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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Court of Appeals Case No.: 2013-002793

K N S Foundation, LLC d/b/a Elite Appellant

v.

City of Myrtle Beach Respondent

APPELLANT'S
PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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COMES NOW the Appellant, KNS Foundation, LLC, d/b/a Elite, by counsel, pursuant to Rule 219(b), S.C.A.C.R. and petitions this Court for a rehearing on the grounds that this Honorable Court overlooked, misapprehended or failed to consider the following matters of law or fact:

1. As to Issue 1, the Appellant met its burden of proof in demonstrating that the circuit did not have the record from the City Council proceedings by virtue of the affidavit submitted by Melanie Huggins-Ward, the Clerk of Court for Horry County. (Supp. R. 0485) Additionally, the filings by the Respondent show that its transcript (Supp. R. 0355) and Supplemental Response to Amended Appeal (R. 0053) were filed under the wrong case number.

2. As to Issue 2, fraud is the basis for the revocation of Appellant's business licenses.

i. The Notice of Business License Suspension states that the business licenses "... appear to have been obtained through misrepresentation, fraud, or deception, which are grounds for revocation of a business license under § 11-35 (3)." (R. 0237.)

ii. The Order for Suspension of Business Licenses found and concluded that Appellant "... obtained its business licenses in question through a fraud, misrepresentation, a false or misleading statement, evasion or suppression of material facts in the license application." (R. 0007.)

iii. The Order of this Honorable Court, by implication, based its decision on the fact that Appellant did not raise, at the hearing before City Council, that City Council was under

a heightened standard of proof that fraud had to be established by clear and convincing evidence. The Appellant was not under a duty to instruct City Council of the standard of proof appropriate to a finding of fraud. City Council was represented by its own counsel at the hearing and, if necessary, he had the duty to instruct City Council, sitting as a tribunal, of the proper burden of proof required.

iv. To find that counsel is required to instruct the tribunal of the appropriate standard of proof required to establish a claim is a novel position not established by practice, rule or case law.

3. As to Issue 3, the Court misapprehended the facts by finding and concluding that the circuit court properly found substantial evidence existed to support the City Council's decision to revoke KNS's business licenses.

The record is devoid of any evidence to substantiate City Council's finding of fact in paragraphs 3 and 11 of its order that Appellant made "false representations" to McDowell and May at the time it sought to obtain their approval for the issuance of KNS's business licenses. (R. 0089-0115; R. 0150-0163.) Specifically, neither McDowell nor May testified at the revocation hearing during direct examination by Respondent's counsel, cross examination by Appellant's counsel, and examination by council members that Appellant had made representations of fact to them, either orally or in writing: (1) ***"that the premises would not be used for nightclub,"*** and (2), ***"that the premises would be used primarily as a pool hall/arcade with secondary uses being serving alcohol and food."*** (R. 0089-0115; R. 0150-0163; R. 0003, ¶ 3.) Contrary to City Council finding "false representations" allegedly made by Appellant, there is no evidence in the record to support this finding of fact, and,

therefore, no evidence of reliance and materiality exist for triggering May and McDowell's approval of Appellant's business licenses as found by council's order. (R. 0089-0115; R. 0150-0163; R. 0003 ¶ 2; R. 0006 ¶ 11.) For example, at the revocation hearing, McDowell confirmed that no "false material representations" were contained in or connected with the license applications submitted by KNS's owner when she said:

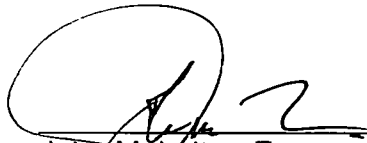
They came in and, and obtained their business licenses as to what the zoning would allow, and it started at one type of business, but it has turned in to be a nightclub, and for those reasons, I suspended the business license (sic) and I ask that Council uphold my suspension and revoke the business licenses. (R. 0096-0097)

As such, Respondent failed to prove one or more of the elements of fraud: (1) representations of fact, (2) their falsity, and (3) their materiality, necessary to show that Appellant's business licenses were obtained through a "***fraud, misrepresentation, a false or misleading statement, evasion or suppression of a material fact***" connected with license applications. See Austin v. Stokes-Craven Holding Corp., Id. at 50, 691 S.E.2d at 149. (The failure to prove any element of fraud or misrepresentation is fatal to the claim.)

The Court found that proof of fraud was established by the fact that Appellant agreed not to charge for admission. Neither Respondent's business or zoning codes prohibit a business from charging for admission. It is error to find that fraud was proven by an act which was not prohibited by the appropriate business license or zoning code. By imposing this condition precedent to the issuance of a business license, the Respondent acted in an arbitrary and unreasonable manner.

WHEREFORE, Appellant prays that this Court grant this Petition for Rehearing, en banc. Counsel for Appellant would be pleased to reargue the case for the full panel of judges, should the Court deem that beneficial. In either event, upon rehearing, this Court should reverse the order of the circuit court and remand the case for further proceedings.

Respectfully submitted,



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January 13, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-26-04103

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Appellate Case No. 2013-002793

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v.

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I certify that I have served a copy of the Appellant's PETITION FOR REHEARING EN BANC by depositing a copy of it in the U.S. Mail, with sufficient postage affixed, on January 13, 2016, addressed to the attorneys of record:

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January 13, 2016

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January 13, 2016

Honorable Jenny Abbott Kitchings
Clerk of the Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Via Federal Express
Overnight Express Delivery

Re: *KNS Foundation, LLC d/b/a Elite v City of Myrtle Beach*
Appellate Case No. 2013-002793

Dear Ms. Kitchings:

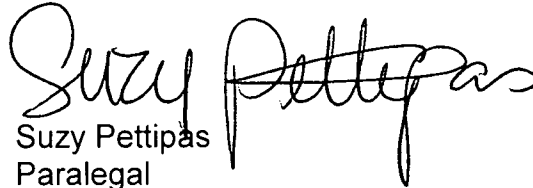
Enclosed for filing please find the original and seven (7) copies of the **Appellant's PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**, together with the original and one (1) copy of my **Proof of Service** of the same. Please return one date-stamped copy of each to me in the enclosed self-addressed, stamped envelope.

To cover the cost of filing this Petition, our firm's check in the amount of \$25.00 is also enclosed.

Thank you for your kind assistance in this regard.

Sincerely yours,

LAW OFFICES OF JOHN M. LEITER, PA


Suzy Pettipas
Paralegal

/smp
Enclosures

cc: Michael W. Battle, Esq.
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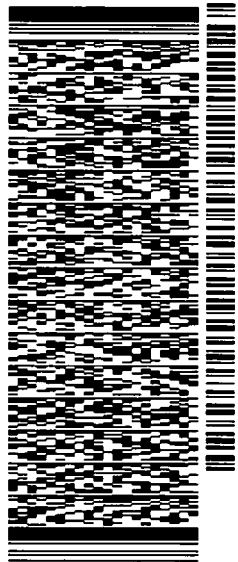
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