THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2015-000292

South Carolina Department of Revenue .... Respondent,

v.

Meenaxi, Inc., d/b/a Corner Mart .... Appellant.

FINAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from an Order of the Administrative Law Court revoking Appellant Meenaxi, Inc., d/b/a Corner Mart's ("Meenaxi's") off premises beer and wine permit pursuant to S.C. Code Ann. § 61-4-580(5)[1]. (R. pp. 1-7). Respondent South Carolina Department of Revenue ("Department of Revenue") commenced this action by issuing its citation on or about February 26, 2013, citing Appellant for violation of S.C. Code Ann. § 61-4-580(5) (2009) by knowingly permitting an act on its premises that constitutes a crime. (R. pp. 156-157). The Respondent Department of Revenue subsequently served its Administrative Determination on Appellant on or about May 8, 2013. (R. pp. 13-19). Appellant Meenaxi timely filed a Request for Contested Case FORM on the grounds that the machines were not illegal, the Appellant had no reason to believe they were illegal, and/or the penalty imposed was unreasonably harsh. (R. p. 230). The matter was then assigned to the Honorable Deborah Brooks Durden for hearing. (R. p. 231).

This matter was set for a merits hearing on December 4, 2014. (R. pp. 20 - 166). At the close of the Department's case, the Appellant's counsel moved to dismiss. (R. pp. 107-111). Judge Durden denied this Motion (R. pp. 116 - 119; 123 l. 25 - 124 l. 5). On January 8, 2015, Judge Durden issued her order finding and ruling as a matter of law that Appellant violated S.C. Code Ann. § 61-4-580(5) and revoked Appellant's off premises beer and wine permit. (R. pp. 1-7). Appellant timely moved for reconsideration and for a stay. (R. pp. 167-170). Appellant subsequently moved for supersedeas. (R. pp. 171-

[1] One of the issues on appeal concerns the improper identification of the parties to this action. For purposes of this appeal, the undersigned will refer to "Appellant" as Meenaxi, Inc. d/b/a Corner Mart, through no corporate entity exists by that name.

172). These motions were denied by Judge Durden without oral argument. (R. pp. 8-11). Appellant timely filed a Notice of Intent to Appeal with the Court on February 17, 2015. (R. pp. 178-179).

STATEMENT OF FACTS

The off premises beer and wine permit at issue in this case is/was held by Meenaxi, Inc., and Malkesh Patel. (R. pp. 126, ll. 6-8; 166). At no time has Malkesh Patel ever been made a party to this action. (R. p. 126, ll. 9-11). Meenaxi, Inc. was not made a party to this action. Instead, the action was brought against an entity called Meenaxi, Inc., d/b/a The Corner Mart. There is no legal entity called Meenaxi, Inc., d/b/a The Corner Mart. (R. pp. 46, l. 17 - 47, l. 1). There was no evidence presented at trial that any such entity exists.

The Corner Mart is a small convenience store located in Anderson, South Carolina. (R. p. 126, ll. 12-22). It sells snacks, drinks, and gasoline. (R. p. 126, ll. 12-22). It has two employees. (R. p. 126, ll. 23-24). The ability to sell beer and wine is crucial to its viability and profitability as a business. The ability to sell beer and wine pursuant to their off premises beer and wine permit is the difference between the store being profitable and unprofitable. If the business lost its license permanently, it would become unprofitable and would go out of business. (R. pp. 126, l. 25 - 127, l. 8).

Mr. Malkesh Patel testified on several occasions during the hearing that he always tried to operate the business legally and would not have done anything to violate the law with respect to the operation of the store. (R. pp. 126, ll. 3-5; 127, ll. 9-11). The machines at issue in this appeal were not owned by Mr. Patel. Instead, they were owned by a third party, Encore Entertainment ("Encore") and placed in the Corner Mart Store.

Encore is not a party to this action or this appeal. At the time of the SLED visit (discussed below), the machines had only been on premises for 3 to 6 months. (R. p. 127, ll. 6-7, 12-17).

Mr. Patel testified that at the time Encore placed them in his store he did not know how they operated. Mr. Patel testified that he had never operated or played either of these machines. (R. p. 127, ll. 12-22). He maintained them pursuant to the instructions found on them. (R. pp. 127, ll. 23-25; 128, ll. 1-5). Mr. Patel testified on several occasions under oath before Judge Durden that he believed these machines were legal when they were placed in his store. (R. p. 128, ll. 8-18). He testified he was informed by the owner of the machines that they were legal. He was provided with a copy of a "court case" from Greenville County stating that they were legal. (R. p. 128, ll. 19-22). He testified that based on the information provided by the owner (including the court order) he concluded that the machines were legal. (R. p. 128, ll. 12-22). Mr. Patel testified that he relied upon the information provided to him by the owner and the Court Order (a copy of which was actually in the machine) when he allowed the machines to be placed in his store. (R. pp. 130, l. 16 - 131, l. 5; 28, l. 5-8). The machines were licensed by the Respondent South Carolina Department of Revenue and had a South Carolina Department of Revenue sticker attached to them. (R. p. 134, ll. 15-25). Mr. Patel testified that he would not have allowed them into his store had he known that they were illegal. (R. p. 129, ll. 10-16).

Mr. Patel testified that sometime after the machines were placed he learned that law enforcement was taking the position that the machines were, in fact, illegal. Although he still believed them to be legal, he unplugged the machines after learning of this position. (R. p.129, ll. 17-25). He did not allow anyone to play them and called the owner to come pick them up. (R. p. 130, ll. 1-12). They were still in this condition when SLED Agent Thomas Bielawski visited the premises on February 26, 2013. (R. pp. 133, l. 23 – 134, l. 12).

Agent Bielawski testified that he entered the Corner Mart premises on February 26, 2013. (R. pp. 31, ll. 21-24; 156-157). There was one clerk in the store at the time, a lady named Ursula Dean. (R. pp. 52, l. 19 – 53, l. 10; 156-157). Ms. Dean was not called as a witness at the hearing before Judge Durden. Agent Bielawski did not make any effort to determine who Ms. Dean worked for or was employed by.[2] (R. pp. 52, ll. 11-25; 81, l. 24 – 82, l. 5; 156-157). When he arrived, the two machines at issue in this appeal were turned off and unplugged. This is consistent with Mr. Patel's testimony. (R. p. 54, ll. 14-21). Information promoting the promotion and rules of play were displayed both on the machine and adjacent to them. (R. p. 104, ll. 3-10). These clearly stated that no purchase, payment or entry fee was required to play them.

After entering the premises, Agent Bielawski plugged the machines into a wall socket, turned them on and opened them. (R. pp. 65, l. 22 – 66, l. 2). He did not attempt to play them or to operate them. (R. pp. 73, l. 24 – 74, l. 3). He made no effort to determine whether or not money was necessary to play these machines. (R. pp. 75, l. 23 – 77, l. 9; 104, ll. 7-21; 105, ll. 14-18). He did not put any money into the machines. He did not find any money inside of the machines. He photographed them. Agent Bielawski spoke with Mr. Patel via telephone. He then wrote up a citation and gave it to Ms. Dean.

[2] Although Respondent's counsel reported to the court that Ms. Dean was an employee at Meenaxi, Inc., there is nothing in the record to support this assertion. (R. pp. 45-46).

The violation report was directed at the license holders, Malkesh Patel and Meenaxi, Inc. (R. pp. 64, l. 14 – 66, l. 21; 156-157).

The machines were removed from the premises and taken to the Anderson County Sheriff's Department. (R. pp. 66, l. 22 – 68, l. 2). They were reviewed by the Magistrate in the presence of Agent Bielawski. (R., p. 67, ll. 2-7). They were determined to be illegal by Order of the Anderson County Magistrate who issued an order of destruction. (R. pp. 67, ll. 5-12; 159-162). The two machines were destroyed prior to the hearing before Judge Durden. (R. p. 72, ll. 12-22). Neither Appellant nor Meenaxi, Inc., were parties to the Magistrate's Court action when the Magistrate determined them to be illegal. (R. pp. 159-162).

STANDARD OF REVIEW

A reviewing court may reverse or modify the decision of the Administrative Law Court (ALC) judge if the finding, conclusion or decision reached by the ALC is arbitrary or capricious or characterized by an abuse of discretion or is a clearly unwarranted exercise of discretion; violates constitutional or statutory provisions; or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or is affected by an error of law. S.C. Code Ann. § 1-23-610(B); *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles,* 380 S.C. 600, 670 S.E.2d 674 (S.C. Ct. App. 2008).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THIS MATTER ON THE GROUNDS THAT RESPONDENT FAILED TO PURSUE THIS ACTION AGAINST THE CORRECT PARTIES

At the close of the evidence presented by Respondent, Appellant moved to dismiss this action on the grounds that it was not brought against the holder of the off premises beer and wine permit at issue in this case and further was brought against a corporate entity that does not exist. (R. p. 119). The Trial Court denied this motion. (R. pp. 123, ll. 10-16; 123, l. 25 - 124, l. 5).

The only evidence introduced at the hearing was that the license in question or at issue in this case was in the name of Malkesh Patel and Meenaxi, Inc. (R. p. 166). Neither Malkesh Patel nor Meenaxi, Inc., were parties to the Magistrate's Court order regarding the legality of the machines. Malkesh Patel was never made a party to this action. While Meenaxi, Inc., was named, it was named as a d/b/a. No evidence was presented at trial that any such corporate entity exists. The only evidence that such an entity exists was the testimony of Agent Bielawski who based this on his "general" experience and not the facts of this case. (R. p. 83). At no time did the Respondent ever attempt to amend its action to add Mr. Patel as a party or to add Meenaxi, Inc., as a party to this case.

The Respondent failed to bring this action against the correct parties. The actual license holders were never named as parties to this action. No attempt was made to amend the pleadings to correct them. Further, even if Meenaxi, Inc., was properly named, Malkesh Patel was not. The Trial Court attempted to excuse this error, and the resulting due process violation, by finding that Mr. Patel had the right to intervene in this action but chose not to do so. (R. p. 121, l. 13 – 124, l. 20). This reasoning is not applicable to the case before the Court. The Respondent carries the burden of proof. It is the Respondent's obligation to determine the correct parties to this action (the holder's of the license) and to bring an action against them. The Respondent failed to do so in this case. The Trial Court erred in failing to grant the Appellant's Motion to Dismiss.

The Trial Court erred by finding and ruling that Mr. Patel's due process rights were not violated by the Department's failure to add him as a party to this action. (R. pp. 1-7). The court erroneously concluded that, " because Patel had the opportunity to meaningfully participate in this case, but declined to do so, the Petitioner (Respondent) did not violate his due process rights." (R. pp. 1-7). This finding is clearly erroneous.

First, as set forth above, requiring Mr. Patel to intervene here constitutes an improper shifting of the burden of proof. Respondent carried the burden of proof. It was Respondent's responsibility, not Appellant's, to pursue this case against the proper parties.

Further, the requirements of due process include an opportunity to be heard in a meaningful way. S.C. Const. Art. I, Section 22; *Stono River Environmental Protection Ass'n v. S.C. Department of Health and Environmental Control,* 305 S.C. 90, 406 S.E.2d 340 (1991). Even if Mr. Patel had intervened, the machines at issue had been destroyed. There was no chance to inspect them, which was crucial to this case as neither Agent Bielawski nor the Magistrate ever turned them on and operated or played them. Mr. Patel was clearly prejudiced by the Department's failure to name him as a party. *Palmetto Alliance, Inc. v. South Carolina Public Service Commission,* 282 S.C. 430, 319 S.E.2d

695 (1984). The Trial Court's order to the contrary is clearly erroneous and should be reversed by the court.

II. <u>THE TRIAL COURT ERRED BY FINDING AND CONCLUDING AS A MATTER OF LAW THAT THE APPELLANT KNOWINGLY PERMITTED AN ACT ON ITS PREMISES THAT CONSTITUTES A CRIME</u>

As set forth above, "the court of appeals may reverse or modify the decision if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (S.C. Ct. App. 2008); *South Carolina Department of Revenue, et. al. v. Sandalwood Social Club,* 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012). "Substantial evidence is evidence that, when viewing the record as a whole would allow reasonable minds to reach the same conclusion the ALC arrived at in justifying its decision." *South Carolina Coastal Conservation League v. S. C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 362, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008) (internal citations omitted). The Trial Judge abused her discretion by ignoring the evidence presented before her. Judge Durden's finding that Appellant violated S.C. Code Ann. § 61-4-580(5) was clearly erroneous and was not supported by the evidence.

A. <u>Judge Durden's Order Not Supported by Evidence Presented at Hearing</u>

The Respondent failed to meet its burden of establishing that Appellant violated S.C. Code Ann. § 61-4-580(5) by knowingly allowing a criminal act to occur on its premises. The Trial Court erred in failing to grant the Appellant's Motion to Dismiss on the grounds that Respondent failed to meet its burden of proving that the machines in question were, in fact, illegal. (R. pp. 123, l. 25 - 124, l. 5). The Trial Court's Final Order to the contrary and her Order denying Appellant's Motion for Reconsideration are clearly erroneous, based on inadmissible and improper evidence and should be reversed by this Court. (R. pp. 1-8).

1. Respondent Failed to Meet Their Burden to Establish That the Machines Were Illegal

The Respondent failed to meet its burden of proof to establish that the machines at issue in this case were illegal. First, the machines whose legality was at issue in this case were not available at the hearing before Judge Durden. Subsequent to their removal from Corner Mart, the machines at issue were taken to the Anderson County Sheriff's Department Armory. (R. pp. 66, l. 22 – 67, l. 1; 72, ll. 12-25). The machines were ultimately destroyed pursuant to an Order of Destruction prior to the merits hearing in this case. (R. pp. 67, ll. 5-25; 159-162). They were intentionally destroyed by the State of South Carolina when it was obvious that the legality or illegality of the machines would be an issue in subsequent litigation. As a result of this destruction, they were not available for inspection or testing at the hearing in front of Judge Durden. The best evidence of the machines, what they are, and how they are operated, are the machines themselves. This is especially true when the only witness called by the Respondent did not actually attempt to operate the machines and had no idea how they operated. This is tantamount to a spoliation of evidence by the Respondent and is a clear denial of the Appellant's due process rights.

In order for destruction of evidence to constitute denial of due process, a party must establish (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that the Defendant cannot obtain other evidence of comparable value by other means. See, *State v. Breeze*, 379 SC 538, 665 S.E.2d 247 (S.C. App. 2008).

In the case before the court, the sole issue for determination is the legality or illegality of the two machines which were taken from the Corner Mart. At the time the machines were removed from the Corner Mart, a citation had already been instituted by the Department. Proceedings had already been commenced against the off premises beer and wine permit held by Meenaxi, Inc., and Malkesh Patel. Since neither Agent Bielawski nor the Magistrate actually played the machines, the only available evidence as to their legality or illegality was going to be the machines themselves. Respondent's ability to properly defend itself turned solely on their ability to inspect these machines or to have them inspected by a potential expert witness.

Yet, in light of their importance to the case, the State of South Carolina and SLED destroyed them. Clearly, this evidence was material to this case. Respondent's ability to examine this evidence was obviously crucial to its ability to defend its license. The State's intentional destruction of this evidence deprived Respondent of its ability to adequately defend itself. The State's destruction of evidence clearly constitutes a violation of the Respondent's due process rights. See *State v. Jackson,* 302 S.C. 313, 396 S.E.2d 101 (1990).

The Trial Court excused the destruction of this vital evidence by citing the fact that the Appellant made no effort or filed no motion to preserve them. (R. pp. 1-7; 112, l. 23 – 113, l. 5). This logic is not controlling. The Respondent, not the Appellant carries the burden of proof in this action. The burden of proving its case, and having the evidence to present before the Trial Court to prove its case, is on the Respondent and not the Appellant. The State of South Carolina and SLED, working in conjunction with the Respondent, had the evidence and allowed it to be destroyed. The Appellant had no responsibility to preserve this evidence. The Trial Court's Order to the contrary constitutes an impermissible shifting of the burden of proof in this case.

Further, the evidence presented at trial was insufficient to establish that the machines were, in fact, illegal. The Trial Judge ruled as a matter of law that the machines at issue did not meet the safe harbor provisions of S.C. Code Ann. § 61-4-580(3). The Court's determination was based on improper and inadmissible evidence and testimony as well as speculative findings unsupported by the evidence presented at trial.

S.C. Code Ann. § 61-4-580(3) is clearly a "safe harbor" provision for promotional chance games which meet the criteria set forth in Section 580(3), subparts (a), (b) and (c). The Trial Court based its finding that the machine at issue fell outside of these exceptions because payment "was clearly required" in order to play the games contained on the machines and further that the coupons provided to individuals playing the machines "lacked value" and were a "...thinly veiled artifice designed to conceal the fact that payout was made solely to play the games." (R. pp. 1-7). These findings are clearly erroneous and not supported by the relevant, admissible evidence presented at trial.

Since the machines were destroyed by SLED and/or agents of the State prior to the hearing before Judge Durden, the only evidence presented at trial as to the legality or illegality of the machines was the testimony of SLED Agent Thomas Bielawski.[3] Agent

[3] Over objection of counsel, the Order of Destruction dated March 1, 2013, and Final Order dated December 8, 2013, were admitted into evidence. (R. pp. 67-69; 159-162).

Bielawski testified that despite the fact that the legality or illegality of these machines is to be determine on a case by case basis, he did not actually play the machines at issue in this case. (R. pp. 73, l. 24 - 74, l. 7). He conceded that the machines had stickers clearly stating the fact that no purchase was necessary to play the machines. (R. p. 78, ll. 6-11). However, since he did not attempt to play them, he had no knowledge as to the relevance of the information contained on these stickers. (R. p. 73, ll. 6-14; 75, ll. 10-25; p. 76, ll. 7-10). Neither he nor the Magistrate put any money into the machines or attempted to operate them. (R. p. 76, ll. 14-18). While he testified that he had played similar machines in the past, he acknowledged that machines can be modified. (R. p. 77, ll. 10-23).

Instead of testimony that pertained to these particular machines, Agent Bielawski's testimony was based upon his general experience as a law enforcement officer and/or his experience with other machines. (R. p. 79, l. 24 – 80, l. 22). Agent Bielawski also testified regarding the value of the coupons that are printed to individuals playing the machine. He was allowed to speculate that since he found coupons on the floor, they must not have had value to the individual who received them.

This testimony had no relevance to the issues in this case. Agent Bielawski had no knowledge as to the number of products redeemable at the Products Direct website. (R. p. 87, ll. 3-23). He had no personal knowledge as to the competitiveness of the pricing of prizes on their website. (R. p. 87, l. 24 – p. 88, l. 9).

While the Appellant takes the position its admission by the court was improper, the court did not cite either opinion is its order.

The Court's finding that the safe harbor provisions of S.C. Code Ann. § 61-4-580(3) were inapplicable to the facts of the case was not supported by the evidence presented at trial. Her findings to the contrary should be reversed by the Court.

2. Respondents Failed to Prove that the Appellant Knowingly Violated S.C. Code Ann. § 61-4-580(c)

Even if the machines at issue in this case were illegal, which the Appellant strenuously denies, the Administrative Court erred in finding as a matter of law that Appellant violated S.C. Code Ann. § 61-4-580(5). The machines at issue in this appeal were owned by a third party, Encore Entertainment ("Encore") (not a party to this appeal). At the time of the SLED visit (discussed below), they had only been on premises for 3 to 6 months. (R. p. 127, ll. 12-17).

Mr. Patel testified that at the time Encore placed them in his store, he did not know how they operated. Mr. Patel testified that he had never operated these machines and never played them. (R. p. 127, ll. 12-22). He testified on several occasions that he believed these machines were legal when they were placed in his store. (R, p. 128, ll. 8-18). He was informed by the owner of the machines that they were legal. He was provided with a copy of a "court case" from Greenville County stating that they were legal. (R. p. 128, ll. 19-22). He testified that based on the information provided by the owner (including the Court Order) he concluded that the machines were legal. Mr. Patel testified that he relied upon the information provided to him by the owner and the court order (a copy of which was actually in the machine) when he allowed the machines to be placed in his store. (R. pp. 28, l. 5-8; 130, l. 16 – 131, l. 5). A copy of this Court decision was actually placed in the machine. (R. pp. 128; ll. 19-22; 130, ll. 22-25). The machines were actually licensed by the Respondent South Carolina Department of Revenue and had a South Carolina Department of Revenue sticker attached to them. (R. p. 134, ll. 15-24). He testified that he would not have allowed them into his store had he known that they were illegal. (R., p. 129, ll. 10-16).

Mr. Patel testified that sometime after the machines were placed he learned that law enforcement was taking the position that the machines were, in fact illegal. Although he still believed them to be legal, he unplugged the machines after learning of this position. (R. p. 129, ll. 17-25). This testimony was collaborated by Agent Bielawski who testified that the machines were unplugged when he came into the store and that there was no money in them. (R. p. 104, ll. 11-15). Mr. Patel testified that he did not allow anyone to play them and called the owner to come pick them up. (R. p. 130, ll. 1-12).

Respondent did not present any evidence to the contrary. The testimony of Agent Bielawski is actually consistent with that of Mr. Patel. Respondent failed to meet its burden of proof that Appellant knowingly violated S.C. Code Ann. § 61-4-508(5).

III. THE TRIAL COURT ERRED IN RULING THAT AGENT BIELAWSKI'S SEARCH WAS PROPER

The Trial Court erred in ruling that the Appellant's due process rights were not violated by Agent Bielawski's search of the Corner Mart on or about February 26, 2013. While S.C. Code Ann. §§ 61-4-230 and 61-6-4190 give SLED the right to enter a premises and perform an inspection, this right is not absolute. Like any search, it is tempered by the constraints of the Fourth Amendment of the United States Constitution. *See, McHam v. State,* 404 S.C. 465, 746 S.E.2d 41 (2013), *State v. Wright,* 391 S.C. 436, 706 S.E.2d 324 (2011). The Trial Court erred in failing to recognize this well-settled principal of law in its Order.

Agent Bielawski entered the Appellant's premises. He discovered that the machines at issue were turned off and unplugged. After discovering that the machines were turned off and unplugged, he proceeded, without obtaining a warrant or anyone's authority or permission, to plug them into the wall. He then turned them on. He physically opened them. He searched them for money. His search of the Corner Mart greatly exceeded any authority that was granted to him to perform an inspection of the Corner Mart pursuant to South Carolina Law. The activities of SLED Agent Bielawski exceeded his statutory authority and violated the Appellant's Fourth Amendment protection against unreasonable search and seizures. Judge Durden committed reversible errors of law which she ruled otherwise. (R. pp. 1-7).

IV. THE TRIAL COURT COMMITTED ERRORS OF LAW WITH RESPECT TO THE ADMISSION OF EVIDENCE

The Trial Court's Order is based on numerous errors of law, particularly with respect to the admission of evidence. The admission of this evidence is clearly erroneous and prejudicial to the Appellant. The Court's Order should be reversed by the Court.

A. The Trial Court Erred in Admitting Exhibit 1 (Report Issued to Corner Mart at 1010 E. Shockley Ferry Road, Anderson, South Carolina) into Evidence

Over strenuous objection of Appellant's counsel, Judge Durden admitted Respondent's (Petitioner's) Exhibit 1, the Report Issued to Corner Mart at 1010 E. Shockley Ferry Road, Anderson, South Carolina into evidence. (R. pp. 32, l. 16 – 48, l. 20). Agent Bielawski's investigative report should have been excluded by the Court. Appellant's counsel objected to the admission of this report on a number of grounds when it was offered into evidence by the Respondent. (R. pp. 33, l. 12 - 44, l. 21). The

Court overruled Appellant's objections and admitted the report into evidence. (R. pp. 36, l. 20 – 37, l. 25).

As set forth above, the report was generated pursuant to an unlawful search performed by Agent Bielawski. By plugging the machine into the wall outlet and by opening it, Agent Bielawski exceeded the statutory authority to inspect the machines under S.C. Code Ann. §§ 61-4-230 or 61-4-190. It should not have been admitted into evidence by Judge Durden. Because of this, it should not have been used for the basis of his opinions in this case.

Further, the report contained inadmissible hearsay statements from Ursula Dean, the clerk working at the Corner Mart when Agent Bielawski entered the premises on February 26, 2013. (R. pp. 156-157). The Trial Court overruled the Appellant's objections on hearsay grounds that the report was a record of a regularly conducted activity pursuant to Rule 803(6) of the South Carolina Rules of Evidence and was also an admission of a party pursuant to Rule 1007 of the South Carolina Rules of Evidence. Neither of these exceptions is applicable to the case before the Court.

While Rule 803(6) does provide that a record of a regularly conducted business activity is potentially admissible as an exception to the Hearsay Rule, this exception (contrary to the Trial Court's Order) is not absolute. The contents of the record must then be examined and impermissible hearsay rooted out. Hearsay contained in the record, or "hearsay within hearsay" is only admissible if each instance of hearsay comes within an exception to the hearsay rule. *See*, *Precision Piping and Instruments, Inc., v. E.I. Du Pont de Nemours and Company,* 951 F.2d 613 (4th Cir. 1991). The statements attributable to Ms. Dean clearly constitute impermissible hearsay. The Trial Court erred by admitting Agent Bielawski's report without examining what was contained in it - the impermissible statements of Ms. Dean.

Further, the Court's findings that Ms. Dean's statements constitute an admission of a party are also not supported by the evidence in this case. There was no evidence presented to the court as to who employed Ms. Dean. Therefore, there was no evidence provided to the trial judge on which she could base specific findings or determinations as to who Ms. Dean may or may not have been an employee or an agent of in this case. There was no determination beyond Judge Durden's conclusionary finding and ruling that she was actually employed by any party to this action. Further, even if she was an employee of the Appellant, which was not proven, there was no evidence presented that she had any authority to speak on behalf of her employer to SLED or anyone else in this manner. The Court erred as a matter of law in holding that Rule 1007 permitted admission of Agent Bielawski's report containing the hearsay statements.

Further, the report contains the subjective, legal opinions of Agent Bielawski. It contains his opinions as to matters which were ultimately matters to be determined by the Court in this case such as whether the machines were illegal video poker machines, (R. pp. 156-157), and whether they were "gambling machines." (R pp.156-157). In addition, the report contains the findings and conclusions of the Magistrate, which are neither controlling nor binding to the issues before the court. South Carolina Law holds that the subjective opinions contained in business records are not admissible. *Duncan v. Ford Motor Company,* 385 S.C. 119, 682 S.E.2d 119 (2008). The Trial Court erred in ruling otherwise, to the prejudice of the Appellant.

B. The Trial Court Erred in Admitting the Magistrate Court's Decisions into Evidence

Over objection of counsel, the trial court admitted Petitioner's Exhibit 3 (Order of Destruction/Notice of Post Seizure Hearing) and Petitioner's Exhibit 4 (Final Order). (R. pp. 67, 69, 159-162). The Trial Court erred in admitting Petitioner's Exhibits 3 and 4. Since neither decision was made by a court of record, they have no binding effect on the matters before the court.

Further, since neither Malkesh Patel nor Meenaxi, Inc., were parties to these actions at the time these decisions were made, they may not be used in any way against them. The admission of these decisions was prejudicial to the Appellant since, on their face, they address the ultimate issue(s) in this case, the legality or illegality of the two machines taken from the Corner Mart. The admission of Petitioner's Exhibits 3 and 4 was improper and Judge Durden erred when she admitted them into evidence in this case.

C. The Trial Court Erred in Admitting Testimony of SLED Agent Thomas Bielawski

Over objection of Appellant's counsel, the trial judge allowed Agent Bielawski to testify as to matters which had no relevance to the issues before this court. Further, Judge Durden allowed Agent Bielawski to give speculative testimony. Finally, Agent Bielawski was allowed to give testimony as to conclusions of law which were beyond his expertise. Appellant was prejudiced by the admission of this testimony.

Over objection of Appellant's counsel, Agent Bielawski was allowed to speculate as to the business arrangement between the parties to this matter and the individuals/entities identified on the off premises beer and wine permit at issue in this case. (R. pp. 50, l. 15 – 52, l. 4). This testimony was clearly outside of any expertise that

Agent Bielawski may or may not have had as a SLED Agent. In addition, there was no effort made to qualify him as an expert in business relationships and/or entities.

The Trial Court erred in allowing Agent Bielawski to testify as to Ms. Dean, and as to statements made by her to him. As set forth above, Agent Bielawski did not conduct any investigation or make any effort to determine who, exactly, employed Ms. Dean. Specifically, the court allowed Agent Bielawski to testify as to matters pertaining to the machines and what he may or may not have been told by third parties concerning them. (R. pp. 54, l. 22 – 57, l. 2). The statements made by Ms. Dean to Agent Bielawski constitute inadmissible hearsay and they should not have been allowed into evidence by Judge Durden in this case.

Finally, the trial judge erred in allowing Agent Bielawski to testify as to matters arising out of "his experience" as a law enforcement officer and which did not touch upon the machines at issue in this case of the facts at issue in this case. Specifically, Agent Bielawski was permitted to testify as to his experience with "similar" machines; his "experience" with individuals play these machines; and his "experience" with respect to receipts and/or coupons issued by these machines. (R. pp. 57-58; 61-62). At no time was Agent Bielawski qualified as an expert in these issues. The trial court's admission of his testimony is tantamount to a allowing a non-qualified witness to offer opinion and expert testimony. *See, Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010); *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490.(2001). Further, even if he had been qualified, this testimony had no specific relevance to the machines at issue in this case. This testimony was improper and prejudicial and should have been excluded by the trial judge.

D. <u>The Trial Court Erred in Determining That SLED's Search of the Corner Mart Was Justified Pursuant to S.C. Code Ann. §§ 61-4-230 and 61-4-190</u>

Judge Durden erred in concluding as a matter of law that SLED's search of the Corner Mart was justified pursuant to S.C. Code Ann. §§ 61-4-230 and 61-4-190. While these statutes do give the Department (and SLED) the statutory right to inspect the business premises, the Corner Mart, this right is not absolute. This right is tempered, as all searches carried out under color of law are tempered, by the protections offered under the Fourth Amendment which protects citizens from unreasonable searches and seizures. *See*, *McHam v. State,* 404 S.C. 465, 746 S.E.2d 41 (2013); *State v. Wright,* 391 S.C. 436, 706 S.E.2d 324 (2011). Even if a search is lawful, it can still exceed its constitutionally permitted scope and violate a citizen's protected Fourth Amendment rights. In its ruling admitting Agent Bielawski's report, the Trial Court ignored this well-settled principal of law, or failed to appreciate the applicable law.

The Appellant does not contest Agent Bielawski's statutorily granted authority to enter the Corner Mart and inspect the machines. However, once he inspected the machines, he also plugged them into the wall and turned them on without either permission or a warrant. Once Agent Bielawski plugged the machines into the wall socket, turned them on and opened them in search of money, his "inspection" became a "search." SLED Agent Bielawski exceeded the permissive scope of his statutory authority to inspect the Corner Mart premises in this case. The Trial Court erred in allowing his report based on his investigation to come into evidence in this case.

IV. THE ADMINISTRATIVE LAW COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT THE APPROPIATE PENALTY FOR APPELLANT'S VIOLATION WAS A REVOCATION OF ITS LICENSE

The harsh penalty imposed in this case by the Administrative Law judge - revocation of the Appellant's off premises beer and wine permit - was excessive, unreasonable and unsupported by the facts surrounding the violation. Mr. Malkesh Patel testified on several occasions during the hearing that he always tried to operate his business legally and would not have done anything to violate the law with respect to the operation of his store. (R. pp. 126, ll. 3-5; 127, ll. 9-11). The machines at issue in this appeal were owned by a third party, Encore Entertainment ("Encore") (not a party to this appeal). At the time of the SLED visit (discussed below), they had only been on premises for 3 to 6 months. (R. p. 127, ll. 12-17).

Mr. Patel testified that at the time Encore placed them in his store, he did not know how they operated. Mr. Patel testified that he had never operated these machines and never played them. (R. p. 127, ll. 12-22). He testified on several occasions that he believed these machines were legal when they were placed in his store. (R. p. 128, ll. 8-18). He was informed by the owner of the machines that they were legal. He was provided with a copy of a "court case" from Greenville County stating that they were legal. (R. p. 128, ll. 19-22). He testified that based on the information provided by the owner (including the court order) he concluded that the machines were legal. Mr. Patel testified that he relied upon the information provided to him by the owner and the court order (a copy of which was actually in the machine) when he allowed the machines to be placed in his store. (R. pp. 128, ll. 19-22; 130, l. 16 – 131, l. 5). The machines were actually licensed by the Respondent South Carolina Department of Revenue and had a

South Carolina Department of Revenue sticker attached to them. (R. p. 134, ll. 15-25). He testified that he would not have allowed them into his store had he known that they were illegal. (R. p. 129, ll. 10-16).

Mr. Patel testified that sometime after the machines were placed he learned that law enforcement was taking the position that the machines were, in fact, illegal. Although he still believed them to be legal, he unplugged the machines after learning of this position. (R. p. 129, ll. 17-24). He did not allow anyone to play them and called the owner to come pick them up. (R. p. 130, ll. 1-11).

The Trial Court attempted to justify this excessive award on the grounds that there were no mitigating factors in this case. This conclusion ignores the evidence presented to it. Mr. Patel testified that he always tried to run his business according to law. He testified that he believed the machines in this case were legal based on the representations of their owner and a court order backing these representations up. He testified that he would not have put them in the store had he known they were illegal.

He testified that once he learned there was a question of their legality, he unplugged them and called the owner to pick them up. This testimony, which was cited as unreliable by the Trial Court, was actually supported by the testimony of the SLED agent.

The Corner Mart has two employees. Its profitability is contingent on its ability to sell off premises beer and wine. If the Trial Court's excessive penalty stands, the store will close and these individuals will be out of work and possibly unemployed.

The Trial Court's findings that there were no mitigating circumstances in this case is simply not supported by the evidence presented. The penalty imposed by the

Administrative Law Court is excessive, not supported by the evidence, and should be reversed by this Court.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Administrative Court judge.

Respectfully submitted,

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September 9, 2015

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Deborah Brooks Durden, Administrative Law Judge

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Meenaxi, Inc., d/b/a Corner Mart.. Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served the Appellant's Final Brief on counsel of record for Respondent in this action by depositing a copy of same in the United States Mail, postage prepaid, on September 10, 2015, addressed as follows:

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September 10, 2015