

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEALED FROM THE SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

---

Opinion No. 4661 (S.C. Ct. App. filed March 24, 2010)

---

Blue Moon of Newberry, Inc., d/b/a Blue Moon Sports Bar,.....Petitioner,

v.

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

---

BRIEF OF PETITIONER

---

Richard J. Breibart, Esquire  
Jesse A. Near, Esquire  
Law Offices of Richard J. Breibart, LLC  
Post Office Box 310  
Lexington, South Carolina 29071  
Telephone: (803) 359-7996  
Facsimile: (803) 951-4619  
Attorneys for Petitioner

**TABLE OF CONTENTS**

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....2

Facts.....3

Arguments

1. THE COURT OF APPEALS ERRED BY IGNORING THE PLAIN LANGUAGE OF REGULATION 7-401.4(K) DEFINING “BONA FIDE GUESTS,” WHILE SUBSTITUTING ITS OWN EXPANDED DEFINITION DERIVED FROM BLACK’S LAW DICTIONARY TO REACH ITS CONCLUSION THAT PETITIONER’S ALCOHOLIC BEVERAGE LICENSE AND PERMIT SHOULD BE REVOKED.....7

2. THE COURT OF APPEALS DEPRIVED PETITIONER OF DUE PROCESS IN GRANTING RESPONDENT’S REQUEST TO REVOKE PETITIONER’S ALCOHOLIC BEVERAGE LICENSE AND PERMIT BECAUSE RESPONDENT FAILED TO PROFFER ADMISSIBLE EVIDENCE OF ALCOHOL CONSUMPTION BY A NON-MEMBER.....11

Conclusion .....13

**TABLE OF AUTHORITIES**

**CASES**

Brown v. South Carolina Dep’t of Health and Enviro. Control, 348 S.C. 507, 560 S.E.2d 410 (2002).....7

Converse Power Corp. v. South Carolina Dep’t of Health and Enviro. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).....7

Richland County Sch. Dist. Two v. South Carolina Dep’t of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999).....7

State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008).....9

Travelscape, LLC v. South Carolina Dep’t of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011).....7

Triska v. South Carolina Dep’t of Health and Enviro. Control, 292 S.C. 190, 355 S.E.2d 531 (1987).....7

Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997).....8

**STATUTES**

S.C. Code Ann. § 61-6-10 *et seq.*(Supp. 2010).....8

**REGULATIONS**

23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010).....2, 3, 4, 5, 6, 7, 8, 11, 12

23 S.C. Code Ann. Regs. 7-401.4(K) (Supp. 2010).....1, 3, 5, 8, 10, 13

**OTHER AUTHORITIES**

Black’s Law Dictionary 168 (7th ed. 1999).....1, 7, 8, 9, 10, 13

## STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err by ignoring the plain language of Regulation 7-401.4(K) defining “bona fide guests,” while substituting its own expanded definition derived from Black’s Law Dictionary in reaching its conclusion that Petitioner’s alcoholic beverage license and permit should be revoked?
  
2. Did the Court of Appeals deprive Petitioner of due process in granting Respondent’s request to revoke Petitioner’s alcoholic beverage license, when Respondent failed to proffer admissible evidence of alcohol consumption by a non-member?

## STATEMENT OF THE CASE

Petitioner is a duly organized nonprofit organization that operates a private social club located at 1320 Lindsey Street in Newberry, South Carolina, known as Blue Moon Sports Bar (“Blue Moon”). Blue Moon possesses an on-premises beer and wine permit and a liquor-by-the-drink permit issued by Respondent, South Carolina Department of Revenue (“SCDOR”).<sup>1</sup>

On February 16, 2007, SCDOR issued an Agency Determination revoking Blue Moon’s alcoholic beverage license and permit based on an alleged violation of Regulation 7-401.4(J), occurring September 9, 2006. 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010) Blue Moon timely appealed the Agency Determination by filing a Notice of Request for Contested Case Hearing on March 9, 2007. A hearing was held by the South Carolina Administrative Law Court (“ALC”) and on September 2, 2008, the Honorable Carolyn C. Matthews reversed SCDOR’s Agency Determination, concluding that no violation had occurred.

Thereafter, SCDOR timely appealed the decision of the ALC to the South Carolina Court of Appeals. The Court of Appeals reversed the decision of the ALC in its Order issued March 24, 2010, which also contained a dissenting opinion by the Honorable Daniel F. Pieper. A Petition for Rehearing was timely filed by Blue Moon on April 8, 2010, but was subsequently denied on May 28, 2010.<sup>2</sup>

---

<sup>1</sup> SCDOR and Blue Moon originally were designated in this Brief as “Appellant” and “Respondent,” respectively, as the caption appeared in the Court of Appeals. However, they have since been changed to “Petitioner” and “Respondent” at the request of the Clerk of Court’s Office. To avoid any confusion, the parties are referred to by their abbreviated names (SCDOR and Blue Moon) throughout the remainder of this Brief.

<sup>2</sup> Although the Petition for Rehearing was denied, the Court’s Order specified that “Judge Pieper would grant the petition for rehearing.” (App. p.16).

On June 25, 2010, Blue Moon timely filed and served its Petition for Writ of Certiorari. The Petition was granted by this Court's Order of September 9, 2011, which further directed the filing of the Brief contained herein.

### **FACTS**

On September 9, 2006, Agent Quincy Ford ("Agent Ford") of the State Law Enforcement Division ("SLED"), who was not a member of Blue Moon, attempted to enter the premises. (R. p. 4, ¶5). An employee of Blue Moon met Agent Ford at the door and asked Agent Ford if he was a member of the private social club, to which Agent Ford responded he was not. (R. p. 39, lines 13-15). The doorman denied Agent Ford's request to enter and instructed him to call a phone number included on a poster displayed outside Blue Moon to attempt to obtain a membership. (R. p. 4, ¶5). Agent Ford did as instructed, left the premises, and called the membership number from his cell phone. (R. pp. 4, ¶5; 39, line 19).

Denise Polifrone ("Ms. Polifrone"), the manager of Blue Moon, testified that the person who answered Agent Ford's call that night was Steve Malone ("Mr. Malone"), who was both an employee of Blue Moon and a club member. (R. pp. 4, ¶6; 58, line 25; 59, lines 1-7). She further testified that Mr. Malone was vested with certain managerial authority and responsibilities, including the authority to admit non-members to the club upon making a prior arrangement with them, as permitted by Regulation 7-401.4(K) ("Bona fide guests shall be limited to those...for whom the member has made prior arrangements with the management of the organization"). (R. pp. 4, ¶6; 72, lines 11-15; 81, lines 24-25, 82, lines 1-2); 23 S.C. Code Ann. Regs. 7-401.4(J-K) (Supp. 2010). Agent Ford testified that he spoke with an individual he believed to be a member of

management or a club guest on the telephone. (R. p. 46, lines 1-15). During this conversation, Agent Ford testified that Mr. Malone asked him for his name and was instructed to return to Blue Moon and provide his name to the doorman. (R. pp. 4, ¶5; 39, line 17).

Agent Ford followed Mr. Malone's directions and returned to the door of Blue Moon. (R. p. 39, lines 21-22). Upon returning, the doorman again asked Agent Ford his name. (R. p. 4, ¶5). Agent Ford told the doorman his name, was required to provide identification, and paid the doorman a Two Dollar (\$2.00) entry fee. (R. p. 4, ¶5). According to Agent Ford's testimony, he then went to the bar and ordered a "Crown and Coke." (R. p. 4, ¶5). The bartender served Agent Ford a drink, for which he was charged Five Dollars and Fifty cents (\$5.50). (R. p. 4, ¶5). No one, including Agent Ford, testified that he consumed any portion of the drink while on the premises of Blue Moon. (See R. p. 4, ¶5 finding that "[a]lthough [Agent Ford] testified that he ordered an alcoholic beverage and was served an alcoholic beverage, Agent Ford did not testify at the hearing that he ever consumed any portion of the drink").

After a few minutes inside Blue Moon, Agent Ford called fellow SLED agents James Causey and Pat Jackson, who were waiting in the area outside of the club. (R. p. 31, lines 10-11). Upon receiving Agent Ford's call, Agents Causey and Jackson entered Blue Moon and issued the violation report that gave rise to this action, citing Blue Moon for violating Regulation 7-401.4(J). (R. pp. 31, lines 10-13; 158); 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010).

Ms. Polifrone testified before the ALC that, prior to displaying the poster and employing the above-described procedure for admitting non-members, she had sought the

advice of legal counsel, as well as the opinion of SLED agent John Kirkland to confirm that Blue Moon's practice would pass statutory muster. (R. pp. 2, ¶4; 60, lines 6-17). She testified that legal counsel, as well as Agent Kirkland, assured her that this procedure comported with South Carolina law on legally admitting non-members to Blue Moon. (R. pp. 2, ¶4; 60, lines 6-17).

Despite SLED's own affirmation on Blue Moon's procedure for legally admitting guests pursuant to Regulation 7-401.4(K), it chose to issue the September 9, 2006 violation report. (R. p. 158). Following the report, SCDOR issued an Agency Determination revoking Blue Moon's alcoholic beverage license and permit for its alleged violation of Regulation 7-401.4(J), which states, "Only bona fide members and bona fide guests of members of [non-profit] organizations may consume alcoholic beverages. . . upon the licensed premises." (R. p. 6, ¶7); 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010). On appeal to the ALC, the Court reversed SCDOR's Agency Determination, concluding that no violation occurred because Agent Ford was a bona fide guest, as that term is defined by Regulation 7-401.4(K), based on the prior arrangements he had made with a member and Blue Moon management before he entered. (R. pp. 7, ¶¶9-10; 8).

SCDOR subsequently appealed the decision of the ALC to the South Carolina Court of Appeals. (App. p. 2). On appeal, the only issue identified by SCDOR was whether the ALC erred in holding that Regulation 7-401.4(J) did not require a bona fide guest to "know the member extending the invitation to the bona fide guest." (App.'s Fin. Br., p. 1).



The Court of Appeals reversed the decision of the ALC on March 24, 2010, holding generally that the non-member alleged to have consumed alcohol on Blue Moon's premises was not a bona fide guest, without actually expounding upon the issue or defining the parameters of a relationship that would be acceptable as between a guest and member to satisfy Regulation 7-401.4(J). Judge Daniel F. Pieper dissented in the opinion, stating that the decision of the ALC should be affirmed because the regulatory definition of "bona fide guest" was plain on its face and that Blue Moon's actions complied with the requirement of a "prior arrangement with the management of the organization." (App. p. 7-8). Judge Pieper further opined that:

[i]f the Department of Revenue has an issue with how the regulation itself defines 'bona fide guest' then it may promulgate a new regulation as appropriate upon proper notice to the public. Until then, other businesses which follow the unambiguous language of the regulation should not be punished as a result.

(App. p. 8).

In its opinion the Court of Appeals also upheld the alleged violation (which requires actual consumption of alcohol by a non-member), but despite that strict requirement, it found that SCDOR abandoned on appeal its argument that the ALC erred in finding it offered no evidence of alcohol consumption at the merits hearing. (App. p. 7).

As a result of the facts and ruling detailed above, Blue Moon filed and served its Petition for Writ of Certiorari, which was granted by this Court's Order of September 9, 2011.

*{Continued On Next Page}*

## ARGUMENTS

**1. THE COURT OF APPEALS ERRED BY IGNORING THE PLAIN LANGUAGE OF REGULATION 7-401.4(K) DEFINING “BONA FIDE GUESTS,” WHILE SUBSTITUTING ITS OWN EXPANDED DEFINITION DERIVED FROM BLACK’S LAW DICTIONARY TO REACH ITS CONCLUSION THAT PETITIONER’S ALCOHOLIC BEVERAGE LICENSE AND PERMIT SHOULD BE REVOKED.**

State agencies such as SCDOR are required to follow their own regulations. Triska v. South Carolina Dep’t of Health and Enviro. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). While there is typically judicial deference to a State agency’s construction of its own regulations, the interpretation is properly rejected by the Court where the agency’s interpretation contravenes the plain language of its regulations. Brown v. South Carolina Dep’t of Health and Enviro. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002) (citing Richland County Sch. Dist. Two v. South Carolina Dep’t of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999)). Like statutes, clear and unambiguous regulations require no statutory construction and must be applied according to the literal meaning of their terminology, “without resort to subtle or forced construction to limit or expand the regulation’s operation.” Converse Power Corp. v. South Carolina Dep’t of Health and Enviro. Control, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) (emphasis added). When the language of a regulation is plain and unambiguous, “the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Travelscape, LLC v. South Carolina Dep’t of Revenue, 391 S.C. 89, 98, 705 S.E.2d 28, 33 (2011).

SCDOR alleges that Blue Moon violated 23 S.C. Code Regs. 7-401.4(J) by permitting on-premises consumption of an alcoholic beverage by an individual whom it

argues was neither a member, nor a guest of a member. Subsections (J) and (K) of Regulation 7-401.4, the two subsections at issue in this case, provide the following:

J. Only bona fide members and bona fide guests of members of such [non-profit] organizations may consume alcoholic beverages sold in sealed containers of two ounces or less upon the licensed premises.

**K. Bona fide guests shall be limited to those who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization.**

23 S.C. Code Ann. Regs. 7-401.4(J), (K) (Supp. 2010) (emphasis added).

Here, while the Court of Appeals correctly acknowledged that “bona fide guest” was defined by SCDOR’s regulations to mean “a person for whom the member has made prior arrangements with the management of the organization,” the Court of Appeals ignored the regulatory definition promulgated by SCDOR and instead relied upon a definition of “bona fide” from Black’s Law Dictionary in determining that Blue Moon’s practices eviscerated the purpose of the regulation. (See App. p. 5, citing Black’s Law Dictionary 168 (7th ed. 1999)); 23 S.C. Code Ann. Regs. 7-401.4(K) (Supp. 2010)<sup>3</sup>. This was a clear misapprehension of the law. In addition to the fact that nothing on the record establishes that Blue Moon’s practices as related to its guests were fraudulent or deceitful,<sup>4</sup> and that Ms. Polifrone sought advice from legal counsel and obtained approval from SLED agent John Kirkland on Blue Moon’s practice of permitting certain guests to

---

<sup>3</sup> Without legal citation to any document actually stating the purpose of the regulation, and without reference to the enabling statute, the Alcoholic Beverage Control Act, S.C. Code Ann. § 61-6-10 et seq., the Court notes that “the stated purpose of the regulation is to ensure that only bona fide members of private clubs and their bona fide guests purchase and consume alcoholic beverages at those clubs.” (App. p. 6). Even assuming that this is the case, SCDOR has defined “bona fide guests” by regulation such that Blue Moon’s practices did not contravene its terms. If the regulation is “complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself.” See Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).

<sup>4</sup> If Blue Moon intended to completely skirt the law, as SCDOR argued before the ALC and in its brief, Blue Moon would have admitted Agent Ford on his initial attempt to enter the club. Instead, Blue Moon required Agent Ford to first make prior arrangements with a member and management, as permitted by law, and in reliance on the advice of SLED itself.

enter the premises, it was improper as a matter of law for the Court to resort to Black's Law Dictionary for a definition of "bona fide" when the plain language of the regulation itself narrowly defines "bona fide guests" in clear and unambiguous language. (See App. p. 5, citing Black's Law Dictionary 168 (7th ed. 1999)). SCDOR chose not to define "bona fide guests" with reference to the subjective intent of the non-profit organization or its members as related to their guests, nor did it elect to define "bona fide guest" status by the duration of the relationship between the guests and the organization's members. As Judge Piper correctly noted in his dissenting opinion, "[t]he [adopted] definition of 'bona fide guest' is contrary to the definition plainly listed within the regulations." (App. p. 8). "[T]here is no room for the [Court] to impose a different judgment based upon [its] own notions of public policy." State v. Sweat, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008).

Here, the plain language of the regulation is clear: a prior arrangement is all that is required for a non-member to be a bona fide guest. It is undisputed that a prior arrangement was, in fact, made between a member, Blue Moon, and Agent Ford before he was permitted entry. The regulation, promulgated by SCDOR, does not on its face require more than the procedure employed by Blue Moon and explained above. The regulation does not require any degree of familiarity or camaraderie between the guest and the member. The regulation does not on its face require that the "prior arrangement" precede the guest's admittance by some predetermined period of time. If the General Assembly or SCDOR desire to impose additional conditions upon non-profit organizations for the admittance of guests, they are free to do so by properly enacting or

modifying applicable regulations. However, until they do so, the clear language of the Regulation must be given its plain and ordinary meaning.

The language of the regulation is clear and to affirm the decision of the Court of Appeals would require a reading into the definition of “bona fide guest” of some nebulous and heretofore unknown and undefined quantum of friendship between the member and the guest, else the guest not be “bona fide.” To affirm the decision of the Court of Appeals would require a reading into the regulation of an expanded requirement that the “prior arrangement” be made at some unknown and undefined time before the guest’s admittance else the admittance be illegal and potentially subject Blue Moon and other non-profit organizations to forfeiture of their alcohol and liquor licenses. To enlarge the regulatory requirements of Regulation 7-401.4(K) ex post facto, through the application of a definition from Black’s Law Dictionary rather than employ the definition contained squarely within the regulation itself, deprives Blue Moon of due process and is a compelling reason for rejecting the unjustified interpretation by the Court of Appeals. (See App. p. 5, citing Black’s Law Dictionary 168 (7th ed. 1999)). Should the decision of the Court of Appeals stand, there would seemingly be no limitation on the ability of SCDOR to declare, in its absolute discretion, that any and all guests admitted to any particular private social club are not “bona fide,” thus subjecting said organization to monetary fines and forfeitures of State issued licenses.

As a matter of law, the Court of Appeals was obligated to apply the plain language of the regulation without seeking external definitions or attempting to redraft the regulatory verbiage. As the Court of Appeals did not do so, its Opinion is affected by an error of law and should be reversed.

**2. THE COURT OF APPEALS DEPRIVED PETITIONER OF DUE PROCESS IN GRANTING RESPONDENT'S REQUEST TO REVOKE PETITIONER'S ALCOHOLIC BEVERAGE LICENSE AND PERMIT BECAUSE RESPONDENT FAILED TO PROFFER ADMISSIBLE EVIDENCE OF ALCOHOL CONSUMPTION BY A NON-MEMBER.**

Only one alleged violation of SCDOR's Alcoholic Beverages Control Act regulations is at issue here: whether Blue Moon, a non-profit organization, permitted an individual other than a bona fide member or guest of a member to consume alcoholic beverages upon its premises. (R. p. 158). See 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010). It is undisputed that this is the only alleged violation with which Blue Moon was ever charged by SCDOR. Accordingly, as a matter of due process, the consumption of alcoholic beverages by a non-member is the only basis upon which Blue Moon's license to sell alcoholic beverages, could be revoked. Inexplicably, however, while the Court of Appeals held that SCDOR had abandoned its argument regarding the lack of evidence of alcohol consumption on Blue Moon's premises and declined to reach the issue, the Court of Appeals simultaneously granted SCDOR's request to revoke Blue Moon's alcoholic beverage license and permit. (App. p. 7).

This was an obvious error by the Court in its application of the law, as Blue Moon's license could not have been revoked here upon a mere showing that a non-member was permitted on the premises. Blue Moon, a nonprofit organization, was not charged with opening its doors to members of the general public but rather was charged solely with a violation citing consumption of alcohol on the premises by an individual who SCDOR contends was not a member or bona fide guest. The ALC correctly found, and the Court of Appeals noted, that no evidence of alcohol consumption was presented by SCDOR at the merits hearing. (R. p. 4 (ALC found, as a matter of fact, that

“[a]lthough [Agent Ford] testified that he ordered an alcoholic beverage and was served an alcoholic beverage, Agent Ford did not testify at the hearing that he ever consumed any portion of the drink.”); App. p. 7 (Court of Appeals found that although SCDOR argued that “the ALC erred in finding it offered at the merits hearing no evidence of Agent Ford’s consumption of the alcoholic beverage,” it concluded that the “issue is abandoned on appeal.”). As discussed fully by SCDOR in its Final Brief to the Court of Appeals, the ALC’s Order accurately pointed out that there was no testimony regarding alcohol consumption by any non-member on Blue Moon’s premises. (R. p. 4). On the contrary, the only evidence of consumption in the record before the ALC consisted of hearsay contained in the violation report, which was written by an agent who had no personal knowledge regarding the facts underlying the violation report. Moreover, the agent’s report consisted solely of hearsay and does not establish the truth of its contents. (Resp. Fin. Br. pp. 9-11). Regardless of whether evidence in the record referred to a non-member allegedly consuming alcoholic beverages on Blue Moon’s premises, any such “evidence” was not admissible to establish that he actually did so, and notably, no person testified that any such consumption had occurred.

Absent admissible evidence establishing that a non-member actually consumed an alcoholic beverage while on Blue Moon’s premises, the second prong of the violation cannot be established, as Regulation 7-401.4(J) does not prohibit the mere presence of non-members on Blue Moon’s premises. To deprive Blue Moon of its alcoholic beverage license and permit without a finding of alcohol consumption by the non-members deprives Blue Moon of due process and constitutes a misapprehension of the law. Accordingly, the decision of the Court of Appeals should be reversed

## CONCLUSION

The South Carolina Court of Appeals erred by ignoring the plain language of Regulation 7-401.4(K) defining “bona fide guests,” while instead applying its own definition obtained from Black’s Law Dictionary to reach its decision that Blue Moon’s alcoholic beverage license and permit should be revoked. The March 24, 2010 decision by the South Carolina Court of Appeals also deprived Blue Moon of due process in granting SCDOR’s request to revoke Blue Moon’s alcoholic beverage license and permit when SCDOR failed to proffer any admissible evidence of actual alcohol consumption by a non-member. For these reasons, Blue Moon respectfully requests that the Court reverse the March 24, 2010, decision of the South Carolina Court of Appeals.

Respectfully submitted,

---

Richard J. Breibart, Esquire  
Jesse A. Near, Esquire  
Law Offices of Richard J. Breibart, LLC  
Post Office Box 310  
Lexington, South Carolina 29071  
Telephone: (803) 359-7996  
Facsimile: (803) 951-4619  
Attorneys for Petitioner

October 7, 2011