THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-02-00259

Appellate Case No. 2014-002728

Retail Services & Systems, Inc., dba Total Wine & More, ... Appellant,

v.

South Carolina Department of Revenue and ABC Stores of South Carolina, ... Respondents.

Initial Brief of Appellant

Dwight F. Drake
Brian M. Barnwell
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Baylen T. Moore
BAYLEN T. MOORE ATTORNEY AT LAW, LLC
7001 Saint Andrews Rd, Ste 316
Columbia, SC 29212
(803) 513-2619

Attorneys for Appellant Retail Services & Systems, Inc., dba Total Wine & More

TABLE OF CONTENTS

Statement Of Issues On Appeal 1

Statement Of The Case 2

Statement Of The Facts 4

Retail Services Has Been Detrimentally Affected By The Challenged Statutes ... 4

History Of S.C. Code Ann. Sections 61-6-140 And -150 4

Respondents' Interests In This Litigation 6

Argument 6

Standard Of Review 7

I. The Statutes Are Not Within The Scope Of The General Assembly's Police Power 8

1. The Statutes' plain text 10

2. The Statutes' legislative history 14

3. The circuit court erred in relying on Pendaris v. Berry 15

II. The Statutes Violate The Equal Protection Clause 18

1. Off-site consumption vs. On-site consumption classification 20

2. *Expanding Retail Liquor Store Owners Post-July 1, 1978 v. Pre-July 1, 1978 Liquor Store Owners and Liquor Store Owners That Do Not Want To Expand* 21

III. The Statutes Violate The Due Process Clause 22

Conclusion 24

TABLE OF AUTHORITIES

Page(s)

Cases

Bacchus Imports v. Dias,
468 U.S. 277 (1984) 9

Bd. of Tr. for Fairfield Cnty. Sch. Dist. v. State,
409 S.C. 119, 761 S.E.2d 241 (2014) 7

Broome v. Truluck,
270 S.C. 227, 241 S.E.2d 739 (S.C. 1978) 18, 19, 20, 21

Byrne's Admin. v. Stewart's Admin.,
3 S.C. Eq. (3 Des. Eq.) 466 (1812) 23

Cabiness v. Town of James Island,
393 S.C. 176, 712 S.E.2d 416 (2011) 18

City of Orangeburg v. Farmer,
181 S.C. 143, 186 S.E. 783 (1936) 23

Grant v. S.C. Coastal Council,
319 S.C. 348, 461 S.E.2d 388 (1995) 18

Holmes v. East Cooper Cmty. Hosp., Inc.,
408 S.C. 138, 758 S.E.2d 483 (2014) 7

Hooper v. Ebenezer Sr. Servs. & Rehab. Center,
386 S.C. 108, 687 S.E.2d 29 (2009) 7

Kennedy v. S.C. Retirement System,
349 S.C. 531, 564 S.E.2d 322 (2001) 15

McCullough v. Brown,
41 S.C. 220 19 S.E. 458 (1894) 9

Mugler v. Kansas,
123 U.S. 623, at 661 (1887) 9

Pendarvis v. Berry,
214 S.C. 363, 52 S.E.2d 705 (1949) 15, 16, 17

S.C. Pub. Interest Found. v. S.C. Dept. of Transp.,
Op. No. 5299 7

Sloan v. Greenville Cnty.,
356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) 8

Sloan v. S.C. Bd. of Physical Therapy Examiners,
370 S.C. 452, 636 S.E.2d 598 (2006) 22, 23, 24

State ex rel. George v. Aiken,
42 S.C. 222, 20 S.E. 221 (1894) 8, 9, 10, 11, 18, 22, 24

Sunset Cay, 357 S.C. 414, 593 S.E.2d 462 (2004) 23

Thompson v. S.C. Comm'n on Alcohol & Drug Abuse,
267 S.C. 463, 229 S.E.2d 718 (1976) 18, 21

Townes Assocs., Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 8

Verenes v. Alvanos,
387 S.C. 11, 690 S.E.2d 771 (2010) 8

Wachovia Bank, N.A. v. Blackburn,
407 S.C. 321, 755 S.E.2d 437 (2014) 8

Rules

S.C. Rule Civ. P. 56(c) 7

S.C. Rule Civ. P. 59 3

Statutes

1956 S.C. Acts 1970 5

1978 Act No. 431 §1 5

1978 Act, No. 644 § 35 5

1978 S.C. Acts 644 14

1996 Act No. 415 5

S.C. Code § 4-36 (1952) 5, 14, 16

S.C. Code Ann. § 1553-80 3

S.C. Code Ann. § 61-3-460 ..... 5, 14

S.C. Code Ann. § 61-3-461 5

S.C. Code Ann. § 61-6-120 12

S.C. Code Ann. § 61-6-140 ..... 2, 4, 5, 7, 10, 11, 12

S.C. Code Ann. § 61-6-150 ..... 2, 4, 5, 7, 10, 11, 12, 14, 16, 17, 22

S.C. Code Ann. § 61-6-170 ..... 11, 12

S.C. Code Ann. §§ 61-2-10 & 61-2-20 6

S.C. Code Ann. §§ 61-6-100 to 61-6-190 20

S.C. Code Ann. §§ 61-6-1600 to 61-6-2610 20

Other Authorities

1970, S.C. Op. No. 2979 ..... 14, 16

Judge John D. Geathers *The Regulation of Alcoholic Beverages in South Carolina* (2007) 15, 17, 20

S.C. Code of Reg. R. 7-303 12

S.C. Const. Article VIII-A 2, 8, 10, 24

S.C. Const. Article I, § 3 ..... 18, 22

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT THE GENERAL ASSEMBLY ACTED WITHIN THE SCOPE OF ITS POLICE POWERS WHEN IT ENACTED S.C. CODE ANN. SECTIONS 61-6-140 AND - 150?

II. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT S.C. CODE ANN. SECTIONS 61-6-140AND -150 DO NOT VIOLATE SOUTH CAROLINA'S EQUAL PROTECTION CLAUSE?

III. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT S.C. CODE ANN. SECTIONS 61-6-140AND -150 DO NOT VIOLATE SOUTH CAROLINA'S DUE PROCESS CLAUSE?

STATEMENT OF THE CASE

On February 5, 2014, appellant Retail Services & Systems, Inc. dba Total Wine & More ("Retail Services") commenced this action seeking a declaration that S.C. Code Ann. sections 61-6-140 and -150 (the "Statutes") are unconstitutional. (Compl. ¶ 4; R. __.) The Statutes are part of the Alcoholic Beverage Control Act (the "ABC Act"), and they limit the number of retail dealer licenses that the respondent South Carolina Department of Revenue ("DOR") can issue to an individual or corporation. (Id. at ¶ 5; R. __.)

Retail Services' Complaint alleges that, in violation of Article VIII-A of the Constitution of the State of South Carolina (the "Constitution"), the General Assembly did not act within the scope of its police powers when it enacted the Statutes, and therefore, they are unconstitutional. (Id. at ¶¶ 21-32; R. __.) Specifically, Retail Services contends the Statutes are not a valid exercise of the General Assembly's police powers because they promote economic protectionism and do not promote the health, safety, or good morals of South Carolina. (Id. at ¶¶ 24-25; R. __.) The Complaint also alleges that the Statutes violate South Carolina's Equal Protection and Due Process Clauses because they arbitrarily treat Retail Services differently from similarly situated individuals and deprive it of a cognizable property interest. (Id. at ¶¶ 40-51; R __.) Retail Services has been injured by these unconstitutional Statutes because they have prevented it from opening a retail liquor store in Aiken County, South Carolina. (Id. at ¶¶ 5 & 8; R. ___.)

Respondent ABC Stores of South Carolina ("ABC Stores") filed an answer opposing the Complaint on March 14, 2014. (ABC Stores' Answer; R. __.) The DOR

filed its answer on March 20, 2014. (DOR Answer; R. __.) Pursuant to S.C. Code Ann. section 1553-80, Retail Services also served its Complaint on the South Carolina Attorney General. (Compl ¶ 7; R. __.) The Attorney General, however, chose not to file an answer or to otherwise participate in this action. (See id.)

In its answer, the DOR asserted a motion to dismiss on the grounds that venue was improper in Aiken County; that the court lacked subject matter jurisdiction because "[t]here exists no case or controversy"; that Retail Services lacked standing; and that Retail Services was required to submit its complaint to the Administrative Law Court under the South Carolina Revenue Procedures Act. (DOR's Complaint ¶¶ 52-53, 55 & 60; R. __.) The Honorable Doyet A. Early, III denied the DOR's motion to dismiss by order entered on May 30, 2014. (5/30/14 Order; R. __.)

On April 10, 2014, Retail Services filed a motion for summary judgment. (Retail Services' Mot. for Summary Judgment; R. __.) On May 30, 2014, ABC Stores filed a cross-motion for summary judgment. (ABC Stores' Cross-Mot. for Summary Judgment; R. __.) The DOR also filed a cross-motion for summary judgment on June 9, 2014. (DOR's Cross-Mot. for Summary Judgment; R. ___.)

On August 5, 2014, Judge Early heard all three motions for summary judgment filed by the parties. (Tr. p.4; R. __.) On November 21, 2014, Judge Early denied Retail Services' motion for summary judgment and granted the DOR and ABC Stores' cross-motions for summary judgment. (11/21/14 Order; R. __.) Judge Early denied Retail Services' Rule 59 motion to reconsider on December 22, 2014. (Mot. to Reconsider; R. __; 12/22/14 Order; R. __.) Retail Services now appeals the November 21, 2014 and December 22, 2014 orders.

STATEMENT OF THE FACTS

Retail Services has been detrimentally affected by the challenged Statutes.

Retail Services owns the following three retail liquor stores in South Carolina: Columbia Fine Wine, Inc., Charleston Fine Wine, Inc., and Greenville Fine Wine, Inc. (Trone Aff. ¶¶ 5-6; R. __; 11/21/14 Order p.2; R. __.) Pursuant to the ABC Act, each of Retail Services' stores has a retail dealer license issued by the DOR to sell alcoholic liquors. (Trone Aff. ¶ 7; R. __; 11/21/14 Order p.2; R. __.) Retail Services would like to expand its business in South Carolina by opening more retail liquor stores. (Trone Aff. ¶¶ 8-9; 11/21/14 Order p.2; R. __.) Based on its market research, Retail Services intends to open a store in Aiken County. (Trone Aff. ¶¶ 8 & 12; R. __; 11/21/14 Order; R. __.) Because Retail Services already has an interest in three licenses, however, the Statutes prohibit it from obtaining another retail dealer license. (11/21/14 Order p.2; R. __.) Without another license, Retail Services cannot proceed with its plans to open a retail liquor store in Aiken County. (Trone Aff. ¶ 11; R. __; 11/21/14 Order p.2; R. __.)

History of S.C. Code Ann. Sections 61-6-140 and -150.

In its present day form, S.C. Code Ann. section 61-6-140 limits the number of retail dealer licenses that can be issued to a licensee or issued for the use of a corporation to "no more than three." (Retail Services Mem. in Supp. of Mot. for Summary Judgment pp. 2-3; R. __.) Current day S.C. Code Ann. section 61-6-150 prohibits any person from directly or indirectly having "any interest whatsoever" in more than three retail liquor stores. (Id. at p.3; R. __.)

However, from 1945, when retail dealer licensing statutes first appeared, until 1978, the ABC Act only limited the number of licenses that could be issued to an individual. (See id. at Ex. B, S.C. Code § 4-36 (1952); R. __ (codifying 1945 S.C. Acts 337) ("Only one license shall be issued to any one licensee.").) It did not have a limitation on the number of licenses that could be issued for a corporation's use. (See id.) In 1956, section 4-36 was amended to raise the license limit to three, but the amendment did not impact the number of licenses that could be issued for the use of a corporation. (See id. at Ex. C, 1956 S.C. Acts 1970; R. __.) Section 4-36 became section 61-3-460 when the 1976 Code was published. (See id. at p.3; R. __.)

In 1978, a limitation on the number of licenses that could be issued for the use of a corporation was added to section 61-3-460, but this limitation was subject to a carve-out provision. (See id. at Ex. D, 1978 Act No. 644 § 35; R. __.) In 1996, section 61-3-460 was re-codified as modern day section 61-6-140, and the carve-out provision was omitted. (Id. at Ex. E, 1996 Act No. 415; R. __.)

Also in 1978, the General Assembly amended the Statutes and limited the number of retail liquor stores in which a person could have a direct or indirect interest. (Id. at Ex. F, 1978 Act No. 431 § 1; R. __.) This limitation, however, did not apply to anyone that already had an interest in any retail liquor store prior to July 1, 1978. (Id.) In 1996, S.C. Code Ann. section 61-3-461 was re-codified as modern day S.C. Code Ann. section 61-6-150, but it still does not apply to anyone that had an interest in a retail liquor store prior to July 1, 1978. (Id. at p.3; R. __.)

Respondents' interests in this litigation.

Under the ABC Act, the DOR is charged with the administration of South Carolina's statutes concerning the manufacturing, sale, and retail of alcoholic liquors. S.C. Code Ann. §§ 61-2-10 & 61-2-20. It is the DOR's enforcement of the Statutes that is preventing Retail Services from opening a retail liquor store in Aiken County. (Retail Services' Mem. in Supp. Mot. for Summary Judgment p. 4; R. __; see also 11/21/14 Order p. 2; R. __.) Therefore, the DOR is a proper party to this action. (See Retail Services' Mem. in Supp. Mot. for Summary Judgment p. 4; R. __.)

Additionally, ABC Stores lobbies before the General Assembly on behalf of its members who are owners and holders of retail dealer licenses. (See ABC Stores' Answer ¶ 4; R. __.) As demonstrated by the affirmative defenses raised in its Answer, and as explained further below, ABC Stores is interested in defending the economic protectionism created by the Statutes. (See id.) Therefore, Defendant ABC Stores is also a proper party to this action. (See id.)

ARGUMENT

In this appeal, Retail Services seeks reversal of the order denying its motion for summary judgment and granting respondents' cross-motions for summary judgment. The Statutes do nothing to regulate the quality or quantity of retail liquor stores in South Carolina. Nor do the Statutes, in any manner, promote the health, safety, or good morals of the State, and thus are not an exercise of the police power. Instead, their sole purpose is to protect the economic interests of certain existing retail liquor store owners, which is repeatedly emphasized in both the circuit court's order and in the arguments advanced by the respondents below. Additionally, in violation of South

Carolina's Equal Protection and Due Process Clauses, the Statutes arbitrarily treat Retail Services differently from similarly situated individuals and deprive it of a cognizable property interest. Accordingly, Retail Services respectfully requests the Court to reverse the circuit court and enter an order declaring S.C. Code Ann. sections 61-6-140 and -150 unconstitutional.

Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a circuit court may grant a motion for summary judgment "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." Rule 56(c), SCRCP. An appellate court reviews an order granting summary judgment under the same standard applied by the trial court. Bd. of Tr. for Fairfield Cnty. Sch. Dist. v. State, 409 S.C. 119, 214, 761 S.E.2d 241, 244 (2014) (applying same standard the trial court applied following cross-motions for summary judgment regarding the constitutionality of state statute); Hooper v. Ebenezer Sr. Servs. & Rehab. Center, 386 S.C. 108, 111, 687 S.E.2d 29, 32 (2009) (applying same standard as trial court when reviewing grant of summary judgment). In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. Holmes v. East Cooper Cmty. Hosp., Inc., 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014).

A declaratory judgment regarding the constitutionality of a statute or State action is an action in equity. See S.C. Pub. Interest Found. v. S.C. Dept. of Transp., Op. No. 5299 (S.C. Ct. App. Filed March 4, 2015) (Sherouse Adv. Sh. No. 9 at 42)

(stating declaratory judgment action brought by taxpayer, which was decided on cross-motion for summary judgment, to be equitable) (citing Sloan v. Greenville Cnty., 356 S.C. 531, 544, 590 S.E.2d 338, 345–46 (Ct. App. 2003)). In an appeal from an action in equity tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976)). Additionally, appellate courts may decide questions of law with no particular deference to the circuit court's findings. Id. (citing Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)).

I. THE STATUTES ARE NOT WITHIN THE SCOPE OF THE GENERAL ASSEMBLY'S POLICE POWER.

Article VIII-A of the Constitution, provides that "[i]n the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State." Article VIII-A reflects the long standing common law of South Carolina, which even before the Constitution's adoption in 1895, held that the General Assembly must act within the scope of its police powers when passing laws that regulate or prohibit the retail of alcoholic liquors.

For instance, when it addressed the Dispensary Act of 1893, which prohibited everyone except state appointed officers from selling alcoholic liquors, the South Carolina Supreme Court explained that "if the act is not a police measure, it is unconstitutional." State ex rel. George v. Aiken, 42 S.C. 222, 247, 20 S.E. 221, 230

(1894); see also McCullough v. Brown, 41 S.C. 220, 247-48 19 S.E. 458, 472-73 (1894), *overruled on other grounds by* State ex rel. George, 41 S.C. at 254, 20 S.E. at 233 (holding that if a statute regulating alcoholic liquors is enacted for economic purposes rather than "as a police regulation of the business of selling intoxicating liquors," it is unconstitutional). Furthermore, if the object of a statute is to impact commercial enterprises within the state, "[w]e have no doubt that . . . it would be unconstitutional." State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230.

When considering constitutional challenges to alcoholic liquors statutes, the Court is "under a solemn duty to look at the substance of things [in determining] whether the legislature has transcended the limits of its authority." McCullough, 41 S.C. at 243, 19 S.E at 471 (quoting Mugler v. Kansas, 123 U.S. 623, at 661 (1887)). Importantly, "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." Bacchus Imports v. Dias, 468 U.S. 277, 276 (1984); see also State ex rel. George, 42 S.C. at 247, 20 S.E at 230.

In State ex rel. George, the court addressed a challenge to the entire Dispensary Act of 1893. 42 S.C. at 230, 20 S.E.2d at 224. The court was able to uphold the act as a valid exercise of the State's police power only because the General Assembly included numerous provisions throughout it that explained how the act promoted the public welfare. See id. at 239, 20 S.E.2d at 227. For example, the title of the act itself stated that its purpose was "to police" "the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors within the state of South Carolina." Id. To promote the public welfare, the act required those authorized to sell liquor to meet

certain qualifications. The "commissioner [had to] be an abstainer from intoxicants" and anyone selling liquor at the county dispensaries must not have "been adjudged guilty of violating the law relating to intoxicating liquors" and could not own a "restaurant or place of public amusement." Id. The act also placed "[m]any safeguards . . . around the sale of liquor":

> The liquor is to be tested by the chemist and declared to be pure. The liquor is to be sold only by the package, which cannot be opened nor drunk where sold. The sales can only be made in daytime.

Id. Any liquor that was not sold in accordance with the act was "declared to be contraband and against the morals, good health and safety of the state." Id.

Applying the foregoing principles in this case, sections 61-6-140 and -150 are unconstitutional because they do not promote the morals, good health, or safety of the State. Rather, the plain language and legislative history of these statutes shows that they serve merely to provide economic protection for existing retail liquor stores, such as Defendant ABC Stores' members, and are, therefore, not a valid exercise of the General Assembly's police powers. See State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230.

1. The Statutes' plain text.

Retail Services is not challenging the entire ABC Act, and it does not dispute that the General Assembly has the authority to regulate and even prohibit the sale of alcoholic liquors—so long as it acts within the scope of its police powers.[1] Rather, the

[1] Respondents' argument that the General Assembly could prohibit the sale of alcoholic liquors completely is a red herring. Even if it prohibits the sale of alcoholic liquors, the General Assembly must do so for the purpose of promoting the health, morals, or safety of South Carolina. See S.C. Const. Art. VIII-A; see also State ex rel. George, 42 S.C. at 238, 20 S.E. at 227 ("If, therefore, a State deems the

narrow challenge here is to two specific provisions of the ABC Act that are completely devoid of any relationship to the "morals, good health, and safety" of South Carolina. Respondents concede that the Court can strike the Statues without invalidating the other provisions of the ABC Act. (Tr. p. 35, lns. 1-6; R. __.)

The plain text of the Statutes and the acts that created them do not identify any perceived evil of alcoholic liquors that they are intended to lessen or regulate. See S.C. Code Ann. §§ 61-6-140 and -150. The Statutes are also silent as to how limiting the number of licenses that can be issued, or the number of liquor stores that a person may have an interest in, promotes the well-being of the State. See id. This is in stark contrast to the Dispensary Act of 1893 at issue in State ex rel. George, which expressly stated that its purpose was to police the sale of alcoholic liquors and included numerous provisions to promote that goal. See State ex rel. George, 42 S.C. at 239, 20 S.E.2d at 227.

Viewing the Statutes in light of the ABC Act as a whole further demonstrates that they do not promote the public welfare. For example, the Statutes do not place any limitations on the number or quality of stores that can exist in a given area. See S.C. Code Ann.§§ 61-6-140 and -150. Rather, they merely limit the number of stores in which one person or company can have an interest. Id. To the extent the General Assembly wanted to control market concentration, it did so in S.C. Code Ann. section 61-6-170, which gives the DOR the discretion to "limit the further issuance of retail

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absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific, and manufacturing purposes, ***to be necessary to the peace and security of society,*** the courts cannot . . . overrule the will of the people as thus expressed by their chosen representatives." (emphasis added)). Because any liquor law must be within the General Assembly's police power, and because the Statutes are not, the fact that the General Assembly could prohibit the sale of alcohol altogether is irrelevant.

dealer licenses in a political subdivision if it determines that the citizens who desire to purchase alcoholic liquors therein are more than adequately served" based on a number of factors, including the number and location of stores in the area. Id. The need for section 61-6-170 becomes evident when one considers that, under section 61-6-140 and -150, an individual could flood a small market with just three stores.

Other provisions of the ABC Act place restrictions on the proximity of retail liquor stores to churches, schools, and playgrounds. S.C. Code Ann. § 61-6-120; see also S.C. Code of Reg. R. 7-303. Again, the Statutes do nothing to regulate where or how a retail liquor store is operated; they merely place an arbitrary restriction on how many stores a person, who otherwise meets every licensing requirement, and who the DOR has already deemed fit to participate in the retail liquor market, may have a financial interest in. See id.

In light of their plain language and the role they play in the ABC Act's regulatory scheme, any hypothetical public welfare purpose that respondents attempt to assign to the Statutes is unfounded. Indeed, when asked to identify how the Statutes are an exercise of the police power, the DOR could not explain how they promote the morals, good health, and safety of the State:

> The Court: Isn't he just focusing on 61-6-140 and 150, not the whole statutory scheme? And if you look at the rest of the statutory scheme, it pretty much takes care of what you're arguing. But how does 140 and 150, how does that evoke police powers of the state, those two separate provisions within the whole statutory scheme? He's arguing not the whole scheme is unconstitutional, just 140 and 150 is because of the limitation of the three licenses, and has nothing to do with the police powers.
>
> [Counsel for DOR]: Your Honor, again, our point is that these two statutes are part of that overall –

> The Court: I understand that.
>
> [Counsel for DOR]: Yes sir. Now -
>
> The Court: But can you declare two sections or two statutes in the whole scheme to be unconstitutional and leave the rest of the statutory scheme in effect? Can you do that?
>
> [Counsel for DOR]: That's certainly possible, Your Honor. But, of course, what we'd urge this Court is that these two statutes are concentrated, are ---
>
> The Court: Well, I understand that. But he's saying just - he's not saying the whole scheme where you're worried about walking out with gallons of liquor, he just wants to be able to have more than three licenses. And he says that's strictly an economic situation that hasn't got anything to do with the police powers.

(Tr. pp. 34-35; R. __.) Thus, the plain language of the Statutes establishes that they do not promote the morals, good health, or safety of the State, and the Court should reverse on this basis alone.

Beverage alcohol is only a matter of health, safety, and morals - i.e., a proper subject for the exercise of the police powers of the state - for one simple reason. That reason is the effect that human consumption - drinking - of beverage alcohol has on the human body. Therefore, for a statute to be a permissible exercise of the police power in the regulation of beverage alcohol, the statute must have some rational, logical connection to the consumption of alcohol. These Statutes have no such connection. The statutes before the Court, which only limit the permissible financial interest of individuals and corporations, have the same relationship to the consumption of alcohol by humans as a textbook on ornithology will have if read to a bird.

2. The Statutes' legislative history.

Furthermore, the legislative history of the Statutes shows that their purpose is to provide economic protection for existing retail liquor store owners. As explained above, prior to 1978, the ABC Act did not place a limit on the number of retail dealer licenses that could be issued for the use of one corporation. (Compare S.C. Code § 4-36 (1952) with 1978 S.C. Acts 644; R. __ (amending S.C. Code Ann. § 61-3-460 by adding a limitation on the number of licenses that could be issued for the use of a corporation).) Additionally, before 1978, the ABC Act did not limit the number of liquor stores in which a person could otherwise have a financial interest. Chairman, 1970 S.C. Op. No. 2979 (Sept. 17, 1970); R. __ ("South Carolina law does not, as yet, prohibit a person from having a financial interest in more than three retail liquor stores.").) The 1978 amendments do not provide any explanation as to why these limitations were needed after 1978 to promote the public welfare where they were not needed before it.

Moreover, section 61-6-150's carve-out provision clearly demonstrates that the purpose of the Statutes is to promote economic protectionism, not the welfare of the State. S.C. Code Ann. § 61-6-150. Importantly, section 61-6-150's carve-out provision does not limit its application to people who already had an interest in more than three retail stores on the statute's effective date. Rather, it states "[t]he prohibitions in this section do not apply to a person having *an interest* in liquor stores on July 1, 1978." S.C. Code Ann. § 61-6-150 (emphasis added). Thus, anyone who had an interest in a single retail liquor store on July 1, 1978 is not prohibited from having an interest in more than three stores today. This carve-out provision makes

crystal clear that the Statutes are purely for economic protectionism. Because the Statues are not a valid exercise of the General Assembly's police power, the Court should reverse the circuit court and declare the Statutes unconstitutional.

3. The circuit court erred in relying on Pendarvis v. Berry.

The only rebuttal to Retail Services' police power arguments that Respondents presented to the circuit court was a citation to a treatise that, although well-respected, talks about the ABC Act as a whole, and a citation to dicta in a case that did not address the constitutional challenge presented to this Court. (Tr. p. 35-36; R. __.) Specifically, respondents cite Judge Geathers' treatise, *The Regulation of Alcoholic Beverages in South Carolina* and Pendarvis v. Berry, 214 S.C. 363, 52 S.E.2d 705 (1949). Neither of these authorities address whether the Statutes at issue here fall within the General Assembly's police powers.

Pendarvis v. Berry, concerned a contract dispute, not a constitutional challenge, i.e. whether a partnership agreement that violated the ABC Act of 1945 was void and unenforceable. Pendarvis, 214 S.C. at 366, 52 S.E.2d at 705. Because the Pendarvis court was not asked to determine the constitutionality of the ABC Act, its opinion has no bearing on the current issues before the Court. See Kennedy v. S.C. Retirement System, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) ("[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

Moreover, the appellant in Pendarvis argued that the ABC Act of 1945, *as a whole*, was "not designed to protect the public." 214 S.C. at 367, 52 S.E. at 706. The Court rejected this broad argument, and in its brief discussion on police powers

explained that "while the Act of 1945 is also a revenue law, its principal purpose is the protection of the public health and morals. Liquor control legislation *is generally* of such purpose." Id. (emphasis added). Thus, Pendarvis merely stated that the ABC Act and the regulation of liquor, in general, fall within the police powers. The Pendarvis court was not asked to decide, and did not decide, whether the predecessors to the licensing Statutes at issue here were within the General Assembly's police powers.

Furthermore, the regulatory scheme in place when Pendarvis was decided was very different from the current day Statutes and did not include the provisions that are injuring Retail Services today. For instance, in 1945, the ABC Act did not limit the number of licenses that could be issued for a corporation's use. (See S.C. Code § 4-36 (1952); R. __ (limiting the number of licensees that could be issued to a person but not for a corporation's use).) Additionally, prior to 1978, there was no limitation on the number of licenses in which a person could have a financial interest. (Chairman, 1970 S.C. Op. No. 2979 (Sept. 17, 1970); R. ___.) The ABC Act that the Pendarvis court addressed also did not contain a carve-out provision like present day S.C. Code section 61-6-150, which impedes the growth of new retail liquor store business while protecting those that existed prior to July 1, 1978. See S.C. Code Ann. § 61-6-150. Therefore, even if the Pendarvis court had specifically addressed the Statues' predecessors, which it did not, it's holding would still have no impact on the instant case because the 1945 version of the ABC Act did not contain the provisions that are preventing Retail Services from opening an Aiken store in 2015. As such, the circuit court erred in relying on Pendarvis and its order should be reversed.

Like Pendarvis, the passages Respondents rely upon from Judge Geathers' treatise broadly discuss the "regulation of alcoholic liquors in South Carolina" and the "licensing system" as a whole. (ABC Stores' Mem. in Supp. of Cross-Mot. for Summary Judgment p.10; R. __.) They did not address the specific Statutes at issue. (See id.) Where Judge Geathers does specifically address the Statutes, he does not comment on whether they fall within the General Assembly's police powers. JUDGE JOHN D. GEATHERS, THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA 137-38 (2007). Instead, Judge Geathers indicates that supposedly similar licensing regulations have survived equal protection and due process challenges in other states because they "prevent monopolies" and preserve "the right of small, independent liquor dealers to do business." Id. at p. 138. "The right of small independent liquor dealers to do business" is totally unconnected to the police power. See id. Judge Geathers did not address section 61-6-150's carve-out provision at all.

Echoing Judge Geathers' treatise, the circuit court's order, which respondents prepared, identifies the protection of small businesses against larger retailers as the sole explanation for why the Statutes do not violate South Carolina's Equal Protection and Due Process clauses. (See e.g. 11/21/14 Order p. 7; R. __ ("The regulation of the number of licenses . . . preserv[s] the right of small, independent liquor dealers to do business is not discriminatory and does not violate equal protection principles.").) The circuit court did not cite this reasoning as a basis for holding that the Statutes fall within the police powers. (See id. at p. 11-12.) Instead, as discussed above, it merely relies on authorities that have concluded the ABC Act, as a whole, falls within the police powers. (See id.) However, even if the circuit court had concluded that the Statues fall

within the police powers because they protect small businesses against larger businesses, which it did not, its conclusion would be incorrect under this Court's holding in State ex rel. George. A statute that only promotes economic protectionism is unconstitutional under South Carolina law. State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230. As such, the Court should reverse the circuit court and declare the Statutes unconstitutional as exceeding the police power.

II. THE STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE.

South Carolina's Equal Protection Clause requires that (1) "any classification [created by a statute] cannot be arbitrary but must bear a reasonable relation to the legislative purpose sought to be effected" and (2) "all members of a class [must] be treated alike under similar circumstances and conditions." Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (S.C. 1978); S.C. Const. Art. I, § 3 ("[N]o[] person shall be denied the equal protection of laws."). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

To determine if a statute creates a classification, courts must look at the statute "both in form and in operation." Cabiness v. Town of James Island, 393 S.C. 176, 189, 712 S.E.2d 416, 423 (2011); see also Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 471-473, 229 S.E.2d 718, 722-23 (1976) (holding that although Uniform Alcohol and Intoxication Treatment Act applied to everyone on its face, its application treated some alcoholics differently than others that were similarly situated, which violated the Equal Protection Clause).

The Broome case involved a statute of repose, which granted immunity to architects, engineers, and contractors "from suit for their torts after the lapse of ten years from the date of substantial completion of the improvement causing injury or damage." Id. at 230, 241 S.E.2d at 740. The Broome Court had to determine "whether there [wa]s a sound basis for regarding architects, engineers, and contractors engaged in the improvement of real property as a distinct and separate class for the purpose of granting immunity." Id. The Court stated in this regard that "[c]ertainly, such classification must fail if the benefits (immunity) granted to them is denied to others similarly situated." Id.

The Broome court concluded that architects, engineers, and contractors are similarly situated to others that are involved in the construction of a building, such as the property owner and manufacturer of component parts. Id. at 231, 241 S.E.2d at 739. The court further found that while there are many distinctions "between architects, engineers, and contractors on the one hand, and owners and manufacturers, on the other," these distinctions were not sufficient "to justify granting immunity to one group and not to the other." Id. This conclusion "clearly follows when we consider that architects, engineers, and contractors are not the only persons whose negligence in the improvement of real property may cause damage or injury to others." Id. As such, there was "[n]o rational basis . . . for making such distinction," and the court struck the statute down. Id.

As in Broome, the statutes at issue here violate the Equal Protection Clause because they arbitrarily treat Retail Services differently from those that are similarly situated to it. Specifically, on their face, the Statutes treat retail liquor store owners

who sell alcoholic liquors for "off-site consumption," differently from individuals that sell alcoholic liquors for "on-site consumption," such as restaurant and bar owners. Additionally, the Statutes discriminate against retail liquor store owners that did not have an interest in a liquor store prior to July 1, 1978, in order to provide economic protection for those who did, which is not a "legislative purpose" that the General Assembly is authorized to pursue when regulating alcoholic liquors.

1. Off-site consumption vs. On-site consumption classification.

The General Assembly has not limited the number of licenses the DOR can issue to businesses that sell liquor for on-site consumption. *See* JUDGE JOHN D. GEATHERS, THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA 135 ("[P]erhaps somewhat unfairly, these [retail] liquor stores are subject to the most stringent regulations of South Carolina's alcoholic beverage law." (citing S.C. Code Ann. §§ 61-6-100 to 61-6-190 (licensure criteria for retail liquor licenses); S.C. Code Ann. §§ 61-6-1600 to 61-6-2610 (licensure criteria and operational regulations for license to sell liquor by the drink)). Neither the challenged Statutes nor the acts that created and amended them explain why people who own retail liquor stores should be treated differently from people who own other businesses that sell the same alcoholic liquors.

Indeed, the Statutes provide no rationale as to why a retail liquor store owner should be limited to just three licenses while a bar owner can have an unlimited number of liquor licenses to sell the same product in the same area. While there may be superficial distinctions between retail liquor store owners and a bar owner, there is no distinction that justifies limiting the number of licenses one can have while not limiting the other. See Broome, 270 S.C. at 231, 241 S.E.2d at 739 (noting there is no basis

for treating architects, engineers, and contractors differently when they "are not the only persons whose negligence in the improvement of real property may cause damage or injury to others"). Hence, there is no rational basis for this classification. Broome, 270 S.C. at 230, 241 S.E.2d at 740. Because the Statutes arbitrarily treat Retail Services differently from other similarly situated businesses, the Court should reverse the circuit court and declare them unconstitutional.

2. *Expanding Retail Liquor Store Owners Post-July 1, 1978 v. Pre-July 1, 1978 Liquor Store Owners and Liquor Store Owners That Do Not Want To Expand.*

Respondents allege that the Statutes do not create any classifications because, on their face, they apply equally to everyone. (See ABC Stores' Answer ¶ 35; R. ___.) Respondents ignore, however, that in their application, the Statutes discriminate against expanding retail liquor store owners who would like to own multiple stores across South Carolina, in order to protect existing retail liquor store owners that do not want to expand. See Thompson, 267 S.C. at 471-473, 229 S.E.2d at 722-23 (looking at statutes application to identify classes). Indeed, Defendant ABC Stores concedes this fact by arguing that the Statutes are needed to "preserv[e] the right of small, independent liquor dealers to do business." (Defendant ABC Stores' Answer at ¶ 31; R. __.) The circuit court also erroneously reasoned that the Statutes are needed to protect "[s]mall single-location licensees [who] have found it difficult to survive [competition with larger retail liquor store owners] and, in some instances, have been driven out of business." (11/21/14 Order p.10; R. __.) Liquor regulations that concern commerce, rather than the public welfare, cannot be reasonably related to a

legitimate government purpose under South Carolina's Constitution. See State ex rel. George, 42 S.C. at 246-47, 20 S.E. at 230.

Moreover, respondents ignore the fact that the Statutes are not even neutral on their face. Instead, section 61-6-150 promotes the interests of people who had an interest in a retail liquor store prior to July 1, 1978 while discriminating against those who did not. See S.C. Code Ann. § 61-6-150. Specifically, section 61-6-150 allows a person who had an interest in a single retail liquor store prior to July 1, 1978 to have an interest in an unlimited number of stores today. Id. Anyone who did not have an interest in a retail liquor store prior to July 1, 1978, however, is limited to having an interest in only three stores. Id.

As explained above, it is unconstitutional for the General Assembly to enact liquor regulation laws that promote economic protectionism. Instead, it can only enact laws that are within the scope of its police powers. Because the Statutes do not promote a proper legislative purpose (i.e. one within the General Assembly's police powers), the disparity that they create between post-July 1, 1978, retail liquor store owners that want to expand and pre-July 1, 1978 retail liquor store owners and owners that do not want to expand, is arbitrary. Therefore, the Court should reverse the circuit court and declare the Statutes unconstitutional.

III. THE STATUTES VIOLATE THE DUE PROCESS CLAUSE.

Under South Carolina's Due Process Clause, no "person shall be deprived of life, liberty, or property without due process of law." S.C. Const. Art. I, § 3. "[T]o prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Sloan v.

S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006). "[T]he standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government." Id. (citing Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)). "The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." Id.

Retail Services has a cognizable property interest in pursuing its chosen field of business in Aiken County. See e.g., Sloan, 370 S.C. at 483, 636 S.E.2d at 598 ("The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause . . . . The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment."); see also City of Orangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783, (1936) (holding ordinance that prohibited door-to-door solicitation, and thereby injuring plaintiff's business without promoting the public welfare, violated due process); Byrne's Admin. v. Stewart's Admin., 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812) ("It cannot be doubted that a man's trade or profession is his property."). Because it cannot obtain a license for an Aiken County store, however, Retail Services is being deprived of its right to participate in its field of business. (Trone Aff. at ¶¶ 8-12; R. __.)

Retail Services acknowledges that the General Assembly has the ability to heavily regulate, and even completely prohibit the sale of alcoholic liquors—as long as such legislation is a valid exercise of the police powers. See S.C. Const. Art. VIII-A; see also State ex rel. George, 42 S.C. at 238, 20 S.E. at 227. As explained above, the General Assembly did not act within the scope of its police powers when it enacted the Statutes. Because these statutes promote economic protectionism rather than the health, morals, and safety of South Carolina, they are arbitrarily denying Retail Services of a cognizable property interest. See Sloan, 370 S.C. at 484, 636 S.E.2d at 615 (holding that a statute may only interfere with an individual's right to pursue his trade if it is within the legislature's police power and enhances the public welfare). As such, the Statutes violate the Due Process Clause. The Court should, therefore, reverse the circuit court and declare the Statutes unconstitutional.

CONCLUSION

Based on the foregoing, the Court should: (1) reverse the circuit court and (2) declare the Statutes unconstitutional because they are not a valid exercise of the General Assembly's police powers and because they violate South Carolina's Equal Protection and Due Process Clauses.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Brian M. Barnwell

Dwight F. Drake
SC Bar No. 001745
E-Mail: dwight.drake@nelsonmullins.com
Brian M. Barnwell
SC Bar No. 78249
E-Mail: brian.barnwell@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

BAYLEN T. MOORE ATTORNEY AT LAW, LLC

Baylen T. Moore
SC Bar No. 16703
7001 Saint Andrews Rd, Ste 316
Columbia, SC 29212
(803) 513-2619
baylenmoore@bellsouth.net

Attorneys for Appellant Retail Services & Systems, Inc., dba Total Wine & More

Columbia, South Carolina

April 6, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-02-00259

Appellate Case No. 2014-002728

Retail Services & Systems, Inc., dba Total Wine & More, ... Appellant,

v.

South Carolina Department of Revenue and ABC Stores of South Carolina, ... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Retail Services & Systems, Inc., dba Total Wine & More, do hereby certify that they have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same United States Mail, prepaid, to the following address(es):

Pleadings: INITIAL BRIEF OF APPELLANT

Counsel Served:

Carol I. McMahan, Esquire
State of SC Dept. of Revenue
P.O. Box 12265
Columbia, SC 29211

Burnett R. Maybank, III, Esquire
Nexsen Pruet, LLC
1230 Main Street
Columbia, SC 29201

Roxanne E. Daniel
Administrative Assistant

April 6, 2015