RECEIVED
JUL 19 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

Hon. John D. McLeod, Administrative Law Judge
Trial Court Case No. 2016ALJ170008CC

Appellate Case No. 2016-000593

Ex Parte: Johnnie Cordero, Appellant,

In Re: Fnu Satish Kumar d/b/a Piney Xpress, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

APPELLANT'S AMENDED REPLY BRIEF

Comes now, Appellant Johnnie Cordero who hereby submits the following as and for his reply to Respondent's Initial Brief.

Note:

Respondent has addressed Appellant's first argument as the second argument in her response and Appellant's second argument as her first. Appellant will adhere to the designation of issues as assigned in this Initial Brief.

1. THE COURT BELOW ERRED IN HOLDING A HEARING ON AN APPLICATION FOR AN OFF-PREMISES PERMIT TO SELL BEER AND WINE THAT HAD NOT MET THE JURISDICTTIONAL NOTICE REQUIREMENTS OF SC CODE §§ 61-4-520(7)(a)(ii) AND 8(a).

STANDING TO APPEAL

Respondent's argument seems to be that Appellant does not have standing to appeal the order of the Administrative Law Court that denied his motion to intervene or that he does not have standing to appeal *at all* and/or that he does not have standing to raise the issue of subject matter jurisdiction in this appeal. In either case Respondent is mistaken. Appellant will address each of these arguments seriatim.

Respondent's argument seems to be that Appellant does not have standing to appeal (Resp. Brief p.8, ¶ 1). This argument ignores that fact that the South Carolina legislature has by statute granted his standing at the administrative level. It cannot be disputed that a protestant, any protestant, may stop the issuance of a permit simply by filing a valid formal protest. If the petitioner does not request a contested hearing the Respondent is without legal authority to issue the permit. It is axiomatic that the legislature has, at least implicitly, established that a protestant, any protestant, in fact, has a sufficient interest and potential injury as to be able to stop the issuance of a permit by the mere fact of his/her valid protest *and* sufficient interest to be heard at any contested hearing on the matter. The issue of standing does not arise where standing is granted by statute.

Although it is now settled law that a protestant must move to intervene in order to be heard on appeal, it is also true that the motion to intervene should be liberally granted. To say that a protestant whose valid protest is sufficient to stop the issuance of a license, even if only

temporarily, has *insufficient* interest to appeal an adverse decision is to vitiate the clear intent of the legislature. The Respondent raises a classic a straw man argument.

Respondent also contends that Appellant does not have standing to appeal based on the holding in two cases: *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992) and *Beaufort Realty Co. V. Beaufort Cty.*, 346S.C. 298, 301 (Ct. app. 2001). Appellant contends that neither of the cited decisions are apposite.

In *Lujan* an environmental organization sought declaratory and injunctive relief requiring the Secretary of the Interior to promulgate a new rule. The Court reversed and remanded on the ground that the petitioner did not have standing to sue, more specifically it did not carry its burden of demonstrating *federal jurisdiction. Lujan* involved an organization and a federal lawsuit not an appeal. The standard set forth was for standing to invoke *federal jurisdiction.*

In *Beaufort Realty,* decided by this court, the party was once again an organization that sought to overturn an agency decision with which it disagreed and to which it was *not* a party. The *Beaufort* Court stated: "An *organization* has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." (citations omitted) (italics added). *Beaufort* did involve an appeal. However the appeal was taken by an organization that was not a party to the action. The appeal was of an agency action that did not involve the *organization.*

In the case at bar Appellant's appeal is of the denial of his motion to intervene. It cannot be logically argued that denial of a motion to intervene is exempt from appellate review. Nor can it logically be denied that a party who has a right to intervene, whether the right is statutory or permissive, does not have standing to appeal the denial of that right. It follows that Respondent can only mean that Appellant does not have the right to appeal *at all.* It should also

be noted here that the Respondent who had no objection to the Appellant's Motion to Intervene at the hearing now has twelve pages of objections at the appellate level.

Appellant's Notice of Appeal states unambiguously that he appeals the final order *denying his motion to intervene*. Appellant's Initial Brief does not raise any issues related to the issuance of the permit to sell beer and wine although it is clear that Appellant does not agree with the court's decision. Appellant would be willing to submit a supplemental brief on the matter of the issuance of the permit to sell beer and wine upon direction from this court and on short notice. Appellant does however raise the issue of subject matter jurisdiction. In this regard Appellant acts more as a friend of the court than an appellant.

SUBJECT MATTER JURISDICTION

It is now settled law that subject matter jurisdiction may be raised at anytime, including on appeal. Assuming *arguendo*, that the Respondent's argument is valid, a point that Appellant does not concede, the matter of a court's jurisdiction can be raised by anyone even by the court *sua sponte*. Clearly, no court can ignore such matters when brought to its attention by any means. This is necessarily true because a court lacking subject matter jurisdiction lacks the power to act. If a lower court lacks subject matter jurisdiction its orders are void and the appellate court necessarily lacks power to affirm them.

As to the matter of amendment without notice Respondent's argument seems to be that because it is the agency's *long standing policy* to treat on-premise and off-premise permits as fungible and to treat an application for one as notice of application for the other does not make the longstanding policy appropriate or legal. The Respondent is not authorized to issue *generic* permits. The applicant must apply for one or the other. Moreover, the fact that a policy of the Respondent is long-standing is not dispositive.

Respondent cites *The Regulation of Alcoholic Beverages in South Carolina* as authority for its legally dubious position. It is not lost on the Appellant that the co-author of this treatise is a sitting judge of this court. The Respondent cites page 119 of this treatise as follows: "... an on-premises beer and wine permit does not prohibit the sale of beer and wine for off-premises consumption." and that an on-premises beer and wine permit is an on-and -off premises beer and wine permit. Finally, Respondent states, that "...when Appellant had notice of the application for an on-premises beer and wine permit Appellant also had notice of an off-premises beer and wine permit." Appellant contends that (1) the cited treatise does not support the proposition for which it is cited, and (2) nor does the statute.

In *Alcoholic Beverages* the authors note that the licenses are not the same (one being more restrictive than the other) and that the *distinction is captured* in the application process. Nowhere does it state that these licenses are the same or that one may be noticed and the other substituted at the hearing. (2) the statute requires that the mandatory notice *must* state the type of permit applied for.

When taken to its logical conclusion Respondent's reasoning means that a mandatory, statutory notice requirement can be satisfied by stating any type of permit since it is apparently not important what notice the public is given. The Respondent's position would also seem to show that it is apparently not even necessary for a petitioner to state the type of license at all.

Appellant also notes that Respondent did not object to his motion to intervene at the hearing. The reason seems obvious. The Respondent did not object because it could not. Respondent's official position memorialized in its Administrative Memorandum provided to all

protestants states specifically and unambiguously that a motion to intervene may be filed at the hearing.[1] Yet Respondent argues here that the motion was untimely.

Respondent, apparently in support of the erroneous finding of the court below states that "... the numerous individuals Reverend Cordero brought to court, and whom he could call as witnesses if he was allowed to intervene." Yet another straw man argument. Appellant did not *bring* anyone to court. The numerous individuals who came to court were concerned citizens who had every right to be there. Apparently, it did not occur to Respondent that members of the community might wish to exercise their right to attend a public hearing on a matter that directly affects community interest without being "brought to court" by anyone. The representation is totally inaccurate, misleading and frankly, insulting. More importantly, Appellant stated on the record under oath, prior to the court's ruling, that he did not intend to call any witnesses. For Respondent to now assert that Appellant brought witnesses to court to testify is at best mistaken and at worst disingenuous. In any case the conclusion is unsupported by any evidence and as such should be stricken from Respondent's Statement of Facts.

2. THE COURT'S DENIAL OF APPELLANT'S MOTION TO INTERVENE WAS CHARACTERIZED BY ABUSE OF DISCRETION OR CLEARLY UNWARRANTED EXERCISE OF DISCRETION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT (APA) . S.C.CODE ANN. §§ -23 –310 to – 400 (2005 & Supp.2011) THE

ERROR OF LAW/ABUSE OF DISCRETION

Respondent argues that "... Appellant filed his motion to intervene on the day of the hearing; therefore, the appellant failed to file his motion with the time required by Rule 20." This statement is in direct contradiction of the Respondent's own policy that states that the

[1] Appellate again urges this Honorable Court to take judicial notice of this official document of the Respondent. Although the document was not admitted below it is the official position of Respondent that it is now arguing against. (See, Appellant's Exhibit A).

motion to intervene may be made at the hearing. (see. Administrative Memorandum Exhibit A). The Respondent should not now be allowed to disavow its own published policy. More importantly, the finding of the court that the motion was untimely is, as a matter of law, erroneous. A motion to intervene filed on the day of the hearing is permissible and therefore, cannot, by that fact alone, be untimely. The court's finding that the motion was untimely because it was filed on the day of the hearing is, therefore, clearly erroneous as a matter of law. It is axiomatic that an order of a court founded on an error of law is, *ipso facto*, an abuse of discretion warranting reversal and remand.

CONCLUSION

For the foregoing reasons Appellant contends and urges this court to find that notwithstanding Respondent's arguments addressed above that the relief requested in his Initial Brief should be granted in its entirety.

Respectfully submitted,

Dated: Columbia, South Carolina
17 July 2016

Johnnie Cordero
4204 Mandel Drive
Columbia, SC 29210
Tel.: (803) 753-8091

APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I, Johnnie Cordero, hereby certify that I have, on the date indicated below, served counsel below with the Appellant's Reply Brief by mailing a copy of same via United States Mail first-class postage prepaid and return address clearly indicated on said envelope, to the following persons at the following addresses:

Kenneth E. Allen, Esq.
1201 Main Street, Ste. 1980
Columbia, SC 29201

Sarah Khouri, Esq.
SC Department of Revenue
P.O Box 12265
Columbia, SC 29211

17 July 2016

Johnnie Cordero

REV. DR. JOHNNIE CORDERO
4204 MANDEL DRIVE
COLUMBIA, SC 29210

17 July 2016

Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Ex Parte: Johnnie Cordero (Kumar v. SCDOR)
Appellate Case No. 2016-000593

Dear Clerk of Court:

Enclosed please find Appellant's Amended Reply Brief submitted for filing in the above referenced matter. Thank you for your kind consideration.

Sincerely,

Johnnie Cordero

TEL.: (803)753-8091
CORDERO1018@ATT.NET

CORDERO
4204 MANDOL DR
COLUMBIA, SC 29210

COLUMBIA SC 290
18 JUL 2016 PM 3 L

CLERK OF COURT
SC COURT OF APPEALS
1220 SENATE ST.
COLUMBIA, SC 29201

RECEIVED
JUL 19 2016
SC Court of Appeals

29201-376993