13-110315-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KITE'S BAR & GRILL, INC.
D/B/A KITE'S GRILL & BAR
Appellant

v.

KANSAS DEPARTMENT OF REVENUE
ALCOHOLIC BEVERAGE CONTROL DIVISION
Appellee

BRIEF OF APPELLANT

Appeal From the District Court of Riley County, Kansas
The Honorable John F. Bosch, Judge
District Court Case No. 11 CV 312

JEREMIAH L. PLATT, #22733
Clark & Platt, Chtd.
417 Poyntz Avenue
Manhattan, KS 66502
(785)539-6634

Attorney for Petitioner/Appellant

ORAL ARGUMENT: 15 Minutes

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NATURE OF THE CASE

Kansas Division of Alcoholic Beverage Control (Agency) initiated an action against Kite's Grille & Bar (Licensee) under the Kansas Club and Drinking Establishment Act, K.S.A. 41-2601 *et. seq.*, for an alleged violation of K.S.A. 41-2615(a). The allegations were that the Licensee "knowingly or unknowingly permitted the possession or consumption of alcoholic liquor or cereal malt beverages on the licensed premises by a person under twenty-one years of age." Licensee timely requested a hearing before the Director of the Agency, and said hearing was held on the 15th day of July, 2011. After the hearing, the Director found Licensee guilty of the charge, and ordered Licensee's liquor license suspended for a period of four (4) weekend days.

Licensee filed an appeal to the Secretary of the Kansas Department of Revenue (Secretary) pursuant to K.S.A. 41-321. At the time of the appeal, the Licensee also requested a stay of the sanctions which was granted by the Secretary. On the 16th day of November, 2011, the Secretary issued a Final Order Following Review upholding the Director's order.

Licensee filed a Petition for Judicial Review pursuant to K.S.A. 77-601, *et. seq.*, in the District Court of Riley County, Kansas. Arguments were heard by the Hon. Paul E. Miller on the 24th day of April, 2012. Judge Miller took the matter under advisement. Subsequently, Judge Miller retired without issuing a ruling, and the case was assigned to the Hon. John F. Bosch. Arguments were again heard by Judge Bosch on the 11th day of October, 2012, at which time Judge Bosch took the matter under advisement. Judge Bosch issued a written ruling on the 15th day of July, 2013, which is the subject of this appeal.

ISSUES PRESENTED

ISSUE 1: DOES K.S.A. 41-2615(a) IMPOSE AN ABSOLUTE LIABILITY ON THE LICENSEE FOR THE PROHIBITED CONDUCT DESCRIBED IN THE STATUTE?

ISSUE 2: WHETHER THE DISTRICT COURT APPLIED THE CORRECT STANDARD FOR COMPLIANCE WITH K.S.A. 41-106?

STATEMENT OF FACTS

The Alcoholic Beverage Control Division of the Kansas Department of Revenue (hereinafter Agency) issued a Citation and Notice of Pre-Hearing Conference to Licensee Kite's Grille & Bar (hereinafter Licensee) on the 13th day of January, 2011. (R.V.1, Pg. 35) The allegations in the Citation were that "the Licensee or its agent did, on or about 12/18/10, knowingly or unknowingly permit the possession or consumption of alcoholic liquor or cereal malt beverage on the licensed premises by a person under twenty-one years of age, in violation of K.S.A. 41-2615(a)." (R.V.1, Pg. 35) The pre-hearing conference was scheduled for the 17th day of January, 2011, but was subsequently continued to the 18th day of January at the request of the Agency. (R.V.1, Pg. 38) Thereafter, the pre-hearing conference was continued to the 29th day of April, 2011, at the request of the Licensee. (R.V.1, Pg. 42) On the 1st day of June, 2011, the Agency issued a Pre-Hearing Order stating that the pre-hearing conference had been held on the 29th day of April, and that an evidentiary hearing was to be held on the 21st day of June, 2011, before the Acting Director of the Agency (hereinafter Director). (R.V.1, Pg. 45-48) On the 21st day of June, 2011, an evidentiary hearing was held before the Director. (R.V.1, Pg. 49)

At the hearing, Riley County Police Officer Neil Ramsey testified that on the 18th day of December, 2010, he observed what he believed to be an underage person in possession of alcohol

inside Licensee's establishment. (R.V.1, Pg. 52 L 22-25) Officer Ramsey stated after he observed the individual quickly set down a beer can and sit down, he approached her and identified her by her driver's license. (R.V.1, Pg. 53 L 5-9, 22-23) The driver's license showed the individual to be 19 years of age. (R.V.1, Pg. 54 L 2-4) The individual, identified as Taylor Dodge, advised Officer Ramsey that she had gained entrance to the Licensee's establishment by walking past the doorman, who never asked her for identification. (R.V.1, Pg. 54 L 14-20) Officer Ramsey indicated that he never spoke to the doorman to ensure that is in fact how the individual entered the establishment. (R.V.1, Pg. 59 L 15-20) Although Officer Ramsey searched Ms. Dodge's purse in an attempt to locate a fake identification card, he never searched her person for the same purpose. (R.V.1, Pg. 118 L 27-28) Ms. Dodge advised Officer Ramsey that she was holding the beer can for a friend of hers, and Officer Ramsey testified he never observed Ms. Dodge drink from the can. (R.V.1, Pg. 54 L 5-11)

Officer Ramsey issued a citation to Ms. Dodge for the offense of Minor in Possession of Alcohol. (R.V.1, Pg. 59 L10-14) Officer Ramsey transported Ms. Dodge to the Riley County Police Department's Aggieville substation in order to issue the citation. (R.V.1, Pg. 60 L 11-15) Officer Ramsey never advised anyone from Licensee's establishment of the situation prior to leaving the establishment and transporting Ms. Dodge to the substation. (R.V.1, Pg 60 L 16-18) Officer Ramsey testified that he later returned to the establishment and spoke with an unknown individual whom he believed was a manager. (R.V.1, Pg. 60 L 19-23) Officer Ramsey did not issue anyone at Licensee's establishment a citation at the time of the offense, but rather advised the unknown manager that a report would be sent to the Agency. (R.V.1, Pg. 60 L 24-25, Pg. 61 L 1-3)

At the conclusion of the hearing, the Director found that the charge was supported by the evidence, and found Licensee guilty of the charge. (R.V.1, Pg. 86 L 6-7) The Director ordered that Licensee's liquor license, #13-030-0672-01, should be suspended for four (4) weekend days. (R.V.1, Pg. 86 L 24-28)

On the 27th day of June, 2011, Licensee filed a Notice of Appeal Pursuant to K.S.A. 41-321, with the Secretary of the Kansas Department of Revenue (hereinafter Secretary). (R.V.1, Pg. 89-91) On the 17th day of August, 2011, the Secretary issued a Notice of Opportunity to Present Written Arguments to the Agency and Licensee. (R.V.1, Pg. 92-93) Also on that date, the Secretary issued an Order Granting Request for Stay, staying the sanctions imposed by the Director against the Licensee until the expiration of all appeals. (R.V.1, Pg. 94-95) Licensee and Agency submitted briefs to the Secretary outlining the issues and their respective positions. (R.V.1, Pg. 96-116) On the 16th day of November, 2011, the Secretary issued a Final Order Following Review. (R.V.1, Pg. 117-124) The Final Order from the Secretary found that the Director's Order should be upheld in all respects. (R.V.1, Pg. 123)

On the 14th day of December, 2011, Licensee filed a Petition for Judicial Review pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* in the District Court of Riley County, Kansas (R.V.1, Pg 3) After the Petition for Judicial Review was filed, neither party submitted any further briefs to the District Court. Rather, oral arguments were heard by the Hon. Paul E. Miller on the 24th day of April, 2012. (R.V.2) On that date, Judge Miller took the matter under advisement. (R.V.2, Pg. 36 L 11-14) Subsequently, Judge Miller retired from the bench and the case was then assigned to the Hon. John F. Bosch. (R.V.1, p 1) On the 11th day of October, 2012, oral arguments were presented a second time to Judge Bosch.

(R.V.3) On that date, Judge Bosch took the matter under advisement. (R.V.3, Pg. 51 L 1-8)

On the 15th day of July, 2013, the District Court issued its Order. (R.V.1, Pg. 126-133) In the Order, the District Court found that K.S.A. 41-2615(a) imposes an absolute liability on the Licensee for the prohibited conduct described in the statue. (R.V.1, Pg. 131 L 8-9) Also, the District Court held that the Agency's service of the administrative citation was in substantial compliance with the requirements of K.S.A. 41-106. (R.V.1, Pg. 133 L 11-14)

ARGUMENTS AND AUTHORITIES

Throughout the entirety of this process, Licensee has maintained that K.S.A. 41-2615(a) does not impose an absolute liability on licensees for the prohibited conduct outlined therein. Licensee has also argued that there are two requirements outlined in K.S.A. 41-106 that must be followed in order for the Agency to take action against a licensee under the Kansas Club and Drinking Establishment Act.

ISSUE 1: DOES K.S.A. 41-2615(a) IMPOSE AN ABSOLUTE LIABILITY ON THE LICENSEE FOR THE PROHIBITED CONDUCT DESCRIBED IN THE STATUTE?

The scope of review is governed by K.S.A. 77-621(c)(4), which states that the court shall grant relief if it determines that "the agency has erroneously interpreted or applied the law." Kansas Courts no longer show a deference to the administrative agency's interpretation of a statute that the agency administers. See, *e.g., In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). This issue is determined by interpreting K.S.A. 41-2615(a). Interpretation of a statute is a question of law, and an appellate court's review is unlimited. *Martin v. Kansas Department of Revenue*, 36 Kan.App.2d 561, 563, 142 P.3d 735, 737 (2006).

The Petitioner is aware of the recent ruling in *MCJS, Inc. v. Kansas Department of*

Revenue, No. 108,788, released by this Court on October 25, 2013, dealing specifically with this issue. In that matter, the testimony was that un underage patron purchased beer from both a bartender, and a waitress, at a bar owned by MCJS, Inc. Further, it was testified to that staff from the bar had observed the underage patron consuming alcohol at a table in the establishment. Clearly, observing someone consume alcohol, and directly selling alcohol to them, is something more than what has occurred in the instant matter. Due to the clear factual distinction in this case, and the arguments raised in this matter before the Director, the Secretary, the District Court, and herein, Petitioner believes there is a good-faith argument the issue should be decided in its favor.

K.S.A. 41-2615(a) states:

> "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 issue is whether this creates an absolute liability to a licensee when there has been no action, or inaction, on the part of the licensee. Here, the police officer found an under-age female inside Licensee's establishment possessing an alcoholic beverage. When questioned, the female indicated that she had been allowed to enter the bar without question. However, Officer Ramsey never asked the doorman if that was the case, and never searched the female to determine if she had a fake identification card on her which could have been used to enter the bar. The female advised Officer Ramsey that she had not purchased the beverage, but that she was holding it for a friend. She also advised Officer Ramsey that she had not consumed any alcohol inside Licensee's establishment. Neither Officer Ramsey, Ms. Dodge, nor anyone from the Licensee's

establishment ever testified that anyone from the establishment knew of or saw Ms. Dodge with the alcohol.

Kansas Appellate Courts have recognized K.S.A. 41-2615(a) as a hybrid penal/regulatory provision. See, *State v. Sleeth*, 8 Kan.App.2d 652, 664 P.2d 883 (1983); *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 733 P.2d 839 (1987); *State v. JC Sports Bar, Inc.*, 253 Kan. 815, 861 P.2d 1334 (1993). When both *Sleeth* and *Sanctuary* were decided, K.S.A. 41-2615(a) read:

> "No club licensed hereunder 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."

However, in 1987, the statute was amended to read as it does today. It is under the current reading that the Court interpreted the statute in *JC Sports Bar, Inc.*

In both *Sleeth* and *Sanctuary* the Court had the benefit of two separate sentences within the statute to guide its determination that, "Our legislature has adopted a strict regulatory policy by imposing upon ***private clubs*** an absolute duty not to permit minors to consume alcoholic beverages on their premises." *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 39, 733 P.2d 839 (1987). (Emphasis added). "Prior to 1987, only a 'club' was subject to the *Sleeth* standard of absolute liability." *State v. JC Sports Bar*, 253 Kan. 815, 821, 861 P.2d 1334 (1993). However, "the [1987] amendment broadened the scope of the language 'knowingly or unknowingly permit' to include all violators of the statute. *JC Sports Bar*, 253 Kan. at 820-21.

The Agency contends that nothing in *JC Sports Bar* reverses or negates the findings by

the Court in *Smith* and *Sleeth*. (R.V.1, Pg. 111 L 21). That contention is incorrect as it clearly defined the "knowingly or unknowingly permit" language. "It appears to us that the legislature in adopting the language 'knowingly or unknowingly permit' intended some action or inaction of a greater magnitude than merely opening for business on the night in question." *JC Sports Bar*, 253 Kan. at 823. As the Licensee has argued throughout this case, it is not only the "knowingly or unknowingly" language that must be interpreted. The word "permit" is as much a part of the statute as the remainder. "Black's Law Dictionary 1140 (6th ed. 1990) defines permit as 'To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act.'" *JC Sports Bar*, 253 Kan. at 822.

Here, the Licensee, its owners, officers, or employees did nothing to permit Ms. Dodge to do anything. There is no prohibition against individuals under the age of 21 from being on the Licensee's premises, only that they not possess or consume alcohol while there. It is uncontroverted that Ms. Dodge received the alcohol from a friend, and that she never consumed alcohol while within Licensee's establishment. To say that the Licensee or any of its agents did anything to permit Ms. Dodge to possess the alcohol is ludicrous.

Likewise, the absolute liability standard which was announced in both *Sleeth* and *Sanctuary* under the previous statute was imposed against clubs and drinking establishments. *State v. Sleeth*, 8 Kan.App.2d 652, 664 P.2d 883 (1983) (The first full sentence of K.S.A. 41-2615 prohibits, inter alia, the commission of certain acts by licensed clubs); *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 733 P.2d 839 (1987) (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). It was not until after the 1987 amendment to K.S.A. 41-2615 that the

entire statute was focused upon prohibited acts of licensees, owners, officers and employees. It is hard to imagine that a club or drinking establishment can do anything to "knowingly or unknowingly permit" someone to possess or consume alcohol on its premises. However, when imposing liability against an actual person, the Court in *JC Sports Bar* concluded that "K.S.A. 41-2615(a) does not establish absolute liability...and does not clearly indicate a legislative purpose to do so." *JC Sports Bar*, 253 Kan. at 823.

Lastly, the Agency's position that the statute imposes strict liability is undercut by the statute itself. K.S.A. 41-2615(c) reads:

> (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 that reasonably appears to contain a photograph of the minor and purporting to establish that such minor was 21 or more years of age.

Why would the legislature go through the effort to write a statute that is an absolute liability offense, only to write into the same statute a defense with a scienter requirement? This would be akin to saying that speeding is a strict liability offense, unless you though you were going slower than the speed limit, and your speedometer was broken. If the legislature truly intended for K.S.A. 41-2615(a) to impose a strict liability upon everyone who committed the offense, there would be no reason for them to allow a defense when the individual possessing or consuming the alcohol has used a fake identification card. In fact, not only is the defense listed in K.S.A. 41-2615(c), but also as a stand-alone statute in K.S.A. 41-346 (outlining a defense to K.S.A. 41-2615 if the defendant has reasonable cause to believe the minor to be over the age of 21, and the

minor presented identification that reasonably appears to be said minor.)

K.S.A. 41-2615(a) does not impose an absolute liability on the Licensee for the prohibited conduct described in the statute. A licensee, or its owners, officers or employees must do something more than open for business to "knowingly or unknowingly permit" someone to possess or consume alcohol on its premises.

ISSUE 2: WHETHER THE DISTRICT COURT APPLIED THE CORRECT STANDARD FOR COMPLIANCE WITH K.S.A. 41-106?

The scope of review is governed by K.S.A. 77-621(c)(4) and K.S.A. 77-621(c)(5). K.S.A. 77-621(c)(4) states that the court shall grant relief if it determines that "the agency has erroneously interpreted or applied the law." K.S.A. 77-621(c)(5) states the court shall grant relief if it determines that "the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure." Kansas Courts no longer show a deference to the administrative agency's interpretation of a statute that the agency administers. See, *e.g., In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). This issue is determined by interpreting K.S.A. 41-106. Interpretation of a statute is a question of law, and an appellate court's review is unlimited. *Martin v. Kansas Department of Revenue*, 36 Kan.App.2d 561, 563, 142 P.3d 735, 737 (2006).

All licensed drinking establishments in Kansas are regulated under the Kansas Liquor Control Act and the Club and Drinking Establishment Act. K.S.A. 41-101, *et seq.* K.S.A. 41-106 dictates how violations of the law are to be dealt with. "Any citation issued for a violation of the liquor control act or the club and drinking establishment act ***shall*** be delivered to the person allegedly committing the violation at the time of the alleged violation. A copy of such citation

also ***shall*** be delivered by United States mail to the licensee within 30 days of the alleged violation. If such citation ***and*** copy are not so delivered, the citation shall be void and unenforceable. K.S.A. 41-106 (Emphasis added); See *Blomgren v. Kansas Department of Revenue*, 40 Kan.App.2d 208, 212, 191 P.3d 320 (2008).

Here, the Licensee was cited for a violation of K.S.A. 41-2615. Clearly this would constitute a violation of the liquor control act. Someone at the Licensee's establishment would have had to allegedly either knowingly or unknowingly permitted a minor to possess or consume alcohol while on the premises. Officer Ramsey testified that he never issued a citation to anyone for the alleged violation. Although the Agency sent notice to the Licensee within 30 days, clearly no citation was delivered.

At oral arguments in the district court, the Agency agreed with Petitioner that "under a strict interpretation of [K.S.A.] 41-106, these actions are void and unenforceable because the Agency freely admits no citation was served at the time of the violation." (R.V.3, Pg 27 L 14-17) However, the Agency contends that, under its interpretation of the statute, substantial compliance is all that is required. In its ruling, the District Court agreed with the Agency and found that the Agency had substantially complied with the statute by notifying the Petitioner of action taken against it within thirty days of the alleged violation. Nowhere does the statute allow for substantial compliance. "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it." *GT, Kansas, LLC v. Riley County Register of Deeds*, 271 Kan. 311, 315, 22 P.3d 600, 604 (2001); Citing *Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 691 P.2d 1303 (1984).

Here, the statute at question requires that a citation be given to someone, it requires that notice be provided to the licensee within thirty days, and it requires that if both of these actions are not taken that the citation and notice be deemed void and unenforceable. The "ordinary English" of the statute is that these actions ***shall*** be done. The officer, during his testimony, and the Agency have both freely admitted that no person was ever cited for the alleged violation.

The Agency's position is that if no Agency agent is present than no administrative citation can be delivered because police do not have the authority to issue administrative citations. The Agency has argued that it does not have the requisite number of agents to be physically present at every licensed establishment in the state. Therefore, the Agency argues that it would be bad public policy, and not what the legislature intended, to interpret K.S.A. 41-106 as requiring strict interpretation. The Agency's position is flawed for a number of reasons.

First, nowhere in the statute are the words "administrative citation" mentioned. The statute requires that a citation be issued to someone allegedly committing a violation of the act. Under K.S.A. 41-2615, knowingly or unknowingly permitting a minor to possess or consume alcohol is a misdemeanor crime. K.S.A. 22-2408 permits a law enforcement officer to issue a notice to appear (citation) to any person who commits a misdemeanor crime. Issuing a citation to someone who has allegedly committed the crime of knowingly or unknowingly permitting the possession or consumption of alcohol on the licensee's premises is what is required under K.S.A. 41-106. If there is no notice given to someone at the licensee's premises the licensee has no way of investigating the alleged offense, and Due Process is violated.

Second, the Agency's concern that it has only a limited number of agents, and a large number of licensed establishments, does not allow for a misinterpretation of K.S.A. 41-106. In

fact, the very same argument was raised by a separate agency within the Department of Revenue in *Zurawski v. Kansas Department of Revenue*, 18 Kan.App.2d 325, 851 P.2d 1385 (1993). In that case, the Kansas Driver Control Bureau argued that it should not be required to raised issues at the administrative level in order to preserve those issues for district court review. That department made the same argument as the Agency here, that a limited staff size precluded them from following the requirements of a statute. The *Zurawski* court stated, "[w]hile we acknowledge the Department's staffing constraints, we are required to consistently apply the law to all parties." *Zurawski,* 18 Kan.App.2d at 330, 851 P.2d at 1389. It is the same legislature which wrote K.S.A. 41-106 as that which provides funding for the number of agents for the Alcoholic Beverage Control Department.

Lastly, the Agency's position is flawed because it's argument on this issue is severely undermined by it's argument on the prior issue. The Agency and the Secretary have both indicated on multiple occasions that "all things related to alcohol are highly regulated and that strict compliance with all rules and regulations is critical." (R.V.1, Pg 9a L 14-16, Pg 16 L 17-18, Pg 122 L 17-18) Apparently, that does not apply to the Agency itself. The Agency asks the Court to interpret K.S.A. 41-106 as the Agency always has, in a way that goes to the "spirit of the law." But as previously stated, Kansas Courts no longer show a deference to the administrative agency's interpretation of a statute that the agency administers. See, *e.g., In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012).

K.S.A. 41-106 is clear. "The statutory language 'shall' generally represents a mandatory course of conduct." *Univ. of Kansas Hospital Authority v. Board of County Commissioners of the Unified Government of Wyandotte County*, Case No. 108,391, Op. released September 13, 2013;

State v. Bee, 288 Kan. 733, 738, 207 P.3d 244 (2009). "The most fundamental rule [of statutory construction] is that we should ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning. [Citation Omitted]. When a statute is plain and unambiguous, we are charged with the responsibility to give effect to the legislature's express intent, resisting the temptation to determine what the law should or should not be." *State v. Stallings*, 284 Kan. 741, 742-43, 163 P.3d 1232, 1234 (2007).

The legislature, in enacting K.S.A. 41-106, intended that a citation be delivered to the person allegedly committing the violation at the time of the alleged violation, and that a copy of such citation be delivered to the licensee within 30 days of the alleged violation. The penalty for not doing both of those requirements is that the action is void and unenforceable. By it's own admission, the Agency agrees no citation was ever given. This action is void and unenforceable.

CONCLUSION

K.S.A. 41-2615(a) does not impose an absolute liability on the Licensee for the prohibited conduct described in the statute. Some action, or inaction, must be taken before liability can be imposed upon a licensee. Likewise, under a plain and ordinary reading of K.S.A. 41-106, the action taken by the Agency in this matter is void and unenforceable.

Respectfully submitted,

JEREMIAH L. PLATT #22733
Clark & Platt, Chtd.
417 Poyntz Avenue
Manhattan, KS 66502
(785) 539-6634
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

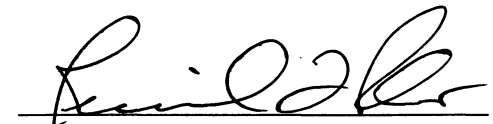
I, Jeremiah L. Platt, hereby certify that on the 22nd day of November, 2013, I served the above foregoing BRIEF OF APPELLANT by depositing two (2) true and correct copies in the U.S. Mail, postage prepaid to:

Sarah Byrne, #21650
Assistant Attorney General
Alcoholic Beverage Control
915 SW Harrison, Room 214
Topeka, KS 66625-3512

and

Nick Jordan
Kansas Secretary of Revenue
915 SW Harrison, Room 214
Topeka, KS 66612

I, further certify that on the same date I caused sixteen (16) true and correct copies of the same to be filed with the Clerk of the Appellate Courts, Carol G. Green, Kansas Judicial Center, 301 W. 10th Street, Topeka, Kansas 66612.



Jeremiah L. Platt, #22733
Clark & Platt, Chtd.
417 Poyntz Avenue
Manhattan, KS 66502
(785)539-6634