

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

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 RevenueRespondent.

**PETITIONER, RESPONDENT WKSC, LLC'S
FINAL BRIEF**

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SC Court of Appeals

S. Jahue Moore, SC Bar #4063
Moore Taylor Law Firm P.A.
1700 Sunset Boulevard
Post Office Box 5709
Columbia, South Carolina 29171
(803) 796-9160

Kenneth E. Allen
1201 Main Street, Suite 1980
Columbia, SC 29201
(803) 748-1335

*Attorneys for the Petitioner,
Respondent WKSC, LLC d/b/a
Savannah's Gentlemen's Club &
Steakhouse*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF CASE2

STANDARD OF REVIEW3

ARGUMENT.....3

 I. The Appellant’s Motion to Intervene Was Untimely4

 II. The Appellant Failed to Show Good Cause to Intervene5

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Davis v. Jennings, 304 S.C. 502, 405 S.E.2d. 601 (1991).....8, 9

In re Horry Co. State Bank, 361 S.C. 503, 604 S.E.2d. 723 (Ct. App. 2004)7, 9

Kiawah Island Resort Associates LP v. Kiawah island Community Association, 421 S.C. 538, 808 S.E.2d. 521 (Ct. App. 2017).....3

Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 670 S.E.2d. 674 (S.C. Ct. App. 2008).....3

S.C. Tax Commission v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d. 72 (Ct. App. 1988).....3

Statutes

Rule 20, SCALC4, 5, 8, 9

Rule 24, South Carolina Rules of Civil Procedure7

South Carolina Code Section 1-23-610(B).....3

STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ABUSE ITS DISCRETION IN DENYING THE APPELLANT EX PARTE: REPRESENTATIVE CHIP HUGGINS' MOTION TO INTERVENE

STATEMENT OF THE CASE

This is an appeal from an Order of the Administrative Law Court denying Appellant Ex Parte: Representative Chip Huggins' ("Appellant Huggins") Motion to Intervene. (R. pp. 5-12). On March 7, 2017, Respondent WKSC, LLC d/b/a Savannah's Gentlemen's Club and Steakhouse ("Respondent WKSC") applied for an on-premises beer and wine permit and restaurant liquor by the drink license. (R. pp. 41-44). The Department of Revenue denied Respondent's application pursuant to a denial letter dated April 13, 2018. (R. pp. 19-20). Respondent WKSC timely protested the Department's denial. (R. p. 45). The Department of Revenue issued a Final Determination Letter on June 19, 2018. (R. pp. 21-35). Respondent timely filed its Request for a Contested Case Hearing on June 20, 2018. (R. pp. 46-47).

On July 9, 2018, Judge S. Phillip Lenski, Administrative Law Judge, issued an Order and Notice of Hearing, setting a merits hearing for September 11, 2018. (R. pp. 1-4). Attached to the Court's Order was an Administrative Memorandum to Individuals Protesting a License or Permit. (R. pp. 1-4). The Administrative Memorandum and Order provided that any motion to intervene filed after August 10, 2018, would be "deemed by the Court to be untimely and prejudicial to the rights of the existing parties." (R. pp. 1-4).

Appellant Huggins moved to intervene on August 30, 2018. (Motion for Leave to Intervene, August 30, 2018, R. pp. 13-16). After a telephone conference between counsel and the Court, Judge Lenski denied Respondent Huggins' Motion to Intervene. (R. pp. 5-12). This appeal followed.

STANDARD OF REVIEW

A reviewing Court may reverse or modify the decision of the Administrative Law Court (ALC) Judge if the finding, conclusion or decision reached by the Court is arbitrary or capricious or characterized by an abuse of discretion or is a clearly unwarranted exercise of discretion; violates constitutional or statutory provisions; or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or is affected by an error of law. South Carolina Code Section 1-23-610(B); *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 670 S.E.2d. 674 (S.C. Ct. App. 2008). The standard of review for a motion to intervene is whether or not the court abused its discretion in denying the motion. *S.C. Tax Commission v. Union County Treasurer*, 295 S.C. 257, 368 S.E.2d. 72 (Ct. App. 1988). The Court will not overturn the Lower Court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the Lower Court's sound discretion as to amount to a deprivation of legal rights of the party. *Kiawah Island Resort Associates LP v. Kiawah Island Community Association*, 421 S.C. 538, 808 S.E.2d. 521 (Ct. App. 2017).

ARGUMENT

This issue before this Court is whether or not Appellant may intervene in an Administrative Court proceeding beyond both the time limit allowed by the Administrative Court Rules and also beyond the time limit set by the Court in its Administrative Memorandum and Order. Appellant Huggins asserts that the Court abused its discretion in denying his late and untimely Motion for Leave to Intervene. However, the Court's

decision to deny Appellant's Motion was clearly not an abuse of discretion. The Administrative Court's well-reasoned Order should be affirmed by this Court.

I. THE APPELLANT'S MOTION TO INTERVENE WAS UNTIMELY

There is no dispute in this case that the Appellant Huggins' Motion for Leave to Intervene was untimely, under both Rule 20 of the Rules of Procedure for the Administrative Law Court and Judge Lenksi's Administrative Memorandum and Order. Rule 20(C) of the Rules of Procedure for the Administrative Law Court specifically provides:

Time for Motion for Intervention. The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the Administrative Law Judge, ***the motion to intervene shall be filed at least twenty (20) days before the hearing.*** Any later motion shall contain a statement of good cause for the failure to intervene earlier.
(Emphasis Added)

The Appellant's Motion was filed on August 30, 2018, only twelve (12) days before the scheduled hearing. It was untimely pursuant to the Administrative Court Rules.

The Appellant's Motion was also untimely pursuant to the Court's Administrative Memorandum and Order. (R. pp. 1-4). Judge Lenski's July 19, 2018, Order and Notice of Hearing established the time and date of the hearing. As set forth in Footnote 1 of the Administrative Court's Order, because of the anticipated drain on the Court's resources due to the anticipated size of the hearing (239 protestants, including the Appellant), the Court had to make special preparations to accommodate the expected attendance at the hearing. (R. pp. 1-4).

With its Order setting the hearing, the Lower Court issued an Administrative Memorandum to Individuals Protesting a License or Permit. This Memorandum provided

that the protestants with a common objection or who were members of a group or organization protesting Respondent's license applications should appoint a spokesperson who could effectively present the concerns of the group or organization in order to minimize the number of witnesses that would be speaking at the hearing. In addition, the Memorandum specifically provided:

SCALC Rule 20 governs motions to intervene. *If you wish to intervene as a party in this case, you must file a motion to intervene with the Administrative Law Judge assigned to hear this case no later than August 10, 2018. Any motion to intervene filed after that date will be deemed by the Court to be untimely and prejudicial to the rights of the existing parties.* All motions to intervene must meet the qualifications set forth in SCALC Rule 20(B) (Emphasis Added).

(R. pp. 1-4)

The Appellant's Motion for Leave to Intervene was not filed until August 30, 2018.

(R. pp. 13-16). It was filed twenty (20) days past or beyond the time limit set forth in the Court's Memorandum. In its Order denying the Appellant's Motion for Leave to Intervene, the Court found and ruled that:

The motion was not filed until Friday, August 30, 2018. It was filed twelve (12) days before the scheduled hearing, and on a Friday before the long Labor Day weekend, effectively leaving only one business week for the existing parties to adjust to the addition of a new party, if granted. This is well outside the 20-day deadline for filing set by forth in SCALC Rule 20 and 20 days after the August 10, 2018 deadline set by this court for this case.

(R. pp. 1-4). The Court properly determined that the Appellant's motion was untimely under both the SCALC, as well as the South Carolina Rules of Civil Procedure.

II. THE APPELLANT FAILED TO SHOW GOOD CAUSE TO INTERVENE

The Appellant argues that the Court abused its discretion in failing to excuse Appellant's late filing. This argument lacks merit. The Court determined after a careful

analysis that the Appellant had not met his burden for establishing good cause to allow him to file late. The Court's Order should be affirmed by this Court.

Following receipt of the Appellant's Motion, the Court did not summarily deny the Appellant's Motion. Instead, the Court conducted a telephone conference with counsel for all existing parties as well as counsel for Appellant Huggins. (R. pp. 1-4). The Court gave Appellant Huggins an opportunity to be heard regarding his late filing. During the conference with the Court, Appellant's counsel restated the grounds for intervention set forth in Appellant's Motion for Leave to Intervene. Despite the already 239 protestants lined up against Respondent's application (which included Appellant Huggins), Appellant Huggins' counsel argued, without proof, that he did not feel that his interests or the interests of his constituents were adequately represented by the existing parties, and that while he was the only person seeking to intervene, he believed that his arguments against Respondent represented grassroots opposition to the Respondent's permit. (R. pp. 1-4). Appellant Huggins further asserted, again without proof, that he believed his participation would "streamline" the hearing process. (R. pp. 1-4).

When asked by the Administrative Law Judge about the tardiness of his Motion, Appellant's counsel represented that they had been retained on August 29, 2018, a day prior to the filing of the Motion to Intervene. Judge Lenski asked Appellant for the reason for the tardiness of his Motion. Appellant stated that, "there was some difficulty or delay in acquiring the funds for his representation, and that there may have been some uncertainty about the process." (R. pp. 1-4).

Respondent's counsel strongly opposed Appellant Huggins' Motion. In addition to pointing out the untimeliness of Appellant's Motion under both the Court Rules and the

Court's Memorandum, counsel for Respondent WKSC took the position that the basis for Appellant Huggins' Motion (brought not in his individual capacity but specifically brought by "Representative Chip Huggins), was political due to the fact that Appellant Huggins is an elected official, up for re-election in a contested race. Counsel for Respondent WKSC informed the Court that Respondent would be prejudiced if the Court allowed Appellant Huggins to intervene as a party. Counsel for Respondent informed the Court that while he ordinarily did not depose non-party Protestants (due to their limited rights), he did depose intervening parties due to the greater rights afforded a party. Counsel for Respondent further informed the Court that because of the late date of Appellant's Motion for Leave to Intervene, "...effectively one business week before the hearing, he would be unable to prepare and depose the Movant and any other witnesses the Movant might seek to call in his case before the Court." (R. pp. 1-4).

Again the Court did not deny Appellant Huggins' Motion outright. Instead, after careful consideration of this matter, Judge Lenski correctly found and ruled that Appellant Huggins had not met his burden of showing that intervention was proper. *In re Horry Co. State Bank*, 361 S.C. 503, 604 S.E.2d. 723 (Ct. App. 2004). The Court specifically found that Appellant Huggins had not established good cause for the untimely filing of his Motion for Leave to Intervene. The Court's order was correct and should be affirmed by this Court.

In reaching this determination that Appellant Huggins had not established good cause for late intervention, the Lower Court applied the test set forth by the South Carolina Supreme Court in evaluating the tardiness of motions to intervene in Circuit Court pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, which the Court found to be

analogous to the matters before it. It applied the four-part test the Court utilized in *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d. 601 (1991). These factors include:

- (1) The time that has passed since the applicant knew or should have known of his or her interest in the suit, (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.

After carefully considering these factors and applying them to the facts of this case, the Court found and ruled that the Appellant had failed to establish that there was good cause for allowing him to intervene. The Court, using the four factors set forth by the Court in *Davis*, concluded:

Here the Movant (Appellant) was already a protestant in this action and filed a written protest with the Department objecting to Petitioner's license application sometime before June 19, 2018, the date the Department denied the Petitioner's application. Therefore the Movant has known of, and asserted his interest in this matter for months. The explanation for the late filing of this motion does not justify its tardiness. The hearing, which is designed to be conducted expeditiously to afford the Petitioner (Respondent) an answer on whether its alcoholic beverage license and permit applications will be granted is only one week away. Finally, the Court accepts that the Petitioner (Respondent) would be prejudiced if it were to permit the Movant (Appellant) to intervene in that there is likely too little time for the Petitioner (Respondent) to schedule and conduct depositions of Movant's (Appellant's) witnesses. As to the harm the Movant (Appellant) will suffer, the court finds that while the Movant (Appellant) will not have the same rights as a party, he is still a protestant in this matter and will be afforded the opportunity to present his objections to the Petitioner's (Respondent's) license applications on the day of the hearing.

(R. 1-4).

The Court correctly determined that the Appellant had not established good cause for late intervention. (R. pp. 1-4).

Appellant argues that the Court became fixated on the provision in its Order setting the August 10, 2018, deadline for intervention and "ignored its obligations under Rule 20

of the SCALC.” Appellant argues throughout his brief that Judge Lenski “pre-determined” his motion and “summarily” denied his motion. This argument is not supported by the facts of this case of the Order of the Lower Court.

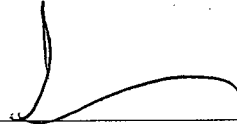
Although the Appellant’s Motion for Leave to Intervene was untimely under both Rule 20 of the SCALC and the Court’s Memorandum, Appellant’s Motion was not summarily denied by the Court. After Appellant filed his motion, the Court conducted a telephone conference with counsel for the existing parties and the movant in which the Court gave Appellant’s counsel an opportunity to explain why his Motion to Intervene was filed beyond the time limit of Rule 20 SCALC or his Memorandum. (R. pp. 1-4). The Court then issued a carefully reasoned Order in which it found and ruled that Appellant Huggins had failed to meet his burden of establishing good cause for his late intervention. (R. pp. 1-4). The Record does not support the Appellant’s position that the Court, “pre-determined” Appellant’s motion. The Court denied the Appellant’s Motion using the factors set forth in the *Davis* case, which Appellant cites favorably in his brief.

While intervention should be liberally granted, as argued by Appellant, the South Carolina Court has made clear that this does not mean it is to be granted in every case. *In re Horry Co. State Bank*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). Instead, each case is to be decided on its own facts and circumstances. Judge Lenski properly denied the Appellant’s Motion for Leave to Intervene. Judge Lenski did not abuse his discretion in doing so and his Order should be affirmed by this Court.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Administrative Court Judge.

Respectfully Submitted,



S. Jahue Moore, SC Bar #4063
Moore Taylor Law Firm P.A.
1700 Sunset Boulevard
Post Office Box 5709
Columbia, South Carolina 29171
(803) 796-9160

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

*Attorneys for the Respondent WKSC, LLC
d/b/a Savannah's Gentlemen's Club &
Steakhouse*

West Columbia, SC

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