THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

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SC Court of Appeals

Appellate Case No. 2018-001613
Case No. 18-ALJ-17-0216-CC

Ex Parte: Representative Chip Huggins,……..Appellant.

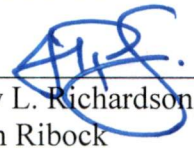
In re: WKSC, LLC d/b/a
Savannah's Gentlemen's Club & Steakhouse,……Petitioner, Respondent,

v.

South Carolina Department of Revenue,……...Respondent.

APPELLANT'S REPLY BRIEF

MCANGUS GOUDELOCK & COURIE, L.L.C.



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ARGUMENT

The Administrative Memorandum issued by Judge Lenski on July 19, 2018, made it abundantly clear that "**any** motion to intervene filed after [August 10, 2018] will be deemed by the court to be **untimely and prejudicial**" regardless of the reason. (emphasis added). In other words, Judge Lenski predetermined any and all rulings on any potential motions to intervene regardless of the merits or support of such motions. The September 5, 2018 order denying Appellant's motion to intervene merely rubber-stamped a decision which was determined by Judge Lenski before the motion to intervene was filed.

For that reason, Judge Lenski abused his discretion. This Court and the South Carolina Supreme Court has supported the recognition that Judge Lenski abused such discretion. "A circuit court's failure to exercise discretion is itself an abuse of discretion." *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003) (citations omitted) (noting the trial judge erred when the court did not consider an affidavit because it was not timely). *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990). ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").

In this case, Judge Lenski's order merely repeated the decision he made weeks before Appellant's motion was filed; that is, any late motion would be untimely and prejudicial. As such, he did not exercise his discretion. "We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

At the conclusion of the summary judgment hearing in *Schmidt v. Courtney*, the judge found:

> The affidavit has been reviewed. **The Court finds that it was not timely submitted**. . . . **But, primarily, the Court doesn't have to get there because there's no affidavit that's been filed timely, pursuant to the Rules**. . . . **You didn't file it timely**. **It's that simple**.

(emphasis in original). *Schmidt*, 357 S.C. at 321-322, 592 S.E.2d at 332. This Court found "[t] he judge was mandatorily required to at least evaluate and consider the affidavit." *Id.* at 322, 333.

This Court also noted in *Balloon Plantation* that the circuit judge (apparently thinking he was bound by a prior order) abused his discretion in imposing sanctions. *Balloon Plantation*, 303 S.C. at 155, 399 S.E.2d at 440-441. Citing *State v. Smith*, this Court found the circuit judge could have held the defendants in contempt but refused to exercise discretionary authority. *Balloon Plantation*, 303 S.C. at 155, 399 S.E.2d at 441.

In Petitioner's initial brief, Petitioner continued to cite and reference Judge Lenski's order denying Appellant's motion to intervene to illustrate that Judge Lenski did not abuse any discretion. However, as noted above, the discretion was abused when Judge Lenski predetermined his decision in his Administrative Memorandum which signaled to the general public how he would rule on any potential motion to intervene that was filed after the deadline – regardless of the reasoning. This unconditional approach triggered an abuse of discretion and failed to recognize that the Administrative Rules of Civil Procedure and South Caroline Rules of Civil Procedure allow for review of motions to intervene filed after the particular deadline and does not allow for such absolute decisions.

Here, Judge Lenski's prior order made it inevitable he was going to deny any untimely motion to intervene, even if good cause was shown by a potential intervener. Judge Lenski deemed Appellant's motion untimely based on his previous order and memorandum, and therefore "it

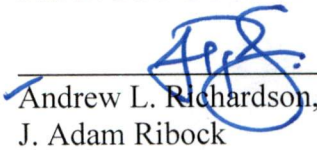
[was] that simple." *Schmidt*, 357 S.C. at 321-322, 592 S.E.2d at 332. Judge Lenski failed to use any discretionary authority to evaluate the good cause shown by Appellant, and ignored the obligation of Rule 20 of the SCALC to consider any "later" motions to intervene.

CONCLUSION

As a result of Judge Lenski not using his discretion, Appellant respectfully requests this Court reverse the ALC's ruling and remand the matter to the ALC to allow Appellant to intervene and participate in the contested case hearing.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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Columbia, South Carolina
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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on the 1st day of April, 2019 as follows:

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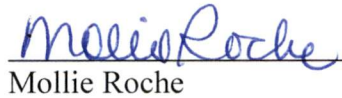

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April 9, 2019

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Columbia, South Carolina 29201

RE: WKSC, LLC d/b/a Savannah's Gentlemen's Club & Steakhouse vs. South Carolina Department of Revenue
Appellate Case No.: 2018-001613
Case No.: 18-ALJ-17-0216-CC
MGC File No.: 22014.18001

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of Appellant's Reply Brief in the above-captioned case. I would appreciate your returning a clocked-in copy of the same to me in the envelope provided.

By copy of this letter, I am serving counsel of record with the above-referenced Appellant's Reply Brief.

Thanking you in advance for your assistance, I am

Very truly yours,

Andrew L. Richardson, Jr.

ALR/_mr
Enclosure

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