

MSC Opinion: OFIS may not seek revocation of resident insurance producer license, issued in 2004, where the licensee disclosed and received waiver for his prior felony conviction

30. December 2010 By Madelaine Lane

On Wednesday, December 29, 2010, the Michigan Supreme Court issued its opinion in *King v. Dept. of Labor and Economic Growth*, Case No. 140684. Justice Davis authored the majority opinion in what is likely to be his last opinion before he leaves the Court on Saturday. The majority affirmed the Court of Appeals' opinion which found that trial court properly enjoined the defendants from revoking plaintiff's resident insurance producer license. In reaching this conclusion, the Court held that the Commissioner of the Office of Financial and Insurance Services was not required to deny the plaintiff's application for an insurance license in 2004. Therefore, where the OFIS Commissioner is now seeking to revoke the license for the reason that he believes he is required revoke King's license, that decision constitutes an abuse of discretion.

Plaintiff was convicted in 2000 of operating a motor vehicle while under the influence of liquor, in violation of MCL 257.625. When King applied with OFIS for a resident insurance producer license four years later, he fully disclosed this felony conviction and requested a waiver under 18 U.S.C. 1033. The Commissioner granted King's request for a license and issued a letter specifically granting King permission to engage in the business of insurance, in spite of his prior felony conviction. King pursued a career as an insurance agent and has not been convicted of any other felonies.

In 2008, defendants initiated proceedings to revoke King's license. In response, King filed this lawsuit. The defendants argued that the Commissioner impermissibly granted King's waiver request in 2004. Defendants asserted that the Commissioner had been required to deny King's application in 2004, pursuant to the Insurance Code of 2002. Now that the mistake had been discovered, defendants were required to correct that mistake by revoking King's license. The trial court disagreed. It held that even if a mistake had been made, equity precluded the defendants from revoking King's license four years later. The Court of Appeals affirmed the trial court's decision.

The Supreme Court affirmed both lower court decisions. The Court concluded that under the Insurance Code, as it existed at the time King applied for his license in 2004, the Commissioner was not required to reject King's application. Rather, it was in the Commissioner's discretion whether or not to grant King's request for a waiver, and thereafter for a license. MCL 500.1239(1). The Court acknowledges that under the Insurance Code as it is written today, the Commissioner no longer has discretion to grant licenses to convicted felons. However, the Court noted that amendments in the law cannot be retroactively applied if doing so will impair a vested right. In this case, the current Insurance Code does not require an existing license to be revoked.

The majority notes that the Commissioner does have discretion to pursue revocation of a insurance license. However, the Commissioner must reasonably exercise this discretion. MCL 500.2505. Here, the proceeding against King was instituted because the Commissioner incorrectly believed that he is required to revoke King's license. This erroneous abdication of discretion is, in itself, an abuse of discretion. The Court is careful to note, however, that it is only holding that the Commissioner may not revoke a license based on the erroneous belief that he must do so, when in fact he has discretion whether or not to pursue revocation of the license.

Justice Cavanagh authored a concurring opinion joined by Chief Justice Kelly. In his concurrence, Justice Cavanagh noted that he agrees with the majority's conclusion, but chose to write separately to express his view that the OFIS may not, in absence of additional cause, revoke a plaintiff's license solely on the basis of a felony conviction which was fully disclosed in the application process. In fact, Justice Cavanagh would go as far as to hold that a governmental agency is estopped from revoking a license on the basis of fully disclosed and accurate facts for which the agency previously granted an express waiver, if the licensee has reasonably relied on the waiver to his or her detriment.

Justice Young authored a dissenting opinion and was joined by Justices Markman and Corrigan. Justice Young stated that the OFIS failed to discharge its statutory duties and enforce statutory mandates when it granted King a license in 2004. As a result, the OFIS must be allowed to revoke King's license as the original licensure was invalid.