

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 18-ALJ-17-0216-CC

WKSC, LLC d/b/a Savannah's Gentlemen's Club & Steakhouse, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

PETITIONER'S RESPONSE TO MOTION FOR STAY

Petitioner, by and through its undersigned counsel, hereby respectfully responds to Movant The Honorable Chip Huggins' Motion for Stay of Proceedings (Movant Huggins).

This matter is before the Administrative Law Court for a contested case hearing. The Petitioner WKSC, LLC, d/b/a Savannah's Gentlemen's Club & Steakhouse (Petitioner) applied for an on-premises beer and wine permit and restaurant liquor by the drink license. The applications for both were denied by Respondent South Carolina Department of Revenue (Respondent). Petitioner sought a contested case hearing with the ALC on June 20, 2018. The Court issued an Order and Notice of Hearing on July 19, 2018, which established the date of the contested merits hearing and the procedure of the court to be followed by all interested parties.

Due to the large number of protestants involved with Petitioner's application, and anticipating a procedural drain upon the Court and its staff, an Administrative Memorandum to

Individuals Protesting a License or Permit was issued. The memorandum contained, in no uncertain language, the deadline of August 10, 2018 for the filing of Motions to Intervene. The Memorandum was transmitted electronically to all named parties and protestants on July 19, 2018.

Movant Huggins filed, through counsel, a Motion for Leave to Intervene on August 30, 2018, twenty days past the deadline established by the Court. Movant, who was already a protestant and thus received the Memorandum establishing deadlines, claimed he met all necessary elements for intervention. Movant attempted to establish good cause for the untimely filing of his motion.

A telephone conference was held on September 4, 2018 with counsel for all parties and the Movant. Movant's counsel restated all grounds for intervention and again attempted to establish good cause for the failure to file the Motion for Leave to Intervene in a timely manner. Counsel for Movant asserted numerous reasons for the delay, including a difficulty in paying for representation and, as Movant is a lay person, unfamiliarity with the proceedings. Counsel further represented the allowance of intervention would not delay the proceedings, as counsel was prepared to proceed on the scheduled hearing date.

The Court filed an Order denying Movant's Motion to Intervene on September 5, finding Movant had failed to establish good cause for the untimely filing of the motion. On September 6, Movant filed a Notice of Appeal regarding the Order denying the Motion to Intervene. Concurrent with the Notice of Appeal, Movant filed this Motion for Stay. Petitioner is filing a Motion to Dismiss Appeal contemporaneously with this Response.

Movant asserts it will be extremely prejudiced if the proceedings currently scheduled for September 11, 2018 are allowed to proceed. Movant's claims are rooted in dissatisfaction with his current status as a mere protestant and his desired status as an intervenor.

Petitioner respectfully submits a Stay in this matter is categorically improper. First, the appeal itself is improper and a stay predicated on it would also be improper. This appeal is an improper interlocutory appeal under S.C. Code Ann. § 14-3-330. An interlocutory appeal is only proper when it falls within the categories of appealable judgments listed in § 14-3-330. *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). The relevant exceptions are enumerated in § 14-3-330(1)-(2). The first section involves orders that “involve the merits.” An order that involves the merits is one which “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). The order Appellant seeks to appeal clearly does not involve any substantial matter which forms the whole of the action. The action relates solely to Petitioner’s applications for alcohol permits. The appeal does not stand under S.C. Code Ann. § 14-3-330(1).

The second section allows appeals from orders that affect a “Substantial Right.” This right has historically been defined as affecting the “mode of trial,” as if the orders are not immediately appealed, appellate review after the final order could not review or fix any error made. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). Appellant’s issue does not fit this mold either. There is no prejudice against Appellant waiting for a final order to present his issues. This case is distinguishable from *McLaughlin v. Strickland*. In *McLaughlin*, the Court held that if an order prevents a party from contesting a case on the merits, it is immediately appealable. 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983). The denial of the Motion to Intervene does not preclude Appellant from participating in the hearing on the merits. Appellant is already a named protestor, and, as such, has the right to present his opinion and arguments at the hearing. Appellant simply seeks greater rights than he is currently afforded via

am improperly filed motion.

The Supreme Court of South Carolina has decided this issue in a somewhat analogous case. In *Duncan v. Government Employees Ins. Co.*, the Court ruled that an order granting a party's request to intervene is not immediately appealable. 331 S.C. 484, 449 S.E.2d 580 (1994). While the appeal at hand involves the denial of intervention, the Supreme Court clearly determined in *Duncan* that an order involving a motion for intervention does not classify as an appealable order under § 14-3-330.

Secondly, the entire Motion lacks merit. The hearing currently scheduled for September 11 is completely independent of Movant's Motion to Intervene. It concerns Petitioner's denied application for licenses. Movant bases his motion on a misinterpretation of South Carolina Appellate Court Rule 241, stating in pertinent part, "as a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Petitioner does not dispute Rule 241 institutes a stay on the matters directly on appeal; Petitioner contends the matters on appeal are wholly irrelevant to the hearing on September 11.

Under Rule 205, SCACR, if the appeal is proper, any matters not affected by the appeal may be heard by the lower court. See also *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (although service of a notice of an intent to appeal divests the lower court of jurisdiction over the order appealed, the lower court retains jurisdiction over matters not affected by the appeal). If the appeal is in fact interlocutory, the service and filing of a notice of appeal does not transfer jurisdiction to the appellate court, nor does it stay further proceedings in the lower court. *South Carolina Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986). Whether the appeal is

proper or interlocutory, a stay of proceedings based upon the appeal is categorically improper. The order denying intervention deals solely with Movant's Motion to Intervene. It has no bearing on the merits of Petitioner's denied applications.

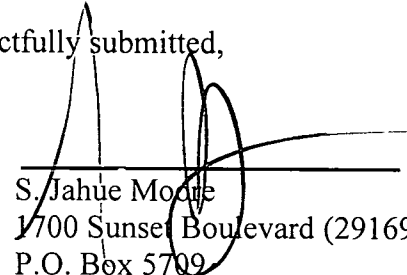
Finally, a stay of the proceedings would be manifestly unfair and prejudicial to Petitioner. Movant seeks to further a political agenda and skirt proper procedure. Movant's initial motion was untimely. Movant is already a protestant and has been aware of the deadlines since the Memorandum was issued to all parties involved. The Court gave all protestants a time period of 21 days to file a Motion to Intervene. The Memorandum was issued electronically to all parties and protestants on July 19th, which included Movant. Movant failed to file by the deadline. In fact, Movant did not file until a further twenty days past the deadline.

The Court was correct in denying the Motion to Intervene for Movant's failure to provide good cause for the delay. Petitioner has attached as Exhibits A-C documentation showing Movant's awareness of particular deadlines as it relates to the merits of this case. Movant has been highly involved with Petitioner's applications, even when the Respondent still maintained jurisdiction. Movant cannot possibly maintain an argument he would be prejudiced by the denial of his motion to stay when he failed to follow proper procedure and file a timely motion. Movant has filed his appeal. He can simply seek to win his appeal and argue his case upon remittance by the Court of Appeals.

In the alternative, if this Court finds that a Stay of Proceedings is proper under the circumstances, Petitioner respectfully requests that Movant file a Bond to protect Petitioner's business interest, pursuant to Rule 65(c). The grant of a stay in this matter would be unfairly prejudicial to Petitioner's business interest and the interests of equity require a bond be filed.

Respectfully submitted,

By:



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September 7, 2018

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PROOF OF SERVICE

I, S. Jahue Moore, attorney for Petitioner, certify that I have served the Return to Motion for Stay on counsel of record for Respondent and Movant in this action by depositing a copy of same in the US Mail, postage prepaid, on September 7, 2018 to:

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S. Jahue Moore

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September 7, 2018