No. 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

vs.

KANSAS DEPARTMENT OF REVENUE,
ALCOHOLIC BEVERAGE CONTROL

Appellee

BRIEF OF APPELLEE

Appeal from the District Court of Riley County
The Honorable John F. Bosch, Judge
District Court Case No. 11CV312

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NATURE OF THE CASE

This is an appeal brought under the Act for Judicial Review and Civil Enforcement of Agency Actions to contest the imposition by the Director of the Alcoholic Beverage Control ("ABC") of a four-day license suspension against the appellant for a violation of K.S.A. 41-2615. The Director's Order was affirmed by the Secretary of Revenue and the Riley County District Court. The Appellee prays that this Court will find the agency's action was appropriate and affirm the district court's holding.

ISSUES ON APPEAL

Appellant's appeal presents two main issues:

I. **Interpretation of K.S.A. 41-2615**. K.S.A. 41-2615 prohibits a licensee from "knowingly or unknowingly" permitting a minor to possess or consume alcoholic liquor on the licensed premises. The Agency found that the statute imposes absolute liability on the licensee when a minor possesses or consumes alcoholic liquor on the licensed premises. Did the agency correctly interpret and apply the law to this action?

II. **Service of the Citation.** K.S.A. 41-106 requires a citation for a violation of the Club and Drinking Establishment Act to be served to the person allegedly committing the violation at the time of the violation and a copy mailed to the licensee within 30 days. The Agency found that ABC substantially complied with the provisions of K.S.A. 41-106 when it issued a Citation to the licensee within 30 days of the violation. Is substantial compliance sufficient for service of the citation?

STATEMENT OF FACTS

On December 18, 2010, Riley County Police Officer Neil Ramsey conducted a bar check at Kite's Grille & Bar (hereinafter "Kite's"). (R. I at 52). Ramsey observed Taylor Dodge in possession of a can of beer inside Kite's. (R. I at 52-53).

Dodge gave Officer Ramsey her driver's license, showing her to be 19 years of age. (R. I at 53-54). Ramsey took Dodge to the Aggieville Substation and issued her a ticket for minor in possession of alcohol. (R. I at 59-60). Ramsey returned to Kite's and spoke to a manager about the incident and informed him that a report would be filed. (R. I at 56 & 60). Ramsey did not issue any citation to Kite's. (R. I at 60-61).

ABC issued a Citation and Notice of Pre-Hearing Conference to Kite's on January 13, 2011. (R. I at 35). The Citation alleged 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. I at 35). The Citation was served via certified mail to the licensed premises and first-class mail to the licensee's process agent. (R. I at 37).

After several continuances, the Pre-Hearing Conference was held on April 29, 2011. (R. I at 45). The parties agreed to set the matter for hearing before the Director. (R. I at 45). The hearing was held on June 21, 2011. (R. I at 83). The Director found Kite's guilty as charged and imposed a penalty of a four weekend-day suspension. (R. I at 86). Kite's appealed the Director's Order to the Secretary of Revenue on June 27, 2011. (R. I at 89-91). On November 16, 2011, the Secretary confirmed the Director's interpretation of K.S.A. 41-2615 and affirmed the Order of a four weekend-day suspension. (R. I at 117-124).

Kite's filed a petition for judicial review in Riley County District Court on December 14, 2011. (R. I at 3). The District Court found the agency's interpretation of K.S.A. 41-2615 was correct. (R. I at 131). The District Court also found the

agency's service of the administrative citation was in substantial compliance with the requirements of K.S.A. 41-106. (R. I at 133).

ARGUMENTS AND AUTHORITIES

I. The Agency correctly interpreted and applied K.S.A. 41-2615 to the facts.

A. Standard of review

The Court's scope of review is defined by K.S.A. 77-621(c). A court reviewing an agency action may grant relief only if it finds, *inter alia*: (4) the agency has erroneously interpreted or applied the law. K.S.A. 77-621. An agency action is presumed valid, and the burden for proving it to be invalid falls on the person challenging the agency action. *Brewer v. Schalansky,* 278 Kan. 734, 102 P.3d 1145, 1148 (2004). Statutory interpretation is a question of law, over which the court exercises unlimited review. *State ex rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 443, 172 P.3d 1154 (2007). Deference is no longer given 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).

B. K.S.A. 41-2615(a) does create absolute civil liability on licensees.

K.S.A. 41-2615(a) provides: "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…"

Agency's interpretation has always been that 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. Absolute liability requires no knowledge or intent on the part of the violator. *State v. JC Sports Bar, Inc.*, 253 Kan. 815; 821, 861 P.2d 1334 (1993). It is enough that the violation occurred.

K.S.A. 41-2615 has been recognized as a hybrid of penal and regulatory provisions. *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). A study of the history of K.S.A. 41-2615 indicates that the legislature intended to impose an absolute liability standard on ***licensees.*** Between 1965 and 1987, K.S.A. 41-2615 read, in pertinent part:

> (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 *State v. Sleeth*, the Kansas Court of Appeals found that the conspicuous absence of the "knowingly or unknowingly" phrase from the sentence applying to criminal prosecution of owners indicated a legislative intent to infuse <u>that</u> provision with a scienter requirement. *State v. Sleeth.* 8 Kan.App.2d 652, 656, 664 P.2d 883 (1983). In other words, 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 court further found that knowledge of the incident was <u>not</u> a prerequisite to holding the club liable for a violation. *Sleeth*, at 656.

In *Sanctuary, Inc. v. Smith*, the Court reaffirmed that interpretation, finding that K.S.A. 41-2615, through the use of the "knowingly or unknowingly permit"

phrase, imposes an absolute liability standard on clubs: "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).

The statute was amended in 1987 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..."

In *State v. JC Sports Bar, Inc., Supra*, the Kansas Supreme Court addressed the language "knowingly or unknowingly permit" as it applied to a **criminal** prosecution. The owner of a bar had been charged criminally with a violation of the amended statute. A minor picked up an abandoned cup of beer at an unoccupied table and consumed from it, then sat it back on the table. When the minor consumed the beer, the owner was actually standing outside the bar with the ABC Agent.

The Court found that "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, which allowed the prohibited conduct to occur before **criminal liability** would attach." *JC Sports Bar*, at 823, emphasis added.

In *JC Sports Bar*, the Kansas Supreme Court addressed only a criminal issue...could a bar and its owners be found <u>criminally</u> liable for the illegal actions of a minor on their premises, when all evidence indicated that no one in the bar provided

beer to the minor or even knew he had taken a drink from someone else's cup? The court found that the bar and its owners could not be found **criminally** liable in that instance. The court did not address **civil** application of the statute.

It is logical that a criminal court and an administrative agency may interpret and apply the same statute differently. Penal statutes must be strictly construed in favor of the accused. *Huelsman v. Kansas Department of Revenue,* 267 Kan. 456, 462, 980 P.2d 1022 (1999). That same statute may be construed more liberally by an administrative agency in a civil action.

Nothing in the *JC Sports Bar* opinion reverses or negates the findings by the Court in *Smith* and *Sleeth.* Simply put, *JC Sports Bar* speaks only to criminal liability, **not** civil liability. The court specifically finds that, previous to the 1987 amendment, the statute imposed absolute civil liability on the licensee, but no absolute criminal liability on the individual. After the 1987 amendment, the statute expanded ***criminal*** liability to all violators, whether the violation was knowingly or unknowingly. *JC Sports Bar*, at 821. The Court further found, however, that "the statute does not establish absolute liability under the facts of this case and does not clearly indicate a legislative purpose to do so." *JC Sports Bar*, at 823.

A recent decision by the Kansas Court of Appeals found the Agency's interpretation and application of K.S.A. 41-2615 in civil actions is correct. In its opinion rendered October 25, 2013, this Court found, in *MCJS, Inc. v. Kansas Department of Revenue,* 311 P.3d 1147 (2013), that the statute <u>does</u> create absolute civil liability. If fact, this court noted: "had *JC Sports Bar, Inc.* been a civil case...the Supreme Court likely would have concluded that the phrase 'knowingly or

unknowingly permit' creates absolute liability for a violation of the statute, as the Sleeth and Sanctuary, Inc. courts concluded." *MCJS, Inc.*, at 1154.

Kite's argues that the inclusion of an affirmative defense in K.S.A. 41-2615 implies the legislature did not intend to create absolute liability. While there is no legislative history explaining the legislature's intent behind the affirmative defense, it could be argued the more reasonable explanation is because the legislature knew the absolute liability standard it had set created a burden on licensees that could be relieved through an affirmative defense. The presence of an affirmative defense, however, is inconclusive of any intent on the part of the legislature either way.

C. Even absent absolute liability, Kite's did knowingly or unknowingly permit a minor to possess or consume alcoholic liquor on the licensed premises.

Evidence presented at the hearing clearly shows that Kite's did "permit" Dodge to possess alcoholic liquor on the premises. "Permit" can be interpreted to imply "circumstances where one has power or control to authorize an act or to give one's consent to a situation" or it 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". *State v. Wilson*, 267 Kan. 550, 560-61, 987 P.2d 1060 (1999).

No one ever checked Dodge's identification or asked her age during the time she was at Kite's. (R. I at 54). No one removed the drink from her hand. Kite's acquiesced in Dodge's possession of alcoholic liquor by taking no action to prevent it. Kite's allowed Dodge to possess alcoholic liquor on its licensed premises by not

opposing it. Under the *Wilson* analysis, therefore, Kite's did "permit" Dodge to possess alcoholic liquor.

This court, in *MCJS, Inc. v. Kansas Department of Revenue* found that, under the plain language of the statute, a drinking establishment licensee unknowingly permitted a minor, Kip Shupe, to consume alcoholic liquor on the premises "merely by allowing him to enter the premises and by serving alcohol in an area within Shupe's reach". 311 P.3d 1147, at 1155. That is exactly what happened in this case.

Kite's allowed Dodge to enter the licensed premises where Dodge was able to possess alcoholic liquor. Officer Ramsey testified that Dodge was at a booth right where the two bars connect, where alcoholic liquor is served. (R. I at 57). Liquor was served in an area within Dodge's reach, even though nothing in the record indicates Dodge acquired the liquor from anyone associated with Kite's. Under the *MCJS* test, Kite's unknowingly permitted Dodge to possess alcoholic liquor on the licensed premises.

II. The ABC substantially complied with the provisions of K.S.A. 41-106 in the service of the citation and substantial compliance is reasonable in cases where ABC agents are not present when the violation is discovered.

A. Standard of review

The Court's scope of review is defined by K.S.A. 77-621(c). A court reviewing an agency action may grant relief only if it finds, *inter alia*: (4) the agency has erroneously interpreted or applied the law; (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure. K.S.A. 77-621. An agency action is presumed valid, and the burden for proving it to be invalid falls on

the person challenging the agency action. *Brewer v. Schalansky,* 278 Kan. 734, 102 P.3d 1145, 1148 (2004). Statutory interpretation is a question of law, over which the court exercises unlimited review. *State ex rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 443, 172 P.3d 1154 (2007). Deference is no longer given 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).

B. Substantial compliance is reasonable in cases where no ABC Agent is present when a violation of the liquor control act or club and drinking establishment act is discovered by local law enforcement.

K.S.A. 41-106 states: "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 shall also 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."

On its face, the statute is clear and unambiguous. And, generally, the legislature's intent is determined based on the plain language of the statute. *Pieren-Abbott v. Kansas Dept. of Revenue*, 16 Kan.App.2d 12, 13. 825 P.2d 172 (1991). Remedial legislation, however, should be "liberally construed to effectuate the purposes for which it was enacted." *Smith v. Marshall*, 255 Kan. 70, Syl. ¶ 1, 587 P.2d 320 (1978).

In situations where no ABC Agent is present to issue an administrative citation, strict compliance with K.S.A. 41-106 would lead to absurd results. The judicial interpretation of a statute should avoid absurd or unreasonable results. *Hays v. Ruther*, 313 P.3d 782, 786 (Kan., 2013). Courts must ascertain the legislature's intent behind a particular statutory provision from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. *State v. McDaniel*, 292 Kan. 443, 445, 254 P.3d 534 (2011).

The liquor control act and the club and drinking establishment act set very clear prohibitions on the actions of licensees. Each act makes it clear that licensees may not do certain things and provides for remedial action in the nature of fines and suspensions or revocation. It is clear from a consideration of the entire act that the legislature intended to prevent licensees from permitting, either knowingly or unknowingly, minors to consume alcoholic liquor on licensed premises. It is clear from a consideration of the entire act that the legislature intended the ABC to take remedial action against a licensee who violates a provision of the act.

As in the present case, local law enforcement officers often report violations of the club and drinking establishment act to ABC for action against the license. Local law enforcement officers have no authority to issue administrative citations on behalf of the Director. Any citation issued by local law enforcement officers would be a criminal citation, pursued through local courts.

Kite's would have this court find that local law enforcement officers must issue a criminal citation before ABC can take administrative action against the licensee for a violation of the act. Even if such criminal citation were issued, ABC

would still have to commence its own administrative action. Not only would the local courts become clogged with misdemeanor actions taken solely to preserve the ABC's ability to sustain an administrative action, the ABC could, arguably, still be precluded from initiating such administrative action, because the licensee was not served with an administrative citation at the time the violation occurred. That is the very definition of absurd.

Carried to its logical conclusion, Kite's argument would require an ABC Agent be present to issue an administrative citation for any violation ABC takes action on. That would effectively prevent ABC from taking administrative action against the licensee on any case reported by local law enforcement, in essence giving the licensee a free pass. It cannot have been the legislature's intention to allow licensees to violate the club and drinking establishment act without consequence. Interpreting K.S.A. 41-106 in such a manner as to allow these remedial actions in substantial compliance with the provisions of that statute is the only reasonable outcome for this Court.

C. The Agency did substantially comply with the provisions of K.S.A. 41-106.

Substantial compliance means compliance with respect to the essential matters necessary to assure every reasonable objective of the statute. *Martin v. Kansas Dept. of Revenue*, 38 Kan.App.2d 1, 9, 163 P.3d 313 (2006). K.S.A. 41-106 was adopted by a conference committee and there are no minutes available to explain the committee's intent. While there is no legislative history to explain the legislature's objective(s) behind adopting K.S.A. 41-106, one can safely assume the statute was

intended to give violators reasonable notice of impending action. That happened in this case.

Officer Ramsey testified that he told a manager of Kite's about the violation on the night it happened. ABC served a citation on the licensee within 30 days after that. Notice was given on the date of the violation and the citation was mailed to the licensee and its process agent within 30 days. Every requirement of K.S.A. 41-106 that could have been complied with in this instance was complied with. The licensee received (almost) immediate actual notice of a violation, and the official citation was mailed to Kite's within 30 days. That constitutes substantial compliance.

CONCLUSION

K.S.A. 41-2615(a) imposes absolute civil liability on a licensee when a minor possesses or consumes alcoholic liquor on its premises. It is not necessary to show that Kite's knew Dodge was under-age, or that Kite's had any knowledge that Dodge possessed alcoholic liquor on the premises. It is enough that it happened. The statute clearly provides that a licensee may not even "unknowingly" permit it to happen.

It would be poor public policy to construe K.S.A. 41-2615(a) in such a way as to require a showing of intent or knowledge to find a licensee liable when minors possess alcoholic liquor on the premises. Such an interpretation would only discourage licensees from taking proactive steps to prevent underage access to liquor. It would also be poor policy to require the licensee to take some overt action to "permit" underage access of liquor before finding them liable for a violation. Licensees could merely serve the people with the minor and look the other way while

the minor consumed alcohol. No good would be served by such a position, while great harm could ensue.

Kite's voluntarily entered into a highly regulated business. A liquor license is a privilege that comes with great responsibility. When Kite's accepted its liquor license, it also accepted the responsibility that comes with it. That responsibility includes an absolute duty to prevent minors from possessing or consuming alcoholic liquor on the licensed premises. Kite's failed that responsibility in this instance.

The only reasonable interpretation of K.S.A. 41-106 that will achieve the objectives of the act is that substantial compliance is sufficient for action against the licensee when no one with authority to issue an administrative citation is present when the violation occurs. Any other interpretation would result in licensees suffering no consequence for violations of the act, which is absurd and against public policy.

In this instance, the licensee received actual notice of a violation on the date in question, and ABC served a citation on the licensee via United States mail within 30 days of the violation date. The agency did substantially comply with the provisions of K.S.A. 41-106, which was legally and physically the best compliance achievable in this instance.

Kite's has failed to maintain its burden of proof to show the agency action was invalid.

WHEREFORE the State urges the Court to affirm the District Court's findings and uphold the license suspension.

Respectfully submitted

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CERTIFICATE OF SERVICE

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