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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2015-000733

Kan Enterprises, Inc., d/b/a A1 Food Stores.....Appellant,

v.

South Carolina Department of Revenue, Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill,.....Respondents.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellant Kan Enterprises, Inc., d/b/a A1 Food Stores hereby files this Petition for Rehearing and Rehearing *En Banc*. Appellant respectfully submits that rehearing and/or issuance of a new opinion reversing the Administrative Law Court's decision is warranted on the grounds that the Panel's opinion overlooked or misapprehended matters of law and fact in affirming the decision of the Administrative Law Judge.

INTRODUCTION

In Opinion No. 5497, filed July 12, 2017, a Panel of this Court affirmed the Order of the Administrative Law Court denying Appellant's application to renew a permit to sell beer and wine for off-premises consumption. Respondent respectfully submits the Panel overlooked or misapprehended matters of law and fact in rendering this Opinion. Further,

in reaching its decision, the Panel misconstrued and misapplied well settled South Carolina Law. As a result this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's opinion.

ARGUMENT

I. The Panel's Opinion Disregards, Misapprehends and Misapplies South Carolina Law regarding Renewal of an Existing Beer and Wine Permit

The Panel's decision affirming the decision of the Administrative Law Judge is based on a misinterpretation and misapplication of the applicable South Carolina Law. This matter was before the Court for a renewal of an existing license, not a first time application for a beer and wine permit. Contrary to the Panel's decision, the Administrative Law Court erroneously treated this matter as a first time application and not as a renewal of a long time license.

Two cases of the South Carolina Appellate Courts are illuminating and applicable to the facts of the present case and demonstrate the Court's erroneous rationale and ruling in this case. In *Taylor v. Lewis,* 261 S.C. 168, 198 S.E.2d 801 (1973), respondent, the holder of an existing off premises beer and wine permit, appealed the decision of the Commission denying a renewal on the grounds that its location was unsuitable for the sale of beer or wine.

The Supreme Court reversed the Commission's decision citing the fact that there, like here, the premises in question had operated with a permit for a lengthy period of time (the premises in question here has operated, upon information and belief, with a permit for approximately 20 years). The Court held that the real issue before the Court was not whether the respondent's premises were "suitable", but whether or not any conditions had changed since its last renewal. The *Taylor* Court reversed the denial on the grounds that

"the record is devoid of any showing that the location is any less suitable for the sale of beer now than during the prior five (5) year period." 261 S.C at 802; 198 S.E.2d at 172.

Similarly, in the case of *Byers v. South Carolina Alcoholic Beverage Control Commission,* 281 S.C. 566, 316 S.E.2d 705 (1984), the South Carolina Court of Appeals affirmed the Circuit Court's reversal of the Commission's determination that respondent's business was unsuitable for a permit to sell wine and beer. In its decision denying Respondent's permit request, the Commission had cited such factors as, "...(2) at least ten incidents at the club were reported to police in the seven month period preceding the hearing; (3) crime in the area is increasing; (4) traffic in the area is heavy; and (5) the permits for some other locations in the area had not been renewed."

The Court held that these facts were insufficient to deny respondent's renewal and affirmed the lower court's order reversing the Commission's adverse determination. The Court held:

> The evidence...reveals that the Hayloft is located in a commercial area. It has operated under a permit to sell wine and beer for over twenty years. Its present owner was issued a permit without protest just seven months prior to the hearing on the respondent's application. Several other establishments in the area sell beer and wine. There was no evidence that the crime rate or traffic in the area had increased since the permit was issued for the Hayloft seven months previously.

Again, the Court, citing the *Taylor v. Lewis* case specifically, recognized that, "the record is devoid of any showing that the location is less suitable for the sale of beer now than during the prior (twenty) year period."

The Appellant submits that these cases are controlling to this case. Like the applicants in these two cases, the Appellant has held an off premises beer and wine permit for a lengthy period of time. There has been a permit in place at the business for

approximately twenty (20) years. Renewals have been consistently granted without protest. Contrary to the evidence presented by the Intervenors and relied on by the Court, evidence presented before the Court in this case did not establish that the area around the Appellant's business has changed significantly since the last renewal. While Respondents presented evidence as to the present status of the neighborhood and perceived problems in the neighborhood pertaining to litter, crime and loitering, there was no evidence that any of these issues had increased significantly since the last renewal of Appellant's license. Like *Taylor* and *Lewis,* the evidence presented to the Court that did not establish that Appellant's location is any less suitable for the sale of beer now than during the period of time that it had held a license and during the period of time since its last renewal. The Trial Court misconstrued and misapplied existing South Carolina law and applied the incorrect standard in this case and its Order denying Appellant's license should be reversed by this Court. As a result this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's opinion regarding actual malice and punitive damages.

II. The Panel's Decision Misconstrues and Misapplies the Facts Contained in the Record

Even if the Court applied the correct standard in this case (which Appellant denies) the overwhelming evidence in this case does not support a denial of the renewal of Appellant's off premises beer and wine permit. In support of his decision, Judge Anderson cited and relied upon two factors - one instance in which the Appellant's business was cited for selling beer to a minor and the fact that the number of calls for law enforcement service to Appellant's store had increased from 209 calls in 2012 to 252 calls in 2014. (A. pp. 10-15; R. pp. 10 - 14).

Mr. Sehgal admitted to the incident where an employee, "Raoul", "made a mistake" and sold alcohol to a minor. (R. pp. 124, l. 22 - 125, l. 11.) Mr. Sehgal testified that this was a "mistake" and the store paid a fine. (R. pp. 106, l. 25 – 107, l. 17.) "Raoul" (who is still employed at the store today) admitted he made a mistake and was given a verbal warning. (R. pp. 124, ll. 22 – 125, l. 11.) There have been no other instances of violations.[1]

The Court erroneously stated that Appellant "did nothing" about this incident and that this failure supported the non-renewal of its license. This finding totally ignores the evidence presented at trial. Further, by making this judgment, the Court substitutes its own business judgment for that of Mr. Sehgal. The Court's Order seems to imply that putting an employee out of work for one "mistake" would have been the correct course of action for Mr. Sehgal.

The Court also cited the fact that calls to the police had increased. This finding ignored Mr. Sehgal's testimony that he instructed his employees to call law enforcement if they had a problem and not to take matters into their own hands. (R. p. 106, ll. 5-22.) The Court's Order, however, encourages businesses who want a permit to take matters into their own hands and not call the police when they have a problem.

The Trial Court's Order also ignores the greater weight of evidence presented by Appellant. Mr. Sehgal, who has managed A1 Food Store for the past two years, testified that he is physically at the store 6-8 hours a day and is available by phone "24/7." (R. pp. 111, l. 21 – 112, l. 9.) He testified that the business maintains an interior and exterior security camera system with "eight or nine cameras." (R. p. 92, ll. 5-14.) These operate

[1] Appellant offered testimony regarding steps the business took to prevent sales of alcohol to minors. (R. p. 112, ll. 19 – 25.)

"24/7." (R. p. 114, ll. 17-24.) Monitors are located in Mr. Sehgal's office and at the counter. (R. p. 92, ll. 15-18; p. 93, ll. 13-19.) Images from these cameras are retained for 2-3 days. On occasion, images from the cameras have been furnished, on request, to the City of Columbia Police Department. (R. pp. 120, l. 23 - 121, l. 11.)

In addition to the security system, the store employs a security guard during the night-time hours. (R. pp. 114, l. 18 - 115, l. 10.) This individual was hired after Mr. Sehgal took over management and is physically on the premises from at least 10:00 p.m. until closing each night to monitor both the interior and the exterior of the premises. (R. p. 115, ll. 4-10; p. 146, ll. 17-25; p. 147, ll. 3-10, 15-20.)

Mr. Sehgal testified that individuals are not allowed to drink alcohol in the building or parking lot. (R. p. 98, ll. 15-18.) Sales of alcohol are not made to intoxicated customers. (R. pp. 109, l. 25 – 110, l. 9.) There are signs inside the store regarding underage drinking and employees received "on the job" training regarding sale of alcohol to underage drinkers. (R. pp. 112, l. 10 – 114, l. 11.) There is a large sign posted on premises indicating that the property is under surveillance and that there is to be no on premises consumption of alcohol, no narcotics, no panhandling and no loitering. (R. p. 94, ll. 19-24.) At times "no trespassing" signs have been placed on the property as well. (R. p. 99, ll. 8-12.)

Two months ago, Mr. Sehgal installed high intensity flood lights to illuminate all areas around the business. (R. pp. 96, l. 18 – 97, l. 20.) Mr. Sehgal testified that neither he nor his employees confront individuals who disregard the posted signs, but instead call upon the City of Columbia Police to do so. (R. pp. 98, l. 19 - 99, l. 7.)

In addition Mr. Sehgal testified that at least three times a day his employees check the parking lot and areas surrounding the store for litter. (R. pp. 99, l. 24 – 100, l. 5.) A1 Food Store is located on a busy street and adjacent to numerous other stores and businesses. (R. pp. 101, ll. 18 – 102, l. 3.) Mr. Sehgal testified that he does not know where this litter comes from. (R. p. 100, ll. 6-25.) He testified that this litter could come from any of these 10-15 other businesses. (R. pp. 100, l. 17 - p. 101, l. 10.) He testified that he did everything he could to keep the business neat and clean. (R. pp. 110, l. 13 – 111, l. 6.) Appellant presented testimony from several witnesses to the effect that the condition of the store had improved since Mr. Sehgal took over as manager. (R. p. 130, ll. 14-20; pp. 144, l. 17 – 145, l. 3; pp. 147, l. 22 – 149, l. 2.)

The Trial Court ignored this evidence in its Order. His findings that Appellant had made no effort to improve its business and had, in fact, stymied efforts to clean up the neighborhood are not supported by the evidence presented at trial and are tantamount to an abuse of discretion. (R. pp. 10 - 14; A. pp. 10-15.) Further, the Panel's Order affirming the Trial Court overlooked, ignored and misconstrued this evidence. Contrary to the Panel's Opinion, the Trial Court's Order denying the Appellant's permit is clearly erroneous and should be reversed by this Court. As a result this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's opinion regarding actual malice and punitive damages.

III. The Panel's Decision Overlooks the Fact that the Lower Court Erroneously Relied on Unsubstantiated Opinion Testimony and Evidence

The Panel's decision erroneously overlooks the fact that the opinions and conclusions of the Intervenors and their witnesses and lack a sufficient factual basis to deny

Appellant's renewal. Judge Anderson noted that, but for the protests of the intervenors and their witnesses, the renewal would have been granted. (R. p.11.) This evidence formed an important part of the Order denying Appellant's renewal. However, the evidence presented by the Intervenors and their witnesses was not sufficient to deny Appellant's renewal and the Trial Court's Order should be reversed by this Court.

In his Order, the Trial Judge cited such issues as vagrancy, panhandling and loitering, not at the Appellant's business, but in an alley adjacent to it. According to the evidence cited in the Court's Order, individuals loitering in this alley (which is not part of Appellant's business or property) engage in solicitation, using the bathroom, and sexual acts.

The Court heard opinion testimony from Intervenors and their numerous witnesses. These witnesses testified to a number of complaints about A1 Food Store regarding such things as its appearance, its signage, the condition of the building and parking lot, the fact A1 Food Store sells single beers, and the fact customers smoke inside the store.[2] The Intervenors attributed all this activity to the Appellant's business and license. However, the Court also cited two other businesses near Appellant's, a Hess and a Sunoco store, who also sell beer and wine for off-site consumption. The Court heard testimony, unrefuted at trial, that Respondent Department of Revenue recently granted an off-premises beer and wine sales license to a business located directly adjacent to the Appellant's. Any of these existing businesses could as easily contribute to and/or cause this loitering as the Appellant. Further, this activity could just as easily occur if there were no businesses in the area selling

[2]None of these factors should play any part in whether or not the Appellant's license is renewed. *Byers v. South Carolina Alcoholic Beverage Control Commission*, 281 S.C. 566, 316 S.E.2d 705 (1984).

beer or wine. The only evidence directly linking these activities to the Appellant's business was the opinion testimony presented at the hearing by those opposed to the Appellant's renewal. The opinion testimony linking this problem solely to the Appellant's business is not sufficient to support an order denying its renewal. *Taylor v. Lewis,* 261 S.C. 168, 198 S.E.2d 801 (1973).

In addition, the Court cited the fact that Appellant's business has become a detriment to the community's effort to clean up the neighborhood. The Court's Order provided, "...for instance, littering occurs quite regularly and frequently at the Store's property and in the surrounding neighborhood." The Court then added, "A significant portion of the litter in the surrounding neighborhood emanates from the Appellant's patrons." Again, this finding of fact is based solely on the speculations and opinions of those who showed up at the hearing to protest the renewal of the Appellant's license. There is no concrete evidence linking a systemic neighborhood wide loitering and litter problem to the Appellant's store. This biased and unsubstantiated evidence is simply insufficient to support the Order of the Court in this case.

Based upon a review of the record and the testimony of Intervenors and their witnesses, it appears that the Appellant's business has become a "scapegoat" for a wide variety of ills, much, if not most of which is completely outside of Appellant's control. As a result of speculative, opinion testimony linking these problems to the Appellant's business, it has lost its license. Its business is in jeopardy. The jobs of its employees and their source of income is at risk. These are serious consequences. The Court's Order

should have been based on substantiated proof and not the opinions and conjecture of the witnesses put up at the contested case hearing by Respondent Intervenors.[3]

The Trial Court's Order cites, and ignores, evidence that supports a renewal of the Appellant's license. This evidence included:

1. Signs posted on the property to discourage loitering;

2. Employment of security officers who "run off" individuals on the property who "panhandle" and "loiter;"

3. Calls to 911 by security guards when situations arise on the premises; and

4. Addressing an incident where a minor was sold beer.

While the Court cited these steps, they did not factor into the Court's decision to revoke the Appellant's license. If anything the Court penalized the Appellant for taking these steps to improve his business. The Panel's decision overlooked this evidence in reaching its decision to affirm the decision of the Lower Court. As a result this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's opinion regarding actual malice and punitive damages.

IV. The Trial Court's Order Impermissibly Deprives The Appellant Of a Vested Interest Under South Carolina Law

In affirming the opinion of the Lower Court, the Panel misconstrued the Appellant's argument regarding the deprivation of its vested interests under South Carolina Law. As argued before the Court, the Appellant A1 Food Store has held its off-premises beer and wine license for approximately 20 years. During this time the sale of beer and wine has

[3] The Trial Court's Order cites testimony from Councilman Sam Davis that a business decided not to invest in the neighborhood due to Appellant's business. However, Mr. Davis testified that this was due to neighborhood foot traffic. (R. pp. 248, l. 25 – 251, l. 23.) Mr. Davis was not able to offer anything other than speculation that A1 Food Store had anything to do with this decision.

become an integral and vital part of the Appellant's business. (R. p. 119, ll. 3-13.) Each time that the Appellant's license has been up for renewal, proper legal standards as set forth under South Carolina Statutory and Case Law have been applied, and it has been renewed without difficulty, pursuant to well established and well settled law. In this instance, if not for the opposition raised by Intervenors, it would have been renewed again without protest. The Appellant has incurred substantial business expenses and continues to incur expenses and obligations in reliance on the proper and non-arbitrary renewal of its license pursuant to the factors as set forth by South Carolina statutory and case law and in reliance of these factors (and laws) being properly applied.

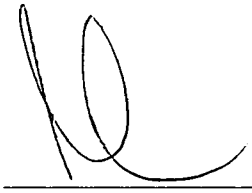
The Court's Order in this case denies the Appellant's renewal by applying an arbitrary and capricious standard not in accordance to the well-established South Carolina law regarding license renewal. Instead of following well established precedent, the Administrative Law Judge, as set forth above, applied an incorrect standard to deny the Appellant its license. This arbitrary standard has, and will, deprive the Appellant of his vested rights and expectations in having the well-established South Carolina authority applied to his renewal application.

As argued in its Brief, the Court's action in this case is tantamount to depriving the Appellant of his vested property right without cause. *See*, *Pure Oil Division, et. al. v. The City of Columbia,* 254 S.C. 28, 173 S.E.2d 140 (1970). In reliance of well-established South Carolina authority, Appellant had a right to expect its license would be renewed. However, the Court, by misapplying and misconstruing South Carolina law regarding license renewal deprived Appellant of its right. The Court should have reversed its prior Order denying the Appellant's renewal. As a result this Court should grant rehearing and/or

rehearing *en banc* in this matter as to the Panel's opinion regarding actual malice and punitive damages.

CONCLUSION

Based on the foregoing, Appellant Kan Enterprises, Inc. d/b/a A1 Food Stores respectfully requests that this Court grant rehearing or rehearing *en banc* as to the Court's opinion in this matter.



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Ralph King Anderson, III, Chief Administrative Law Judge

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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 Petition for Rehearing and Rehearing *En Banc* by mail, to the following parties by depositing a copy of same in the United States Mail, postage prepaid, on February 5, 2016, addressed as follows:

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RE: Kan Enterprises, Inc., d/b/a A1 Food Stores v. SC Department of Revenue, et al
Appellant No. 2015-000733

Dear Ms. Kitchings:

Please find enclosed with this letter the original and ten copies of Appellant's Petition for Rehearing and Rehearing *En Banc*, along with our firm check for $25.00. We would appreciate the return of the extra clocked copies via our courier.

By copy of this letter, we are serving opposing counsel with notice of this petition.

Thank you for your assistance with this matter.

Respectfully yours,

Lynn Gilvey
Assistant to John C. Bradley, Jr.

Enclosures
cc: Milton Kimpson. Esquire
Sean Ryan, Esquire
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Dana Thye, Esquire