

1955

Benjamin D. Ritholz et al v. City of Salt Lake et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

of the

FILED

JAN 27 1955

STATE OF UTAH

Supreme Court, Utah

BENJAMIN D. RITHOLZ, SAMUEL
J. RITHOLZ, FANNY RITHOLZ,
MORRIS I. RITHOLZ, SOPHIE
RITHOLZ, SYLVIA RITHOLZ, J.
BEDNO and ANN BEDNO, d/b/a
KING OPTICAL COMPANY,

Plaintiff and Respondent,

vs.

THE CITY OF SALT LAKE, a
municipal corporation, and EARL J.
GLADE, LORENZO C. ROMNEY,
GRANT M. BURBIDGE, JOE L.
CHRISTENSON, and LYLE B.
NICHOLS, its Board of Commis-
sioners,

Defendants and Appellants.

Case No.

8296

BRIEF OF APPELLANTS

GEORGE E. BRIDWELL and
CHRISTENSEN, HOLMGREN and
CHRISTOFFERSEN

Attorneys for Appellants

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Case No.
8296

BRIEF OF APPELLANTS

STATEMENT OF FACTS

On September 17, 1954, Appellants passed ordinance
titled 4865, which provides:

“SECTION 4865: ADVERTISING PRICES OF PRESCRIPTION EYE GLASSES, LENSES, OR FRAMES AND PRESCRIPTION LENSES.

“(a) No person, firm, corporation, partnership, association, or any agent or employee thereof engaged in or connected with the sale of prescription eye-glasses, lenses, or frames and prescription lenses shall directly or indirectly cause to be made, published, disseminated, or circulated or placed before the public, or any person or groups of persons whatever, in any manner whatever any statement or advertisement of any kind or nature.

“(1) That states a definite or fixed price or range of prices for such articles, or that such articles may be bought at a discount, or

“(2) That offers or purports to offer any ophthalmic article of any description in connection with the sale of said above items at a discount or free of charge, or

“(3) That is false or misleading.

“(b) Nothing in this ordinance, however, shall be construed to prevent the advertising of price of toy glasses, goggles consisting of non prescription glasses or sun glasses; nor shall this ordinance be construed to prevent advertising of any of said articles, provided said advertising complies with the prohibitions above set forth.

“(c) If any phrase or part of this ordinance is declared to be invalid, that portion shall be severable and the remaining portions shall be and remain in full force and effect.

“(d) Any violation of this ordinance shall be punishable by a fine of not more than \$299.00 or imprisonment in the City Jail for not more than six (6) months, or both.”

Respondents are retail merchants in Salt Lake City who are engaged in the business of selling prescription eyeglasses, the component parts being frames and prescription lenses. They advertise fixed prices as a regular and common merchandising technique.

Respondents brought an action in Third District Court requesting that a permanent injunction issue preventing enforcement of the ordinance.

The Court granted said injunction upon the grounds that said ordinance had no relationship to the public health and welfare and was, therefore, unconstitutional.

Following is a representative and typical advertisement Respondent continually uses, said fact having been stipulated to:

a 1955 Spectacular



AMAZING OFFER!

THIS WEEK ONLY!

Sale Positively Ends Saturday, Jan. 8th

CHECK THESE FACTS

- ✓ Our Former Price, \$20-\$25.
 - ✓ Our Price Now, Only \$8.98!
 - ✓ 100 Styles, Shapes and Colors.
 - ✓ Lenses Individually Ground to Your Exact Need.
 - ✓ One Price—One Price Only!
 - ✓ No Middleman's Profit!
 - ✓ Factory-to-You.
 - ✓ Prices Include Frames and Lenses.
 - ✓ No Extras for Tints, Astigmatism, Odd Shapes, etc.
- NO EXTRAS OF ANY KIND!**



**"THE RIM-KING"
AMERICA'S FAVORITE
EYEGLASSES!**

OUR FORMER PRICE
\$20-\$25

OUR PRICE NOW ONLY

Save Over \$10.00! Limited Offer! Come at Once!

Once again the King Optical Co. presents the most outstanding offer in optical history. For **ONE WEEK ONLY**, we offer you the RIM-KING, with genuine engraved 12-karat Gold-Filled Bridge. This is positively the last word in styling, looks and durability. Combines the strength and beauty of the "Tortoise Shell" color, hand-carved and polished Zylite, and the smartness and invisibility of a rimless mounting. Featherweight, comfortable and good to look at. Buy now! Sale lasts this week—positively ends Saturday, Jan. 8, and may never be repeated.

**100 STYLES, SHAPES AND COLORS!
At One Price! You Can't Pay More!**

You may choose the RIM-KING, or select a frame to suit your personality and facial contour, from our tremendous assortment of over 100 styles, shapes and colors. Complete with lenses, ground to your exact needs, regardless of your prescription or lens strength, they are truly a sensational value at \$8.98. (Bifocals, if desired, \$4.98 additional.) **YOU JUST CAN'T PAY MORE.**

No Kickbacks, No Extras, Just \$8.98!
Frankly, our difficulty is convincing the public that they can purchase complete glasses at the one price, of \$8.98. Now prove to yourself, without cost or obligation, that you can get complete glasses for \$8.98!

Repairs

Broken lenses duplicated; frames repaired; frames replaced while you wait lowest price!

No Switching! No Extras!

NO APPOINTMENT NECESSARY

\$8.98
COMPLETE WITH FRAMES AND LENSES

PRESCRIPTION SUNGLASSES

At Same Low Price

NO MORE, NO LESS.

YOU CAN'T PAY MORE!

COMPARE! COMPARISON PROVES

If you have been paying \$20.00 for your glasses it's high time you had the true facts. Investigate! Compare. We honestly believe that the glasses you purchase from us far **\$10.00** compare favorably with those for which you paid twice and three or more times as much.

OCULISTS' PRESCRIPTIONS
Oculists' Prescriptions also filled at the same price. Your prescription promptly filled.

WHY PAY MORE!

Though the price is low the quality of our glasses is beyond compare. If we wanted to make glasses to sell for \$35.00, we couldn't use finer materials or better workmanship than that which goes into these glasses.

\$1,000.00 REWARD!

We will pay \$1,000.00 to anyone who can purchase glasses here for more than the price quoted in this advertisement. Reward offer guaranteed by two leading London, England, insurance companies.

- FOR MEN
- FOR WOMEN
- FOR CHILDREN



KING Optical Co.

**OPTICIANS
DARLING BLDG.
Suite 412
320 S. Main St.**

OVER 3,000,000* SATISFIED CUSTOMERS

Hours: 9 A.M. to 5:30 P.M. Daily, Including Wednesdays and Saturdays. Open Monday Nights Till 9 P.M. Phone 5-0679
Branches in Many Principal Cities of U. S. and Canada

FOUNDED 1904

All Glasses Union Made



POINT I.

MUNICIPAL CORPORATIONS ARE EMPOWERED TO ENACT ORDINANCES PROPER TO PROVIDE FOR THE PUBLIC HEALTH AND WELFARE:

It is submitted that such power is expressly conferred by statute.

Title 10, Chapter 8, Section 39, 1953 Utah Code Annotated:

“ . . . They may license, tax and regulate the business conducted by merchants, wholesalers and retailers, shopkeepers and storekeepers . . . ”

Title 10, Chapter 8, Section 61, 1953, Utah Code Annotated:

“ They may make regulations to secure the general health of the city, prevent the introduction of contagious, infectious or malignant diseases into the city, and make quarantine laws and enforce the same within the corporate limits and within twelve miles thereof . . . ”

Title 10, Chapter 8, Section 84, 1953, Utah Code Annotated:

“ They may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein . . . ”

The above section is known and referred to as the "General Welfare Clause," supra *Bohn vs. Salt Lake City*, 8 P. 2nd 591.

It can't be argued that the City may not pass ordinances designed to protect the public health and welfare. They most certainly can and are duty bound to do so.

It follows, therefor, that any contention made that Salt Lake City does not have the power to oversee health and welfare and to regulate business is not valid. There is no conflict. The City does have that power. The question therefor resolves itself to the next proposition.

POINT II.

PREVENTION OF PRICE ADVERTISING OF PRESCRIPTION GLASSES IS WITHIN THE LEGITIMATE AMBIT OF REGULATION TO PROTECT PUBLIC HEALTH AND WELFARE:

Who will appear to seriously argue that eyesight and eye care have no relation to health and welfare? No one can. But, does advertising of price for completed prescription glasses, or of give-aways or premiums in connection therewith have any relation to public health and welfare? It is submitted there is a relationship—a real and vital one.

The spokesmen for the Utah Medical Society, the Optometric Association, and the Society for the Blind will tell you that price advertising for such care and services will result in deceptive practice and inferior merchandise to the detriment of the people of the City.

There are many judicial decisions standing for the same proposition.

In the case of *Springfield vs. Hurst*, 56 N.E. 2nd 185, (Ohio, 1944), it was held that an ordinance provision forbidding the advertising of the price of lenses by anyone engaged in the sale of glasses, lenses, etc., had a reasonable relation to health and was a valid exercise of police power. It did not interfere with the constitutional guarantees of the rights of liberty, property, and due process of law.

The Court, in its opinion, stated:

“Lenses must be prepared by those trained in grinding. Quality of material and skill in workmanship are prime essentials in producing the finished lenses. Poor quality and poor grinding will naturally result from the desire to sell spectacles in quantity at a low advertised price, with the purpose of underselling the optometrist and other opticians who do not indulge in such advertising. Poor and improperly ground lenses will impair the eyesight. Thus, regulation prohibiting such bait advertising has a real and substantial relationship to the public health . . . The advertising would increase the sales and incidentally, the harm . . .”

Also, in the 1936 Michigan case of *Seifert vs. Buhl Optical Company*, 286 NW 784, the Court upheld a provision prohibiting the advertising of the sale of glasses at a price certain as being a legitimate exercise of police power, having a relationship to public health.

Ritholz vs. Johnson, 17 NW 2nd 590 (Wisc., 1945), involved a statute making it unlawful to advertise any definite or indefinite price or credit terms of lenses, complete glasses, or any optical service, or to advertise in any manner tending to mislead or deceive the public. It was held that such statute did not violate the constitution as to liberty, property and due process of law.

Again, in *Ritholz vs. Commonwealth*, 35 SE 2nd 210, (Virginia, 1945), the Court held that advertising of glasses and services at a price certain was apt to be used as a lure and bait to the unwary and as a means of deception of those who are attracted by a seemingly low price without considering the degree of skill involved, and that the legislature undoubtedly had such evils in mind. The court rejected the argument that it prohibited a person from advertising price who was authorized to sell eyeglasses and spectacles and was therefor violative of the Bill of Rights. The court stated that regulations of the sales of eyeglasses are measures directed to the prevention of substantial harm to the public health and are within the police power.

It is to be noted that the orders against the type of advertising we are here dealing with were directed squarely against the same people who are now attempting to do in Salt Lake City what they were ordered not to do in, among other states, Virginia and Wisconsin.

There is a conflict in the cases, however, and in the case of *Ritholz vs. City of Michigan*, 13 NW 2nd 283, (Mich., 1944), by a divided court, it was held that such

an ordinance had no relation to public health. The Court stated that the things that were proved regarding false and misleading advertising were business evils. Plaintiff, Ritholz, also introduced evidence to prove that when price advertising was stopped, their business showed a very heavy decline.

The proof made by these Respondents of a decline of their business in the Michigan case would seem to point up the wisdom of the Court's statement in the Hurst case, cited above, that price advertising would increase the sales and incidentally the harm.

It is most certainly true that these ordinances are designed to prevent a business evil. Salt Lake City has power to regulate business by express grant. A business evil that has for its net result a permitting of shabby and inferior care of human eyesight is an integral part of public health and welfare, and is subject to regulation.

POINT III.

THE COURTS ARE BOUND BY A STRONG PRESUMPTION OF VALIDITY OF A MUNICIPAL ORDINANCE:

As a basic precept of constitutional law, it is abundantly clear that the courts will assume, in the absence of clear contrary proof, that conditions exist warranting the passing of a regulatory ordinance by a municipal corporation.

The following statement, to be found at 37 Am. Jur. 956 succinctly sums the universal precept of law that should govern this case. It reads:

“Municipal corporations under authorized grants of police power, emanating directly from constitutional provisions, or from grants, or from general state statutes, may regulate any trade, occupation, calling, or business, the unrestrained pursuit of which MIGHT affect injuriously the public health, morals, safety, comfort, or welfare, or MIGHT result in fraud or imposition on the public. The courts have stated that regulatory powers of such nature are so well recognized and established as to be beyond question.” (Emphasis supplied.)

For examples of what MIGHT happen as a result of price advertising of corrective eyewear:

1. Mr. A has cataracts. He sees a newspaper advertisement reading:

“AMERICA’S EYEGLASS SENSATION

\$8.98 complete with
frames and lenses

You just can’t pay more!

No switching! No extras!”

Mr. A. goes to this shop. His prescription cannot be filled for \$8.98. He must either pay more money or be switched or be fitted with a prescription that does not meet his need.

2. Mr. B is a machinist. He requires a strong prescription, together with case hardened lenses to protect his eyes from flying fragments. He reads subject advertisement. His prescription and case hardening cannot be made at a cost of \$8.98. He is switched. Or perhaps imperfect hardening costs him his eyesight.

At the hearing in the trial court, Appellants' made an offer of proof that switching does, in fact, take place at Respondents' place of business. The trial judge rejected any proof, stating that no matter what the proof made out, there was no relationship to public health and welfare.

That is the reason for the very narrow issue in this case, namely, MIGHT price advertising have an adverse effect upon the health and welfare of the public!

It is respectfully submitted that all reasonable minds must conclude that price advertising MIGHT result in switching—a fraud and an imposition on the public. That it MIGHT result in inferior merchandise—a fraud and an imposition on the public. That it MIGHT result in accident or mishap of untold variety because of imperfectly corrected vision.

At this juncture, it must be carefully noted that the ordinance in question prevents only the advertisement of price of corrected eyewear. It does not prevent price advertising of frames by themselves, or of eyewar containing no prescriptive correction.

The thing the ordinance is directed at is the correction of a business evil, which, unrestrained, MIGHT have great and deleterious effect upon a large segment of the public. The greater the volume, the more opportunity for switching and the more acute and real is the potential damage.

It makes absolutely no difference how Respondents may conduct their business, or with what integrity—

although Appellants have proof of switching—or with what degree of skill. The whole point is: MIGHT price advertising of corrective eyewear have the effects suggested by Appellants, and other bad effects not dreamed of.

Of course, no man can say: No. Such things just couldn't happen. They could happen and they DO happen, but this court only need find that they MIGHT happen in order to reverse the trial judge and sustain the ordinance.

The case of *Ogden City vs. Leo*, 54 Utah 556, 182 P. 530, seems to have met all of the precepts as are involved in this case and it resolves them all in favor of constitutionality.

In the Ogden City case, Leo was convicted of the violation of a city ordinance which provided that booths, stalls, or partitions in restaurants could not be higher than three feet six inches from the floor. Leo appealed from his conviction, claiming that the City had no power to enact such an ordinance and that it had no relationship to public health, welfare, or morals.

Mr. Justice Frick, sustaining the conviction by unanimous opinion, referred to that Utah Code Section now known as Title 10, Chapter 8, Section 84, 1953 Utah Code Annotated, and stated:

“The statute thus confers amply powers upon cities to make all reasonable and proper regulations of the various business enterprises mentioned in the statute.”

It is to be noted that Respondents make no claim that their business pursuit is not one expressly covered by the statute. They are retail merchants and have so categorized themselves throughout these proceedings.

Mr. Justice Frick in the Ogden City case further states:

“The record is entirely devoid of anything from which we can judge or determine the condition prevailing in Ogden City which may have induced the city authorities to pass the ordinance in question . . . In the absence of facts to the contrary, WE MUST ASSUME THAT THE CITY AUTHORITIES WERE WARRANTED IN PASSING THE ORDINANCE (citing cases) . . . We therefor are required to presume that the local conditions . . . are such as to justify the city authorities to regulate . . . EVERY PRESUMPTION, as we have pointed out, IS IN FAVOR OF THE VALIDITY OF THE ORDINANCE. Unless, therefor, the regulation prescribed is manifestly oppressive or NECESSARILY constitutes an unreasonable and unwarranted interference with defendant’s business . . . we must uphold the ordinance.” (Emphasis supplied).

For other authority as to presumption of validity see supra: *Salt Lake City vs. Bennion Gas and Oil Co.*, 80 Utah 530; 15 P. 2nd 648; *Hopkins vs. Galland Mercantile Laundry Co.*, 21 P. 2nd 553 (Calif., 1933); *Sunny Slope Water Co. vs. City of Pasadena*, 33 P. 2nd 672 (Calif., 1934); *Skalko vs. City of Sunnyvale*, 91 P. 2nd 168, 93 P. 2nd 93 (Calif., 1939); *City of Spokane vs. Coon*, 100 P. 2nd 36, (Wash., 1940).

It cannot be argued that this ordinance NECESSARILY constitutes unreasonable and unwarranted interference. Nothing from which such a conclusion can be drawn appears on the face of the ordinance.

On the other hand, MIGHT evil result from price advertising of prescription glasses. The question is not has evil resulted or must evil result—but MIGHT it.

Of course it might and therefor this court must reverse the ruling of the trial court.

CONCLUSION

Respondents are retail merchants. The ordinance in question prohibits price advertising of prescription glasses by retail merchants. Advertising of price—a low price, one price for all in this case—might result in shabby products and detriment to public health. The ordinance is not necessarily unreasonable on its face. It must be upheld and the injunction granted dismissed.

Respectfully submitted,

GEORGE E. BRIDWELL and
CHRISTENSEN, HOLMGREN and
CHRISTOFFERSEN

Attorneys for Appellants

Received two true copies hereof, this
day of January, 1955.

Attorneys for Respondents.