No. 12-108788-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MCJS, INC DBA REED'S RINGSIDE SPORTS BAR AND GRILL,
Petitioner/Appellant,

v.

KANSAS DEPARTMENT OF REVENUE,
Respondent/Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Larry D. Hendricks, Judge
District Court Case No. 12-C-1

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Oral Argument: Time Requested 30 Minutes

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NATURE OF THE CASE

This is an appeal from administrative action taken by the Kansas Department of Revenue, Alcohol Beverage Control Division, against MCJS, Inc., doing business as Reed's Ringside Sports Bar and Grill (Reed's). Reed's appeals the order of the Shawnee County District Court affirming the holdings of the Director of the Alcohol Beverage Control Division and the Secretary of Revenue.

STATEMENT OF ISSUES

I. ***Is the mere fact a minor possessed or consumed alcohol on a licensee's premises, standing alone, enough to constitute a violation of K.S.A. 41-2615, for the purpose of an administrative prosecution?***

II. ***Was the Agency's determination regarding Shupe's possession and consumption of alcohol at Reed's supported to the appropriate standard of proof by evidence which is substantial when viewed in light of the record as a whole?***

FACTS

On July 3, 2010, Kipp Shupe was arrested after fleeing and eluding police officers. (R. I at 105:18). Subsequent to his arrest, officers were told he had been at Reed's Ringside Sports Bar and Grill (Reed's) with a man by the name of Jonathan Bourdon. (R. I at 114:6). When Shupe's vehicle was recovered after the chase, officers discovered a 30-pack of Bud Light beer; four cans were missing. (R. I at 112:2). Shupe had obtained the beer from a coworker. (R. I at 112:6). Shupe testified he had consumed all the missing cans. (R. I at 148:13). At some point, Shupe told officers, while at Reed's, Bourdon had purchased pitchers of beer and allowed him to drink some. (R. I at 116:21). In Shupe's initial statement, he did not claim to have purchased any alcohol at Reed's. (R. I at 128: 17). However, in his second statement, drafted in the presence of his attorney three weeks later, Shupe claimed he purchased one pitcher of beer, at the end of

the night. (R. I at 116:24 & 129:17). At the hearing, Shupe testified he purchased two pitchers of beer. One when he arrived, from the bartender, and the second, at the end of the night. (R. I at 146:21).

On Monday July 5, 2010 Officer Darrel Chapman of the Potawatomi Police Department went to Bourdon's residence to question him about the incident. (R. I at 107:5). Initially, Bourdon denied Shupe was at Reed's with him. (R. I at 115:17). After further questioning, Bourdon changed his story; telling officers Shupe was with him at Reed's. (R. I at 107:19). Bourdon told officers he bought all the beer at Reed's for he and Shupe. Bourdon further admitted, "Shupe did not buy any alcoholic drinks at Reed's" and that he, Bourdon, "was contributing to a minor." (R. I at 117:19). Bourdon never amended this statement to officers. (R. I at 118:13). However, at the hearing Bourdon claimed Shupe purchased a pitcher of beer, but denies being present when this allegedly occurred. (R. I at 133:7 & 135:12). Bourdon is not aware of how Shupe obtained the pitcher; he only claims he came out of the bar with it. (R. I at 139:6). He testified it would have been possible for Shupe to have taken the pitcher from another table. (R. I at 143:12). Officer Chapman testified, Bourdon initially claimed to have no knowledge of Shupe purchasing beer at Reed's. (R. I at 121:7).

Officer Chapman spoke with Matt Ketter, the bartender on duty the night in question. (R. I at 107:23). Ketter recalled a man matching Bourdon's description, who commented his nephew was with him. (R. I at 108:21). Ketter recalled Bourdon purchasing pitchers of beer, but the younger male never purchased anything. Further, Ketter denied having any knowledge of the younger male drinking alcohol. While at Reed's on July 5th, Officer Chapman never inquired as to whether Reed's had video

footage from the night in question. (R. I at 130:3). Authorities did not inform the owners of Reed's of the incident, until a violation notice was received in the mail, long after any video would have remained available for viewing of the bar's occupants on the date in question. (R. I at 130:8).

PROCEDURAL BACKGROUND

Based on the events of July 3, 2010, the Agency issued Reed's an administrative citation on July 28, 2010. (R. I at 23). On September 8, 2012 ABC's director ordered Reed's to pay a $500 fine. (R. I at 25 ¶ 8). Reed's requested an evidentiary hearing on the matter. (R. I at 28). A hearing was conducted on April 21, 2011. (R. I at 101). ABC's director issued an Initial/Final Order on August 9, 2011. (R. I at 196). The Agency found K.S.A. 41-2615 imposed absolute liability on drinking establishments and knowledge of an individual's actual age was not required for an administrative prosecution. (R. I at 197 ¶ 12). The Agency also found sufficient evidence had been presented to support the charge. (R. I at 198 ¶ 18). The Agency ordered Reed's to pay a $500 fine. (R. I at 199). Reed's appealed the Agency's order to the Secretary of Revenue. (R. I at 201). On December 2, 2011, the Secretary affirmed the imposition of a fine. (R. I at 233-37). Reed's filed a petition for judicial review of the Agency's decision in Shawnee County District Court on January 3, 2011. R. II at 3. The District Court found the Agency had appropriately interpreted K.S.A. 41-2615. R. II at 29. The District Court also found the Agency's determination of fact was supported to the appropriate standard of proof by evidence which was substantial when viewed in light of the record as a whole. R. II at 31.

ARGUMENTS AND AUTHORITIES

I. IS THE MERE FACT A MINOR POSSESSED OR CONSUMED ALCOHOL ON A LICENSEE'S PREMISES ENOUGH TO CONSTITUTE A VIOLATION OF K.S.A. 41-2615 FOR THE PURPOSE OF AN ADMINISTRATIVE PROSECUTION?

On issues of statutory interpretation, an appellate court exercises unlimited review, without deference to an administrative agency's interpretation of its authorizing statutes. *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 457, 228 P.3d 403 (2010). An agency's interpretation of a statute is not conclusive, the final construction of a statute lies with the appellate courts. *Bluestem Tel. Co. v. Kansas Corp. Comm'n*, 33 Kan.App.2d 817, 823, 109 P.3d 194 (2005). The party challenging the validity of an agency's action bears the burden of proving such invalidity. K.S.A. 77-621(a)(1). A challenging party is entitled to relief if the agency erroneously interpreted or applied the law. K.S.A. 77-621(c)(4). Reed's raised the issue of the Agency's interpretation and application of K.S.A. 41-2615 before the Secretary of Revenue and the District Court. (R. I at 219; R. II at 7). The District Court ruled the Agency did not erroneously interpret or apply the statute. (R. II at 29).

K.S.A. 41-2615(a) provides in relevant part: "No licensee…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." The language primarily at issue, is the phrase "knowingly or unknowingly permit". The Agency maintains the phrase "knowingly or unknowingly" establishes absolute liability and requires no knowledge or intent on the part of the violator. Reed's, however, maintains the use of the word "permit" expressly precludes

such an interpretation. When presented with an issue of statutory interpretation, the court first heeds the express language of the statute, giving ordinary words their ordinary meaning. *State v. Raschke*, 289 Kan. 911, 914, 219 P.3d 481 (2009). Should a statute's meaning not be evident from its plain language, the court moves from interpretation to construction; employing a study of legislative history, application of canons of statutory construction, and appraisal of other background constructions. *Id.*

In the current case, an analysis of the express language of the statute is sufficient to show the agency has applied an erroneous interpretation; specifically regarding the use of the term "permit". The court addressed the meaning of "permit" in *State v. Wilson*, 267 Kan. 550, 559, 987 P.2d 1060 (1999). In *Wilson*, the defendants were convicted of endangering a child, which at the time was defined as: "intentionally and unreasonably causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health may be injured or endangered." *Id.* at 555. The defendants shared a house with several other adults and children. Among the occupants were a 5-year-old girl and her parents. *Id.* at 551. On several occasions, the child was verbally and physically abused by her mother and another adult in the presence of the defendants. *Id.* at 552. The State did not argue the defendants caused the child to be placed in a situation of danger, but rather they permitted her to be placed in dangerous circumstances. *Id.* at 559. On appeal, the defendants argued they could not be convicted of "permitting" the child to be placed in dangerous circumstances because they had no authority or control over the child or her mother. *Id.* at 560. The court held the term "permit" may imply circumstances where one has power or control to authorize an act or give consent to a situation. *Id.* at 560-61. It may also imply "circumstances where one

acquiesces in the doing of a thing or the existence of a circumstance by failing to take action to prevent it or where one allows a thing to happen by not opposing it." *Id.* at 561. Applying the first definition of permit, the court reversed the defendant's conviction because they had no control or authority over the child or the abuser. *Id.* at 567-68.

The interpretation applied by the Agency, which imposes absolute liability in any circumstance where a minor possesses or consumes alcohol on a licensee's premises, is erroneous because it ignores the term "permit". It is not enough a minor possessed or consumed alcohol. Pursuant to the plain language of the statute, to constitute a violation, the possession or consumption must be permitted, whether knowingly or unknowingly, by the licensee. See K.S.A. 41-2615(a). When this matter was before the Director of the ABC, the Director merely found Shupe possessed and consumed alcohol at Reed's, but made no finding as to whether such possession and consumption was permitted by Reed's. (R. I at 198). Instead, the Director found K.S.A. 41-2615 creates absolute liability on a licensee for any possession or consumption on its premises. (R. I at 198). Similarly, when the case was reviewed by the Secretary of Revenue, the Secretary accepted the Director's finding Shupe possessed and consumed alcohol at Reed's, and acknowledged Reed's did not knowingly permit the possession or consumption; however, the Secretary failed to make a finding as to whether Reed's unknowingly permitted the possession or consumption. (R. I at 237 ¶ 19). The Secretary likewise held K.S.A. 41-2615 imposed absolute liability, requiring no intent on the part of the violator, and it held it was enough the possession or consumption occurred. (R. I at 237 ¶ 19).

In affirming the Agency's action, the District Court held the Agency did not erroneously interpret K.S.A. 41-2615. R. II at 29. The District Court's ruling was based

on the interpretation of the statue provided in *State v. Sleeth*, 8 Kan.App.2d 652, 664 P.2d 833 (1983) and addressed again in *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 733 P.2d 839 (1987). However, the holdings of *Sleeth* and *Sanctuary* are not applicable to the current factual scenario. Unlike Reed's, there was a specific finding in both prior cases the licensees had permitted the minors to possess or consume alcohol on their premises. *Sleeth* involved the criminal prosecution of a club owner after one of her employees served alcohol to a minor. 8 Kan.App.2d at 654. Three individuals entered Sleeth's club, presented identification representing they were over 21 years of age, and each ordered an alcoholic beverage from the bartender. *Id.* at 653. The bartender prepared the drinks for the individuals and each consumed at least a portion of their beverage. *Id.* at 654. Police officer making a routine age check at the club requested identification from the three individuals and eventually learned one was under 21 years of age. *Id.* at 653. Sleeth, the owner of the club, was neither present, nor consented to the sell or consumption of alcohol to the minor; nonetheless, she was convicted for a violation of K.S.A. 41-2615. *Id.* at 654. The issue before the court was whether the penal provisions of the statute may be invoked against a club owner who was not present at, had no knowledge of, and did not consent to the sale of alcoholic beverages to a minor by an employee of the club. *Id.* at 654-55. The court noted K.S.A. 41-2615 is neither purely regulatory, nor purely penal, but is a hybrid of the two; providing for regulatory sanctions against clubs and imposing criminal liability upon owner, officers and employees of clubs. *Id.* at 655-56. The court noted, knowledge of the infraction is not a prerequisite to holding a club liable for a regulatory transgression (i.e. good-faith mistake is not a defense). *Id.* at 656. To the contrary, authorization, knowledge or approval on the part of the owner, officer or

employee is a prerequisite to establishing criminal liability. *Id.* at 657. The court concluded, Sleeth could not be held criminally liable because she was neither present at the club, nor consented to the unlawful act of her employee. *Id.* at 658.

Comparing *Sleeth* to this case, it is important to note the distinctions between the two. In *Sleeth*, the parties agreed a violation occurred; the club permitted a minor to possess and consume alcohol on its premises. *See id.* at 654. In contrast, Reed's maintains no violation occurred, because any possession or consumption of alcohol by Shupe, alleged to have occurred on its premises, was not permitted by Reed's or any of its employees. The stipulated facts in *Sleeth* established the club, through an employee, unknowingly permitted a minor to possess and consume alcohol on its premises. *Id.* The violation occurred unknowingly, because the bartender was unaware the individual was a minor; nonetheless, the bartender still permitted the unlawful possession and consumption by serving alcohol to an individual who was in fact underage. The issue in *Sleeth* was whether the club owner could be held criminally liable for a violation both parties agreed occurred. *See id.* at 654-55. The issue in this case is whether a violation occurred. The stipulated facts in *Sleeth* clearly showed the club permitted the underage individual to possess and consume alcohol on its premises, the bartender prepared and served an alcoholic beverage to a minor; thus a violation occurred. In contrast, the record in this case is absent any finding by the Director of the ABC, the Secretary of Revenue, or the District Court, as to whether Reed's permitted Shupe's alleged possession or consumption of alcohol. Instead, all prior rulings in this case were based on an erroneous interpretation of K.S.A. 41-2615, under which the term "permit" was ignored. The Director, the Secretary, and the District Court all held, the mere fact a minor possessed or

consumed alcohol on a licensee's premises, was enough to establish a violation, whether such possession or consumption was permitted by the licensee or not. (R. I at 198; R. I at 237; and R. II at 29). To support the position K.S.A. 41-2615 imposes absolute liability, the Agency and the District Court cite the language of *Sleeth* which provides: "knowledge of the infraction is not a prerequisite to holding a club liable for a transgression of the provision (i.e. good faith mistake is not a defense)." However, this language is not applicable because without finding Reed's permitted Shupe's possession or consumption, no such "infraction" or "transgression" has been established.

Four years after *Sleeth*, K.S.A. 41-2615 was again addressed by this Court in *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 733 P.2d 839 (1987). In *Sanctuary*, the club admitted Smith and served him an alcoholic beverage. *Id.* Subsequently, a police officer discovered Smith was underage and arrested him. The Director of the ABC then fined the club $500 for violating K.S.A. 41-2615. The club brought suit against Smith to recover the $500 fine, claiming Smith fraudulently used another person's driver's license to gain entry into the club. *Id.* This Court held: "K.S.A. 41-2615 imposes upon a private club an absolute duty not to permit the consumption of alcoholic liquor or cereal malt beverage by a minor on its premises." *Id.* at 39 (emphasis added). By serving Smith, the club violated this duty. *Id.* The court went on to hold the strict regulatory policy expressed by K.S.A. 41-2615 bars such fraud actions against minors. *Id.*

In *Sanctuary*, like *Sleeth*, there was no issue as to whether a violation occurred; the facts showed the club admitted a minor and served him an alcoholic beverage. *Id.* at 38. By serving Smith a drink, despite his misrepresentation of age, the club permitted a minor to possess and consume alcohol on it premises, albeit unknowingly. *See id.* As

discussed in depth above, there were no findings, either in the administrative proceedings or during judicial review, as to whether Reed's permitted Shupe to possess or consume alcohol. The Secretary of Revenue, and the District Court, merely found sufficient evidence was presented to establish Shupe possessed and consumed alcohol at Reed's, but neither found whether the possession or consumption was permitted (i.e. whether Shupe purchased beer from a bartender or waitress, or whether employees allowed him to share beer purchased by Bourdon). R. II at 30.

In *Sanctuary*, this Court did speak of absolute legal duties imposed upon clubs by K.S.A. 41-2615; however, it is not the type absolute liability the Agency is attempting to impose here. This Court held: "K.S.A. 41-2615 imposes upon a private club an absolute duty not to permit the consumption of alcoholic liquor or cereal malt beverage by a minor on its premises." *Sanctuary*, 12 Kan.App.2d at 39. Unlike the Agency's, the Court did not ignore the legislature's use of the term "permit". The holding in *Sanctuary* supports Reed's position; there is not absolute liability merely because a minor possesses or consumes alcohol on a licensee's premises, absolute liability only applies when the licensee permits such possession or consumption. *Id.*

Based on the foregoing, Reed's contends a reading of the express language of the statute, giving permit its ordinary meaning, is sufficient to determine the meaning of K.S.A. 41-2615. *See Raschke*, 289 Kan. at 914. However, should the court find such meaning is not evident from the plain language, Reed's further assert an application of the canons of statutory interpretation also support Reed's interpretation, and precludes the interpretation offered by the Agency. *See id.* Where the meaning of a statute is doubtful and susceptible to two constructions, the court may look at the legislative

history to assist in determining such meaning. *Tompkins v. Bise*, 259 Kan. 39, 47, 910 P.2d 185 (1996). If the legislative history does not assist the court as to which of the two constructions is correct, the court must select the reasonable construction, so as to avoid unreasonable or absurd results. *Id.* at 47-48. In this case, the legislative history provides no guidance as to the meaning of the statute; therefore, the court must consider the reasonableness of the two interpretations. Upon doing so, the Court should reject the Agency's interpretation, so as to avoid unreasonable or absurd results.

Under the agency's interpretation, a licensee would be liable in any circumstance where a minor possesses or consumes alcohol on the licensee's premises. However, such an interpretation creates the potential for unreasonable and absurd results. For example, a club or bar which may lawfully admit individuals less than 21 years of age could be fined or have its license revoked if a minor snuck a flask into the bar and drank from it in a bathroom stall. Likewise, a restaurant would be subject to regulatory sanctions if a minor drank a beer in his car before coming in to eat dinner. Similarly, if a minor snuck a drink from an unattended beer sitting on a table at a bar and grill, despite the fact the beer was lawfully purchased, the establishment could still be prosecuted. In each hypothetical a minor possessed or consumed alcohol on the licensee's premises which would satisfy a violation under the interpretation presented by the Agency, notwithstanding the fact no action or unreasonable inaction on the part of the licensee, led to the possession or consumption by the minor. To protect itself, a licensee would have to constantly monitor every car in the parking lot, each stall in the bathroom, and continually supervise every individual on the premises. Such requirements would not only be impossible and

impracticable, it would lead to the imposition of an unreasonable and absurd burden on legitimate business like Reed's.

The Agency argues, without the form of absolute liability it is attempting to enforce, licensees would be able to turn a blind eye to possession or consumption by minors or plead ignorance as a defense. (R. I at 69). The Agency further argues such an interpretation would discourage licensees from taking proactive steps to prevent underage drinking. (R. I at 69). However, a correct reading of the plain language of the statute, giving "permit" proper effect, would have no such result. The "knowingly or unknowingly" language establishes absolute liability when a licensee permits possession or consumption by a minor. K.S.A. 41-2615. As discussed in *Wilson*, this Court specifically held, the term permit can imply "circumstances where one acquiesces in the doing of a thing or the existence of a circumstance by failing to take action to prevent it or where one allows a thing to happen by not opposing it." 267 Kan. at 561. If a licensee ignored the fact a minor was drinking in its establishment, or remained willfully ignorant by failing to take reasonable proactive measures, the licensee would still be permitting the possession or consumption by allowing the activity or acquiescing or failing to take actions to prevent it. *See id.* The phrase "knowingly or unknowingly permit" balances the interest of the Agency and licensees. The "Knowingly or unknowingly" language prevents a licensee from pleading ignorance as a defense, while the term "permit" prevents a licensee from being held liable when a minor possesses or consumes alcohol on its premises in a manner which was beyond the licensee's control.

In the current case, Reed's power to control Shupe's action was limited. It would be impossible for any drinking establishment to continually monitor each and every

customer, to ensure the person who ordered alcohol was the only one who consumed it. Reed's maintains none of its employees witnessed Shupe possess or consume alcohol. Testimony to the contrary is inconsistent and contradictory. If Shupe was drinking, he was doing so surreptitiously. Employees cannot permit possession or consumption, knowingly or unknowingly, when it is intentionally hidden from them. Assuming Shupe did consume alcohol at Reed's, it was not a result of a failure to take preventative steps or oppose the situation. Reed's is absolutely opposed to minors possessing or consuming alcohol on their premises, and has a reputation for taking a proactive approach to enforcing alcohol control laws. (R. I at 179). Reed's has never been cited for allowing minors to possess or consume alcohol on its premises. (R. I at 2). The Secretary of Revenue even acknowledged Reed's proactive approach to enforcing alcohol control laws and its record of enforcement. (R. I at 237). Reed's prides itself on its ID policy; it is standard practice for Reed's employees to check identification at the door, and again when a customer orders alcohol. (R. I at 179:13; 180:14). This reputation is evidenced by the multiple letters of commendation Reed's has received from the ABC for refusing to serve to minors, who were sent into the bar by ABC during staged tests, both prior to the agency action and the acts alleged, as well as subsequent thereto. (R. I at 179:22).

Reed's is entitled to relief because the Agency erroneously applied K.S.A. 41-2615 by failing to give effect to the term "permit". The Agency has failed to find Reed's or any of it's employees permitted Shupe to possess or consume alcohol on its premises; therefore, it has not properly found a violation occurred.

II. WAS THE AGENCY'S DETERMINATION REGARDING SHUPE'S POSSESSION AND CONSUMPTION OF ALCOHOL AT REED'S SUPPORTED TO THE APPROPRIATE STANDARD OF PROOF BY EVIDENCE WHICH IS SUBSTANTIAL WHEN VIEWED IN LIGHT OF THE RECORD AS A WHOLE?

When called upon to review the actions of an administrative agency, the standard of review applied by an appellate court is statutorily defined. *Brewer v. Schalansky*, 278 Kan. 734, 737, 102 P.3d 1145 (2004). The court shall grant relief if an agency's action is based on a determination of fact, which is not supported to the appropriate standard of proof by evidence which is substantial, when viewed in light of the record as a whole. K.S.A. 77-621(c)(7). Case law defines substantial evidence as evidence which a reasonable person would accept as sufficient to support a conclusion. *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan.App.2d 360, 363, 212 P.3d 239 (2009). "In light of the record as a whole" means the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record which detracts from or supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. K.S.A 77-621(d). An appellate court must consider all of the evidence, including evidence that detracts from an agency's factual findings, when assessing whether the evidence is substantial enough to support those findings, and the appellate court must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence it is insufficient to support the agency's conclusion. *Herrera-Gallegos*, 42 Kan.App.2d at 363. Reed's raised

sufficiency of evidence as an issue before the Secretary of Revenue as well as the District Court. (R. I at 213; R. II at 10). Both ruled the Agency's determination of fact was supported to the appropriate standard of proof, by evidence which was substantial when viewed in light of the record as a whole. (R. I at 237; R. II at 31).

The Agency's action against Reed's is based solely on the Director of the ABC's determination Shupe possessed and consumed alcohol on Reed's premises. (R. I at 198 ¶ 16). This determination is erroneous because the Director failed to consider the "record as a whole" as required by statute. On review, the Secretary of Revenue and the District Court likewise failed to properly consider the evidence which detracts from the Director's determination. Each piece of evidence presented at the hearing, which suggests Shupe possessed or consumed alcohol at Reed's, was contradicted on at least one occasion. Despite the fact Shupe and Bourdon never told the same story twice, the Director concluded one of the stories in which Shupe possessed alcohol at Reed's, must have been true. (R. I at 198 ¶ 16). Reed's denies all allegations Shupe possessed and consumed alcohol on its premises, and any claims to the contrary are based entirely on the contradictory and inconsistent statements of two individuals involved in criminal activity. (R. I at 197 ¶¶ 4 & 7).

Notwithstanding the inconsistencies and contradictions, the evidence against Reed's is not substantial. In previous cases involving K.S.A. 41-2615, accusations against the respective licensees arose from observation made by law enforcement officers. In *Sleeth*, and *Sanctuary*, police officers discovered underage individuals consuming alcohol in the respective drinking establishments while conducting random bar checks to uncover underage drinking. See 8 Kan.App.2d at 653 & 12 Kan.App.2d at

38. Similarly, in *State v. JC Sports Bar, Inc.*, an ABC Investigator and a sheriff's deputy witnessed an individual, whom they knew to be underage, drinking in a bar through the window. 253 Kan. 815, 816 (1993). In contrast, all claims against Reed's are based entirely on uncorroborated, inconsistent and contradictory statements of Kipp Shupe and Jonathan Bourdon, individuals who repeatedly provided false information throughout the investigation. Law enforcement only learned of the alleged offense after apprehending Shupe following a high speed chase, which occurred miles away from Reed's. Besides Bourdon, no other person, law enforcement or otherwise, claims to have witnessed Shupe, possess or consume alcohol at Reed's. Even Bourdon on one occasion denied Shupe was at Reed's. (R. I at 115:17). The statements of Shupe and Bourdon are not corroborated by any independent evidence; to the contrary, Matthew Ketter, the bartender at Reed's on the night in question, told law enforcement he never observed the individual he believed to be Shupe, consume or possess any alcohol. (R. I at 109:6).

Beyond the inherent unreliability of the accusations, the minimal uncorroborated evidence which was present against Reed's, is inconsistent and contradictory. Bourdon and Shupe deviated from their initial statements to law enforcement, not only in subsequent statements, but also at the hearing held April 28, 2011. When Bourdon was initially confronted by officers, he denied Shupe was with him at Reed's. (R. I at 115:17). Bourdon then changed his story, stating Shupe was in fact at Reed's with him. (R. I at 115:17). After changing his story and admitting Shupe was present, Bourdon maintained Shupe purchased no alcohol at Reed's. (R. I at 117:19). Bourdon never amended this statement to officers; however, at the hearing he testified he believed Shupe had purchased alcohol at Reed's. (R. I at 117:13; R. I at 133:7). Bourdon testified he never

personally witnessed Shupe purchase a pitcher of beer. (R. I at 139:6). He merely claimed he observed Shupe come outside with a pitcher. (R. I at 139:10). Bourdon also testified he did not know where Shupe obtained the beer, and it was possible Shupe did not purchase any, but picked it up from another table, without anyone's knowledge. (R. I at 143:21). Further, Shupe's claim he purchased beer from a waitress is contradicted by Bourdon, who testified the group received no table service during the night, but purchased their beer directly from the bar. (R. I at 134:21).

Shupe's statements and testimony are equally inconsistent and contradictory. Shupe initially claimed, when he arrived at Reed's there were pitchers of beer on the table, which Bourdon shared with him; Shupe made no claim of purchasing alcohol at Reed's. (R. I at 157:9-17). Subsequently, in Shupe's second statement, made approximately three weeks after the incident, he changed his story, claiming he purchased one pitcher of beer, at the end of the night from a waitress. (R. I at 125:24). Shupe's story changed yet again at the hearing, when he testified he purchased two pitchers of beer, the first from the bar, immediately upon arriving at Reed's, and the second from the waitress. (R. I at 145:13). Shupe's blood alcohol content also contradicts his story. At the hearing, Shupe testified he consumed four cans of beer and nearly all of two pitchers. (R. I at 148:3-16). However, a blood test performed by law enforcement revealed his blood alcohol content was only 0.09, at the time he was arrested. (R. I at 111:1). If Shupe had consumed as much alcohol as he claimed, his blood alcohol content would have been much higher.

On the night in question, Reed's had video surveillance equipment operating which captured what truly happened. (R. I at 177:4). Had the officer or the Agency asked

for video surveillance to be preserved, or even told that there was a possibility charges would be filed, such evidence could have then been preserved to be available to clarify the ambiguities, inconsistencies, and contradictions in Shupe's and Bourdon's statements, which the Agency was left to rely upon. Nothing was communicated to the owners of this business until they received a citation in the mail, well after the tribal officer's contact upon re-use of any video existing. However, Reed's was not made aware of any pending charges until nearly one month after the alleged incident occurred. (R. I at 176:15). By this time, the automatic digital storage system had lapsed and erased the video captured when Shupe and Bourdon claim to have been at Reed's. (R. I at 177).

The fact Shupe was intoxicated, does not corroborate his claims, or those of Bourdon. When Shupe's vehicle was served by law enforcement, they found a 30 pack of Budweiser beer, four cans of which were missing. (R. I at 112:1). Shupe testified he had consumed all four of the missing cans on the night in question, while driving. (R. I at 148:13). Though there is evidence Shupe consumed alcohol on the night in question, the only evidence he consumed any at Reed's, is the inconsistent and contradictory statements and testimony of two individuals who have provided patently false statements throughout the investigation.

Given the low credibility of the two individuals, their inconsistent, dishonest, and contradictory statements, and the fact no independent corroboration has been presented, there is insufficient evidence to find Shupe possessed or consumed alcohol at Reed's.

CONCLUSION

The action taken by the Agency against Reed's, was based on the erroneous interpretation of K.S.A. 41-2615 as apply absolute liability. Further, the Agency's finding

Shupe possesses and consumed alcohol at Reed's, was not supported by evidence which is substantial when viewed in light of the record as a whole. As a result, Reed's is entitled to relief pursuant to K.S.A. 77-621 (c)(4) & (7).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify on the 30th day of January, 2013, I caused sixteen (16) copies of the above and foregoing "**BRIEF OF APPELLANT,**" to be hand delivered to the Clerk of the Appellate Courts, 301 SW 10th Ave, 3rd Floor, Topeka, KS 66612. Two additional copies were hand delivered to the Kansas Department of Revenue, 915 SW Harrison Room 214N, Topeka, Kansas 66623.

Robin Alvarez/Anne Geier
Administrative Assistants