additional benefit of lowering prices with respect to motor vehicle fuel sales. Thus, DATCP's expert provides evidence that the Act helps achieve at least one of the legislature's express goals, as well as evidence that the Act results in lower prices for consumers, an additional rational goal that is at least implicit in or consistent with the legislature's express goals.

¶19 We therefore conclude that DATCP's expert evidence shows that there is plainly a plausible policy reason for the classification objected to by Bhandari, and that the classification is not arbitrary in relation to the legislative goal of "fair" prices. We now address and reject each of three more detailed objections that Bhandari raises.

¶20 First, Bhandari contends that the circuit court incorrectly applied the rational basis test by failing to appreciate that, under ***Ferdon***, courts apply rational basis review that is not "toothless." The result of this failure to apply ***Ferdon*** correctly, Bhandari argues, is that the court did not conduct the required fact-intensive, "meaningful" review of the opinions given by his experts. Bhandari contends that this resulted in error, because his experts establish beyond a reasonable doubt that any legitimate goal of the legislature in preventing sales

[5] When considered in isolation, the phrase "a fair price policy" used by the legislature in the Act's policy statement is an ambiguous term that requires context to give it meaning. However, when read in context it is clear that the legislature meant "fair because not below cost."

below actual cost to the retailer is not addressed by minimum markup provisions that prohibit some sales that are above those actual costs.

¶21 The parties devote considerable energy to a debate on the question of whether ***Ferdon*** contemplates a new, more rigorous rational basis review standard, based on some language used by the majority in ***Ferdon***. *See, e.g.*, ***Ferdon***, 284 Wis. 2d 573, ¶78 (Courts are required "to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose."). However, this debate by the parties is beside the point in this appeal, because even assuming, without deciding, that ***Ferdon*** articulates a more fact-intensive rational basis standard than has been employed in the past and that such a new standard should be applied here, Bhandari fails to explain how his expert opinion evidence defeats the plausible policy goals described above or demonstrates that the classification at issue is not a rational means for furthering those goals.

¶22 Bhandari is wrong when he argues that the circuit court ignored his "unrebutted expert testimony demonstrating that there [is] no connection" between the Act's minimum markup provisions and [the] state's "concerns about 'sales below cost.'" Although Bhandari's experts offer several opinions, including an opinion that the concept of "predatory pricing" is largely a myth, those opinions are not unrebutted. Rather, the DATCP expert's opinion was offered as a rebuttal to Bhandari's expert opinion, and may be taken as proof that Bhandari's expert evidence embodies only one view among competing, reasonable views. Bhandari's expert evidence at most suggests that there is a legitimate debate regarding the *extent* to which the minimum markup provisions for motor vehicle fuel are effective in achieving *all* of the Act's goals. This does not demonstrate beyond a reasonable doubt that there is no rational basis for the legislature to adopt

the approach that it did in order to achieve any goal that it has stated, or for that matter any rational goal that we might construct.

¶23 Second, Bhandari appears to argue that the legislature's definitions of "cost" for motor vehicle fuel are less reasonable than other possible definitions, which he submits would more accurately approximate a retailer's actual cost in each instance, rather than, as one of Bhandari's experts puts it, require retailers to sell motor vehicle fuel at prices "well above the retailer's own cost, by any ordinary definition of that term."

¶24 It is true that the formulas used in the Act may prohibit not only prices below the retailer's actual cost but also sometimes prices that are above the retailer's actual cost.[6] Yet Bhandari fails to explain why this fact alone—that some above-actual-cost prices could be in violation of the Act—causes the Act to be no longer rationally related to the legitimate state purpose of encouraging competition and reducing prices in the retail motor vehicle fuel market. Moreover, Bhandari only vaguely describes what he views as a "correct" formula that the legislature could have used to accomplish its goals in this area: what "[the retailer] paid for it, plus [the retailer's] cost of doing business."

¶25 Bhandari's position seems to be that the minimum markup provisions are not constitutional unless the legislature uses a formula that purports to be based exclusively on each retailer's "actual costs," assuming agreement among accountants and economists as to the precise meaning of that phrase in the

[6] It would seem that this situation is mostly likely to occur when the retailer is required to set its retail fuel prices based on the formula using the average terminal price, marked up by 9.18%, instead of the formula using the 6% markup. As already noted, the statute requires the retailer to use the higher of those two prices. *See* ¶¶5-6, *supra*.

context of this market. However, there are plausible reasons why such a formula might not work as well as the one the legislature has chosen to accomplish its objectives, as we explain below by way of example. Once that premise is accepted, it is up to the legislature to determine the details of formulas that involve elements reasonably related to actual costs to retailers, and Bhandari has not shown that the particular formulas that the legislature has chosen are outside the range of what would be reasonable. As DATCP points out, numerical aspects of any such formulas will always be "arbitrary" to a degree, just as any given speed limit may be considered "arbitrary" in comparison with alternatives that are, say, five miles per hour slower or faster.

¶26 The following is one example of the potential utility of a technical "cost" definition of the type that the legislature has chosen. It can be plausibly inferred that the "cost" definition is designed to ensure that competition exists even if some retailers receive discounts on gasoline from wholesalers, either because the wholesaler owns the retail station or because the retailer has the ability, that other retailers lack, to purchase in bulk from the wholesaler. One of Bhandari's experts specifically notes this possibility in his affidavit in the context of large, chain retailers selling gasoline.

¶27 Third, Bhandari asserts that courts in some jurisdictions have struck down analogous statutes. *See, e.g.*, ***Ports Petroleum Co. v. Tucker***, 916 S.W.2d 749, 755 (Ark. 1996); ***Remote Servs., Inc. v. FDR. Corp.***, 764 S.W.2d 80, 82 (Ky. 1989). DATCP asserts, in contrast, that courts in some jurisdictions have upheld analogous statutes. *See, e.g.*, ***Baseline Liquors v. Circle K Corp.***, 630 P.2d 38, 42 (Ariz. Ct. App. 1981); ***State v. Rio Vista Oil, Ltd.***, 786 P.2d 1343, 1348 (Utah 1990). Our review of these cases suggests no clearly persuasive rationale supporting a conclusion that sales-below-cost statutes as a general matter violate

equal protection standards, or that language matching that used in the particular Wisconsin provisions violates those standards. Bhandari has not shown that any particular case or cases from another jurisdiction involve both statutory provisions and expert opinions like those presented here. We therefore do not find the cases that Bhandari relies on to be persuasive in showing that the Act is unconstitutional beyond a reasonable doubt.[7]

CONCLUSION

¶28 For these reasons, we conclude that the circuit court properly denied Bhandari's motion for summary judgment and properly granted summary judgment to DATCP. We therefore affirm the court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[7] Although we have not been directed to any case addressing the precise issue here, we note that, over the years, the Act has repeatedly withstood constitutional challenge. *See* ***Eby-Brown Company, LLC v. DATCP***, 295 F.3d 749, 753-57 (7th Cir. 2002) (upholding Act provisions against equal protection, due process, and commerce clause challenges in the context of tobacco wholesalers); ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, 259 Wis. 2d 181, ¶¶2, 55-64, 655 N.W.2d 718 (upholding Act provisions against vagueness and substantive due process challenges); ***State v. Eau Claire Oil Co.***, 35 Wis. 2d 724, 739, 151 N.W.2d 634 (1967) (concluding that the presumption of intent in WIS. STAT. § 100.30(4) (1963) is constitutional because there is a rational connection between the facts presumed and the evidence of selling the items below statutory cost); *see also* ***State v. Ross***, 259 Wis. 379, 385, 48 N.W.2d 460 (1951) (rejecting argument that presumption of intent in WIS. STAT. § 100.30(4) (1949) is unreasonable because it amounts to a conclusion of guilt).