

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Presiding Court Judge

Appellate Case No. 2013-002793

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JAN 28 2016
SC Court of Appeals

KNS Foundation, LLC, d/b/a
Elite.....*Appellant*

v.

City of Myrtle
Beach.....*Respondent,*

RESPONDENT CITY OF MYRTLE BEACH'S RESPONSE IN
OPPOSITION TO APPELLANT'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Michael W. Battle, SC Bar # 00584
James R. Battle, SC Bar # 73604
Battle Law Firm, LLC
PO Box 530
Conway, SC 29528
T: 843-248-4321
mbattle@battlelawsc.com

Attorneys for Respondent City of Myrtle
Beach

January 25, 2016

Respondent City of Myrtle Beach opposes Appellant K.N.S. Foundation, LLC, d/b/a Elite's Petition For Rehearing and Suggestion For Rehearing En Banc as follows:

PETITION FOR REHEARING

Appellant's claim:

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.

Response:

This Court found the evidence in the record demonstrates the circuit court had the record from the city council proceedings. During oral argument before Judge Seals both attorneys referred to the transcript of record. Judge Seals stated he reviewed the record on appeal in his order denying appellant's appeal. [R. p. 11] The presumption by both attorneys was that Judge Seals had the transcript of record. The affidavit of the Horry

County Clerk of Court only describes the file number assigned to the transcript from the Business License Hearing. [R. p. 486] The affidavit does not contain any information in connection with Judge Seals or what he had in his possession when he decided the appeal.

Appellant's claim:

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

Response:

Fraud is not the basis for revocation of Appellant's business license. A violation of § 11-35, Code of Ordinances of the City of Myrtle Beach, South Carolina is the basis for revocation of Appellant's business license.

i. 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.)

Response:

The record is replete with evidence that Appellant violated one or more of the categories mentioned in §11-35. For example

Appellant represented that it would not charge an admission or a cover charge for entry into Club Elite. [R. p.469] However, Club Elite staff charged money for customers to enter the club. [R. p132 & p145] Appellant represented that it understood that it could not operate its business as a night club because of zoning restrictions, but the evidence clearly supports the finding that Appellant did operate its business as a night club. [R. 91]

Appellant's Claim:

ii. 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 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.

Response:

Appellant has not supported in any way its bare claim that City Council's determination that Appellant violated §11-35 was arbitrary, unreasonable, or an obvious abuse of its discretion. This

Court found the circuit court properly operated under a deferential standard of review. See *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct.App.2005) (“Where the city council of a municipality has acted after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion.”).

Appellant’s Claim:

iii. 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.

Response:

A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. S.C. App. Ct. R. RULE 407 RPC 3.3 Also see: *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) (“The burden of proof is on the appellant to convince this [c]ourt that the lower court was in error.”).

Appellant’s Claim:

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, r 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, there-fore, 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 ,12; R. 0006 1] 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.

Response:

This Court found the circuit court properly found substantial evidence existed to support the city council's decision to revoke KNS's business licenses. First, based on testimony from City business license inspector Mary McDowell, the Court found the evidence supports the city council's finding that KNS falsely represented to the City that it would not operate its business as a night club. Second, the testimonies of McDowell, Officer Gavrilis, Officer Castle, and Chief Gall all support the finding that KNS intended to charge for admission and falsely represented to the City that it would not do so in order to gain approval of its business license applications. The advertisements for Elite and Elite's social media entries, as well as Elite's operation of a dance floor, provide additional support for the City's action. Respondent City of Myrtle Beach concurs and contends that the Record on Appeal amply supports the consistent findings of City

Council, the Circuit Court and the Court of Appeals.

SUGGESTION FOR REHEARING EN BANC

Respondent opposes Appellant's Suggestion For Rehearing En Banc. A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. SCACR 219

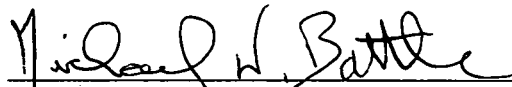
Consideration by the full court is not necessary to secure or maintain uniformity of its decisions. All cases on business license revocations and the standard of review to be applied to decisions of city councils revoking business licenses are uniform. See *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct.App.2005). *Amrik Singh & SBPS, Inc. v. City of Greenville*, 384 S.C. 365, 370, 681 S.E.2d 921, 924 (Ct. App. 2009).

While all cases may be important to the individual litigants, the issues presented in the above captioned appeal are not novel or legally significant to the jurisprudence of our judicial system. That conclusion is demonstrated by the fact that most appeals deciding similar issues after *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct.App.2005). are found in unpublished opinions. See *KNS Found., LLC v. City of Myrtle Beach*, No.

2015-UP-572, 2015 WL 9589604 (S.C. Ct. App. Dec. 30, 2015); *Singh v. City of Greenville*, No. 2012-UP-227, 2012 WL 10841379 (S.C. Ct. App. Apr. 18, 2012); and *Sherald v. City of Myrtle Beach*, No. 2010-UP-449, 2010 WL 10085572 (S.C. Ct. App. Oct. 19, 2010).

CONCLUSION

For the foregoing reasons, Respondent City of Myrtle Beach respectfully requests that the Petition For Rehearing and Suggestion For Rehearing En Banc of Appellant K.N.S. Foundation, LLC, d/b/a Elite be denied.



Michael W. Battle, SC Bar # 00584

James R. Battle, SC Bar #73604

Battle Law Firm LLC

PO Box 530

Conway, SC 29528

(843) 248-4321

Attorneys for City of Respondent/Myrtle

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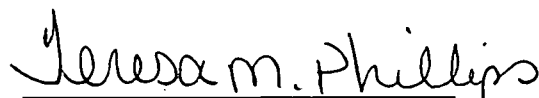
PROOF OF SERVICE

Teresa M. Phillips certifies that she is an employee with Battle Law Firm, LLC, attorneys for Respondent City of Myrtle Beach and that he has caused to be mailed Respondent City of Myrtle Beach's Response in Opposition to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc to the addressees shown this 25th day of January, 2016, with proper postage attached thereto.

Howell V. Bellamy, III
Bellamy Law Firm
PO Box 357
Myrtle Beach, SC 29578
Attorney for Plaintiff

John M. Leiter
1203 48th Ave. North, Suite 109
Myrtle Beach, SC 29577
Attorney for Plaintiff

Armand G. Derfner
PO Box 600
Charleston, SC 29402
Attorney for Plaintiff


Teresa M. Phillips

BATTLE LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW
1200 MAIN STREET
POST OFFICE BOX 530
CONWAY, SOUTH CAROLINA 29528
TELEPHONE (843) 248-4321
FACSIMILE (843) 248-4512
www.battlelawfirm.com

MICHAEL W. BATTLE
E-Mail Address: mbattle@battlelawsc.com
JAMES R. BATTLE, II
E-Mail Address: jbattle@battlelawsc.com

M. KIRK BATTLE
E-Mail Address: kbattle@battlelawsc.com

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, SC 29211

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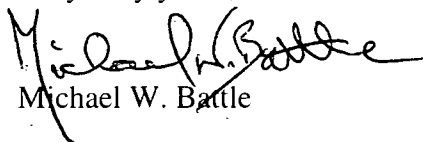
RE: K & S Foundation, LLC d/b/a Elite v. City of Myrtle Beach
Appellate Case No.: 2013-002793

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the Respondent City of Myrtle Beach's Response in Opposition to 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-addresses, stamped envelope. By copy of this letter I am serving the attorneys for the Appellant with a copy of this Response.

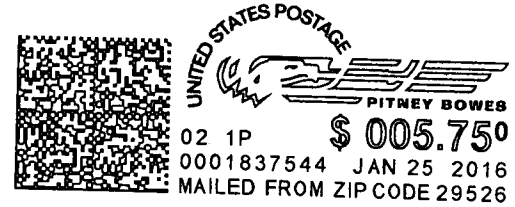
Thank you for your attention to this matter.

Very truly yours,


Michael W. Battle

Enclosure: Stated

C: Howell Bellamy, III, John M. Leiter and Armand Derfner
Tom Ellenburg



BATTLE LAW FIRM, LLC
1200 MAIN STREET
POST OFFICE BOX 530
CONWAY, SOUTH CAROLINA 29528-0530

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