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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000886
Administrative Law Court Case No. 21-ALJ-17-0143-CC

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

v.

Agua Pina, LLC d/b/a Hookah on the River, ...Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court err in revoking the beer and wine and liquor by the drink licenses of Appellant Agua Pina, LLC d/b/a/ Hookah on the River (hereinafter, the "Appellant")?

II. Did the Administrative Law Court err by finding the Department met its burden of proof?

III. Did the Administrative Law Court err by not following the Rules of Evidence presumption that when a party fails to produce evidence within its sole control, there is a presumption it is harmful to its case?

IV. Did the Administrative Law Court abuse its discretion and commit an error of law by determining that revocation (rather than suspension or a monetary fine) was the proper penalty?

STATEMENT OF THE CASE

This matter originally came before the Administrative Law Court (the "ALC") pursuant to a Motion for Emergency Suspension and Expedited Hearing ("Motion") filed by the Department of Revenue (the "Department" or "DOR") on May 13, 2021. R. p. 56. In its Motion, the Department moved to suspend Appellant's permit and license until a hearing on the merits could be held in this matter. On May 13, 2021, the Department filed its Final Determination, in which it notified Appellant of its intent to revoke their on-premises beer and wine and restaurant liquor-by-the-drink license. R. p. 40. Following a conference call on the Motion, the ALC granted the Department's request to suspend Appellant's permit and license until the merits hearing. R. p. 1.

This matter subsequently came before the ALC pursuant to a request for injunctive relief filed by the Department in relation to their determination issued on May 13, 2021. In their Final Determination, the Department found that Appellant, who held an on-premises beer and wine permit and a business liquor-by-the-drink license, knowingly permitted acts that constitute a public nuisance, posed an imminent threat to public health, safety, or welfare, and lacked a reputation for peace and good order. As a result, the Department sought to permanently revoke Appellant's permit and license pursuant to S.C. Code Ann. §§ 61-4-270 (2009) 61-4-580 (Supp. 2020), 61-6-1820 (2009), 61-6-1830(1) (2009), and 1-23-310 *et. seq.* (2005 & Supp. 2020).

The ALC held a hearing on June 9, 2021 and issued a Final Order filed June 28, 2021. The Final Order revoked Appellant's on-premises beer and wine permits as well as its liquor-by-the-drink license. R. p. 7. Appellant subsequently filed a Motion to Reconsider on July 7, 2021. R. p. 93. The Department of Revenue filed a Response to the Motion to Reconsider on July 13, 2021. R. p. 137. The ALC entered an Order denying the Motion on July 22, 2021. R. p. 26. Appellant then filed a timely appeal with the Court of Appeals.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for the Court of Appeals for cases decided by the ALC and is set forth in § 1-23-610(B), which provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> * * * * *
>
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In an appeal from the ALC, an appellate court may reverse or modify an ALC decision if an appellant's "substantive rights . . . have been prejudiced due to constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of the evidence in the record; or an abuse of discretion." *Murphy v. S.C. Dep't of Health & Envtl. Control,* 396 S.C. 633, 639, 723 S.E. 2d 191, 194 (2012). "Determining the proper interpretation of a statute is a question of law, and [an appellate court] reviews questions of law *de novo*." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 100, 622, S.E. 3d 40, 41 (2008).

STATEMENT OF FACTS

The Final Order states:

> Hookah on the River is located at 2700 Broad River Road, Suite B, Columbia, South Carolina. [Appellant]'s business is permitted/licensed to

> sell beer, wine, and liquor. Jack Oliver (Oliver), the owner of the business since April 2020, described Hookah on the River as primarily a restaurant/lounge, yet it has a DJ and rents hookahs to its patrons. Hookah on the River is located in a strip mall next door to an event center, Exquisite Event Center, and across the street from Rush's, a fast-food restaurant, neither of which have a beer and wine permit or a liquor license.

Id. at 2 (footnote omitted); R. p. 8, lines 6-11.

A. Background

Appellant is owned by Jack Oliver. His main business is Jack Oliver's Pool, Spa and Patio. Tr. p. 223, lines 7-9; R. p. 366, lines 7-9. He got into the restaurant business in an effort to diversify his income given the limitations of his pool business. Tr. p. 223, line 20-p. 224, line 3; R. p. 366, line 20-p. 367, line 3. His business model was to establish a restaurant, which sells food in a lounge-type atmosphere with a DJ primarily to African Americans. He sells food and alcohol, and also rents hookahs for smoking flavored blends of tobacco. Tr. p. 224, lines 6-12; R. p. 367, lines 6-12.

The restaurant is located in a strip mall on Broad River Road in Columbia. Tr. p. 225, lines 6-12; R. p. 368, lines 6-12. It is located literally next door to the Exquisite Event Center—the Event Center is Suite A and the Appellant is Suite B of the same building. Tr. p. 227, lines 9-20; R. p. 370, lines 9-20. The two share a parking lot. Tr. p. 233, lines 17-19; R. p. 376, lines 17-19.

The establishments often were confused for one another and as a combined establishment, considering the Event Center did not have a sign in front of it until the landlord made the Event Center put one up, which happened just a couple of months before the ALC hearing. Tr. p. 227, line 23-p. 228, line 3; R. p. 370, line 23-p.371, line 3. The Sheriff's department was apparently not aware the Event Center was in business, as it had no ABL Licenses and on at least one occasion, the Sheriff's department thought a rap concert hosted by the Event Center which featured a national gang member was occurring at Appellant's establishment. Tr. p. 232, line 24-p. 233, line 8; R. p.

375, line 24-p.376, line 8. The Event Center hosted at least 20 rap concerts there along with multiple private parties. Tr. p. 228, lines 9-12; R. p. 371, lines 9-12.

The Event Center's internet advertisement was shown at trial for "Stripper Bowl" which had strippers performing on Super Bowl night. Tr. p. 230, lines 6-10; R. p. 373, lines 6-10. Another advertisement was for free "Henny and Hookah" in which they gave away "free" Hennessy liquor. Tr. p. 230, lines 11-15; R. p. 373, lines 11-15.

The rap concerts typically ended at 2:00 - 3:00 AM and after the concert ended, the rap concert crowd would pour into the mutual parking lot with some coming into Appellant's restaurant and some into the Rush's parking lot across the street. Tr. p. 234, lines 1-12; R. p. 377, lines 1-12.

Oliver testified that he would text Captain Steven Tapler and Captain Coggins at the Sheriff's department and alert them to rap concerts. Tr. p. 254, lines 22-25; R. p. 397, lines 22-25.

Because the rap concert crowds would pour into the joint parking lot, Oliver testified they set up a barrier to separate his establishment from the Event Center in the parking lot. Tr. p. 313, lines 13-21; R. p. 456, lines 13-21.

B. Security

Appellant's restaurant had extensive security, including eight video cameras, SLED certified guards at the entrance to the restaurant who used metal detector wands to check for guns, and bouncers inside the restaurant.

The Final Order notes:

Security at the Licensed Premises

> In terms of security at the premises, Appellant has a total of eight cameras and hires SLED-certified armed security through SC Security Protection to protect

> the outside of the premises and control the entry of patrons into the business. Richard Higgins (Higgins), owner of SC Security Protection, explained he typically has two to six guys working at Appellant's location depending on the event. According to Oliver, all patrons are checked at the door for weapons using a wand and/or a pat down and then patrons are patted down again once inside the premises. Sullivan also testified security pats down every patron at least twice. Additionally, Appellant employs security to maintain order inside the premises who they refer to as "bouncers." These individuals are not employees of SC Security Protection. Higgins hires former law enforcement and military as security guards. All of Higgins' employees are trained on how to correctly pat down a patron.

Id. at p. 2-3; R. p. 8, line 21-p. 9, line 7. Of the eight security cameras, two are over the back door, four inside, and two over the front door. Tr. p. 241, lines 9-10; R. p. 384, lines 9-10. Appellant hires 2-3 bouncers depending upon the night of the week. Both the security guards and bouncers are on guard from opening until closure. Tr. p. 244, lines 2-23; R. p. 387, lines 2-23.

All the security guards are SLED-certified and all are prior military or law enforcement. The owner of the Company testified he personally trained them how to frisk, Tr. p. 341, line 23-p. 343, line 6; R. p. 484, line 23-p. 486, line 6, and he had never had a gun slip through one of the establishments he guarded. Tr. p. 343, lines 7-11; R. p. 486, lines 7-11.

C. Incidents

The Department's Motion is based upon the burden on law enforcement and two shootings. All sides agree on one shooting (May 2nd) which occurred across the street and the parties disagree on the second (May 8th).

The Final Order states:

Incidents at the Licensed Premises

> Since October 23, 2020, Richland County Sheriff's Department has responded to calls at [Appellant]'s location over 100 times for increasingly violent incidents including assaults, weapon law violations, and shootings. In fact, as Sergeant Torres specifically explained, there have been 102 calls for service since January 2021 at [Appellant]'s location. These two incidents exemplify the escalating violence.

> The first shooting incident occurred on May 2, 2021. On that date, shots were fired and law enforcement discovered eleven (11) 9mm shell casings in the parking lot of 2640 Bush River Road (Rush's restaurant) across from [Appellant]'s business where [Appellant]'s patrons sometimes park....
>
> Investigator Short described the second incident that occurred on May 8, 2021, in which law enforcement responded to Prisma Richland Hospital in reference to a shooting victim. Investigator Short interviewed the victim who alleged he was at [Appellant]'s premises when his friend was involved in an altercation and, as a result, the victim was shot in the stomach. Investigator Short testified the evidence establishes that the victim was shot inside [Appellant]'s business.

Id. at 3-4; R. p. 9, line 17-p. 10, line 16.

1. May 2nd Shooting

The first shooting – which all sides agree to – occurred on May 2, 2021. The unrefuted testimony was that the shooting occurred when the next door rap concert ended. According to eyewitness accounts, some 200-300 people poured out of the rap concert and onto Appellant's parking lot and the parking lot at Rush's across the street. Appellant's security guards dialed 911 as the crowd was completely out of control. Tr. p. 278, line 23-p. 280, line 4; R. p. 421, line 23-p. 423, line 4. The concert ended at 2:45 AM, which was shortly before the shooting. Tr. p. 314, lines 8-12; R. p. 457, lines 8-12. The crowds were so unruly that Appellant locked its door, denying entry to the crowd. Tr. p. 314, lines 22-23; R. p. 457, lines 22-23. Armed Security Guards stood in front of the door and denied entry. Tr. p. 315, lines 1-4; R. p. 458, lines 1-4. Appellant had erected barriers to prevent the rap club patrons from coming in. Tr. p. 315, lines 5-17; R. p. 458, lines 5-17. Appellant attempted to prevent the crowd from coming in, and perhaps as a response, a gang member was handed a pistol and shot the security guard. The shooter was apparently in the Rush's parking lot across the street, which was where shell casings were found. Tr. p. 71, lines 16-22; R. p. 214, lines 16-22. The Final Order states that "it is unclear whether the

shooter was a patron of Appellant." *Id.* at 4; R. p. 10. There was *no* testimony the shooter ever set foot in Appellant's location. This does not make the record "unclear."

The Final Order states "the shooter was never identified." *Id.* The Appellant in fact identified the shooter, gave his name to the Sheriff's Office, and further advised that he was singing at a rap concert two weeks later. One of the Appellant's employees identified the shooter, a rap singer who probably performed at the rap concert that just ended. Tr. p. 319, line 14-p. 320, line 3; R. p. 462, line 14-p. 463, line 3 . The day after the shooting, the Appellant's employees gathered and looked at the videos of the shooting. One employee identified the shooter and found his Facebook page. Jack Oliver then gave the shooter's name to the Richland County Sheriff's Department. Tr. p. 320, line 12-p. 321, Line 11; R. p. 463, line 12-p. 464, line 11.

Incredibly, no one from the Sheriff's department interviewed any of the Appellant's staff or security guards regarding the shooting. Chris Sullivan who owned the Security Company also called the Sheriff's department and said they had identified the shooter but the Sheriff's department never responded. Tr. p. 321, lines 12-22; R. p. 464, lines 12-22. The shooter continues to give rap concerts. Tr. p. 322, lines 6-8; R. p. 465, lines 6-8. The shooter has apparently not been arrested and the Sheriff's Office never interviewed any of Appellant's witnesses.

Ms. Joanna Duffy, Deputy Chief and General, Counsel to the Richland County, Sheriff's Office testified:

> Q. So, if --- if the shooting had nothing to do with the bar, you don't hold it – the bar responsible, do you?
>
> A. No. I don't think you should.
>
> Q. Right. Well, suppose, hypothetically, the shooter was at the rap concert, tried to get in the bar, we refused to let him into the bar, and he drew a gun and --- shot our security agent. What part of the facts do you blame on us?

> A. So, based on those very limited facts, it – I mean, it would depend on, you know, what the interact was with security, how – how that interaction went, but if security did everything properly, then – then, no, I wouldn't think that you would hold that against somebody.

Tr. p. 209, line 9-p. 210, line 8; R. p. 352, line 9-p. 353, line 8.

2. May 8th Shooting

The second incident occurred on May 8, 2021. The incident report stated that he was shot at Appellant's location. Appellant's employee testified that a large Hookah (over two feet tall) fell off a table and made a large noise. This caused several people to leave. He testified he saw no evidence of a shooting. Tr. p. 324, lines 3-11; R. p. 467, lines 3-11. The next day when they cleaned the club after the Sheriff's department had finished his investigation, they found no shell casings, bullet holes or blood. Tr. p. 325, lines 15-20; R. p. 468, lines 15-20. The shooting allegedly occurred at 3:00AM and the supposed victim left at 3:05 AM. Tr. p. 326, lines 23-25; R. p. 469, lines 23-25, yet the victim did not arrive at the hospital until 4:55 AM. Tr. p. 326, lines 20-22; R. p. 469, lines 20-22.

The next morning the Sheriff's Office arrived with a subpoena and took the inside video and looked for blood, shell casings and bullet holes – none were found. Tr. p. 327, lines 4-25; R. p. 470, lines 4-25. Deputy Short was asked: "Was there any other evidence that was recovered from the Restaurant? A. No." Tr. p. 29, lines 15-19; R. p. 172, lines 15-19. He also was asked if the videos inside the club showed a shooting and he said "No." Tr. p. 37, lines 17-18; R. p. 180, lines 17-18. Incidentally, none of the inside videos which the Sheriff's department took through a subpoena were shown at trial. Tr. p. 58, lines 5-25; R. p. 201, lines 5-25. While no camera may have caught the actual alleged shooting, they certainly would have recorded an altercation if there was a shooting – and may have supported Appellant's contention that the altercation simply resulted from a heavy hookah falling to the floor. But none of these videos were shown at trial.

The Sheriff's department did not question or interview any of Appellant's staff or security guards. Tr. p. 328, lines 20-23; R. p. 471, lines 20-23.

The Department relies on outside video footage showing a man clutching his stomach after leaving. The video apparently showed him running into a large rubber cone while leaving the establishment. The video showed several people running but also showed several people calmly walking out of the club. To reiterate, despite this confusion, the Sheriff's department never interviewed any of the employees who were working that night.

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT ERRED BY REVOKING APPELLANT'S BEER AND WINE AND LIQUOR-BY-THE-DRINK LICENSES.

A. General

Can a restaurant have its license revoked as a result of actions by third parties who are not patrons of the restaurant? John D. Geathers & Justin R. Werner, *The Regulation of Alcoholic Beverages,* (S.C. Bar 2007) discuss enforcement in Chapter 6. They note that revocation and suspension actions typically involve either (1) maintaining the integrity of the Alcohol Beverage Industry; or (2) provisions aimed at protecting public health welfare and morals. The latter provisions all involve violations of the sale of alcohol (e.g., sales to underage individuals, Sunday sales, sales to intoxicated persons, drinking games, games of chance). The treatise discusses "disorderly conduct" as follows:

> It is generally recognized that an alcoholic beverage license may have his license suspended or revoked, or an administrative fine imposed upon him, for the conduct of his *patrons* in certain instances. Alcoholic beverage licensees have an affirmative duty to maintain their licensed premises in an orderly fashion, which includes a duty to supervise the *conduct of their patrons* in and around the premises; and, where a licensee fails to meet this responsibility such that his premises become disorderly or become a nuisance to the surrounding community, his license may be subject to

> suspension or revocation. However, this liability will typically only be found where the offending *conduct of the patrons* has occurred continuously or routinely such that the licensee can be held accountable for tolerating the conduct, and, thus, except in extraordinary circumstances, a liquor license will not be suspended or revoked for isolated incidents of disorderly conduct committed by *patrons* on the licensed premises.

Id. at pp. 290-91 (emphasis added). This section mentions "patrons" four times. There was no testimony that any of the violence which occurred on May 2nd was from patrons.

Footnote 246 of the treatise gives several representative cases:

> *See* S.C. Code Ann. § 61-4-580(5) (Supp. 2005) (providing that a retail beer and wine permit may be suspended or revoked if the permittee or its employees "permit any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State); *see also, e.g., Yu v. Alcoholic Beverage Control Appeals Bd.*, 4 Cal. Rptr. 2d 280, 286-287 (Ct. App. 1992) (noting that a "licensee is charged with preventing his premises from becoming a nuisance" and affirming the revocation of a convenience store's beer and wine license because of numerous illegal drug transactions committed by the store's patrons on or immediately outside of the licensed premises); *Benedetti v. Bd of Comm'rs*, 113 A.2d 44, 45-46 (N.J. Super. Ct. App. Div. 1955) upholding the revocation of a tavern's liquor license where the premises were frequently used by local prostitutes to solicit clients)...

Id. at 290. All of these cases involve actions by patrons. The Final Order states:

> The Department contends the on-premises beer and wine permit and liquor-by-the-drink license for Hookah on the River should be revoked because: (1) Appellant's business is permitting a public nuisance in violation of § 61-4-580(5); (2) the location is no longer suitable as defined in § 61-4-520 and § 61-6-910; (3) Appellant's business constitutes an immediate threat to the public's health, safety, and welfare pursuant to § 1-23-370(C), § 12-60-1340, § 61-6-1820(2), and § 61-6-1830; and (4) Appellant's business has failed to maintain a reputation for peace and good order in its community in violation of § 61-6-1820.

Id. at 11; R. p. 17, lines 18-24.

And who testified in favor of the revocation? Three officers from the Sheriff's department testified but not in favor of revocation. Who did not testify? Liquor (ABL) regulation is done by the Department of Revenue with enforcement of liquor laws in the hands of SLED. "The

investigation of administrative violations of the alcoholic beverage regulatory scheme ... is generally shared by SLED and the Department of Revenue, with SLED taking the lead on street-level law enforcement activity." Geathers, *supra*, at p. 291.

Nobody from the Department or SLED testified in support of the revocation. SLED's importance in ABL matters is explicit in South Carolina law. Section 61-4-590(A) states that "[t]he [Department of Revenue] has jurisdiction to revoke or suspend permits authorizing the sole of beer and wine." However, the Department may not order suspension or revocation until after SLED "*has conducted and completed an investigation.*" § 61-4-590(B) (emphasis added). No one from SLED testified at the hearing, much less testified that an investigation was done and it supported revocation. Significantly, not a single resident or nearby business owner/operator testified in support.

The Department's *Lawyer* – and we emphasize lawyer because not a single witness from the Department's Alcohol Division so contended – that the Appellant's licenses should be revoked because (1) the burden on law enforcement and (2) two shootings occurred.

1. A Burden on Law Enforcement

The thrust of the Department's case regarding the burden on law enforcement, as stated on page 3 of the Final Order is that the "Sheriff's Department has responded to calls at [Appellant]'s location over 100 times" and "Sergeant Torres specifically explained, there has been 102 calls for service at Appellant's location." R. p. 9, lines 17-20.

The burden on the Richland County Sheriff's Office is measured by the number of calls they were required to make at Appellant's restaurant. When a 911 call was made to the Sheriff's department, an incident report is filled out. The records custodian for the incident reports, Sgt. Torres, so testified at the ALC Hearing. Tr. p. 68, line 8-p. 69, line 2; Tr. p. 78, lines 21-25; R. p.

211, line 8-p. 212, line 2; R. p. 221, lines 21-25. Simply put, evidence on the burden on law enforcement was wildly contradictory, reflecting anywhere between five and 130 calls.

Five calls? Appellant subpoenaed the Sheriff's department incident reports prior to trial. The Sheriff's department produced just five incident reports, two of which were for the same incident. All of these were introduced into evidence. R. p. 511.

Upwards of Fourteen calls? This action was started when the DOR filed its Motion. The Motion attached an affidavit from Richland County Sheriff's Department Captain Stephen Tapler. R. p. 59. Paragraph 2 of the affidavit states that "I am aware that Richland County Sheriff's Deputies have responded to the location over fourteen times since [it opened on] October 23, 2020." Tr. p. 157, lines 2-8; R. p. 59, lines 11-14. Tapler, incidentally, did not testify at the Hearing.

Upwards of 26 or 28? Corporal Hawkes testified, "I would almost venture to say upwards of 26 or 28 calls for service." Tr. p. 155, lines 2-3; R. p. 298, lines 2-3.

Over 50 Calls? Sergeant Torres testified, "There's many incidents – there's over 50 incident reports that we have at your business." Tr. p. 119, lines 4-5; R. p. 262, lines 4-5.

102 Calls? The ALC Order revokes the Appellant's license in part because of 102 calls for service. The only testimony regarding 102 calls was from Sgt. Torres. Tr. p. 87, line 17-p. 88, line 9; R. p. 230, line 17-p. 231, line 9.

130 Calls? Corporal Hawkes testified to 130 calls although he said he didn't "think they are all 911 calls…" Tr. p. 146, lines 15-19; R. p. 289, lines 15-19. He agreed he did not bring the list of calls to the ALC Hearing. Tr. p. 146, line 24-p. 147, line 2; Tr. p. 148, lines 1-3; R. p. 289, line 24-p. 290, line 2.

In summary, Sgt. Torres testified there were 50 calls for service Incident Reports, and she also testified there were 102. Only five incident reports were attached to the Department's Motion and only five introduced into evidence at the trial. Two of those incident reports detailed the same incident, which means only four incidents were independently corroborated with incident reports

Sgt. Torres testified she brought the 50 incident reports to the ALC Hearing, Tr. p. 119, lines 4-20; R. p. 262, lines 4-20, whereas, she earlier testified she had not:

> Q. I am going way out on a limb here, you didn't bring that list of 102 calls with you?
> A. No

Tr. p. 98, lines 3-6; R. p. 241, lines 3-6.

In any event, reports reflecting only four independent incidents were introduced into evidence – not 15, upwards of 26 or 28, over 50 or 102 Incident Reports. *See S.C. Dep't of Motor Vehicles v. McCarson*, 391 SC 136, 705 S. E2d 425 (2011) (hearsay evidence in the form of a police incident report containing evidence that the testifying witness cannot independently testify to, cannot be admitted to establish probably cause in the context of an administrative hearing).

2. Other Incident Reports – Mistakes by Sheriff's Office

The Sheriff's Office made one visit to shut down the restaurant for violation of the Governor's curfew order for serving food after midnight. Corp. Hawkes admitted that the curfew had expired and this was in error. Tr. p. 200, line 23-p. 201, line 12; R. p. 343, line 23-p. 344, line 12.

The Event Center/rap club next door held a concert with a national gang leader singing. The Richland Sheriff's department parked the Gang Unit in the joint parking lot during the concert. Capt. Coggins from the Sheriff's Department Gang Squad called Mr. Oliver, the owner of Appellant's establishment, under the mistaken impression the rap concert was being held at his

restaurant. He was informed it was not being held at his restaurant. He was informed it was being held directly next door. Tr. p. 231, line 21-p. 233, line 19; R. p. 374, line 21-p. 376, line 19.

Some 2 weeks after Appellant opened for business, they received a Stop Work Order from the Sheriff's department. The Stop Work Order related another business with a similar name – the After Hookah Lounge – in the same strip mall. The Sheriff's department admitted it was in error and it was withdrawn. Tr. p. 292, line 19-p. 293, line 14; R. p. 435, line 19-p. 436, line 14.

3. Other Incident Reports – Fake 911 Calls

Appellant's business model – restaurant, alcohol, Hookah and music advertised to a primarily African American customer base – was hugely successful, and this evidently didn't sit well with competing establishments.

Jack Oliver, the owner, testified that the restaurant was a victim of between 20-30 fake 911 calls, wherein someone would call the Sheriff's Office or Fire Department and allege a false incident at Appellant's establishment. Tr. p. 252, lines 6-21; R. p. 395, lines 6-21.

Chris Sullivan, who was the events promoter for Appellant and other similar bars and restaurants, described it as follows:

> Well, the – I've advised other night life inventors in Columbia, so I'm pretty familiar with them. [Fake 911 calls is] a tactic that's used by competitors to try to put an establishment in – paint the establishment in a bad – in a bad light. So, that's why we started video recording when deputies arrived to assure that we have it well documented that – what the 911 calls were for did not exactly occur. So, we've experienced quite frequent fake 911 calls including three – at least three noise complaints, a shoot – well, one to two shootings inside, fight inside, a woman passed out. We had even one after this – after DOR filed its motion where they said a woman was passed out in the restaurant and EMS came and we weren't even opened yet.

Tr. p. 309, line 21-p. 310, line 12; R. p. 452, line 21-p. 453, line 12.

There were two fake 911 calls to the Fire Department, who came, saw there was no fire and left, "roll[ing] their eyes." Tr. p. 311, line 17-p. 312, line 1; Tr. p. 255, lines 13-24; R. p. 454, line 17-p. 455, line 1; R. p. 398, lines 13-24.

The fake 911 calls were so bad that Oliver emailed Sheriff Lott to arrange a meeting to discuss them. Tr. p. 252, lines 21-24; R. p. 395, lines 21-24. Corp. Hawkes described the fake 911 calls as follows:

> We get 911 calls all the time that we get to the area where they say there is an incident happening of whatever nature. If we arrive and there's nothing there, we've checked, we don't find anything, we clear the call and keep going.

Tr. p. 140, lines 19-24; R. p. 283, lines 19-24.

4. Other Incident Reports – Calls by Appellant

Appellant called 911 between 5-7 times. These included the shooting of the security guard, once or twice when they confiscated weapons, a domestic fight on the next block in front of the Subway restaurant, and unruly crowds at the Event Center. Tr. p. 251, line 18-p. 252, line l; Tr. p. 249, lines 6-12; Tr. p. 250, lines 10-14; R. p. 394, line 18-p. 395, line 1; R. p. 392, lines 6-12; R. p. 393, lines 10-14. Corp. Hawkes testified the Sheriff's Office would never criticize an establishment for reporting an illegal gun. Tr. p 167, line 22-p. 168, line 3; R. p. 310, line 22-p. 311, line 3.

5. Other Incident Reports – Visits by the Sheriff's Office

The Sheriff's Office visited the restaurant on numerous occasions when there were no incidents. Corp. Hawkes alone went there 30 times. Tr. p. 188, lines 4-6; R. p. 331, lines 4-6. He said the Sheriff's Office went many times to be "proactive." Tr. p. 108, lines 3-7; R. p. 251, lines 3-7. On November 18, 2020, Tactical Action Team with six officers visited the restaurant to check on their Business License. They found it in order and wrote no violations. Tr. p. 269, lines 5-18;

R. p. 412, lines 5-18. In less than a four-month span between November 2020 and February 2021, the Sheriff's Office returned on November 19, December 2, December 6, December 31, January 23, February 6 and February 11. No citations were written. Tr. p. 269, line 24-p. 273, line 10; Tr. p. 295, line 10-p. 300, line 15; R. p. 412, line 24-p. 416, line 10; R. p. 438, line 10-p. 443, line 15.

The Department parked a surveillance van in the parking lot in front of the restaurant with cameras all over it for a three-month period. Tr. p. 275, line 10-p. 277, line 10; R. p. 418, line 10-p. 420, line 10.

The visits started in late October or early November, 2020, about two weeks after the restaurant opened. The Department announced they were doing a compliance check. No violations were found and no tickets were written. Tr. p. 292, lines 4-18; R. p. 435, lines 4-18.

The harassment of the restaurant by the Sheriff's department is best exemplified by their shutting the establishment down on New Year's Eve, 2021 – usually the busiest day of the year for a bar/restaurant. The Sheriff's Office, with a K-9 unit, arrived first and parked across the street in the Rush's parking lot. Between 5-10 minutes later two fire trucks, including the Fire Marshall and the Fire Chief arrived. By that time, there were between three and five Sheriff's vehicles in the parking lot. They arrived around 11:30 PM and stayed until 1 AM, blocking the entrance to the parking lot as the New Year rang in. No smoke detector or fire alarm had gone off and no arrests or violations were found. Tr. p. 297, line 1-p. 299, line 24; Tr. p. 270, line 20-p. 272, line 7; R. p. 440, line 1-p. 442, line 24; R. p. 413, line 20-p. 415, line 7.

6. Do the above incidents constitute a burden on law enforcement?

The ALC revoked the Appellant's beer and wine and liquor licenses based upon the Appellant's burden on law enforcement. The Sheriff's department repeatedly denied Appellant

was a burden on their office. (Appellant was obviously not a burden on the DOR ABL Regulatory Division or SLED, as no one from that Division or SLED testified at the Hearing.

Corp Hawkes testified:

> Q. Right. So, I – my – my point being you – you talked about your involvement in this and you've said that the 130 calls is a lot of – is a lot of burden on the Department, correct?
>
> A. No. I didn't say that.
>
> Q. Is there not a lot of burden or you just didn't say it?
>
> A. I didn't say that.

Tr. p. 149, lines 11-16; R. p. 292, lines 11-16. He also stated "I -- I didn't say that it was . . . too much of a – of a burden." Tr. p. 196, lines 15-17; R. p. 339, lines 15-17.

He repeated the lack of burden as follows:

> Q. So, let – let's get back to where it's crystal clear. You're not saying we're a burden to a law enforcement, are you?
>
> A. No, sir. You are a – a business in the community that we have to devote a lot of time too. I didn't say it was a burden.

Tr. p. 198, lines 5-9; R. p. 341, lines 5-9. He flatly stated: "It's not a burden. We're not overworked or overwhelmed." Tr. p. 198, lines 18-19; R. p. 341, lines 18-19. He also said:

> Q. And so you – you – not only you—have you not said we – we're not a burden – we a burden to – to your department, correct.
>
> A. A burden?
>
> Q. Right.
>
> A. No, sir. We respond to calls for service.

Tr. p. 200, lines 9-13; R. p. 343, lines 9-13. Additionally, he testified:

> Q. So, your – your testimony is, we're just too – too big of burden on the Sheriff's Department, correct?

A. That was not my opinion, sir.

Q. I'm sorry.

A. I didn't say that was my opinion. No.

Tr. p. 191, lines 11-16; R. p. 334, lines 11-16.

Jack Oliver, the owner of the establishment, testified:

> But no one from the Sheriff's Department has ever come to me personally and told me that my business was a problem. And multiple people in leadership at the Sheriff's Department have my direct number.

Tr. p. 253, lines 15-20; R. p. 396, lines 15-20.

A very recent case where a permit renewal was denied based upon a drain on law enforcement was *Alhanik. LLC v. S.C. Department of Revenue*, Docket No. 20 ALJ-17-0330 (2021). The Sheriff's Office in that case (unlike this case) filed a protest to the ABL Permit renewal, and the Sheriff's department (unlike this case) testified that the applicant "is a drain on law enforcement resources and harms community welfare." Six neighbors (unlike this case) testified in opposition to the permit renewal. Not a single neighbor testified in support of our revocation.

The drain on resources included "the Department arrested more than one hundred individuals but often no one from [the license holder] Obama Mart appeared to testify at the prosecution of those arrested." Not a single person was arrested at Appellant's location. The Sheriff's Office testified as to the drain on resources as follows:

> Major Harry Polis from the Richland County Sheriff's Department testified as the Respondent's witness. The Richland County Sheriff's Department received some seven hundred seventy (770) calls to Obama Mart over a two-year period ending the day before the hearing (through August 10, 2021). These calls were for robberies, assaults, carjacking's, resisting arrest, fights, shots fired, suspicious persons, civil disturbances (with and without reports of weapons), drunkenness, disorderly conduct, prostitution, indecent exposure, loitering, vandalism, and pointing or presenting a firearm. Although not every call resulted in arrests, law enforcement

> responses to Obama Mart are a severe drain on the resources of the Sheriff's Department.

Id.

II. THE ADMINISTRATIVE LAW COURT ERRED BY FINDING THE DEPARTMENT MET ITS BURDEN OF PROOF.

The Final Order should be reversed because, simply put, the Department failed to prove its case. The Final Order notes:

> The matter is before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to a request for injunctive relief filed by the South Carolina Department of Revenue (Department) in relation to their determination issued on May 13, 2021. In their determination, the Department found Agua Pina LLC, d/b/a/ Hookah on the River (Appellant or Hookah on the River), who holds an on-premises beer and wine permit and a business liquor-by-the-drink license, knowingly permits acts that constitute a public nuisance, poses an imminent threat to public health, safety, or welfare, and lacks a reputation for peace and good order.

Id. at 1; R. p. 7. The Final Order similarly notes:

> **General Conclusions**
>
> The Department issued a Final Determination finding Appellant is in violation of section 61-4-580(A)(5) of the south Carolina Code (Supp. 2020) because Appellant's business knowingly permits a public nuisance on the licensed premises. Furthermore, the Department found that Appellant's business constitutes an "immediate threat to the public's health, safety, and welfare" pursuant to § 1-23-370(C), § 12-60-1340, § 61-6-1820(2), and § 61-6-1830. The Department also found Appellant no longer has a reputation for peace and good order in the community in violation of § 61-6-1820. Finally, the Department also determined that revocation was the appropriate penalty for the violations of § 61-6-1820. Appellant challenges those determinations.

Id. at 10; R. p. 16. Paragraph 10 states that the Department is the moving party and bears the burden of proof. *Geathers, supra,* states:

> While an aggrieved licensee is the party requesting a contested case before the ALC in an alcoholic beverage enforcement matter, the Department, as the qasi-prosecutorial party, is considered the moving party in such proceedings. Accordingly, the Department is captioned as the petitioner in

> enforcement-related contested cases and bears the burden of proving, by a preponderance of the evidence, facts demonstrating that the alleged violation was committed by the licensee.

Id. at 302. The Order should be reversed for the simple reason the Department failed to put up a single witness from the Department or SLED to prove its case.

The Department's Motion states conclusions of facts and law. Obviously the elements of the Motion must be proved at the substantive hearing and the Department was the moving party. The DOR's attorney plainly stated: "the Sheriff's Department does not revocate [*sic*] licenses, that is the action of the Department of Revenue." Tr. p. 39, lines 7-9; R. p. 182, lines 7-9. *See also* Tr. p. 42, lines 16-24; Tr. p. 43, lines 5-12; R. p. 185, lines 16-25; R. p. 186, lines 5-12. The DOR's Motion states that the Appellant's business constitutes an immediate threat to the public safety. R. p. 57. Not a single witness from the Department or SLED so testified. The Motion states that the Appellant no longer has a reputation for peace and good order. *Id.* Not a single witness from the Department or SLED so testified. None of these conclusory allegations were supported by a single witness from the ABL section of the Department or SLED who enforces liquor laws for the DOR. When the moving party fails to support its own case through testimony from its own witnesses the case should be dismissed.

S.C. Department of Revenue v. Bob Brandi Stations, Inc., Docket No. 15-ALJ-17-0507 (2016 WL 3361106), involved the sale of beer to an underage minor. SLED did not properly inventory and preserve the bottle of beer sold to the minor, and the DOR was not able to get the bottle of beer introduced into evidence. The ALC noted:

> The Department bears the burden of proof in this case by a preponderance of the evidence. The Department made numerous attempts throughout the hearing (including in its rebuttal case) to place the bottle into evidence, but was ultimately unsuccessful. In cases in which the contents of the actual container are called into question, as in this case, the Department should be fully prepared and able to lay a proper foundation for the admission of the

> evidence. The Department's failure to properly authenticate the evidence and establish to the satisfaction of the court that the bottle being offered into evidence was the same bottle the UCI purchased from the store and gave to the agent, coupled with the opposing counsel's appropriate objections, nearly resulted in a failure of proof.

Id.

The Sheriff's Office produced three witnesses who testified at length, principally on the burden of their office as well as the two shootings. All of their witnesses studiously testified, however, that they had not requested the Department to bring the revocation action. *See* Tr. p. 84, lines 16-25; R. p. 227, lines 16-25. Corporal Hawkes testified: "I have no idea how the Department of Revenue got in -- got involved, I know that they are the ones that are seeking a revocation, not the Sheriff's Department...." Tr. p. 142, line 23-p. 143, line 1; *see also* Tr. p. 175, lines 21-25; R. p. 285, line 23-p. 286, line 1; *see also* R. p. 318, lines 21-25. One so testified after off-the-record counseling by the Sheriff's attorney. Tr. p. 207, line 13-p. 208, line 1; R. p. 350, line 13-p. 351, line 1.

None of these witnesses testified that Appellant's business (1) was a threat to public safety (although they testified as to the shootings and the burden on law enforcement); (2) did not have a reputation for peace and good order; or (3) that revocation was an appropriate penalty. As stated by the Department's lawyer, only the Department of Revenue – not the Sheriff's Office – could testify that revocation was an appropriate penalty. To repeat, they all said they had not requested the Department bring the action.

When presented with the number of incidents at neighboring locations, they affirmatively stated that they would push for revocation only after a thorough analysis of the incidents. They never testified that the incidents at Appellant's location justified revocation – to the contrary, they refused to do so. (Presumably they refused to do so as Appellant had subpoenaed the incident

reports from three other neighboring establishments which were much more serious than Appellant's location and they had never requested the Department to revoke these licenses.)

By contrast, *Alhanik, supra,* was a permit renewal action – not a license revocation brought by the DOR. The DOR did not file a license revocation, notwithstanding 100 arrests and 700 incident reports. The Sheriff's Office (along with 7 other people) filed protests and the Sheriff's Office testified in support of its protest. The DOR apparently did not file a protest and was accordingly not the moving party. The Sheriff's Office affirmatively protested the burden on law enforcement.

The ALC has never granted a DHEC revocation petition which alleged environmental violations and imposed penalties without a witness from DHEC testifying in support of the allegations. In a typical DHEC action against a business which allegedly violated its water or air permit, DHEC might typically introduce testimony from expert witnesses (environmental engineers) that the permit had been violated based upon their environmental studies. But in every case a witness from DHEC would testify as to (1) the existence of the permits; (2) the permit requirements; (3) how the permits had factually been violated (e.g., the pollution); and (4) why revocation of the permit was appropriate.

Regarding the extensive testimony of DHEC witnesses in license suspension and revocation actions, *see S.C. Dep't of Health & Envtl. Control v. Bellamy's Community Care Home,* 02-ALJ -07-0123 (2002) (2002 WL 31867781); *Safety Disposal Systems, Inc. v. S.C. Dep't of Health & Envtl. Control*, 01-ALJ-07-0122 (2002) (2002 WL 1354623); and *S.C. Dep't of Health & Envtl. Control v. Thames*, 19-ALC-0397 (2021) (2021 WL 1256615).

In our case, the Department of Revenue ABL section issues and enforces ABL permits. Although Appellant's ABL permits were introduced in the records, not a single witness from the

Department testified in support of the revocation. Specifically, no one from the Department testified that the ABL permits had been violated and that based upon their experience and legal requirements the permits should be revoked.

The ALC has never ruled in favor of the DOR on a proposed assessment of taxes, interest and penalties without an auditor from the DOR testifying on why taxes and penalties are due. (There is the occasional case where all sides stipulate to the facts.) In EVERY DOR case before the ALC, there may be expert witnesses who testify that, e.g., sales taxes are owned under the particular statute, but in EVERY case the DOR auditor testifies as to the audit and why under the facts sales taxes, interest and penalties are owed, how much sales taxes, interest and penalties are owed, and why the taxpayer's calculations or legal arguments are incorrect.

The ALC has never ruled in favor of a County in a property tax matter where the assessor or auditor did not testify regarding valuation of the premises. In the typical real property tax valuation dispute, the assessor may have an expert witness (MAI Appraiser) testify as to valuation, but in EVERY case, the assessor testifies as to basis of its appraisal (comparable sales, costs, income approach), why its appraisal is correct and why the taxpayer's valuation is incorrect.

To repeat (for the third time) the Sheriff's Office testified regarding the shootings and burden on law enforcement but all their witnesses said they did not request the DOR file its motion. The Department of Revenue moved to revoke the ABL permits, but no one from the ABL Section of the Department or SLED testified (1) that the permits had been violated; (2) that Appellant permitted a public nuisance; (3) that Appellant's business constituted an immediate threat to the public health or safety; (4) Appellant no longer had a reputation for peace and good order and (5) that in their judgment as the chief regulator of ABL Licenses, the statutes cited above had been violated and revocation was an appropriate and required action. State law, § 61-4-590(B), requires

a SLED investigation. Apparently one was not done and no one from SLED testified.

And why did no one from the ABL section of the Department of Revenue testify in support of the revocation? Perhaps because they did not request the Action? They did not support the Petition? They had not sought revocation against establishments with much worse records (e.g. USC football games with hundreds of arrests after each game). The Department has no standards to file revocation actions? The Department has no standards or guidelines for what constitutes a public nuisance, an immediate threat to the public health or safety, or reputation for peace and good order such that the Department will move for revocation of ABL permits?

South Carolina law has long held that a party's failure to call a witness within his control creates a presumption that the testimony would be harmful. *See Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.,* 374 S.C. 171, 648 S.E.2d 585 (2007) (The failure of a defendant to testify raises an inference that his testimony, if it has been submitted, would have been unfavorable to his position); *McCowan v. Southerland,* 253 S.C. 9, 168 S.E.2d 573 (1969) (Defendant's unexplained failure to testify, although facts were peculiarly within his knowledge, raised inference that his testimony would have been unfavorable to his position); *Crocker v. Weathers,* 240 S.C. 412, 126 S.E.2d 335 (1962) (Failure of defendants who were only parties present at time of automobile accident killing plaintiff's decedent to testify with respect to who had been driving raised inference that their testimony would have been unfavorable to their position); *Nelson v. Coleman Co.,* 249 S.C. 652, 155 S.E.2d 917 (1967) (If party fails to produce testimony of available witness on material issue, it may be inferred that such testimony, if presented, would have been adverse to him); *Hodges v. Hodges,* 243 S.C. 299, 133 S.E.2d 816 (1963) (Failure of wife suing for divorce to call as corroborating witnesses persons present when she alleged husband became drunk created strong presumption that, had they been called, they

would not have corroborated her version); *Keller v. Provident Life & Acc. Ins. Co.,* 213 S.C. 339, 49 S.E.2d 577 (1948) (In suit against insurer to recover premiums on theory that no insurance contract was ever consummated, failure of insurer to produce as a witness the insurance agent who allegedly counter-signed policy warranted inference that his testimony if presented would have been unfavorable to insurer's contention); and *Mickle v. Dixie Sec. Life Ins. Co.,* 216 S.C. 168, 57 S.E.2d 73 (1949) (If a party fails to produce testimony of an available witness on a material issues it may be inferred that his testimony if presented would be adverse to the party who fails to call the witness.)

The failure of the DOR to produce a single witness from its ABL section or from SLED who enforces ABL statutes to testify in support of the Department's revocation action should result in the reversal of the ALC Order.

One obvious reason why no one from the ABL section testified in support of the revocation action, and why the Sheriff's Office repeatedly testified they did not request the revocation action was because they had never requested a revocation action against a similar establishment in close proximity, McCrary's Bar. McCary's Bar had one forcible rape, one unlawful conduct towards a child, nine simple assaults, two disorderly conducts, five drug violations, two missing persons, six aggravated assaults (including four shootings), and numerous other violations, as disclosed in The Richland County Incident Reports. Since 2019, there has been a simple assault (1/6/19), simply assault (2/20/19), simple assault (2/23/19), aggravated assault (3/23/19), larceny (6/19/19), theft from motor vehicle (stolen gun) (6/22/19), aggravated assault (8/19/19), aggravated assault (murder) (8/22/19), narcotics (11/17/19), theft from motor vehicle (stolen gun) (12/21/19), simple assault (2/16/20); swindle, stolen car (5/1/21). The Sheriff's department and the ALC order minimize the murder by noting it was self-defense, Tr. p. 97, lines 2-4; R. p. 240, lines 2-4, but

this just means two people were trying to murder each other. This is hardly a defense. No one testified from the Department of Revenue or the Sheriff's Office why Appellant's license should be revoked, when they never moved to revoke McCrary's Bar's licenses, which had much more serious violations.

Sgt. Torres was asked

> Q. ...you're familiar with Michael Bistro, right down the street?
> A. I am.
> Q. Okay. So they had drug narcotics violation, one; drug equipment violation, one; theft of motor vehicles, twelve; aggravated assault, one; trespassing, two; destructive damage, vandalism of property, two; disorderly conduct, one; simple assault, one; burglary, breaking and entering, one; weapons law violation, one. Would you support the – would you support the revocation of that license?
> A. Once again, it does not sound like 102 calls for service to me.

Tr. p. 95, line 18-p. 96, line 6; R. p. 238, line 18-p. 239, line 6. Sgt. Torres was also asked about the burden on law enforcement at USC football games:

> Q. And so people drink in the parking lot, don they, rightly or wrongly, when they –
>
> A. When they tailgate, yes, sir.
>
> Q. Right. Tailgate. That was the word I was looking for. So y'all – the combined law enforcement arrests hundreds of people after every football game from a combination of DUI, open container you know drinking in public, then a few fights. Every single football games that happens, doesn't it?
>
> A. Yes, sir.

Tr. p. 106, lines 15-25; R. p. 249, lines 15-25.

III. THE AMINISTRATIVE LAW COURT ERRED BY NOT FOLLOWING THE PRESUMPTION THAT WHEN A PARTY FAILS TO PRODUCE EVIDENCE WITHIN ITS SOLE CONTROL THERE IS A PRESUMPTION IT IS HARMFUL TO ITS CASE.

The ALC Order was largely based upon the Appellant's burden on law enforcement. The

ALC Order repeatedly noted that the Appellant's burden on law enforcement was demonstrated in part because "Since January, 2021, Richland County Sheriff's Department has responded to over 100 calls at Appellant's location." Final Order at 13. See also *Id.* at 3, 8 and 17; R. p. 19; R. p. 9; R. p. 14; R. p. 23.

When the Sheriff's department receives calls they fill out an incident report. The Department entered some 5 incident reports into evidence – just five.

The Department failed to introduce into evidence the other 95 incident reports. Sgt. Torres testified she had the incident reports at the Courthouse. Yet neither she nor the other witnesses produced the incident reports nor testified from them. The witnesses were well prepared and obviously another over 95 incident reports would have been helpful to their case. Yet they were not introduced into the record. Why?

The law in South Carolina is clear that the failure of a party to introduce evidence creates a presumption that the evidence would be harmful. As the Supreme Court stated in *Davis v. Sparks,* 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959):

> In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, it not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him. The most recent example of application of the rule by this court is *Amer. Mut. Fire Ins. Co. v Green,* 233 S.C. 588, 106 S.E.2d 265. Another recent case if *Matthews v. Nat. Fid. Ins. Co.,* 228 S.C. 124, 89 S.E.2d 95, citing *Robinson v. Duke Power Co.,* 213 S.C. 185, 48 S.E.2d 808.

See Cato v. Atlanta & C.A.L. Ry. Co., 164 S.C. 123, 162 S.E. 239 (1931) (Railroad's failure to produce data showing where car came from, and between what points it was used, gives rise to inference that car was employed in intrastate commerce); *Wilcox, Ives & Co. v. Jeffcoat,* 135 S.C. 149, 133 S.E. 463 (1926) (Modification of requested charge that failure or refusal to produce evidence peculiarly within knowledge or control warrants interference that it would be unfavorable

to such party's contention held erroneous); and *Smith v. Southern Ry. Co.,* 121 S.C. 94, 113 S.E. 465 (1922) (Information as to the weight and market value of cattle which died in transit was necessary in the power of plaintiff shipper to furnish, and where it was withheld it will be presumed to have been detrimental). *See also Gathers v. S.C. Elec. & Gas Co.,* 311 S.C. 81, 427 S.E.2d 687 (1993) and *Kershaw County Bd. of Ed. v. U.S. Gypsum Co.,* 302 S.C. 390, 396 S.E.2d 369 (1990) (When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party).

One obvious reason is that the incident reports had nothing to do with Appellant's restaurant. The incident reports may have all related to the rap venue. They may have related to simple traffic accidents in the busy roads near Appellant's location. They may have related to nearby bars and restaurants with numerous serious incidents.

Given the presumption that the failure or refusal to produce evidence particularly within the control of one party [Sheriff's department] warrants the inference that it would be unfavorable to the Sheriff's department, the ALC erred in relying on "Richland County Sheriff's Department has responded to over 100 calls at [Appellant's] location." The inference is that the Sheriff's department responded to five calls and the other 95 had nothing to do with Appellant's location.

IV. THE ALC ABUSED ITS DISCRETION AND COMMITTED AN EROR OF LAW BY DETERMINING THAT REVOCATION (RATHER THAN SUSPENSION OR A MONETARY FIX) WAS THE PROPER PENALTY.

The ALC abused his discretion by not imposing a monetary penalty or suspension, especially given that Appellant not violated any alcohol sales.

The ALC permanently revoked Appellant's beer and wine and liquor licenses, versus suspending them or issuing a monetary penalty. This is the most serious ABL penalty with consequences for both the present and future for the permit holder. When a license is suspended,

the permit holder cannot sell alcohol during the suspension period, and the permit holder is ineligible to receive a new license for that location for a period of one year after suspension. The holder is ineligible to receive a license at a different location only during the suspension period. By contrast, when a license is revoked, the Department is prohibited from issuing the holder a new beer and wine license for two years, and for liquor five years from the date of revocation. *See S.C. Dep't of Revenue v. Club Rio,* 392 SC 636, 709 S.E.2d 690 (2011).

A license-suspension hearing may potentially terminate an important interest of the licensee. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licensees are issued, ..., their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees.

Section 61-4-580 provides, "[A] violation of any provisions of [§ 61-4-580] is a ground for the revocation or suspension of the holder's permit." "The Department has the authority to determine an appropriate administrative penalty, within the statutory limits established by the legislature, after the parties have had an opportunity for a hearing on the issues." *S.C. Dep't of Revenue v. Sandalwood Soc. Club,* 399 S.C. 267, 278-79, 731 S.E.2d 330, 336 (Ct. App. 2012). "[I]n assessing a penalty, [the Department] 'should give effect the major purpose of a civil penalty,' which is 'deterrence.'" *Id.* at 279,731 S.E.2d at 336 (quoting *Midlands Util, Inc. v. S.C. Dep't of Health & Envtl. Control,* 313 S.C. 210, 212, 437 S.E.2d 120-121 (Ct. App. 1993)). Similarly in *S.C. Department of Revenue v. Bob Brandi Stations, Inc.*, Docket No. 15 ALJ-17-0507 (2016) (2016 WL 3361106) the ALC stated:

> "[I]nsuring compliance with the law, not punishment, is the reason for administrative penalties." S.C. Department of Revenue Procedure #13-2 (April 16, 2013). *See e.g., Midlands Util. Inc. v. S.C. Dep't of Health & Envtl. Control* 313 S.C. 210, 212, 437 S.E. 2d 120, 121 (Ct. App. 1993) ("Each line must be analyzed individually to determine if it is appropriate under the circumstances. The assessment of a civil penalty for violation of

> an environmental statute is committed to the informed discretion of the circuit court; in exercising this discretion, the court should give effect to the major purpose of a civil penalty-deterrence.").

In *S.C. Health & Envtl. Control v. Bellamy's Community Care*, 02-ALJ-07-0123 (2002) (2002 WL 1867781), the ALC stated:

> The Department imposed penalties on Respondent for allegedly violating S.C. Code Ann. Regs.61-894 and S.C. Code Ann. § 44-7-320 (Supp. 2001). Basic principles of administrative law establish that an agency bears the burden of proof establishing that a penalty is justified. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Shipley, South Carolina Administrative Law §5-79 5-80 (1989). The caption, therefore, pursuant to an Order of the Division dated June 12, 2002, was changed to reflect the correct allocation of the burden of proof.

The ALC in this case had the alternative of (1) imposing a monetary fine; (2) suspension of the licenses, or (3) revocation. The ALC imposed the most drastic penalty of revocation. An example where revocation of ABL permits was upheld is *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 647, 790 S.E. 2d 792, 796 (2016) where "Appellant had knowingly kept illegal video gaming machines inside the Corner Mart."

SCDOR Rev. Proc. #13-2 provides penalty guidelines for ABL violations. The Guidelines note that:

> The Department recognizes that insuring compliance with the law, not punishment, is the reason for administrative penalties. Accordingly, except for the most serious offenses, the Department adopts a progressive response to assessing penalties. The penalties listed below provide a monetary amount, a license suspension period, license revocation, or some combination thereof.
>
> The severity of some penalties listed below depends on the number of previous violations at the licensed location.

There are separate guidelines for Beer and Wine as well as for Liquor by the drink. For beer and wine violations, monetary penalties are assessed for first ($500) and second offenses ($1,000) with a 45 day suspension for third offenses, and revocation for the fourth offense. The

Beer and Wine guideline does impose revocation for "Permitting any act that tends to create a public nuisance." Liquor by the drink guidelines impose revocation for three kinds of offenses all relating to the sale of alcohol but public nuisance is not included.

Given the wildly contradictory evidence regarding the incident reports and the fact there was no evidence linking the May 2nd shooting to patrons of Appellants, the ALC should have issued a monetary penalty.

CONCLUSION

Regrettably, there has been one undisputed shooting, and one disputed shooting in 2021. Clearly crowds from rap concerts have caused problems for both Appellant and law enforcement.

The ALC Order revoking Appellant's licenses is based upon the shootings and the burden on law enforcement. The ALC Order repeatedly notes 102 calls/visits to the establishment. But the incident reports were not introduced into the record and there was no testimony regarding what happened or caused the other 98 or so incident reports. Not a single witness testified to the other 98. Oral testimony when the incident reports were not entered into the record are inadmissible. *See Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E. 2d 607 (2015) ("We hold Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence" and "[I]t is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.'"") (citations omitted).

Appellant testified to numerous visits by the Sheriff's department but no tickets were written or violations found. Indeed, there was not a single arrest for any violation, and no ABL violations by Appellant.

Revocation of licenses is the most serious ABL penalty. None of the Sheriff's witnesses

had ever testified at a revocation hearing. The ALC Order sets a precedent whereby a bar with SLED-certified security guards policing the exterior, frisking and using metal detector wands, bouncers on the inside, and numerous surveillance cameras is subject to revocation – for the simple reason it was situated next to a rap club. Very few bars and restaurants employ that level of security.

There was *no* testimony that the first shooter ever set foot in the Appellant's establishment.

Lastly, revocation when no witness from the Department of Revenue requested revocation or testified in support of it and the Sheriff's Office did not request it appears unprecedented.

The evidence that was not introduced – 102 incident reports, the Appellant's videos and the Sheriff's Office videos outweigh the evidence that was introduced, and the Sheriff's deputy that signed the original affidavit in support of the motion never testified.

Finally, revocation where the SLED investigation required by § 61-4-590(B) was not done is unprecedented and sets a dangerous precedent.

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February 17, 2022
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000886
Administrative Law Court Case No. 21-ALJ-17-0143-CC

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

v.

Agua Pina, LLC d/b/a Hookah on the River, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Brief of Appellant** complies with Rule 211(b), SCACR.

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