COURT OF APPEALS
STATE OF COLORADO

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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 3rd Floor Denver, Colorado 80203 (303) 861-1111	▲ COURT USE ONLY ▲
Trial Court: Denver District Court **Trial Court Case No:** 06-CV-12325, Courtroom 22 **Trial Judge:** Honorable J. Stephen Phillips **Agency Subject to Judicial Review:** Colorado Department of Revenue, Liquor Enforcement Division **Agency Case No:** Not Applicable **Party Initiating Appeal:** Plaintiff Kevin Minh Le **Plaintiff/Appellant:** KEVIN MINH LE, d/b/a MARINA POINTE LQUORS, v. **Defendants/Appellees:** COLORADO DEPARTMENT OF REVENUE, LIQUOR ENFORCEMENT DIVISION, an agency of the State of Colorado.	**Case No.: 2007 - CA - 927**
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ARGUMENT

1. The Department of Revenue Erroneously Interpreted the Law.

To justify its interpretation of the law, it is submitted that the Department of Revenue improperly attempts to interject elements of proof that are not required under the statutory affirmative defense. *See* Answer Brief, pp. 9-11. The affirmative defense as set forth in Regulation 47-912.B. requires that "the licensee possessed an identification book issued within the past three years which contained a sample of the kind of identification presented for compliance purposes." The affirmative defense does not incorporate by reference any additional elements of proof as may or may not be contained in unspecified identification books, or in unspecified signs created by third parties that may or may not be posted within the licensed premises.

Furthermore, the clerk's testimony in hindsight to not accept an expired identification does not eradicate the language contained in Regulation 47-912. Without reiterating the entire Opening Brief, the Department of Revenue does not have authority to suspend or revoke a liquor license if a licensee sells alcohol after being presented with an expired identification. Moreover, the statutorily mandated affirmative defense is triggered when a minor presents a "fraudulent identification." The meaning of "fraudulent identification" is entirely opposite to

the meaning of "currently valid identification." It is undisputed that the term "valid" is defined as "1. Legally sufficient, binding. 2. Meritorious." *See* Black's Law Dictionary (8th ed. 2004). Thus, how can a "fraudulent identification" ever be a "currently valid identification?" It is respectfully submitted that it cannot. It is noteworthy that the Department of Revenue completely ignores this dilemma and inescapable conclusion.

The Department of Revenue also submits that Marina Pointe failed to reasonably rely on the fraudulent identification. The case of *Gounaris v. City of Chicago*, 747 N.E.2d 1025 (Ill. App. Ct. 2001) is inapposite. First, the regulation in *Gounaris* specifically required that a licensee "reasonably" rely on the identification. *Id.* at 1033-1034. Here, the statute and regulation do not contain that language. *See* C.R.S. § 12-47-901(5)(a)(I) and Regulation 47-912. Second, the identification in *Gounaris* contained a birth date depicting a person ten (10) years older than the minor presenting it. *Id.* at 1034. Here, the fraudulent identification presented to Marina Pointe depicted a birth date three (3) years older than the one presenting it. Third, the person on the identification in *Gounaris* had different eye color than the person presenting it. *Id.* at 1034. Here, Marina Pointe was reasonable in relying on the birth date, picture, name, address, weight, height, eye color, blood type, endorsements and restrictions on the fraudulent

identification, as the hearing officer found that the fraudulent identification "strikingly resembles the minor who purchased the alcohol." Fourth, the court in *Gounaris* specifically declined to rule on whether an expired identification is *per se* unreasonable for reliance purposes. *Id.* at 1034. Here, the Department of Revenue does not have authority to suspend or revoke a liquor license if a licensee sells alcohol after being presented with an expired identification. Accordingly, accepting an expired identification is not a *per se* violation.

It is submitted that Mr. Ondrish, age 20, intentionally presented a fraudulent identification that strikingly resembled himself to induce Marina Pointe in making the sale of alcohol. Marina Pointe acted with reasonable reliance in selling the alcohol. It is submitted that the Department of Revenue could not justify its erroneous interpretation of the law that would circumvent and render meaningless the statutorily mandated affirmative defense.

2. The Revocation of the Liquor License is an Abuse of Discretion.

The Department of Revenue chose to ignore the holdings in *Chroma Corp. v. Campbell*, 619 P.2d 74 (Colo. App. 1980) and *Brownlee v. State Department of Revenue*, 686 P.2d 1372 (Colo. App. 1984). Similarly, the Department Revenue could not point to any competent evidence in the record to support the finding that Marina Pointe's sale of alcohol in reliance on intentional misrepresentations was a

"flagrant violation." The Department of Revenue's failure to address these keystone issues confirms that its revocation of the liquor license was an abuse of discretion.

Moreover, the Department of Revenue cannot escape the conclusion that there is no competent evidence to prove a causal connection between the sale of alcohol and the motor vehicle accident. Instead, the Department of Revenue attempts to support the revocation by merely relying on the statement that "the judgment of the licensing authorities should be given deference." *See* Answer Brief, p. 21. While deference should be afforded to the agency, it is the cornerstone of American Jurisprudence that an agency's decision must first be supported by competent evidence, not just conclusory arguments.

Finally, the Department of Revenue misstates the relevance of its prior sanctions against other licensees. As noted in the Opening Brief, the relevance is that the over-service of an intoxicated person is substantially more egregious, as the licensee's conduct is continuous, intentional and deliberate, or at the very least, reckless. In *Worcester v. Town of Steamboat Springs,* 501 P.2d 150, 152 (Colo. App. 1972), the court found that a liquor licensing authority's conflicting rulings and weight afforded to evidence was arbitrary and capricious. In overruling the denial of a liquor license, the court held:

> Consistency should not be the hobgoblin of the law. Not only should rulings be correct, but courts and boards should be consistent in their rulings. Different rules on a question should not be applied, one for the affirmative of the issue and another for the negative; such procedure is destructive of the fairness with which such hearings should be conducted. *Id.*

Accordingly, when inconsistencies exist, the inconsistencies demonstrate "arbitrariness and capriciousness." *Anderson v. Spencer*, 426 P.2d 970, 973 (Colo. 1967). When considering that the Department of Revenue issued a 60-day suspension for the over-service of an individual and the subsequent single motor accident that resulted in his death, it is submitted that there is no escaping the conclusion that the revocation of Marina Pointe's liquor license for relying on the intentional misrepresentations of a minor is an abuse of discretion.[1]

The Department of Revenue is not cloaked with unbridled discretion. The Colorado Liquor Code and related case law do not condone the Department of Revenue's predisposition to revoke the liquor license. *See Southland Corporation v. City of Westminster*, 746 P.2d 1353 (Colo. App. 1987); *Webster v. Board of County Comm'rs*, 539 P.2d 511 (Colo. App. 1975).

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[1] It is noteworthy that *Gounaris* further supports this conclusion. In *Gounaris*, the licensing authority issued a 21-day suspension, not revocation.

CONCLUSION

The Department of Revenue's discretion is subject to judicial review. The Department of Revenue misconstrued the law and its erroneous interpretation of Regulation 47-912 circumvented and rendered meaningless the statutorily mandated affirmative defense. Moreover, the revocation of the liquor license is clearly an abuse of discretion. The erroneous agency action must be overruled in favor of a judicial determination and declaration consistent with Colorado law.

Respectfully submitted this 31st day of October, 2007.

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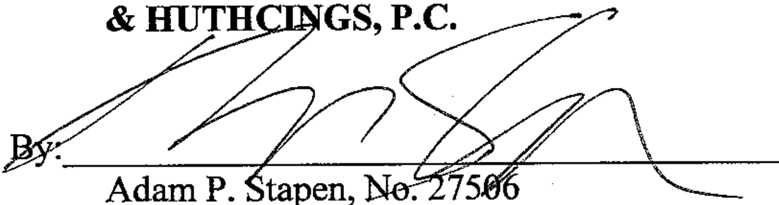
& HUTHCINGS, P.C.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of October, 2007, a true and correct copy of the above and foregoing **REPLY BRIEF** was served via U.S. mail to the following:

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