No. 12–108788-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MCJS, INC. DBA REED'S RINGSIDE SPORTSBAR AND GRILL,
Appellant

vs.

KANSAS DEPARTMENT OF REVENUE
Appellee

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County
The Honorable Larry D. Hendricks, Judge
District Court Case No. 12-C-01

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FACTS

This appeal involves an alleged violation of K.S.A. 41-2615(a), for knowingly or unknowingly permitting a minor to possess or consume alcohol on licensee's premises, M.C.J.S. Inc., DBA Reeds Sportsbar and Grill (hereafter Reed's). In the factual statement of Alcoholic Beverage Control Division's brief, (hereafter ABC), ABC asserts, "No one at Reed's checked Shupe's identification when he entered Reed's or during the time he was there. (*Appellee's Brief*, p. 1, citing R. 1, p. 145 and 147). At the hearing held before the Director of ABC, Damon and Derrick Reed, the owners of Reed's, testified. (R. I, p. 176-191). Damon Reed testified he was not aware of the alleged event at Reed's, until he received a citation in the mail. (R. I, p. 176). Damon testified Reed's completely prides themselves on their ID policy. (R. I, p. 180). The bartender working on the night of the alleged incident, Mr. Matt Ketter, left Reed's employment by the time the Reeds' received the citation in the mail, and later efforts for process servers to reach him were unsuccessful. (R. I, p. 180-81). Damon testified Mr. Ketter would have been well-aware of the ID policy at Reed's, as they let all employees know they terminate employment immediately, if such policy is ever violated. When an employee is hired, they go through a training process, part of which includes the ID policy, and Reed's past commendation(s) for their ID practices. (R. I, p. 181).

Damon did not believe someone on the staff at Reed's would not have asked for identification from Shupe during the course of the evening of the alleged event, as they take pride in their policy on minors with regard to identification. (R. I, p. 182). Damon was at the business earlier on the day of the alleged event, but was not present that

evening. (R. I, p. 182). Damon indicated on Fridays and Saturdays, Reed's has a doorman. The doorman checks everyone's ID, and then the waitresses and bartenders check persons again, through the course of the evening. On Sundays through Thursdays, there is no doorman, and the waitresses and bartenders ID the customers. After certain hours, minors are not allowed in the business, and minors already inside are told to leave, at that time. (R. I, p. 183-84). The waitresses are strict about having minors leave at the end of the designated time period. (R. I, p. 184). If it is questionable whether there is a minor present at the end of the designated time period, the employees will ask for ID, and if they are not of age, they make them leave, immediately. (R. I, p. 185). Reed's has a triple check system - the customers's ID's are check by the doorman, and the waitresses and bartenders also check ID's. For six years prior to this alleged event, nothing similar ever occurred. (R. I, p. 186).

Derrick Reed testified there is a dining and cocktail side of the business. The dining area closes at 11:00 p.m., during the week, and at 12:00 a.m., during the weekends. If someone is in the dining area at 12:00 p.m., there is a check done to see if the person is under 21. After they eat, persons sitting there drinking are checked for ID. It is a policy in Reed's bar, which they are strict about. People's ID's are constantly checked, and they keep checking them. (R. I, p. 188-89). At midnight, someone announces in the dining area, food service is over, and, if the person is under 21, they are asked to leave. (R. I, p. 189). Reed's maintain with regard to ABC's assertion Shupe came into the business after midnight, no dining area would have been open, and Shupe would have been checked for ID when he came in. The policy is they are checked when they come in, and if they are

under 21, and the business is not serving food, the person is not allowed inside. (R. I, p. 189). Derrick testified Shupe was possibly on the patio, and snuck inside, but he would not have been allowed in, without showing an ID, unless he had a fake one. (R. I, p. 190). Derrick would not know whether Shupe showed a fake ID, as he did not become aware of the alleged event until he received a citation in the mail, almost thirty days later. At that point, the video camera system the business maintains would not have existed, as it is only preserved for 14 days. (R. I, p. 177 and 190).

Derrick was never advised Officer Chapman came into the business to ask Mr. Ketter some questions. Mr. Ketter was not fined or ticketed when Chapman went to see him. (R. I, p. 190). It is common for ABC representatives to stop by the business to talk to employees. Some previous letters of commendation reflect ABC representatives went to the business and talked to an employee, but this is not relayed to Derrick unless the representative wants to talk to an owner. Derrick was not aware of any effort by Mr. Ketter or Officer Chapman to contact him, on July 3, 2010. Officer Chapman never left a card, or asked an owner to call him. (R. I, p. 191).

ABC asserts Shupe's first written statement to officers, provided Johnny Bourdon purchased pitchers of beer at Reed's, and Shupe consumed some of the beer. (*Appellee's Brief*, p. 2, citing R. I, p. 116). ABC asserts in Shupe's second written statement to officers, he claimed he purchased a pitcher of beer at Reed's. (*Id.*, at p. 2, citing R. I, p. 151-52). ABC asserts at the hearing before the ABC director, Shupe testified he purchased two pitchers of beer at Reed's. (*Id.*, at p. 2, citing R. I, p. 146). It is correct Shupe testified at the hearing he bought two pitchers of beer with cash. However, this

assertion overlooks additional testimony from Shupe at the hearing. For example, Mr. Shupe admitted he was currently on diversion for charges arising after this alleged event, including eluding police. Shupe's second statement shows a date of July 30, and was also signed by his attorney. (R. I, p. 152-54). The first statement provided on July 3, 2010, and the second statement on July 30, 2010 were clearly legible, and in Shupe's handwriting. (R. I, p. 153).

Shupe's blood was taken at 4:00 a.m., on the morning of the alleged event, and it was determined his breath alcohol reading was .09. He agreed based on material distributed by ABC, to get a breath-alcohol reading of above .08 percent, it would take someone of Shupe's height and weight about four beers to get to such a reading. He further agreed if he had two pitchers of beer, and four cans of beer later, his breath alcohol content should have been at least .20. (R. I, p. 154). Shupe allegedly left Reed's at 2:00 a.m. or 2:30 a.m., and his blood was taken between 4:00 a.m. and 5:00 a.m. His breath alcohol result does not correspond with activities he alleges occurred at Reed's, given the rate of elimination set forth in ABC materials. (R. I, p. 154-55). Shupe was charged with DUI, fleeing and eluding, and was speeding, at 104 miles per hour. (R. I, p. 155-56).

Shupe's initial statement taken on Jule 3, 2010 provides, "Soon as I walked in, got to the table, there was a couple of pitchers of beer. Started drinking." There was no mention of going to the bar and purchasing beer, and no reference to buying a pitcher of beer at the table. (R. I, p. 157). After Shupe had retained an attorney, and was working out a deal on his case, and had been released from custody for three weeks, he wrote a

second statement on July 30, 2010, providing he bought one pitcher of beer at the end of the night. Shupe then testified at the hearing, "I first got there, went straight up to the bar, got a pitcher of beer, went back to the table..." His second statement did not mention buying a pitcher of beer when he walked into the bar. (R. I, p. 145, 158). Shupe considered his testimony at the hearing part of his cooperation agreement to satisfy the terms of his diversion agreement. (R. I, p. 159-60).

Shupe indicates with regard to his second written statement, he purchased a pitcher of beer, because, when they got to Reed's, he and Johnny split the cost of one pitcher, and officers asked him if he paid with his own money, or bought the pitcher by himself, or whether he split it, and Shupe bought the last pitcher with his own money. He split the cost of the first pitcher with Johnny. (R. I, p. 160-61). Shupe indicated Johnny gave the guy the money. Shupe testified, "we were both there...I handed him (Johnny) the money, Johnny got the cups and he took the pitcher and went back to the table. He (Johnny) carried the beer." (R. I, p. 161). Shupe indicated law enforcement told him to "write down who handed the money. Johnny handed the money. So that means he bought it. Shupe indicated, "I also gave him money to buy that pitcher. So from my understanding - we both bought it, which means I would have bought one and a half pitchers of beer." (R. I, p. 164).

ABC asserts, "during the hearing, Johnny Bourdon testified Shupe bought a pitcher of beer, although he did not see him do it." (R. I, p. 133 and 135). Mr. Bourdon also testified he *did not recall any interaction between Mr. Shupe and any of the employees* at the bar. Bourdon testified, "Like I said, I didn't even see him go up to the

bar. I seen him coming out from that general direction." (R. I, p. 141). Bourdon did not know whether Shupe took beer off of somebody's table when their backs were turned, and indicated it was possible, as it was pretty crowded. All Bourdon saw was Mr. Shupe coming back with a pitcher, and whether he picked it up off of a table while somebody else was doing something, Bourdon did not know where he got it. (R. I, p. 143) On July 5, 2010, Officer Chapman talked to Bourdon, but he never told Chapman Shupe purchased any beer. (R. I, p. 137).

ARGUMENTS AND AUTHORITY

I. DID THE AGENCY CORRECTLY INTERPRET AND APPLY K.S.A. 41-2615 TO THE FACTS?

ABC maintains K.S.A. 41-2615(a) creates absolute civil liability on licensees. (*Appellee's Brief*, p. 4). The Agency's interpretation has always been the "knowingly or unknowingly permit" language of the statute, creates absolute liability on a licensee, when a minor is found in possession of alcohol on its licensed premises. (*Id.*, at p. 4). ABC notes in *State v. Sleeth*, 8 Kan. App. 2d 652, 656, 664 P.2d 883 (1983), the Court of Appeals found the conspicuous absence of the "knowingly or unknowingly" phrase, from the sentence applying to criminal prosecution of owners, indicated a legislative intent to infuse that provision with a scienter requirement. In other words, ABC argues, the first sentence applying to the regulatory enforcement of clubs, created an absolute liability standard, while the criminal provision, applying to the individual, did not. The *Sleeth* Court found knowledge of the incident was not a prerequisite to holding the club liable

for a violation. (*Id.*, at p. 5, citing *Sleeth*, at 656.) It is important to note, K.S.A. 41-2615 read as follows, at the time *Sleeth* was decided:

> "(a) No club shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt beverage on its premises by a minor...The owner of any club, or any officer or employee thereof, who shall permit the consumption of alcoholic liquor or cereal malt beverage on the premises of the club by a minor shall be deemed guilty of a misdemeanor."
>
> In 1987, the statute was amended to:
>
> "(a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt by a minor on premises where alcoholic beverages are sold by such licensee or permit holder...
>
> (b) Violation of this section is a misdemeanor punishable by a fine of not less than $100 and not more than $250 or imprisonment not exceeding 30 days, or both..."

ABC points out the holding in *Sleeth* was reaffirmed four years later in *Sanctuary, Inc. v. Smith*, 12 Kan. App. 2d 38, 733 P.2d 38, 733 P.2d 839 (1987). (*Appellee's Brief*, p. 5-6). ABC provides the Court in *State v. JC Sports Bar, Inc.*, 253 Kan. 815, 861 P.2d 1334 (1993) found, "it appears to us the legislature in adopting the language 'knowingly or unknowingly permit', intended some action or inaction of greater magnitude, than merely opening for business on the night in question, which allowed the prohibited conduct to occur, before criminal liability would attach." (*Appellee's Brief*, p. 6). ABC argues in *JC Sports Bar*, the Kansas Supreme Court addressed only a criminal issue... could a bar and its owners be found criminally liable for the illegal actions of a minor on their premises, when all evidence indicated no one in the bar provided the beer to the minor, or even knew he had taken a drink from someone else's cup? ABC argues the court found the bar and its owners could not be found criminally liable, but did not

address the civil application of the statute. (*Appellee's Brief*, p. 6-7). ABC argues nothing in the *JC Sports Bar* opinion reverses, or negates, the findings by the Court in *Smith* and *Sleeth*. ABC also provides the conclusion by the Court in *JC Sports Bar:* "the statute does not establish absolute liability under the facts of this case and does not clearly indicate a legislative purpose to do so." (*Appellee's Brief*, p. 7, citing *JC Sports Bar*, at 823.) ABC argues the public policy of the State of Kansas has been minors shall not possess or consume alcoholic liquor, and since 1965, K.S.A. 41-2615 has been interpreted as applying absolute liability on licensees. ABC argues in the 20 years since *JC Sports Bar* was decided, the statute has continued to be interpreted by the agency, and district courts, as applying absolute civil liability on licensees. ABC notes, at no time has the legislature, the maker of public policy, taken any action to correct or change that interpretation. (*Appellee's Brief*, p. 8). ABC argues it is logical a criminal court, and an administrative agency, may interpret and apply the same statute differently, and the same statute may be construed more liberally by an administrative agency, in a civil action. (*Appellee's Brief*, p. 7).

Although not binding, it is persuasive there is at least one recent district court decision finding K.S.A. 41-2615(a) does not provide for absolute civil liability. In *SMG F&B Kansas LLC, d/b/a Savor v. Kansas Department of Revenue*, 11-C-1489, Judge Franklin R. Theis, Shawnee County District Court Judge, concluded in a *Memorandum Opinion*, (attached as *Appendix A*), "the statute controlling the basis for the administrative order issued against petitioner, in its use of "knowingly and unknowingly permit", is the same as it existed in 1992." Judge Theis found the 1993 amendment to the statute added

the term "or consumption" to its prohibitions, and added a proviso excepting employees 18 to 21, with certain supervision, to dispense alcoholic liquor or cereal malt beverages. However, no text affected the language in the 1992 statute of "knowingly or unknowingly permit", as construed by the Kansas Supreme Court in *JC Sports Bar*. Judge Theis noted the statute was amended in 1994 to add the following new section:

> "(c) it shall be a defense to a prosecution under this section if: (1) the defendant permitted the minor to possess or consume the alcoholic liquor or cereal malt beverage with reasonable cause to believe the minor was 21 or more years of age; and (2) to possess or consume the alcoholic liquor or cereal malt beverage, the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document containing a photograph of the minor and purporting to establish that such minor was 21 or more years of age." L. 1994, ch. 300, §2.

Judge Theis set forth, in 2008, K.S.A. 21-2615 was amended again, but only to substitute in Section (c) above, for the word, "containing", the phrase, "that reasonably appears to contain." Judge Theis found in terms of the opinion issued by the Kansas Supreme Court in the *JC Sport's Bar* case, nothing in regard to the "knowingly or unknowingly permit" language of K.S.A. (1992 Supp.) K.S.A. 41-4615(a) has changed, except to add "possession", to the earlier proscription of "consumption", alone. Judge Theis indicated though *JC Sports Bar's* declaration of K.S.A. 41-2615(a)'s meaning and reach had been the declared law governing it, for over seventeen years, at the time of the occurrence in question, the Kansas Legislature had never acted to restrict *JC Sports Bar* Court's declaration of its meaning. Judge Theis indicated, "the agency would possess no power to change its governing law, whether that be by rule or regulation nor, seemingly, could the agency change it through the adoption of the opinion of a quasi-judicial official,

on administrative review of the opinion, as was done here." *Memorandum Opinion*, at p. 13, citing *Schmidt v. Kansas Bd. Of Technical Professions*, 271 Kan. 206, 214 (2001).

Judge Theis further provided:

> "The upshot of this inability to ameliorate or limit the *JC Sports Bar* holding for agency enforcement is the statute, that is to say, the statute has been construed to require an intentional human action or omission, an actor, so to speak, tied to the licensee, that permitted or allowed the occurrence in question to come about. While the Kansas Supreme Court in the *JC Sports Bar* case noted prior opinions issued by the Court of Appeals that referenced a basis for distinguishing between criminal and civil enforcement in the application of then existing K.S.A. 41-2615(a), (*State v. Sleeth*, 8 Kan. App. 2d 652 (1983); *Sanctuary, Inc. v. Smith*, 12 Kan. App. 2d 38 (1987)), the *JC Sports Bar* Court also noted while the "knowingly or unknowingly permit" language in K.S.A. 41-2615(a) had not changed from the time of the events in the *Sleeth* and *Sanctuary*, nevertheless, the context in which it appeared, had. The *Sleeth* events occurred in 1982 and the *Sleeth* Opinion was delivered in June, 1983. The *Sanctuary* events occurred at some point prior to the *Sanctuary* Court's decision, which was rendered on March 12, 1987." *Memorandum Opinion*, p. 15.
>
> "Further, it should be noted it was just after the *Sanctuary* opinion was issued, ... on March 12, 1987, the legislature, on April 15, 1987, amended K.S.A. 41-2615(a), made effective, April 13, 1987, to change the language in this section such as to destroy any basis for construing, as did the *Sleeth* case, and adopted by *Sanctuary*, the dichotomy and basis for a differing application between civil versus criminal enforcement proceedings depending on whether it was the club or licensee, or whether it was an officer or employee that was the particular subject of the proceeding. The legislative change could seem none other than coming from a recognition by the legislature, perhaps, belatedly, in terms of the *Sleeth* case, of the legal ramifications of the *Sleeth* and *Sanctuary* decisions and, hence, the 1987 amendment can be well viewed as intended to harmonize any basis for a differing enforcement. While the *Sanctuary* case did not directly involve construction of "knowingly and unknowingly", it did rely on the *Sleeth* holding." *Memorandum Opinion*, p. 16, citing *JC Sports Bar, Inc.* 253 Kan. at 820-21.

Judge Theis indicated *JC Sports Bar, Inc.* is the last authority on what "knowingly and unknowingly permit" means, in the context of this statute. He further ruled the form in which such terms may be applied, while changing, perhaps, the burden of proof, should

not change the meaning and interpretation of the statute. He found the hearing officer and the agency misapplied the *JC Sports Bar* case, which resulted in the petitioner being subjected to a fine. Thus, while the agency was acting fully within its authority under K.S.A. 41-2633(a), and its operative rules to independently cite the petitioner for a violation of K.S.A. 41-2615(a) under its administrative authority of K.A.R. 14-21-11, it, nevertheless, misapplied K.S.A. 41-2615(a) in the adjudication of the complaint. See *Memorandum Opinion*, at p. 17.

The district court further found the factual record did not support the agency's finding as a matter of law, notwithstanding the erroneous application of the *JC Sports Bar, Inc.* case to it. The Court found no employee was identified as an actor in the offense, nor was there any pattern of conduct by the licensee as a company or organization. The record only established the minor's mother as the only instigator of the violation. The minor's possession was derivative of his mother, which beer had been obtained by her from Petitioner's vendor at some earlier point. These facts did not support the finding made, as there clearly was no evidence of human conduct tied to the Petitioner "permitting" the minor's possession of beer to occur. Even under a minimum civil burden of proof, the facts were wholly insufficient to sustain the finding of a violation. In addition, the minor and his mother were employees of the petitioner, but they were not working at that venue at the time. *Memorandum Opinion*, at p. 19-20.

In accord with Judge Theis' decision above, with regard to *JC Sport's Bar*, nothing in regard to the "knowingly or unknowingly permit" language of K.S.A. (1992 Supp.) K.S.A. 41-4615(a) has changed, except, to add "possession" to the earlier

proscription of "consumption", alone. Though *JC Sports Bar's* declaration of K.S.A. 41-2615(a)'s meaning and reach has been the declared law governing it for over twenty years, the Kansas legislature has never acted to restrict *JC Sports Bar* Court's declaration of its meaning. *JC Sports Bar* remains the governing law, and the agency has misapplied K.S.A. 41-2615(a).

II. WHETHER REED'S KNOWINGLY OR UNKNOWINGLY PERMITTED A MINOR TO POSSESS OR CONSUME ALCOHOLIC LIQUOR ON LICENSED PREMISES?

ABC contends Reed's permitted Shupe to possess or consume liquor. *(Appellee's Brief*, p. 8). ABC contends Shupe purchased at least one pitcher of beer from an employee of Reed's. (R. I, p. 146, 151-52). ABC contends testimony showed employees passed by, and cleared the table, where Shupe was in possession of, and consuming alcoholic liquor. (R. I, p. 146-17). ABC contends Shupe testified he was clearly consuming beer at the table, and saw several employees pass by, or wait on his table, during the time he was doing so. (R. I, p. 147-48). ABC argues employees of Reed's knew, or should of known, Shupe was consuming alcoholic liquor on the licensed premises, and did nothing to stop him. (*Appellee's Brief*, p. 9). ABC provides no one ever checked Shupe's identification, or asked his age, during the time he was at Reed's, nor removed beer from the table, or otherwise prevented Shupe from consuming it. (R. I, p. 145, 147). First, Shupe's testimony is not reliable, given the substantial difference between his first and second written statements, and his testimony at the hearing before the Director. Later in the hearing, Shupe testified as to why he wrote in his second statement, he purchased one pitcher of beer. Shupe stated, "Because, when we got there,

me and Johnny both split the cost of that one pitcher, and then, I thought when I wrote that second one, they asked: Did you pay with your own money, by yourself, did you buy a pitcher by yourself? Did you split it? And I bought that last pitcher all with my own money." (R. I, p. 160-61). He further testified, "Johnny gave him the money... that's why I said Johnny gave the guy the money... we were both there, though. Because, I handed him the money, Johnny got the cups, and took the pitcher, and went back to the table, and he carried the beer." (R. I, p. 161). Bourdon testified he did not see Shupe purchase any beer. (R. I, p. 141). Even though Shupe testified he was drinking, as waitresses walked by, and there was "no way they could not tell he was drinking," no employee has been identified to date, as a person who allegedly saw Shupe consume beer. There was testimony Reed's was "massively crowded," and people were mingling, on the evening of alleged events. (R. I, p. 140, 143). Damon and Derrick Reed testified as to their strict ID policy, as it relates to minors. Shupe alleges he avoided being checked for ID, but never physically purchased any beer. There is no evidence anyone at Reed's served Shupe with alcohol. To date, no employee has been identified as having observed Shupe, let alone observed him consume or possess alcohol. The fact Shupe was allegedly in the bar, is insufficient to show Reed's, or any employees at Reed's, violated K.S.A. 41-2615(a). There is no evidence to support Reed's, or any employees thereof, acquiesced to Shupe's alleged acts, as there is no evidence any employee of Reed's ever saw Shupe. At a minimum, it would seem an identifiable employee would have had to see Shupe, in order for there to be a possibility of a violation. No such evidence exists. Shupe's testimony, "there was no way they did not see him," is vague and unreliable, as he gave three

different and conflicting versions of events surrounding the evening. It is notable, he never even generally describes any employee who he thinks may have seen him - whether it was a male, female, etc. ABC cannot establish any acts or omissions by Reed's, or it's employees, which suggest they permitted Shupe to consume or possess alcohol. For these same reasons, it can further be said the agency's action was not based on a determination of fact, that was supported to the appropriate standard of proof, by evidence which is substantial, when viewed in the light of the record as a whole.

III. WAS THE AGENCY ACTION BASED ON A DETERMINATION OF FACT, SUPPORTED TO THE APPROPRIATE STANDARD OF PROOF BY EVIDENCE WHICH IS SUBSTANTIAL WHEN VIEWED IN LIGHT OF THE RECORD AS A WHOLE

ABC asserts the agency action was based on a determination of fact, supported to the appropriate standard of proof, by evidence which is substantial, when viewed in light of the record as a whole. (*Appellee's Brief*, p. 10). ABC asserts the record supports a finding Shupe did possess and consume alcoholic liquor on Reed's licensed premises, citing in support Shupe's testimony he purchased and consumed beer at Reed's, and Bourdon's testimony he purchased beer at Reed's, and shared beer with Shupe. (*Appellee's Brief*, p. 12, citing R. I, p. 133). ABC's position is this testimony is consistent with the fact Shupe consumed alcoholic liquor while on the premises. (*Appellee's Brief*, p. 12). However, this evidence is insufficient to show Reed's, or any employee acted, or failed to act, to show a violation of K.S.A. 41-2615(a) occurred. As a result, the agency's action was not based on a determination of fact, supported to the appropriate standard of proof, by evidence which is substantial, when viewed in light of

the record as a whole. The evidence fails to show it was more probable than not, a violation of K.S.A. 41-2615(a) occurred.

WHEREFORE, based on the above and foregoing, the decision and findings of the District Court should be reversed, and the agency action against this Appellant should be dismissed, and for any and all such other relief this court deems necessary.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 17th day of June, 2013, I caused to be filed with the Clerk of the Appellate Courts, 301 SW 10th Ave, 3rd Floor, Topeka, Kansas 66612, sixteen (16) copies of the above and foregoing, **"REPLY BRIEF OF APPELLANT,"** and two copies were delivered to the office of Sarah Byrne, Assistant Attorney General, Alcoholic Beverage Control Division, Kansas Department of Revenue, Docking State Office Building, 915 SW Harrison, #214, Topeka, Kansas 66612-1588.

ROBIN ALVAREZ/ANNE GEIER
Administrative Assistants

APPELLANT'S APPENDIX A

SHAWNEE COUNTY DISTRICT COURT OPINION
SMG F&B Kansas LLC, d/b/a Savor v. Kansas Department of Revenue,
11-C-1489 (March 28, 2013)

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

SMG F&B KANSAS, LLC d/b/a SAVOR, Petitioner, vs. KANSAS DEPARTMENT OF REVENUE, Respondent.	Case No. 11C1489

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE:

This is an appeal pursuant to the Kansas Judicial Review Act, as amended, K.S.A. 77-601 *et seq.* The agency, the Kansas Department of Revenue, is charged with enforcing the Club and Drinking Establishment Act as K.S.A. 41-2601 *et seq.* is referred to. On February 1, 2011, the Petitioner, a "drinking establishment/ caterer" licensee under the *Act*, was operating as such

at the time at an event in the Intrust Bank Arena in Sedgwick County, Kansas, when a revenue enforcement agent of the agency's Alcoholic Beverage Control Division, cited a 19 year old male with a minor in possession offense. An administrative citation was served apparently shortly thereafter on the Petitioner's Food and Beverage Manager. On February 6, 2011, the licensee Petitioner was served by mail with a copy of such citation. On March 24, 2011, a Notice of Administrative Action was served on the Petitioner proposing a finding under the Act of a violation of K.S.A. 41-2615(a) and proposing a fine of $750.00 unless contested by the Petitioner. The Petitioner contested the *Notice of Administrative Action* and was subsequently, after a hearing, adjudicated liable and fined, as earlier proposed, in the amount of $750.00. This decision was affirmed by the agency head on Petitioner's Petition for Review and Petitioner now has this appeal of that finding and order before the Court.

FACTS OF RECORD:

At the hearing held on May 18, 2011, before the

presiding officer, live testimony was forgone and the parties, by counsel, stipulated to the enforcement officer's, who issued the citation, report and narrative as the facts governing the hearing:

> "MS. BYRNE: And we have another case outstanding, Director, with the same legal issue that's been argued that we're going to provide written arguments to you. If you'd like, we can do that with this and provide written arguments based on the-- the facts that were presented in the narrative, you know, and you can make a determination as to whether the *JC Sports Bar* case governs or not.
>
> PRESIDING OFFICER REYNOLDSON: Okay.
>
> MS. BYRNE: If you have no objection. That way we won't have to go to hearing, we'll just argue the legal, and we can, what, you know, 30 days or--
>
> MS. STANDIFER: Okay."

ROA at pps. 22-23: TR at p. 5, l. 19 - p. 6, l.8.

Ms. Story's, the revenue agent's, narrative is as follows:

> "**INVESTIGATIVE NARRATIVE**
>
> **Kansas Department of Revenue** **Case No.**: 2011-28-0009
> **Investigation and Criminal Enforcement Agent Name**: Christine A Story
> **Date of Report: February 10, 2011 Investigation Type**: Bar Check - Public
>
> Investigative Narrative
> Savor

2011-28-0009

I, Christine Story, a Revenue Enforcement Agent with the Kansas Alcoholic Beverage Control, being first duly sworn on oath, say: The following offense has been committed:

41-2615. Possession or consumption by minor prohibited. (a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the possession or consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold by such licensee or permit holder, except that a licensee's or permit holder's employee who is not less than 18 years of age may serve alcoholic liquor or cereal malt beverage under the on-premises supervision of the licensee or permit holder, or an employee who is 21 years of age or older.

SMG F&B Kansas LLC
Savor
500 E. Waterman
Wichita, Kansas
67202
License #13-002-2645-01

This report is based on the following facts:

On February 1, 2011, I worked the Kid Rock concert at Intrust Bank Arena in Sedgwick County, Kansas, to determine if persons less than 21 years of age were consuming and/or possessing alcohol on the licensed premises, I was wearing a black polo with the ABC Badge on the left with the word Enforcement Agent embroidered underneath. In addition my badge was displayed on my belt along with other equipment commonly utilized by law enforcement officers.

At approximately 1915 hours on the above date, I entered Intrust Bank Arena, located at 500 E. Waterman, Wichita, Sedgwick County, Kansas, License 13-002-2045-01. At approximately 2035 hours, I

observed a white male with a youthful appearance standing outside the women's restroom near section 105 (2nd level). The individual, later identified as 19 year old Bronson Carter Mans was holding a clear plastic cup with an amber colored liquid and foamy top. Through my training and experience I believed the cup contained beer. I approached Mr. Mans and identified myself by displaying my badge and asked to see his identification Mr. Mans said 'I'm holding it for my mom'. I again asked to see his identification and Mr. Mans removed his wallet from his back pocket and held it out. I asked if I could remove the identification from the wallet and Mr. Mans said yes. During my contact with Mr. Mans, I noticed his eyes were bloodshot and glassy and his speech was slurred at times. I asked Mr. Mans if he'd been drinking alcohol and he said no. I reviewed his Kansas driver's license and learned Mr. Mans was only 19 years of age. At that time a white female in her 40's, later identified as Shannon L. Mans, exited the women's room and took the beer from Mr. Mans and said to me 'this is my beer, I asked him to hold it for me'. I asked Ms. Mans if she purchased alcohol for her son, Mr. Mans, and she said no. She also stated he does not take any prescription drugs. I asked Ms. Mans if Mr. Mans had been drinking and she said 'not with me'. I seized the alcohol from Ms. Mans at that time and she said 'don't take my beer it cost me $7.50.' I then placed Mr. Mans in handcuffs and escorted him and Ms. Mans to the Sheriff's office on the lower level for processing. Due to the aforementioned indicators I believed Mr. Mans had consumed alcohol and asked if he was able to walk down the stairs. He replied 'yes'. While descending the stairs, I had to help Mr. Mans maintain his balance twice and had to instruct him several times to slow down.

While processing Mr. Mans, I told him I knew he had been drinking alcohol and he shook his head in the affirmative and said yeah. I asked him if he was willing to blow into a PBT (Portable Breath Test) and he declined.

I read Miranda at 2050 hours first to Ms. Mans then to Mr. Mans and both invoked.

The plastic cup and sample of beer will be stored as evidence.

During my contact with Brandon Mans and Shannon Mans I learned they were employees of Savor. I contacted the Food & Beverage Manager, Greg Read, and explained the situation to him. I served Mr. Read with a copy of the administrative citation. On February 6, 2011, I mailed a copy of the administrative citation to SMG F&B Kansas LLC, d.b.a. Savor, 500 E. Waterman, Wichita, Kansas 67202.

It should be noted Savor had the following staff working the concert;

10 Alcohol Control Team
90 T-Shirt Security
17 flo
or/stage area
16 event level hallways, dressing rooms, and exterior doors
23 bag searchers at entrance
2 rovers on lower concourse
4 rovers on upper concourse
8 show specific

6 EMT's
13 Sheriff's Officers
1 Fire Marshall

111 Guest Services Staff
8 parking lot entrances I 1
14 arena floor
36 event level
30 lower concourse
19 upper concourse
4 top level"

Subsequent to this stipulation, the hearing officer

entered an opinion, one primarily, if not exclusively, based on his interpretation of the text of K.S.A. 41-2615(a), which provides:

> "(a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the possession or consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold by such licensee or permit holder, except that a licensee's or permit holder's employee who is not less than 18 years of age may serve alcoholic liquor or cereal malt beverage under the on-premises supervision of the licensee or permit holder, or an employee who is 21 years of age or older."

The hearing officer determined that the prohibitions advanced by K.S.A. 41-2615(a), in the context of an administrative proceeding, provided for absolute liability. (ROA: at pp. 84-88: *Initial Order*). He distinguished the last court construction of that statute, which held that statute did *not* create an absolute liability offense, hence, requiring some intent, *ergo*, cognition, to any act or omission before liability would attach (*State v. JC Sports Bar, Inc.*, 253 Kan. 815 (1993)), by virtue of its then current application in an administrative context, rather than

in a criminal context. *Id.* at pps. 85-86, ¶'s 10-12, 17. This *Initial Order* was affirmed on review by the agency head on the same grounds employed by the presiding officer. ROA at pps. 109-112: *Final Order Following Review.*

CONCLUSIONS OF LAW

The statute controlling the basis for the administrative order issued against Petitioner here, SMG F&B Kansas, LLC dba Savor, in its use of "knowingly and unknowingly permit" is the same as it existed in May 1992, which then provided:

> "(a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold by such licensee or permit holder."

K.S.A. (1992 Supp.) 41-2615(a).

Since 1992, K.S.A. 41-2615 has been amended three times. The first in 1993 to add the term "or consumption" to its prohibitions and to add a proviso excepting employees 18 to 21, with certain supervision,

to dispense alcoholic liquor or cereal malt beverages. (L. 1993, ch. 173 § 3). No text affected the language in the 1992 statute of "knowingly or unknowingly permit" as construed by the Kansas Supreme Court in the noted *J.C. Sports Bar* case.

In 1994, K.S.A. 41-2615 was again amended. No change was made to its then existing text, however, the following new section was added:

> "(c) It shall be a defense to a prosecution under this section if: (1) The defendant permitted the minor to possess or consume the alcoholic liquor or cereal malt beverage with reasonable cause to believe that the minor was 21 or more years of age; and (2) to possess or consume the alcoholic liquor or cereal malt beverage, the minor exhibited to the defendant a driver's license, Kansas nondriver's identification card or other official or apparently official document containing a photograph of the minor and purporting to establish that such minor was 21 or more years of age."

L. 1994, ch. 300, § 2.

In 2008, K.S.A. 41-2615 was again amended, but only to substitute in *Section (c)* above for the word "containing", the phrase "that reasonably appears to contain". L. 2008, ch. 126, § 9.

Thus in terms of the *opinion* issued by the Kansas

Supreme Court in the *JC Sport's Bar* case, nothing in regard to the "knowingly or unknowingly permit" language of K.S.A. (1992 Supp.) 41-2615(a) has changed except to add "possession" to the earlier proscription of "consumption" alone. Thus, the holding in *JC Sports Bar* that some intentional act, or overt omission to act, triggers a violation of the statute should apply in evaluating the conduct evidenced for a violation in 2011 as occurring in this case unless it be the fact its application was in an administrative proceeding. Further, the adoption of section (c), occurring in 1994 to articulate a defense would seem to provide some shield to, or mitigation from, the "unknowingly" language existing at the time of the *JC Sports Bar* case, which prevails yet today. That defense only can have meaning when it is assigned to an intentional act or omission of a human actor. This amendment would mitigate the reach of the holding from the *JC Sports Bar* case and can be seen to have been made in response to it.

The Club and Drinking Establishment Act, K.S.A. 41-

2601 *et seq.*, as well as such regulations as are promulgated under the authority of K.S.A. 41-2634(a), establish the parameters for this agency's administrative governance of licensees, such as Petitioner, SMG, here. The Act provides for licensing, K.S.A. 41-2623. As relevant, ineligibility for licensure inures to "[a] person who has had the person's license revoked for cause *under the provisions of this act.*" K.S.A. 41-2623(a)(2). (Emphasis added). A "person" includes a natural person and entities. K.S.A. 41-2601(a); K.S.A. 41-102(u). Also see K.S.A. 41-2623(a)(1) and (a)(7)(A). Further, no corporation who has as an official, or stockholder owning over 5%, *who has been convicted of a violation of the Act* prior can be licensed. K.S.A. 41-2623(a)(1) an (a)(7)(13). (Emphasis added). Licensees who subsequently are "convicted by any court of a violation of any provisions of the act, or the rules and regulations lawfully promulgated thereunder", are to be revoked or suspended. K.S.A. 41-2626 ("shall"). Other grounds for suspension or revocation also are enumerated in

K.S.A. 41-2611, including violations of the act or its regulations (*Id.* at "(b)") or federal or state laws pertaining to the sale of liquor, cereal malt beverage, or a crime involving a morals charge, if occurring on the licensee's premises. (*Id.* at "(d)"). The agency's rules and regulations that apply to a type of the agency's licensees, whether a Class A Club, a Class B Club, or a Drinking Establishment/Caterer, provide that the violations can lead to suspension, revocation, cancellation of the license, or fine. K.A.R. 14-16-15; K.A.R. 14-16-25. Further, the rules and regulations specify that each of its licensees is vicariously liable for its employees' conduct. K.A.R. 14-19-26 (Class A Clubs); K.A.R. 14-20-28 (Class B Clubs); K.A.R. 14-21-11 (Drinking Establishment Caterer). By example, K.A.R. 14-21-11 provides:

> "Each licensee shall be responsible for the conduct of its business. Each licensee shall be responsible for all violations of the club and drinking establishment act by the following people while on the licensed premises:
>
> (a) An employee of the drinking establishment;

(b) an employee of any person contracting with the drinking establishment to provide services or food; and

(c) any individual mixing, serving, selling, or dispensing alcoholic liquor."

It is not insignificant that human individuals are identified as the instruments of violation throughout the Act and regulations, with K.A.R. 14-21-11, by example, then tying the violation to the licensee.

Here, though the *J.C. Sports Bar's* declaration of K.S.A. 41-2615(a)'s meaning and reach has been the declared law governing it for over seventeen years at the time of the occurrence in question, the Kansas legislature, except as noted, has never acted to restrict the *JC Sports Bar* Court's declaration of its meaning. The agency would possess no power to change its governing law, whether that be by rule or regulation nor, seemingly, could the agency change it through the adoption of the opinion of a quasi-judicial official, on administrative review of that opinion, as was done here. *Schmidt v. Kansas State Bd. of Technical Professions,* 271 Kan. 206, 214 (2001).

The upshot of this inability to ameliorate or limit the *JC Sports Bar* holding for agency enforcement purposes is that the statute is the statute, that is to say, that statute has been construed to require an intentional human action or omission, an actor, so to speak, tied to the licensee, that *permitted or allowed* the occurrence in question to come about. While the Kansas Supreme Court in the *JC Sports Bar* case noted prior opinions issued by the Court of Appeals that referenced a basis for distinguishing between criminal and civil enforcement in the application of then existing K.S.A. 41-2615(a), (*State v. Sleeth*, 8 Kan. App. 2d 652 (1983); *Sanctuary, Inc. v. Smith*, 12 Kan. App. 2d 38 (1987)), the *JC Sports Bar* Court also noted that while the "knowingly or unknowingly permit" language in K.S.A. 41-2615(a) had not changed from the time of the events in the *Sleeth* and *Sanctuary* cases, nevertheless, the context in which it appeared had. The *Sleeth* events occurred in 1982 and the *Sleeth Opinion* was delivered in June, 1983. The *Sanctuary* events occurred at some point prior to the *Sanctuary*

Court's decision, which was rendered on March 12, 1987.

Further, it should be noted that it was just after the *Sanctuary* opinion was issued, which, as noted, was on March 12, 1987, that the legislature on April 15, 1987, amended K.S.A. 41-2615(a), made effective April 13, 1987, to change the language in this section such as to destroy any basis for construing, as did the *Sleeth* case, and adopted by *Sanctuary*, the dichotomy and basis for a differing application between civil versus criminal enforcement proceedings depending on whether it was the club or licensee or whether it was an officer or employee that was the particular subject of the proceeding.

> "Sec. 70. K.S.A. 41-2615 is hereby amended to read as follows: 41-2615. *(a)* No ~~club licensed hereunder~~ *licensee or permit holder, or any owner, officer or employee thereof,* shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt beverage ~~on its premises by a minor and no minor shall consume or attempt to consume any alcoholic liquor or cereal malt beverage while in or upon the premises of a club licensed hereunder or as prohibited by K.S.A. 41-715 and any amendments thereto. The owner of any club, any officer or any employee thereof, who shall permit the consumption of alcoholic liquor or cereal malt beverage on the premises of the~~

~~club by a minor shall be deemed guilty of a misdemeanor and upon conviction shall be subject to the same penalty as prescribed by K.S.A. 41-715 for violation of that section~~ *by a minor on premises where alcoholic beverages are sold by such licensee or permit holder.*

(b) Violation of this section is a misdemanor punishable by a fine of not less than $100 and not more than $250 or imprisonment not exceeding 30 days, or both."

L. 1987, ch. 182, § 70. See also *Id.* at § 147. This legislative change could seem none other than coming from a recognition by the legislature, perhaps, belatedly in terms of the *Sleeth* case, of the legal ramifications of the *Sleeth and Sanctuary* decisions and, hence, the 1987 amendment can be well viewed as intended to harmonize any basis for a differing enforcement. While the *Sanctuary* case did not directly involve construction of "knowingly and unknowingly", it did rely on the *Sleeth* holding. *See JC Sports Bar, Inc.*, 253 Kan. at 820-821.

Hence, again, the *JC Sports Bar, Inc.* case is the last authority on what "knowingly and unknowingly permit" means in the context of this statute. The forum in which such terms may be applied, while

changing, perhaps, the burden of proof, should not change the meaning and interpretation of the statute. *Schmidt, supra*. First, the hearing officer, then the agency by adopting the hearing officer's opinion, misapplied the *J.C. Sports Bar, Inc.* case, which resulted in the Petitioner here being subjected to a fine. Thus, while, simply, no question exists, but that the agency was acting fully within is authority under K.S.A. 41-2633a and its operative rules (K.A.R. 14-16-15; K.A.R. 14-16-25) to independently cite Petitioner for a violation of K.S.A. 41-2615(a) under its administrative authority of K.A.R. 14-21-11, it, nevertheless, misapplied K.S.A. 41-2615(a) in the adjudication of the complaint.

The question then remaining is whether the factual record on appeal supports the agency's finding as a matter of law, notwithstanding the erroneous application of the *JC Sports Bar, Inc.* case to it. First, the narrative supplied identifies no employee of the licensee as an actor in the offense nor does it specify any identifiable pattern of conduct by the

licensee as a company or organization, by example, such as a failure to have adequate or appropriate staffing for such an event, but then here, too, it has never undertaken by regulation to establish such thresholds, leaving only as causative of the offense that the event at issue occurred on its premises as its sole foundation. Rather, the record on appeal only establishes the minor's mother as the only human instigator of the violation. Too, while the enforcement agent identified the minor as exhibiting signs that can be associated with alcohol use and he, as well, affirmatively nodded when asked had he been drinking, there was no adjudication of "consumption", only "possession", and that "possession", by the facts, was derivative of his mother, which beer had implicitedly been obtained by her from Petitioner's beer vendor at some earlier point. These facts, but for the mistaken theory of liability upon which this case was adjudicated by the agency, would not support the finding made as there clearly is no evidence of human conduct tied to the Petitioner "permitting" the

minor's possession of beer to occur, or the minor's consumption, even had the latter been an issue that had been addressed.

Thus, even under a minimum civil burden of proof of more probably true than not true, these facts are wholly insufficient to sustain the finding of a violation unless one goes further and relies on the enforcement agent's narrative where she identifies both the minor and his mother as "employees" of the Petitioner. *See* K.A.R. 14-21-11(a). That statement, however, lacks a then current, to the circumstances, context to it, that is, was the reference to a present tense *employment, i.e.*, working there in employment at the time, or just employees of the Petitioner, generally, but not working or assigned to that particular venue at the time. The pictures of the minor (ROA at p. 6) and his mother (ROA at p. 7) belie any inference of on duty status and the record beyond the officer's statement reveals nothing. Further, it is to be noted that all counsel involved, as well as the presiding officer or the agency head on review,

made no reference to the minor or his mother's employment status. Such collective omissions, whether of evidence or argument, imports a valid reason for disregard of these recited facts, since it would have otherwise been obvious and relevant to any decision. *e.g.*, K.A.R. 14-21-11(a). As such, this mutual omission of consideration of this possible issue should not provide a basis for a remand in order to raise an issue present in the record, but that was left unaddressed, whether intentionally or otherwise.

Accordingly, and for the reasons stated, the finding of the Agency that the Petitioner violated the Act by violating K.S.A. 41-2615(a) and should be fined $750.00 should be reversed and the Petitioner should be, and is, discharged from liability under the Agency's *Notice of Administrative Action* in this case.

ENTRY OF JUDGMENT

Judgment is hereby entered for the Petitioner, SMG F&B Kansas LLC d/b/a Savor, and against the Respondent, the Kansas Department of Revenue, for the reasons stated in the foregoing *Memorandum Opinion*. Costs are

taxed to the Respondent, Kansas Department of Revenue.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDERED this 28th day of March, 2013.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Patrick Hughes
Sara Byrne