IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 2, 2023 Session

BRENDA SMITH D/B/A SUGAR CREEK CARRIAGES v. DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE

Appeal from the Chancery Court for Davidson County
No. 20-0640-1 Patricia Head Moskal, Chancellor
Telford E. Forgety, Jr., Chancellor
Rhynette N. Hurd, Judge

No. M2022-00941-COA-R3-CV

The Tennessee Department of Revenue issued a tax assessment against a horse-drawn carriage company pursuant to Tenn. Code Ann. § 67-6-212(a)(2). The carriage company filed a complaint in the chancery court challenging the tax assessment on two grounds: (1) that its carriage rides did not constitute a place of amusement under the statute and (2) that its equal protection rights had been violated because no other carriage companies had been assessed the tax. Both parties filed motions for summary judgment. The court granted the Tennessee Department of Revenue's motion for summary judgment and denied the carriage company's motion for summary judgment. Discerning no reversible error, we affirm the chancery court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and JEFFREY USMAN, JJ., joined.

William Gary Blackburn and Bryant Beatty Kroll, Nashville, Tennessee, for the appellant, Brenda Smith.

Jonathan Skrmetti, Attorney General and Reporter, Andrée Blumstein, Solicitor General, and Charles Larry Lewis, Special Counsel, for the appellee, Tennessee Department of Revenue.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute over whether a taxpayer's charges for carriage rides are subject to taxation as a place of amusement under Tenn. Code Ann. § 67-6-212(a)(2). Brenda Smith, doing business as Sugar Creek Carriages ("Sugar Creek"), charges customers for rides in horse-drawn[1] carriages in downtown Nashville. Sugar Creek's principal place of business is located in McEwen, Tennessee, but Sugar Creek rents storage space for its carriages at 701 Second Avenue North, in downtown Nashville. Initially, Ms. Smith's husband, Johnny Smith, ran the business, but she became the owner and primary operator when he became ill in 2014; Mr. Smith still acts a consultant with the business, however.

Like taxi cabs, vehicles-for-hire, pedal taverns, and wreckers, Sugar Creek is licensed and regulated by the Metropolitan Transportation Licensing Commission ("the Commission"). The Commission restricts Sugar Creek to operating no more than five carriages at a time and defines the general downtown area within which those carriages may operate.[2] Between fifty and seventy percent of Sugar Creek's carriage rides occur in Nashville's lower Broadway entertainment area. The Commission prohibits Sugar Creek from operating before 6:00 p.m. on weekdays but allows Sugar Creek to operate during the day and night on weekends and holidays. The Commission designates three specific carriage stand locations for Sugar Creek to load and unload customers, but Sugar Creek does not have a permanent physical facility at the carriage stands. Sugar Creek brings its horses to the storage space on Second Avenue to hook them up to the carriages, and the horses then draw the carriages to one of the three carriage stands to load passengers.

On its website, Sugar Creek offers several types of rides, including "Historical Rides of Nashville," "Narrated rides," "Walk-up Rides," and "Special Events," such as weddings, funerals, and other events. It advertises carriage tours that take riders to "tourist attractions," such as the Schermerhorn Symphony Center, Country Music Hall of Fame, Bridgestone Arena, Johnny Cash Museum, Riverfront Park, Hard Rock Café, Wildhorse Saloon, Ryman Auditorium, and Tootsies Orchid Lounge. Sugar Creek's carriages are themed, having names and decorations relating to "Cinderella," "Gone with the Wind," "Stage Coach," "Covered Wagon," Royal Vis a Vie," "Anniversary Vis a Vie," and "Christmas/Valentines' Vis a Vie." The "Cinderella" carriage is the most frequently used carriage because it is considered "more romantic."

---

[1] Sugar Creek's carriages are also drawn by mules. Ms. Smith stated that Sugar Creek uses mules "all the time" "because they're better in the heat and in the weather." We will, however, refer to the rides as "horse-drawn" carriage rides because that is how the parties refer to them.

[2] Sugar Creek's area of operation is bounded by the Capitol on the northern side, Eighth Avenue on the western side, Demonbreun Street on the southern side, and First Avenue on the eastern side.

Sugar Creek charges its customers based on time, not distance traveled. For instance, Sugar Creek offers rides for varying lengths of time: twenty, thirty, and forty-five minutes, or an hour or longer. Under optimum traffic conditions, Sugar Creek's carriages can travel twelve or thirteen blocks in twenty minutes but, under unfavorable traffic conditions, Sugar Creek's carriages may travel only two blocks in twenty minutes. If a customer has requested a specific drop-off location and time runs out before the carriage reaches that location, the customer is not dropped off at the requested location. Rather, the customer is asked to disembark at whatever location the carriage has reached when the time runs out. Sugar Creek admits that this policy sometimes results in customers becoming upset.

In 2019, the Tennessee Department of Revenue ("the Department") audited Sugar Creek for business tax and for sales and use tax. Following the audit, the Department issued a notice of proposed assessment to Sugar Creek for business tax plus interest in the amount of $548.36 for the time period from January 1, 2016, to December 31, 2018, and for sales and use tax plus interest in the amount of $32,858.12 for the time period from December 1, 2015, to April 30, 2019. The Department based the sales and use tax assessment on its determination that, as a "place of amusement," Sugar Creek was subject to taxation under Tenn. Code Ann. § 67-6-212(a)(2).

Sugar Creek filed a complaint in the Davidson County Chancery Court on July 2, 2020, challenging the assessment of the sales and use tax.[3] In the complaint, Sugar Creek alleged that the Department lacked statutory authority to tax it as a "place of amusement" and that it had been denied equal protection of the law because the Department had not assessed this tax against any other carriage company in Tennessee. Sugar Creek paid the total amount of taxes and interest due under the assessment on December 4, 2020, thereby converting the matter to a refund suit under Tenn. Code Ann. § 67-1-1801(i).[4] Because Sugar Creek challenged the constitutionality of a state statute, the Tennessee Supreme Court appointed a three-judge panel to hear the case. *See* Tenn. Code Ann. § 20-18-101(a) (stating that civil actions in which a party has filed a complaint challenging the constitutionality of a state statute "must be heard and determined by a three-judge panel").

[3] The complaint stated no claim regarding the business tax portion of the assessment.

[4] Tennessee Code Annotated section 67-1-1801(i) states as follows:

> To the extent of any amounts collected by or paid to the commissioner with respect to an assessment, or any portion of the assessment, challenged by suit by the taxpayer, whether such collection was pursuant to a jeopardy proceeding, by application of assets restored to the taxpayer pursuant to subsection (h), or otherwise, the suit shall proceed as a timely suit for refund of taxes paid, as if a timely claim for refund had been filed by the taxpayer and denied by the commissioner.

After engaging in discovery, the parties filed cross-motions for summary judgment. The three-judge panel heard arguments on the motions and subsequently entered an order denying Sugar Creek's motion and granting the Department's motion. The panel found that Sugar Creek was subject to taxation as a place of amusement under Tenn. Code Ann. § 67-6-212(a)(2) because Sugar Creek "charges admission for its horse-drawn carriage rides in downtown Nashville," and "those rides are a form of amusement or [recreational] activity." The panel further found that the operation of the carriage rides "over the public streets of downtown Nashville . . . supplies the required 'places' of amusement or entertainment" under the statute. Lastly, the panel concluded that Sugar Creek failed to make the necessary showing to support its equal protection claim.

Sugar Creek appealed and presents two issues for review: (1) whether the three-judge panel erred in concluding that Sugar Creek is liable for sales tax under Tenn. Code Ann. § 67-6-212(a)(2) because it charges admission to a place of amusement, and (2) whether the three-judge panel erred in determining that Sugar Creek failed to prove its equal protection claim.

STANDARD OF REVIEW

We review a trial court's summary judgment determination de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). This means that "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* We "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *see also Acute Care Holdings, LLC v. Houston Cnty.*, No. M2018-01534-COA-R3-CV, 2019 WL 2337434, at *4 (Tenn. Ct. App. June 3, 2019).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. A disputed fact is material if it is determinative of the claim or defense at issue in the motion. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). When a party moves for summary judgment but does not have the burden of proof at trial, the moving party must submit evidence either "affirmatively negating an essential element of the nonmoving party's claim" or "demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. Once the moving party has satisfied this requirement, the nonmoving party "'may not rest upon the mere allegations or denials of [its] pleading.'" *Id.* at 265 (quoting TENN. R. CIV. P. 56.06). Rather, the nonmoving party must respond and produce affidavits, depositions, responses to interrogatories, or other discovery that "set forth specific facts showing that there is a genuine issue for trial." TENN. R. CIV. P.

56.06; *see also Rye*, 477 S.W.3d at 265. If the nonmoving party fails to respond in this way, "summary judgment, if appropriate, shall be entered against the [nonmoving] party." TENN. R. CIV. P. 56.06. If the moving party fails to show that he or she is entitled to summary judgment, however, "'the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.'" *Martin*, 271 S.W.3d at 83 (quoting *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

Because any party may move for summary judgment under Tenn. R. Civ. P. 56, cases sometimes involve cross-motions for summary judgment. *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 82 (Tenn. 2010). As the Tennessee Supreme Court explained in *CAO Holdings v. Trost*:

> Cross-motions for summary judgment are no more than claims by each side that it alone is entitled to a summary judgment. The court must rule on each party's motion on an individual and separate basis. With regard to each motion, the court must determine (1) whether genuine disputes of material fact with regard to that motion exist and (2) whether the party seeking the summary judgment has satisfied Tenn. R. Civ. P. 56's standards for a judgment as a matter of law. Therefore, in practice, a cross-motion for summary judgment operates exactly like a single summary judgment motion.

Id. at 83 (citations omitted).

ANALYSIS

I. Sugar Creek's tax liability under Tenn. Code Ann. § 67-6-212(a)(2)

Tennessee imposes a sales tax on retail sales of tangible personal property and certain services. Tenn. Code Ann. § 67-6-201. With the adoption of Chapter 13 of the Public Acts of 1984, the Tennessee General Assembly extended the sales tax to include "a broad range of amusement and recreational activities." *P & P Enterps., Inc. v. Celauro*, 733 S.W.2d 878, 879 (Tenn. 1987). Generally referred to as the amusement tax, Tenn. Code Ann. § 67-6-212 imposes a tax "upon gross receipts or gross proceeds derived from admission, dues or fees charged by membership sports and recreation clubs, or for amusement, recreational or athletic events or activities." *Id.* The statutory section at issue in this case provides, in pertinent part, as follows:

> (a) There is levied a tax . . . on the sales price of each sale at retail of the following:
> . . .
> (2) Sales of tickets, fees or other charges made for admission to or voluntary contributions made to places of amusement, sports, entertainment,

> exhibition, display or other recreational events or activities, including free complimentary admissions when made in connection with a valuable contribution to any organization or establishment holding or sponsoring such activities which shall have the value equivalent to the charge that would have otherwise been made[.]

Tenn. Code Ann. § 67-6-212(a)(2).

Sugar Creek contends that the three-judge panel incorrectly interpreted this statute in determining that Sugar Creek was liable for the amusement tax. Our task is to determine whether the panel correctly interpreted this statute when applying it to the undisputed facts established by the parties' cross-motions for summary judgment. When construing statutes, our primary objective "is to ascertain and give effect to the intention or purpose of the legislature as expressed in the statute," *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007), "'without unduly restricting or expanding'" the coverage of the statute beyond its intended scope. *Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005) (quoting *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002)). To achieve this objective, we look to the plain and ordinary meaning of the language in the statute. *Id.* We must construe the words used "in the context in which they appear in the statute and in light of the statute's general purpose." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). If a statute's language is clear and unambiguous, we "need not look beyond the statute itself to ascertain its meaning." *Id.* at 527.

"It is well settled in this state . . . that 'tax statutes are to be liberally construed in favor of the taxpayer and strictly construed against the taxing authority.'" *Qualcomm Inc. v. Chumley*, No. M2006-01398-COA-R3-CV, 2007 WL 2827513, at *3 (Tenn. Ct. App. Sept. 26, 2007) (quoting *White v. Roden Elec. Supply Co.*, 536 S.W.2d 346, 348 (Tenn. 1976)). A court "may not extend by implication the right to collect a tax 'beyond the clear import of the statute by which it is levied.'" *Am. Airlines, Inc. v. Johnson*, 56 S.W.3d 502, 504 (Tenn. Ct. App. 2000) (quoting *Boggs v. Crenshaw*, 7 S.W.2d 994, 995 (Tenn. 1928)). If doubt exists "'as to the meaning of a taxing statute, the doubt must be resolved in favor of the taxpayer.'" *Qualcomm Inc.*, 2007 WL 2827513, at *4 (quoting *Memphis Peabody Corp. v. MacFarland*, 365 S.W.2d 40, 43 (Tenn. 1963)). Statutory construction presents a question of law that we review de novo without a presumption of correctness. *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020).

A. Does Sugar Creek charge admission to a place of amusement?

Sugar Creek argues that the chancery court erred in concluding that Sugar Creek's carriage rides fall within the range of amusement and entertainment activities encompassed by Tenn. Code Ann. § 67-6-212(a)(2). In particular, Sugar Creek disagrees with the court's determination that the statute "does not require a permanent, physical location as the 'places' of amusement." The language used in the statute provides that a tax is levied on

retail sales of "charges made for admission to . . . places of amusement, sports, entertainment, exhibition, display or other recreational events or activities," but the statute provides no specific definitions of the amusement, entertainment, or other recreational events and activities that are subject to the tax. Tenn. Code Ann. § 67-6-212(a)(2). The Department attempted to define the various amusement and recreational activities encompassed by Tenn. Code Ann. § 67-6-212(a)(2) by exercising its authority to promulgate reasonable rules and regulations. *See* Tenn. Code Ann. § 67-6-402(a) ("The commissioner has the power to make and publish reasonable rules and regulations not inconsistent with this chapter or the other laws, or the constitution of this state or the United States, for the enforcement of this chapter and the collection of revenues hereunder."). Specifically, the Department promulgated Rule 1320-05-01-.117 ("Rule 117"), which states as follows:

> Places of amusement, sports, entertainment, exhibition, display or other recreational events or activities subject to sales and use tax upon charges or admissions shall include, but not be limited to:
> (1) Establishments listed or described in Major Group 79 of the Standard Industrial Classification Manual as establishments providing amusement or entertainment.
> (2) Motion picture theaters, mini adult theaters, or similar establishments displaying motion pictures, whether the exhibition is indoors or outdoors.
> (3) Establishments listed or described in Major Group 84 of the Standard Industrial Classification Manual including noncommercial museums, art galleries and botanical and zoological gardens.

TENN. COMP. R. & REGS. 1320-05-01-.117.

Only subpart (1) of Rule 117 is relevant here, and it references Major Group 79 of the Standard Industrial Classification Manual ("SICM"), which is promulgated by the U.S. Department of Labor. Major Group 79 is divided into several subcategories addressing various amusement and recreation services. *Major Group 79: Amusement and Recreational Services*, https://www.osha.gov/data/sic-manual/major-group-79 (last visited Sept. 18, 2023). The pertinent subcategory is Industry Group 7999. This group pertains to "Amusement and Recreation Services, Not Elsewhere Classified" and lists numerous amusement and recreational activities, including amusement rides, agricultural fairs, canoe rentals, motorcycle rentals, saddle horse rentals, riding stables, scenic railroads for amusement, tourist attractions, and tourist guides. *Description for 7999: Amusement and Recreational Services, Not Elsewhere Classified*, https://www.osha.gov/sic-manual/7999 (last visited Sept. 22, 2023).

In addition to promulgating Rule 117, the Department issued Sales & Use Tax Notice #16-09 ("Notice #16-09") in September 2016. The notice advised that, pursuant to Tenn. Code Ann. § 67-6-212, "[t]ours conducted for amusement within the state for a fee,

whether the tour is on foot *or in a vehicle*, are subject to the Tennessee sales tax as an amusement." (Emphasis added). The notice listed several examples of tours subject to the amusement tax, including "ghost tours, celebrity bus tours, cave tours, facility tours, city tours, sight-seeing tours, boat tours, etc."

Subpart (1) of Rule 117 and Notice #16-09 show that the Department interprets Tenn. Code Ann. § 67-6-212(a)(2) as applying to a broad range of "places" of amusement, including those that are not permanent buildings or locations. When the Commissioner of Revenue exercises his or her authority to promulgate reasonable rules and regulations relating to the taxing statutes, "a court should not substitute its judgment for the Commissioner's" unless there is "a clear showing that a rule is arbitrary or contrary to statute." *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 134 (Tenn. 1992). This is because "administrative interpretations of statutes by the agency charged with enforcement or administration are entitled to great weight in determining the intention of the legislature." *Id.* (citing *Nashville Mobilphone Co., Inc. v. Atkins,* 536 S.W.2d 335, 340 (Tenn. 1976)). "However, it is fundamental that the Commissioner cannot enlarge the scope of a taxing statute by regulation, and rules contrary to the express directives of a taxing statute are void." *Id.* (citing *Volunteer Val-Pak v. Celaura*, 767 S.W.2d 635, 637 (Tenn. 1989); *Coca-Cola Co. v. Woods*, 620 S.W.2d 473, 475-76 (Tenn. 1981)). Therefore, "where the language of the statute is plain and the meaning is obviously different from the administrative construction," the rule of affording great weight to administrative interpretations does not apply. *Id.*

Sugar Creek asserts that Rule 117 and Notice #16-09 are void because they enlarge the scope of Tenn. Code Ann. § 67-6-212(A)(2). According to Sugar Creek, the plain language of the statute obviously requires a permanent, or stationary, locality or building as the "places" of amusement. Thus, Sugar Creek contends, its carriages cannot possibly be "places" of amusement because the carriage rides constitute neither permanent buildings nor permanent localities as the carriages are pulled by horses along several routes on the public streets of downtown Nashville.

When, as in this case, a statute does not define a word or phrase, a court may use dictionary definitions to determine the plain and ordinary meaning of the word or phrase. *McGarity v. Jerrolds*, 429 S.W.3d 562, 578 (Tenn. Ct. App. 2013) (citing *State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010)). *Merriam-Webster Dictionary* defines "place" as "a building or locality used for a special purpose," but it also defines "place" as a "physical environment" or "space." *Place*, http://www.merriam-webster.com/dictionary/place (last visited Sept. 22, 2023). "Physical environment" means "the part of the human environment that includes purely physical factors (as soil, climate, water supply)." *Physical Environment*, https://www.merriam-webster.com/dictionary/physical%20environment (last visited Sept. 22, 2023). Thus, the term "place" as used in the amusement tax statute is broad enough to encompass more than a permanent building or locality. We agree with

the three-judge panel's finding that "[t]he Department's view of what constitutes a place of amusement is . . . consistent with the statute's plain language."

Sugar Creek asserts that, even if the amusement tax statute encompasses more than a permanent building or locality, it is not subject to taxation as an amusement because horse-drawn carriage rides are not specifically mentioned in Tenn. Code Ann. § 67-6-212(a)(2) or Rule 117. As already discussed, Tenn. Code Ann. § 67-6-212(a)(2) does not define "places of amusement," but the plain and ordinary meaning of the language in the statute encompasses a broad range of amusement and recreational activities. Moreover, Rule 117 expressly states that the amusement and recreational activities subject to the amusement tax are "not limited to" those provided in the rule. TENN. COMP. R. & REGS. 1320-05-01-.117. Therefore, the fact that horse-drawn carriage rides are not expressly included in the statute or the rule does not mean they are not subject to the tax.

There are no Tennessee cases addressing whether horse-drawn carriage rides fall within the purview of Tenn. Code Ann. § 67-6-212(a)(2). Like the three-judge panel below, however, we find guidance on the issue in a case from the Missouri Supreme Court, *Surrey's on the Plaza, Inc. v. Director of Revenue*, 128 S.W.3d 508 (Mo. 2004). *Surrey's* involved a similar statute that taxed "'fees paid to, or in any place of amusement, entertainment or recreation . . . .'" *Surrey's on the Plaza*, 128 S.W.3d at 509 (quoting Mo. Ann. Stat. § 144.020.1(2)). Pursuant to this statute, Missouri's director of revenue sought to tax a horse-drawn carriage company for the fees the company charged for carriage rides in Kansas City's Country Club Plaza. *Id.* The carriage company argued that it was not subject to the amusement tax because "it ha[d] no *place* of amusement—as the rides follow several routes on public streets" that it did not control. *Id.* at 509-10. The Missouri Supreme Court disagreed and held that where a business "controls the locality of amusement or entertainment[, it] is liable for sales tax." *Id.* at 510. As the Court explained:

> [The carriage company's] business . . . is like those in two other cases. Tax applies to helicopter tours, because the operator controls where the helicopter flies, where the entertainment occurs. *Fostaire Harbor, Inc. v. Director of Revenue,* 679 S.W.2d 272, 273 (Mo. banc 1984). Entertaining boat rides are subject to tax, because the operator controls the location of amusement—the boat. *Lynn v. Director of Revenue,* 689 S.W.2d 45, 48 (Mo. banc 1985).
>
> [The carriage company] controls the location of amusement and entertainment by directing the carriage through the Plaza. The carriage functions the same as the helicopter in *Fostaire* or the boat in *Lynn*. . . . The horse-drawn carriages are places of amusement under section 144.020.1(2).

Id.

Applying that reasoning here, we note that between 50 and 70 percent of Sugar Creek's carriage rides occur in Nashville's lower Broadway entertainment district.

Although Sugar Creek's carriage rides through this entertainment district must stay within the area designated by the Commission, Mr. Smith testified that Sugar Creek's carriage drivers determine the routes they take for each ride through that area, usually based on the traffic conditions. Like in *Surrey's*, the driver controls the location of amusement—the carriage.[5] We, therefore, conclude that Sugar Creek's carriage rides fall within the broad range of amusement or entertainment activities encompassed by Tenn. Code Ann. § 67-6-212(a)(2).

B. Are Sugar Creek's carriage rides a transportation service rather than an amusement?

Sugar Creek next argues that it is not subject to taxation under Tenn. Code Ann. § 67-6-212(a)(2) because, although its carriage rides may be entertaining, their primary purpose is transportation. To support this argument, Sugar Creek compares its carriage rides to taxis and other hired vehicles because, like those businesses, horse-drawn carriages are regulated by various state laws relating to motor vehicles and local ordinances relating to licensing requirements. For the reasons discussed below, this argument is unavailing.

In *Carson Creek Vacation Resort, Inc. v. Department of Revenue*, 766 S.W.2d 783, 783 (Tenn. 1989), the taxpayer owned and operated a campground that had "180 full hookups and 40 partial hookups for travel trailers camped at its facility." *Carson Creek*, 766 S.W.2d at 783. The taxpayer charged a membership fee that allowed its members access to the hookups as well as to an assortment of other facilities located at the campground, such as "a swimming pool, miniature golf course, a trout pond, video games and a cooking area." *Id.* The state assessed the amusement tax on the membership fees charged by the taxpayer on the ground that those fees "constitute[d] either 'dues or fees to membership sports or recreation clubs' or 'fees or other charges made for admission . . . to places of amusement . . . or other recreations events or activities.'" *Id.* (quoting Tenn. Code Ann. § 67-6-212(a)). The taxpayer challenged the assessment, arguing that the primary purpose of the campground was to provide lodging, not amusement or recreation. *Id.* at 784. The Tennessee Supreme Court disagreed, finding that "[i]n its natural and ordinary meaning, 'camping' is considered a recreational activity. The presence of other recreational facilities such as swimming pools and miniature golf lends further support to the overall recreational purpose." *Id.* Given these facts, the Court concluded that the campground's primary purpose was not to provide lodging, but rather, to provide "the recreational activity of camping which is a different purpose from that of simply obtaining a place to stay overnight." *Id.*

[5] The three-judge panel found that the operation of the carriage rides "over the public streets of downtown Nashville . . . supplies the required 'places' of amusement or entertainment" under Tenn. Code Ann. § 67-6-212(a)(2). We agree with this conclusion, but we also see no substantial difference between the horse-drawn carriages in this case and those in *Surrey's* and, therefore, conclude that the carriages may also provide the location of amusement.

Here, the undisputed facts demonstrate that the primary purpose of Sugar Creek's carriage rides is amusement, not transportation. First, the Commission restricts the carriages to a relatively small area of downtown Nashville—between First and Eighth Avenue on the East and West, and between the Capitol and Demonbreun Street on the North and South. This area extends approximately a mile in either direction, meaning the carriages do not travel very far. Many of Nashville's most popular tourist attractions, however, are located in that small area, a fact that strongly indicates that amusement is the overall purpose.

The fact that Sugar Creek does not guarantee its passengers that its carriages will drop them off at a requested location further detracts from its position that its carriages provide a transportation service. Indeed, Sugar Creek requires passengers to disembark from its carriages wherever they may be at the moment the passengers' pre-paid time expires, a practice that often results in disgruntled passengers. Lastly, the cost of the carriage rides contradicts the assertion that they provide a transportation service. A thirty-minute ride in the Cinderella carriage costs $75, while a narrated, forty-five minute ride in the same carriage costs $174.95 If customers wish to ride in Sugar Creek's large carriage, The Surrey, they must pay $304.95 per regular hour or up to $500 for the first hour if charged at a special event rate. Considering the short distance that Sugar Creek's carriages are permitted to travel, these charges make its carriage rides an impractical means of transportation. As the Department points out, taxis, buses, and walking provide cheaper, faster, and more reliable transportation than Sugar Creek's carriages. We are of the opinion that the primary purpose of the carriage rides is amusement, not transportation.

Based on the foregoing, we conclude that the three-judge panel properly determined that the fees for admission that Sugar Creek charges for its carriage rides are subject to taxation under Tenn. Code Ann. § 67-6-212(a)(2).

II. Sugar Creek's equal protection claim

Sugar Creek next contends that the three-judge panel erred in concluding that Sugar Creek was not entitled to summary judgment on its equal protection claim. Sugar Creek's primary argument on this issue is that the three-judge panel erred in considering the equal protection claim as one for selective enforcement.

"The United States Constitution prohibits the states from denying the equal protection of the laws to any person within the state's jurisdiction." *MCI Telecomms. Corp. v. Taylor*, 914 S.W.2d 519, 521 (Tenn. Ct. App. 1995) (citing U.S. CONST. amend. XIV, § 1). "The phrase 'equal protection,' as used in the Fourteenth Amendment to the Constitution of the United States, requires that all persons and entities shall be treated the same under like circumstances and conditions, both as to privileges conferred and liabilities incurred." *Genesco, Inc. v. Woods*, 578 S.W.2d 639, 641 (Tenn. 1979). Therefore, "'[t]he right of equal protection is violated . . . when those similarly situated are unequally

burdened.'" *MCI Telecomms.*, 914 S.W.2d at 521 (quoting *MCI Telecomms. Corp. v. Tracy*, 616 N.E.2d 1212, 1216 (Ohio Ct. App. 1992)). In regard to taxation, the Fourteenth Amendment "prohibits states from discriminating against some taxpayers by subjecting them to taxes not imposed upon others of the same class." *Id.* (citing *Allegheny Pittsburg Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989)). The Fourteenth Amendment does not require "'absolute equality or precisely equal advantages,'" *Genesco*, 578 S.W.2d at 641 (quoting *Nolan v. State*, 568 S.W.2d 837, 840 (Tenn. Crim. App. 1978)), but it does "'demand that persons similarly situated be treated alike.'" *Osborn v. Marr*, 127 S.W.3d 737, 741 (Tenn. 2004) (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003)).

Within equal protection law is a "'murky corner'" known as "'selective enforcement'" or "'selective prosecution.'" *Nat'l Loans, Inc. v. Tenn. Dep't of Fin. Insts.*, No. 01A01-9506-CH-00241, 1997 WL 194992, at *4 (Tenn. Ct. App. Apr. 23, 1997) (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980)). A selective enforcement claim is one where a party asserts that public officials have enforced a statute or regulation against him or her but not against others who are more or equally guilty of the same thing. *See 421 Corp. v. Metro. Gov't of Nashville & Davidson Cnty.*, 36 S.W.3d 469, 479 (Tenn. Ct. App. 2000) (involving a claim that a zoning board violated a company's equal protection rights by enforcing the strict requirements of a zoning ordinance against them but not against similar businesses); *Nat'l Loans*, 1997 WL 194992, at *4 (involving a claim that a corporation's equal protection rights had been violated because the Tennessee Department of Financial Institutions enforced the Industrial Loan and Thrift Act against it but not against others guilty of the same conduct).

"[T]here are surprisingly few [selective enforcement] cases and no clearly delineated rules to apply," but our courts have provided some guidance for analyzing these cases. *LeClair*, 627 F.2d at 608. For instance, the fact that "some people escape the law's reach while others have the law enforced against them does not, by itself, run afoul of the equal protection guarantees in the state and federal constitutions" because "[t]here is no constitutionally protected right to have the law go unenforced." *421 Corp.*, 36 S.W.3d at 480. When a party makes a selective enforcement claim, he or she has "a heavy burden to overcome because the courts, in recognition of the doctrine of separation of powers, presume that public officials have discharged their duties in good faith and in accordance with the law." *Id.* (footnote and internal citations omitted). Moreover, "[b]ecause practical realities require the allocation of limited public resources, the courts afford public agencies and officials substantial discretion with regard to law enforcement decisions." *Id.*

In light of the deference given to law enforcement decisions, a party asserting a selective enforcement equal protection claim must prove not only that an enforcement decision produced a discriminatory effect but also that the enforcement decision had a discriminatory purpose. *Nat'l Loans*, 1997 WL 194992, at *5 (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). More specifically, the party must prove: "(1) that they have been singled out for prosecution while others similarly situated have generally

not been prosecuted for the same type of conduct and (2) that the decision to prosecute them rests on an impermissible consideration," such as "race, gender, religion, or some other arbitrary classification such as the exercise of statutory or constitutional rights." *Id.*; *see also 421 Corp.*, 356 S.W.3d at 480.

The three-judge panel considered Sugar Creek's equal protection challenge to the amusement tax assessment as one for selective enforcement due to Sugar Creek's allegation that "it ha[d] been singled-out for assessment" because the Department did not assess the amusement tax against any other carriage companies. Applying the requirements of a selective enforcement claim to the facts of the case, the panel concluded that Sugar Creek failed to make the necessary showing by failing "to come forward with undisputed material facts establishing either discriminatory effect or discriminatory intent." Sugar Creek contends that the panel erred in requiring it to prove that the tax assessment has a discriminatory purpose. According to Sugar Creek, a tax assessment that denies a taxpayer equal protection requires only a showing that there was a discriminatory effect—that the tax assessment treated the taxpayer differently than similarly situated taxpayers.

In this case, it is unnecessary to determine whether Sugar Creek had to prove that the assessment had a discriminatory intent because a thorough examination of the record shows that Sugar Creek failed to establish that it was "singled-out" or treated differently than similarly situated carriage companies. In fact, the record contains no evidence that only Sugar Creek was assessed the amusement tax. The only evidence in the record relating to this issue is an affidavit of Mr. Smith that Sugar Creek attached to its motion for summary judgment. In the affidavit, Mr. Smith stated as follows:

> There are only eight (8) horse-drawn carriage businesses in the state of Tennessee and I am familiar with each of them. Because we have common concerns, we are in regular communication. Based upon my knowledge of the industry and my familiarity of the businesses, no other carriage business in the state of Tennessee has been assessed an "amusement tax."

The Department correctly points out that this statement is not sufficient to show that Sugar Creek was entitled to summary judgment on its equal protection claim because it was inadmissible hearsay, as it was based on Mr. Smith's communications with other carriage companies. *See* TENN. R. CIV. P. 56.06 ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts *as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") (emphasis added).

Sugar Creek acknowledges that it did not present sufficient proof on this issue but attributes this failure to the three-judge panel's denial of Sugar Creek's requests for discovery. Specifically, Sugar Creek devotes the last four pages of the argument section of its appellate brief to its argument that the three-judge panel erred in denying Sugar

Creek's requests for discovery from the Department because the discovery requests sought confidential tax information.[6] Sugar Creek did not set forth any issue regarding the discovery request ruling in the statement of the issues section of its appellate brief. Therefore, we deem this argument waived and conclude that the three-judge panel properly determined that Sugar Creek failed to prove it was entitled to summary judgment on its equal protection claim.[7] *See City of Memphis v. Edwards by & Through Edwards*, --- S.W.3d ---, No. W2022-00087-SC-R11-CV, 2023 WL 4414598, at *2 (Tenn. July 5, 2023) (emphasizing that "an issue must be presented in the manner prescribed by [Tenn. R. App. P. 27] . . . and may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Rule 27(a)(4)").

Having concluded that the three-judge panel properly determined that Sugar Creek's carriage rides were subject to taxation under Tenn. Code Ann. § 67-6-212(a)(2) and that Sugar Creek failed to prove it was entitled to summary judgment on its equal protection claim, we affirm the panel's decision granting the Department's motion for summary judgment and denying Sugar Creek's motion for summary judgment.

CONCLUSION

The judgment of the chancery court is affirmed. Costs of this appeal are assessed against the appellant, Brenda Smith d/b/a Sugar Creek Carriages, for which execution may issue if necessary.

_/s/ Andy D. Bennett_____
ANDY D. BENNETT, JUDGE

[6] Tennessee Code Annotated section 67-1-1702(a) states:

> Notwithstanding any law to the contrary, returns, tax information and tax administration information shall be confidential and, except as authorized by this part, no officer or employee of the department or of any office of a district attorney general or any state or local law enforcement agency, and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to this part, or obtained otherwise.

Disclosure of any return or tax information "is a Class E felony." Tenn. Code Ann. § 67-1-1709(a).

[7] If Sugar Creek had established that it was the only carriage company assessed the amusement tax, it does not necessarily mean there is an equal protection violation. As the Tennessee Supreme Court stated in *Porter Brown Limestone Co., Inc. v. Olsen*, 648 S.W.2d 242, 244 (Tenn. 1982), "[t]axypayers owe and it is the duty of the Commissioner of Revenue to collect the taxes due the State under the law as written by the Legislature and interpreted by the Courts, not as interpreted or overlooked or otherwise omitted by various field auditors or other individuals in the Department of Revenue."