

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Trial Court Case No. 2012ALJ170298CC
Appellate Case No. 2013-000126

South Carolina Department of Revenue,.....Respondent,

v.

C & M Market,.....Appellant.

Initial Brief of Respondent

Kathryn R. Brown (Bar No. 78399)
Counsel for Litigation
Sean G. Ryan (Bar #76585)
Managing Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
Chief Counsel for Litigation
Harry T. Cooper, Jr. (Bar No. 1383)
General Counsel for Litigation
PO Box 12265
Columbia, SC 29211
(803) 898-5764 Fax (803) 896-0171
brownk@sctax.org
courtorders@sctax.org

RECEIVED

JUL 15 2013

SC Court of Appeals

TABLE OF CONTENTS

Statement of the Issues on Appeal 1

Statement of the Case 2

Statement of the Facts 4

Arguments:

I. THE ALC DID NOT ERR IN CONCLUDING THAT THE MAGISTRATE’S
ORDER DETERMINING THE ILLEGALITY OF THE SEIZED MACHINES
IS BINDING UPON THE APPELLANT. 7

 A. In Rem Proceeding.7

 B. Res Judicata 10

 C. Collateral Estoppel 11

 D. No Specific Authorization Under S.C. Code Ann. § 64-4-580(3) 12

II. THE ALC DID NOT ERR IN ITS FACTUAL FINDING THAT THE
APPELLANT KNOWINGLY PERMITTED AN ACT WHICH
CONSTITUTES A CRIME UNDER THE LAWS OF
SOUTH CAROLINA PURSUANT TO THE REQUIREMENTS
OF S.C. CODE ANN. §§ 61-4-580(5) AND 12-21-271016

Conclusion 22

TABLE OF AUTHORITIES

Statutes:

S.C. Code Ann. §1-23-310	6, 17
S.C. Code Ann. § 1-23-400	6
S.C. Code Ann. § 1-23-600	17
S.C. Code Ann. § 12-21-2710	Passim
S.C. Code Ann. § 12-21-2712	8
S.C. Code Ann. § 12-21-2744	2
S.C. Code Ann. § 23-3-15 (2007)	17
S.C. Code Ann. § 61-2-20	17
S.C. Code Ann. § 61-2-70	17
S.C. Code Ann. § 61-2-200	17
S.C. Code Ann. § 61-2-210	17
S.C. Code Ann. § 61-2-260	17
S.C. Code Ann. § 61-4-580(5)	Passim
S.C. Code Ann. § 61-6-100	17
S.C. Code Ann. § 1860 (1942)	18

Cases:

<u>Allendale County Sheriff's Office v. Two Chess Challenge II</u> , 361 S.C. 581, 606 S.E.2d 471 (2004)	8
<u>Anonymous v. State Bd. Of Med. Exam'rs.</u> , 32- S.C. 371, 496 S.E.2d 17 (1988)	17
<u>Daley v. Ward</u> , 303 S.C. 81, 339 S.E.2d 13 (Ct. App. 1990)	19

<u>Ex parte Kenmore Shoe Co.</u> 50 S.C. 140, 27 S.E. 682 (1897)	9
<u>Fledman v. S.C. Tax Comm’n.</u> 203 S.C. 49, 26 S.E.2d 22 (1943)	17, 18, 19
<u>Hilton Head Center of South Carolina, Inc. v Public Service Comm’n of South Carolina,</u> 294 S.C. 9,362 S.E.2d 176 (1987)	11
<u>Kershaw County Sheriff’s Office v. Magic Minutes Machine and U.S. Currency,</u> 2012CV2810100148 (March 26, 2012)	2, 6
<u>Mims Amusement Co. v. S. Carolina Law Enforcement Div.,</u> 366 S.C. 141, 621 S.E.2d 344 (2005)	7, 8, 9, 20
<u>MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’tl. Control,</u> 394 S.C. 567, 716 S.E.2d 111 (Ct. App. 2011)	6, 7
<u>Reidman Corp. v. Greenville Steel Structures, Inc.,</u> 308 S.C. 467, 419 S.E.2d 217 (1992)	11
<u>Roberts v. Recovery Bureau, Inc.,</u> 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994)	12
<u>S.C. Cable Television Ass’n. v. S. Bell Tel. & Tel. Co.,</u> 308 S.C. 216, 417 S.E.2d 586 (1992)	17
<u>Sealy v. Dodge,</u> 289 S.C. 543, 347 S.E.2d 504 (1986)	11
<u>Settlemyer v. Southern Ry. Co.,</u> 97 S.C. 85, 81 S.E.2d 465 (1914)	19
<u>State v. Edwards,</u> 787 So.2d 981, 990-91 (La. 2001)	9
<u>State v. Petty,</u> 270 S.C. 206, 241 S.E.2d 561 (1978)	8, 9
<u>State v. Thompkins,</u> 263 S.C. 472 211 S.E.2d 549 (1975)	19
<u>Sub-zero Freezer Co. v. R.J. Clarkson Co.,</u> 308 S.C. 188, 417 S.E.2d 569 (1992)	11

<u>U.S. v. Gilbert,</u> 244 F.3d 888, 918-20 (11 th Cir. 2001)	8
<u>Venture Engineering, Inc. v. Tishman Constr. Corp. of South Carolina,</u> 360 S.C. 156, 600 S.E2d 547 (Ct. App. 2004)	11
<u>Zaman v. S.C. State Bd. of Med. Exam'rs,</u> 305 S.C. 281, 408 S.E.2d 213 (1991)	10
<u>Other Authorities:</u>	
Administrative Procedures Act	6
Rule 220(c), SCACR	21
S.C. Laws Act 5 (S.B.3)	13

STATEMENT OF THE ISSUE ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR IN CONCLUDING THAT THE MAGISTRATE'S ORDER DETERMINING THE ILLEGALITY OF THE SEIZED MACHINES IS BINDING UPON THE APPELLANT?

- II. DID THE ADMINISTRATIVE LAW COURT ERR IN ITS FACTUAL FINDING THAT THE APPELLANT KNOWINGLY PERMITTED AN ACT WHICH CONSTITUTES A CRIME UNDER THE LAWS OF SOUTH CAROLINA PURSUANT TO THE REQUIREMENTS OF S.C. CODE ANN. §§ 12-21-2710 AND 61-4-580(5)?

STATEMENT OF THE CASE

This appeal arises from an Order of the South Carolina Administrative Law Court (ALC) suspending the on-premises beer and wine permit of the Appellant, C & M Market (Appellant) for 120 days.

The Department issued an on-premises beer and wine permit to the Appellant at its location 2105 Highway #1 South, Elgin, South Carolina. On January 26, 2012, Agents from the South Carolina Law Enforcement Division (SLED) and the Kershaw County Sheriff's Department (KCSD) entered the Appellant's location and seized two Magic Minutes gaming machines after determining that they were illegal. On January 27, 2012, the KCSD brought the gaming machines for examination in an *in rem* proceeding before a Kershaw County Magistrate. The Magistrate found the games were unlawful games of chance under § 12-21-2710 and signed an Order of Destruction/Notice of Post Seizure Hearing.¹ (R., pp. __) As a result of the Magistrate's ruling, SLED issued the Appellant an administrative citation for violation of § 61-4-580(5), permitting an act on its premises that constitutes a crime under the laws of this State. On February 7, 2012, the Department issued the Appellant a Notice of Intent to Revoke its permit under § 61-4-580(5). On April 20, 2012, the Appellant timely protested the revocation of its permit. In response to the Appellant's protest, on May 29, 2012, the Department issued its Department Determination (Determination) finding that the Appellant had violated § 61-

¹A post seizure hearing was held in this matter on March 5, 2012. In his Order dated March 26, 2012, the Magistrate found that the party who requested the post seizure hearing lacked standing pursuant to S.C. Code Ann. § 12-21-2744 (2000) and "the original Order of Destruction stands and machine is to be destroyed and the currency forfeited to the proper authorities." Kershaw County Sheriff's Office v. Magic Minutes Machine and U.S. Currency, Case No. 2012CV2810100148.

4-580(5) by allowing a crime to be committed on its premises – possession of an illegal gaming machine - and that the appropriate penalty for that violation was revocation of the Appellant's permit. The Appellant commenced this action in the ALC by timely protesting the Department's Determination with a request for a contested case hearing on June 27, 2012.

The ALC conducted a contested case hearing in the matter on November 6, 2012. Prior to the hearing, the Department filed a Motion for Partial Summary Judgment (R., pp. ___) asserting that the final Magistrate's Order determining the illegality of the machines established that the Appellant knowingly allowed a crime to be committed on its premises. The Appellant responded with a Memorandum in Opposition to the Motion. (R., pp. ___) The ALC heard the motion prior to the hearing on the merits and found that there was no genuine issue of material fact, that the possession and operation of the seized machines was an unlawful act which occurred upon the Appellant's premises. However, the ALC found that the Magistrate's determination alone did not establish that the Appellant "knowingly" allowed the crime to occur as required by § 61-4-580(5). The ALC then proceeded with the hearing on the merits. On December 7, 2012, the ALC issued a written order affirming the Department's determination that Appellant violated § 61-4-580(5). However, the ALC found that there were mitigating circumstances present and reduced the penalty from revocation of the Appellant's on-premises beer and wine permit, to a suspension of one hundred twenty (120) days to begin on January 1, 2013.

On December 17, 2012, the Appellant filed a Motion to Alter or Amend the Judgment. (R., pp. ___) Later, on December 20, 2012, the Appellant filed a Motion to

Stay Enforcement of the Order (R., pp. ___) with the ALC which was granted. The ALC issued an Amended Final Order and Decision (R., pp. ___) on January 14, 2013.

On January 22, 2013, the Appellant filed a Notice of Appeal (R., pp. ___) with this Court.

STATEMENT OF THE FACTS

The Appellant holds an on-premises beer and wine permit (permit) issued by the South Carolina Department of Revenue (Department) for a convenience store located at 2105 Highway #1 South, Elgin, South Carolina. (R., p. ___, ALC Order, p. 4, para. 2). In 2011, McDonald's Amusements (McDonald's) approached the Appellant about putting Magic Minutes machines at the Appellant's licensed location. (R., p. ___, ALC Order, p. 4, para. 2). McDonald's provided the Appellant with an order from a magistrate in Kershaw County purportedly finding that similar machines were legal. (R., p. ___, ALC Order, p. 4, para. 2).

Upon receiving that information, the Appellant asserted that he contacted his brother who drives a truck and delivers potato chips to local convenience stores. (R., p. ___, ALC Order, p. 4, para. 3). His brother allegedly informed him that he had seen similar machines in other stores. (R., p. ___, ALC Order, p. 4, para. 3). The Appellant contends that he therefore agreed to the placement of the machines in his store based upon the magistrate's order provided by McDonald's and his brother's observations. (R., p. ___, ALC Order, p. 4, para. 3). The order provided to the Appellant by McDonald's was not a valid Magistrate's Court order as it did not relate to a proper seizure hearing and had not been properly filed. (Tr. pp. 33-35: 10-2).

However, the Appellant never sought any legal advice about the legality of the machines nor did he contact anyone concerning the validity or applicability of the magistrate's order. (R., p. ____, ALC Order, p. 4, para. 4). Further, the Appellant knew that poker and blackjack games were available for play on the seized machines. (R., p. ____, ALC Order, p. 4, para. 4). The Appellant and McDonald's split the money from the seized machines 50/50. (R., p. ____, ALC Order, p. 4, para. 4).

On January 26, 2012, SLED Special Agent W.G. Bickley and KCSD Sergeant Jamey Jones investigated a report of illegal gambling machines at the Appellant's premises. (R., p. ____, ALC Order, p. 4, para. 5). Sgt. Jones, who was working undercover, entered the Appellant's location and found two Magic Minutes machines in the center of the location. (R., p. ____, ALC Order, p. 5, para. 1). He sat at one of the machines, inserted money into the machine, and noted that several games, including poker, keno, and blackjack, were available to play. (R., p. ____, ALC Order, p. 5, para. 1). Sgt. Jones chose to play poker. (R., p. ____, ALC Order, p. 5, para. 1). The machine had "a free play feature," which allowed the player to redeem the points earned. (R., p. ____, ALC Order, p. 5, para. 1).

Sgt. Jones left the Appellant's location and reported to Agent Bickley, who was waiting outside, that there were two illegal gaming machines in the store. (R., p. ____, ALC Order, p. 5, para. 2). Sgt. Jones and Agent Bickley, with other officers from the Sheriff's office, then entered the market and seized the two Magic Minutes machines as illegal gaming machines. (R., p. ____, ALC Order, p. 5, para. 2). Bickley also issued an administrative violation report to the Appellant for permitting an act that constituted a crime under § 12-21-2710. (R., p. ____, ALC Order, p. 5, para. 2).

The following day, the machines were brought before a Kershaw County Magistrate and, by Order dated January 27, 2012, the Magistrate held that the machines violated § 12-21-2710 and ordered the destruction of the machines. (R., p. ____, ALC Order, p. 5, para. 3). The Appellant was given notice of the Order of Destruction and Notice of Post-Seizure Hearing but did not request a Post-Seizure Hearing to contest the determination that the machines were unlawful. (R., p. ____, ALC Order, p. 5, para. 3; Tr. pp. 56-58:5-12). However, another party, Magic Minutes, not the Appellant, requested a Post-Seizure Hearing in the matter, and pursuant to that request, a Post-Seizure Hearing was held on March 5, 2012. (R., p. ____, ALC Order, p. 5, para. 3). Afterwards, in an Order dated March 26, 2012, the Magistrate found that Magic Minutes lacked standing pursuant to § 12-21-2744 and therefore, “the original Order of Destruction stands” and the machines would be destroyed. (R., p. ____, ALC Order, p. 5, para. 3), see Kershaw County Sheriff’s Office v. Magic Minutes Machine and U.S. Currency, 2012CV2810100148, dated March 26, 2012.

“Appeals from the ALC are governed by the Administrative Procedures Act (APA).” MRI at Belfair, LLC v. S.C. Dep’t of Health & Envtl. Control, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011); see S.C. Code Ann. §§ 1-23-310 to 1-23-400 (2005 & Supp. 2011).

Pursuant to the APA, the Court of Appeals may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or

capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

MRI at Belfair, 394 S.C. at 572, 716 S.E.2d at 113 (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2012)).

Here, the judgment of the ALC was not in error. The ALC's finding that the Appellant knowingly allowed a crime to be committed on its premises in violation of § 61-4-580(5) was not affected by an error of law and is supported by substantial evidence. Accordingly, this Court should uphold the ALC's Order and affirm the one hundred twenty (120) day suspension of the Appellant's permit.

ARGUMENT

I. THE ALC DID NOT ERR IN CONCLUDING THAT THE MAGISTRATE'S ORDER DETERMINING THE ILLEGALITY OF THE SEIZED MACHINES IS BINDING UPON THE APPELLANT.

A. In Rem Proceeding.

"Gaming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005) (quoting Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303, 534 S.E.2d 270, 273 (2000) (citing Lawton v. Steele, 152 U.S. 133, 136, 14 S.Ct. 499, 38 L.Ed. 385 (1894))). South Carolina statutory law prescribes the procedure for seizing and destroying unlawful machines:

[a]ny machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any

other law of this State, direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712 (Supp. 2011) (Emphasis added).

Further, in Mims Amusement Co. v. S.C. Law Enforcement Div., the South Carolina Supreme Court has specifically stated that it is the magistrate's court, acting pursuant to § 12-21-2712, which determines the legality of those machines seized by any law enforcement officer. See Mims, 366 S.C. 141, 621 S.E.2d 344, and Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004). A gaming machine is "contraband *per se*," not "derivative contraband," at the moment of seizure, despite any subsequent showing in a post seizure hearing before a magistrate that the machine is lawful. Mims, 366 S.C. at 155, 621 S.E.2d at 351. "An action for forfeiture of property is a civil action at law." Id. (quoting 192 Coin-Operated Video Game Machines, 338 S.C. at 184, 525 S.E.2d at 876; State v. Petty, 270 S.C. 206, 208, 241 S.E.2d 561, 562 (1978)).

The Supreme Court further explains in Mims that

The government's seizure of alleged contraband may arise in the context of a civil or criminal forfeiture proceeding... **"The critical difference between civil forfeiture and criminal forfeiture is the identity of the defendant. In civil forfeiture, the Government proceeds against a thing (*rem*). In criminal forfeiture, it proceeds against a human being (*personam*). Any differences between civil forfeiture and criminal forfeiture arise from the practical and theoretical considerations implicated when the Government proceeds against an inanimate object or a person."**

(Emphasis added) Id. (quoting U.S. v. Croce, 345 F.Supp.2d 492, 494 (E.D.Pa.2004)); see also U.S. v. Gilbert, 244 F.3d 888, 918-20 (11th Cir.2001) (discussing history of

forfeiture law and traditional distinctions between civil forfeiture proceeding against a thing and criminal forfeiture proceeding against a person); State v. Edwards, 787 So.2d 981, 990–91 (La.2001) (discussing differences between civil and criminal forfeiture); State v. Petty, 270 S.C. 206, 208–09, 241 S.E.2d 561, 562 (1978) (action for forfeiture of property is civil, *in rem* proceeding against the property itself). The Court, in Mims, using an Illinois Court of Appeals case as guidance, further elaborates that “the seizure of property employed as a gambling device in violation of a statute is a proceeding *in rem*, and being contraband, the provisions of the Constitution relating to...depriving one of his liberty or property without due process of law are inapplicable.” Id. (quoting People v. One Pinball Machine, 316 Ill.App. 161, 44 N.E.2d 950, 957 (1942)). It is well settled law in South Carolina that a determination by a court with jurisdiction of the status of a *res* (a “thing”) binds all parties, including third-parties. The South Carolina Supreme Court has long held that, “Where the court has jurisdiction of the *res*, its decree *in rem* upon the character or status of the subject-matter is binding, **not only on the parties and their privies, but also upon all persons who might have asserted an interest therein.**” (Emphasis added.) Ex parte Kenmore Shoe Co., 50 S.C. 140, 27 S.E. 682, 684 (1897) (citing 5 Am. & Eng. Enc. Law, p. 385; 1 Greenl. Ev. 525; Freem. Judgm. § 606).

The Kenmore Court went further, and emphatically declared that:

‘A distinction may be noticed between those judgments [*in personam*], and judgments strictly *in rem*. The latter bind third persons. **They are conclusive evidence against all the world.**’ So, then, this judgment. . . , being undoubtedly a judgment *in rem*, as admitted by the counsel for petitioners, bound not only the parties to the record, but the whole world.

Id. (Emphasis added) (Citations omitted).

In this case, the machines seized from the Appellant's licensed location were brought before a Kershaw County Magistrate who issued an Order of Destruction/Notice of Post-Seizure Hearing (R., pp. ____) holding that the machines were illegal games of chance pursuant to § 12-21-2710. The Appellant, however, did not appeal that ruling by requesting a Post Seizure Hearing. Another entity, Magic Minutes, and not the Appellant, timely appealed and requested a Post-Seizure Hearing in the Magistrate's Court. Ultimately, the Magistrate's Court found that Magic Minutes, the entity which requested the hearing, did not have standing to contest the ruling of the Magistrate's Court and upheld its initial ruling of illegality. The Appellant opines that it was denied a meaningful opportunity to participate in the post-seizure hearing and therefore should not be bound by the Order. However, the Appellant also admits that it had notice of the Order of Destruction/Notice of Post Seizure Hearing. Accordingly, whether or not the Appellant had a meaningful opportunity to participate in the post-seizure hearing, which actually took place, is immaterial. Appellant was given a full and fair opportunity to litigate the issue of the legality of the seized machines before the Magistrate by requesting a hearing to contest the determination; Appellant simply failed to do so.²

B. Res Judicata.

In its Amended Final Order and Decision, (R., pp. ____) the ALC concluded that Appellant was bound by the Magistrate's Order under the doctrine of *res judicata*. The Appellant argues that the doctrine of *res judicata* does not apply and that it should not be

²See Zaman v. S.C. State Bd. of Med. Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("one cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it.")

barred from litigating the legality of the seized machines in the ALC. Appellant claims that, because the civil forfeiture action before the Magistrate's Court was an action *in rem* where the only defendants were the seized machines, it was not a party to the action and, therefore, *res judicata* does not apply. Appellant's argument fails. *Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). This Court held, in Venture Engineering, Inc. v. Tishman Constr. Corp. of South Carolina that in a proceeding *in rem*, all persons concerned are deemed to be parties to the proceedings. Venture Engineering, Inc. v. Tishman Constr. Corp. of South Carolina, 360 S.C. 156, 162-63, 600 S.E.2d 547, 550 (Ct. App. 2004). Accordingly, the Appellant is deemed to have been a party to the civil forfeiture proceeding in the Magistrate's Court. As a party to the proceeding who could have requested a post seizure hearing, but did not, the Appellant is bound by the Magistrate's ruling under the doctrine of *res judicata*.

C. **Collateral Estoppel.**

The ALC also concluded that the Appellant was barred from litigating the legality of the seized machines under the doctrine of collateral estoppel. The Appellant argues that it is not barred from litigating the legality of the machines under the doctrine of collateral estoppel because it was not a party to the action in the Magistrate's court. Again, for the same reasons stated above, the Appellant's argument fails. "Under the doctrine of offensive nonmutual collateral estoppel, a party may be prevented from relitigating an issue which was actually litigated and directly determined in a prior action if the party had a full and fair opportunity to litigate the issue in the first action[.]" Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). Moreover, the question of whether to allow the use of offensive collateral estoppel "so as to bar a party from relitigating an issue in a subsequent action is one addressed to the broad discretion of the trial judge." Id. (quoting McPherson v. South Carolina Dept. of Highways and Public Transportation, 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989)). Here, the Appellant was a party to the proceedings in the Magistrate's court but did not request a post seizure hearing to challenge the legality of the machines. Accordingly, the Appellant had a full and fair opportunity to litigate this issue in the Magistrate's Court, but simply failed to do so. Further, in its broad discretion, the ALC concluded because the Appellant failed to bring its arguments before the Magistrate's Court, the Appellant was collaterally estopped from attempting to argue the legality of the seized machines at the ALC.

D. No Specific Authorization Under S.C. Code Ann. § 61-4-580(3).

In its Amended Final Order and Decision, (R., pp. ___) the ALC ruled that, because the Appellant was collaterally estopped from litigating the issue of the legality of the

machines, it did not need to address the Appellant's arguments that the seized machines were specifically authorized under § 61-4-580(3) as a "sweepstakes" machine. However, the ALC took the opportunity to address § 61-4-580(3), "so as to further clarify its decision as to Sections 12-21-2710 and 61-4-580(5)." (R., pp. ___) Amended Final Order and Decision, p. 11, para 2. Appellant argues once again that collateral estoppel does not apply and that it should not be barred from litigating the legality of the seized machine in the context of an exception under § 61-4-580(3)³. For all of the reasons stated above, the Appellant's argument fails and the Appellant is collaterally estopped from relitigating the legality of the machines. However, if the Appellant is not barred from arguing the legality of the machines, then the Appellant's argument still fails as § 61-4-580(3) does not specifically authorize the seized machines which were found to be illegal under § 12-21-2710.

Section 12-21-2710 provides:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those

³In fact, since the matter under appeal took place, the S.C. Legislature has further clarified § 61-4-580(3) to add language which states "this subsection is not an exception or limitation to Section 12-21-2710 or other provisions of the South Carolina Code of Laws in which gambling or games of chance are unlawful and prohibited." 2013 South Carolina Laws Act 5 (S.B. 3). This is not a change in the law, but merely a restatement of the General Assembly's intent that § 61-4-580(3) is not an exception to § 12-21-2710 and does not make the possession of illegal gaming machines legal.

machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Additionally, § 61-4-580(3) provides in pertinent part:

No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the license premises covered by the holder's permit:

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

Section 61-4-583(3) provides an exception to a general prohibition on gambling or games of chance on a beer or wine permit holder's premises. In order to meet this exception, a permit holder must comply with subparts (a), (b), and (c). The ALC explained in its Amended Final Order and Decision (R., pp. ___) that the Appellant failed to satisfy subpart (b) because the "sweepstakes" in this case required an entry fee to play. Further, the sweepstakes were "not merely incidental and ancillary to the

purchased item or service . . . ” but rather, that they were “intertwined with, and their value dependent upon, success at games of chance that require the payment of an entry fee to play.” Accordingly, the Appellant fails to meet the requirements of § 61-4-580(3) because the “sweepstakes” were merely an extension of the underlying games of chance.

Further, the ALC explained that § 61-4-580(3) “provides no exception to Section 12-21-2710, but is rather an exception to Section 61-4-580(3)’s own prohibition of gambling or games of chance on premises covered by a beer or wine permit holder.” The ALC also explained that “[n]one of the gambling devices or machines prohibited under Section 12-21-2710 could satisfy the exception under Section 61-4-580(3), because the machines forbidden under Section 12-21-2710 all require a player to deposit a coin or thing of value in order to play them, which at the very least, fails to satisfy one of the exception’s requisites, under Section 61-4-580(3).” Continuing, the ALC elaborated that “[t]he exception in Section 61-4-580(3) merely allows . . . sweepstakes that require no cost to a customer but instead can be played or entered into free of charge as the result of making an ordinary purchase of an item or service.” The underlying transaction, accordingly, would involve no gambling or games of chance.

Here, the Appellant offered no evidence to show that the seized machines, which were found to be in violation of § 12-21-2710, complied with the requirements of § 61-4-580(3), specifically subpart (b), which states that “no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize.” The KCSD agent testified that he inserted money into the machine in order to play poker and determined the games to be in violation of § 12-21-2710 and seized the machines, at which time the machines became contraband *per se*. In a hearing before the

Kershaw County Magistrate, the Magistrate concluded that the machines were “. . . vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling . . .” Accordingly, the machines in question fail to meet the requirements of § 61-4-580(3) because they require a coin or thing of value to be deposited in them as a condition of entering the game promotion.

The facts in this case are clear. The Magistrate’s Court has the jurisdiction to determine the illegality of the seized machines. That court issued a final determination of illegality in an *in rem* proceeding. The Appellant was a party to that proceeding. As discussed above, an order in an *in rem* proceeding is binding upon all persons who might have asserted an interest therein and is conclusive evidence against all the world. Moreover, the doctrine of *res judicata* applies and the Appellant is collaterally estopped from any further litigation as to the legality of the machines, including any argument that § 61-4-580(3) is an exception to the Magistrate’s finding of illegality under § 12-21-2710. Further, even if § 61-4-580(3) specifically permits certain machines, the machines in question do not meet those qualifications. Accordingly, the Magistrate’s Order determining the illegality of the machines is binding upon the Appellant, any further argument as the legality of the machines is closed to it.

II. **THE ALC DID NOT ERR IN ITS FACTUAL FINDING THAT THE APPELLANT KNOWINGLY PERMITTED AN ACT WHICH CONSTITUTES A CRIME UNDER THE LAWS OF SOUTH CAROLINA PURSUANT TO THE REQUIREMENTS OF S.C. CODE ANN. §§ 61-4-580(5) AND 12-21-2710.**

In matters concerning the sale and consumption of alcoholic beverages in South Carolina, “[t]he State, through the [D]epartment, is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors” S.C. Code Ann. § 61-2-70 (Supp. 2012), see also S.C. Code Ann. 61-6-100 (Supp. 2012). In conjunction with the Department, SLED enforces the provisions regulating alcohol and alcoholic beverages. S.C. Code Ann. § 61-2-20 (2009). This enforcement power includes issuing administrative violations as well as official summons to an offending party for a criminal violation of the alcoholic beverage laws that falls within the jurisdiction of the magistrate’s court. See S.C. Code Ann. 23-3-15(A)(7) (2007); see also S.C. Code Ann. §§ 61-2-200 to 61-2-210 (2009). In cases where the decision of the Department is challenged, jurisdiction rests with the ALC. See S.C. Code Ann. §§ 1-23-310 (Supp. 2012) et seq., 1-23-600(B) (Supp. 2012) and 61-2-260 (Supp. 2012). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The standard of proof in these administrative proceedings is a preponderance of the evidence. Anonymous v. State Bd. of Med. Exam’rs, 329 S.C. 371, 496 S.E.2d 17 (1988).

In general, permits and licenses issued by this State for the sale of liquor, beer, and wine are not property rights. Rather, they are privileges granted in the exercise of the police power of this State with the restrictions and conditions governing them. See Feldman v. S.C. Tax Comm’n, 203 S.C. 49, 26 S.E.2d 22 (1943). In South Carolina,

those holding a beer and wine permit are prohibited by § 61-4-580(5) from allowing any criminal act to occur on their licensed premises. More particularly, such provision states:

No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may **knowingly** commit any of the following acts upon the licensed premises covered by the holder's permit:

(5) permit any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State (Emphasis added.)

Further, the South Carolina Supreme Court has defined the term "knowledge" which must be proven in civil license revocation cases. *Id.* In Feldman, an alleged sale of alcoholic liquors was made to a minor by an employee of the license holder. In formulating its decision, the South Carolina Supreme Court construed § 1840 of the 1942 Code, a criminal statute which provided that a violation thereof constituted a misdemeanor. The statute read:

No retail dealer shall knowingly sell, offer for sale, barter, or exchange any alcoholic liquors to any person when drunk or intoxicated, nor to a minor, nor to any insane person, and upon violation of any of these provisions, upon conviction, shall suffer the penalties hereinafter provided.

In construing the meaning of the word "knowingly," the Court held that an employee "knowingly" permits the purchase of beer or wine to an underage person:

...if the clerk knew that the [purchaser] was a minor or had such information, from his appearance or otherwise, **as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring knowledge of that fact home to him**, then the sale was made knowingly."

Id. at 25. (Emphasis added).

In Feldman the Court also stated that

“[t]he authorities seem to uniformly hold that in the granting and the revoking of licenses to sell alcoholic liquors, much is left to the discretion of the Court or body charged with that duty. And in most jurisdictions **the law does not require the same strictness as to proof and procedure** that obtains in actions or criminal prosecutions, generally.”

Id. at 25. (Emphasis added).

The “knowledge” requirement espoused in Feldman was specifically addressed by the South Carolina Court of Appeals in Daley v. Ward. Daley v. Ward, 303 S.C. 81, 339 S.E.2d 13 (Ct. App. 1990). There, the Court stated that Feldman “provides authority for a charge which injects a ‘reasonable person’ standard into the definition of ‘knowingly’ as used in these statutes.” Id. at 86. The “reasonable person” standard was defined in Settlemyer v. Southern Ry. Co. as that of a man of ordinary care, sense, and prudence, and not what any particular person did or did not do under any particular state of facts. Settlemyer v. Southern Ry. Co., 97 S.C. 85, 91, 81 S.E.2d 465, 470 (1914). Moreover, a person may be found to act “knowingly” where it appears the person “[shut] his eyes to avoid knowing what would otherwise be obvious.” State v. Thompkins, 263 S.C. 472, 484, 211 S.E. 2d 549, 554 (1975).

In the instant matter, McDonald’s, in an attempt to convince the Appellant of the legality of the machines, provided the Appellant with a copy of a Kershaw County Magistrate’s order purporting to show the legality of machines of this type. The Appellant made his decision to place the machines on the licensed premises by relying largely upon this Magistrate’s order which was provided to him by McDonald’s, the company attempting to profit from the placement of the machines. Further, the only person the Appellant consulted in his decision-making process was his brother, the potato

chip delivery truck driver, who explained to the Appellant that he had seen similar machines in other locations.⁴ The Appellant admitted that the machines contained both the games of poker and blackjack. Machines containing blackjack and poker, both of which are games of chance, are specifically prohibited by statute. Clearly, he permitted machines which he knew possessed games of chance upon his premises.

The Appellant avers that he was never advised by the KCSD or SLED of the illegality of the machines. Further, the Appellant asserts that, had he inquired further into the legality of the machines, he would have found evidence of their legality. The fact remains, however, that the Appellant made no affirmative attempt whatsoever to contact either law enforcement organization. Further, had the Appellant attempted to contact the Court to verify the authenticity of the Magistrate's Order provided by the machine vendor, he may have discovered that the order in question was not a valid order as it did not pertain to a proper seizure hearing nor was it properly recorded by the Magistrate's Court. Moreover, he may have discovered that, because a video gaming machine may be manipulated so as to change its nature from lawful to unlawful, the legality of gaming machines is decided, not by the type of machine, but on a machine-by-machine basis. Mims Amusement Co. v. S. Carolina Law Enforcement Div., 366 S.C. 141, 155, 621 S.E.2d 344, 351 (2005). However, speculation upon what the Appellant *may* have found upon further inquiry, such as those the Appellant puts forth in his arguments, is

⁴The fact that the Appellant consulted his brother at all indicates that the Appellant was aware of the questionable nature of the machines. It is highly unlikely the Appellant would have consulted his brother should the Coca Cola Company have wished to place a soda vending machine containing a promotional sweepstakes game on his licensed premises.

immaterial as the facts show that the Appellant made no further inquiries that a prudent man would have made as to the legality of the machines placed on his premises.

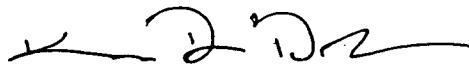
The ALC, as the trier of fact, had the opportunity to hear and observe the testimony of the Appellant and closely pass upon his credibility based on a preponderance of the evidence. Here, the ALC concluded that the Appellant knowingly permitted machines, which he knew contained games of chance, to be placed on his premises. These are not the actions of a “reasonable person” with “ordinary care, sense, and prudence,” but of a man who, in his desire to maximize profits, chose to shut his eyes to the laws of this State and the serious responsibilities placed upon him when granted the privilege of a permit for the sale of alcohol. Accordingly, the ALC did not err in its factual finding that the Appellant knowingly permitted an act which constitutes a crime upon its licensed premises.

Clearly the vast majority of the evidence supports the Department’s position, and therefore the ALC’s ruling is supported by sufficient evidence. Furthermore, the Department asserts that Appellant has not satisfied its burden of proving that substantial evidence supports Appellant’s assertion that the ALC’s ruling was erroneous. For the foregoing reasons, the Department requests that this Court uphold the order of the ALC and affirm the one hundred twenty (120) day suspension of the Appellant’s on-premises beer and wine permit.

CONCLUSION

For the reasons specified herein, and further, pursuant to Rule 220(c), SCACR, for any reasons appearing in the Record, the Respondent, Department of Revenue, respectfully requests that this Court affirm the decision of the ALC in this matter.

Respectfully submitted,



Kathryn R. Brown (Bar No. 78399)
Counsel for Litigation

Sean G. Ryan (Bar #76585)

Milton G. Kimpson (Bar #: 7917)
Chief Counsel for Litigation

Harry T. Cooper, Jr. (Bar #1383)
General Counsel

PO Box 12265

Columbia, SC 29211

Phone: (803) 898-5764

Fax:(803) 896-0171

Department of Revenue

Email: BrownK@sctax.org

Courtorders@sctax.org

Columbia, South Carolina
July 15, 2013

PROOF OF SERVICE

I, Jean M. O'Connor, hereby certify that I have caused to be mailed, postage prepaid, a copy of the Department of Revenue's Initial Brief of Respondent in South Carolina Department of Revenue v. C & M Market, Docket No. 12-ALJ-17-0298-CC, Appellate Case Number 2013-000126 to James M. Griffin, Esquire, Lewis, Babcock & Griffin, L.L.P., PO Box 11208, Columbia, SC 29211, this 15th day of July 2013.


Jean M. O'Connor

RECEIVED

JUL 15 2013

SC Court of Appeals