

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00243

WENDY RYALS AND RONALD PERRY

APPELLANTS

VS.

BOARD OF SUPERVISORS OF PIKE COUNTY, MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Board of Supervisors of Pike County, Mississippi Appellee
  - A. Lexie Elmore
  - B. Venton Adams
  - C. Chuck Lambert
  - D. Gary Honea
  - E. Tazwell Bowsky
2. Wayne Dowdy Attorney for Board of Supervisors
3. Wendy Ryals Appellant
4. Ronald Perry Appellant
5. Alfred Lee Felder Attorney for Appellants

  
ALFRED LEE FELDER

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STATEMENT OF THE ISSUES

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STATEMENT OF THE CASE

On the 12<sup>th</sup> day of June, 2008, the Pike County Board of Supervisors passed an ordinance styled “An Ordinance of the Pike County Board of Supervisors Prohibiting the Possession and Consumption of Alcohol of Any Type on Certain Portions of the Bogue Chitto River, and Topisaw Creek, in Pike County, Mississippi.” The act became effective immediately upon passage.

Paragraph 5 of the ordinance states:

CONSUMPTION AND/OR POSSESSION OF ALCOHOLIC BEVERAGES PROHIBITED. It is unlawful for any person to possess or consume alcoholic beverages of any type or description, on the waters of the Bogue Chitto River from the Holmesville Bridge downstream to the water park, and on the Topisaw Creek from the Leatherwood Bridge downstream to its place of merger into the waters of the Bogue Chitto River.

On June 20, 2008, the Appellants herein, Wendy Ryals and Ronald Perry, filed a Notice of Appeal from the decision of the Pike County Board of Supervisors, and attached to their Notice of Appeal a copy of the ordinance and the proposed copy of a “Bill of Exceptions.” The attached Bill of Exceptions was modified slightly and signed by Tazwell

Bowsky, the president of the Board of Supervisors, and its attorney, Wayne Dowdy, and was filed with the Court on June 23, 2008.

The Board of Supervisors filed a "Response in Nature of Answer to Notice of Appeal" on July 7, 2008.

A hearing on the Bill of Exceptions and Appeal was heard on August 21, 2008, and a Memorandum Opinion and Order was entered by David H. Strong, Jr., Circuit Judge of Pike County, Mississippi, on the 18<sup>th</sup> day of August, 2008.

On August 28, 2008, the Appellants made a Motion for New Trial, or Reconsideration; and Motion to Alter or Amend the Judgment Under Rule 52 and Rule 59. A response was filed by the Appellees on September 9, 2008.

On January 7, 2009, the Circuit Judge, Honorable David H. Strong, Jr., entered his Order denying the Appellants' Motion for New Trial, or Reconsideration; and Motion to Alter or Amend the Judgment Under Rule 52 and Rule 59.

On January 28, 2009, the Appellants filed their Notice of Appeal to the Supreme Court.

**STATEMENT OF THE FACTS RELEVANT TO  
THE ISSUES PRESENTED FOR REVIEW**

Pike County, Mississippi, and its municipalities have allowed the sale and consumption of alcoholic beverages since the inception of the laws allowing the sale and consumption of alcoholic beverages. In 1934 the legislature legalized the manufacture and sale within the State of Mississippi of light wines and beer of an alcoholic content of less



than five percent (5%) by weight. 67-3-1 et seq. When the Local Option Alcoholic Beverage Control Law was passed by the legislature in 1966, Pike County and its municipalities opted for the sale of alcoholic beverages, defined by statute as any alcoholic liquid of more than five percent (5%) alcohol by weight, capable of being consumed as a beverage by a human being. Local Option Alcoholic Beverages is controlled by Chapter 67-1-1 et seq.

For over thirty years, since the opening of the Bogue Chitto Water Park just south of U.S. Highway 98 where it crosses at Bogue Chitto River in Pike County, Mississippi, there developed a large seasonal tube renting, canoeing and kayaking business by several companies that were located adjacent to the Bogue Chitto Water Park in eastern Pike County. The record makes reference to there being four to five thousand tubers, canoers, and kayakers (mostly tubers) floating the Bogue Chitto River each weekend during a period that would be roughly from mid-May of each year into mid-August of each year.

The Appellants, Wendy Ryals and Ronald Perry, inter alia, have businesses that rent tubes, canoes, and kayaks to use for floating down the Bogue Chitto River, and such generally are taken out at the lower end, or south end, of the water park. It was common for the tubers to consume alcoholic beverages on these floats.

The Supervisors gave as their reasons for adopting the ban the following:

“Whereas, the Board of Supervisors of Pike County, Mississippi has become aware of wide spread problems related to drunkenness, excessive littering, lude behavior, disturbances of the peace, profane language, possession and consumption of alcohol by minors, and other more offensive

acts which have been committed by intoxicated persons occur on certain portions of the Bogue Chitto River and the Topisaw Creek in Pike County, Mississippi and

Whereas, the Board of Supervisors is aware that there have been numerous drownings and other serious accidents resulting in bodily injury upon certain portions of the Bogue Chitto River and the Topisaw Creek in Pike County, Mississippi which events have been attributed to drunkenness and excessive use and consumption of beer, wine, and other alcoholic beverages.”

The trial judge in his findings of fact on pages 2, 3, and 4 of his Memorandum Opinion and Order, essentially adopted the statement of the Supervisors and expounded on it.

At the hearing the first witness called was Andrew Alford, the current county administrator for Pike County, Mississippi. He testified on cross-examination that for over twenty-five years he had floated the Bogue Chitto River, and that alcoholic beverages had been consumed continuously for over twenty-five years. TR16

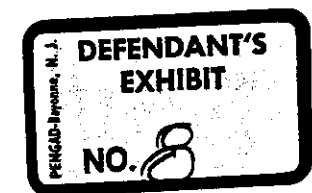
The Sheriff of Pike County, Mark Shephard, and Game and Fish Wildlife Officer Lane Ball, and Chief Deputy Sheriff Steve Rushton all testified generally that all of the problems at the water park were caused by the excessive use of alcohol.

The only verifiable statistics presented during the hearing by law enforcement officers was Exhibit 8 at the hearing, a compilation of the arrests made on the Bogue Chitto River by Wildlife and Fisheries and other law enforcement personnel from the years 2000 through

P. 4A

Offense	2000	2001	2002	2003	2004	2005
Littering	7	27	50	102	19	18
Possession of Marihuana		25	65	151	31	22
Possession of Controlled Substance	3	3	10	12	4	4
Possession of Glass on BC River	7	57	147	151	49	17
Possession of Beer by Minor	1	10	16	89	10	17
Public Drunk		4	6	9	1	1
Public Profanity	2	8	14	24	3	2
Indecent Exposure		1	3	3		
Failure to Obey/Disorderly Conduct		2	10	7	1	2
Trespassing			42	103		9
Totals	20	137	363	651	118	92
Total Citations	1381					

43  
21



2005. A total of 1,381 arrests were made. However, only 21 of the 1,381 arrests were for public drunk/intoxication.

Tube vendors adjacent to the Bogue Chitto Water Park testified concerning how the ban had affected their businesses. Dianna Barrett said her business was 1/3 of what it was last year. TR131 She testified it affected her income, it affected the amount she paid to the water park for the tubes that went through the park, it affected the sales tax paid, and that all of it was extremely less than one year ago. TR131

The vendors paid the water park \$1.25 per tube that exited from the water park, and \$2.50 per canoe or kayak that exited from the water park. TR127

Dianna Barrett was of the opinion that if law enforcement had kept a sustained presence on the Bogue Chitto, that the river would have quietted down and there would have been no problems. TR134

Darrell Ryals, husband of Wendy Ryals who is the Appellant herein, testified that their business for the season was down 90%. He testified that the first week after the ban, to be exact, business dropped 84.1%. TR141 Darrell Ryals also felt that law enforcement was keeping the rowdy people quietted down on the river and that the year preceding the ban was the best year ever for their business. He was shocked when the ban was passed. TR142

Wendy Ryals testified that prior to the ban her business rented no less than 500 tubes per day on a weekend. The best she has done since the ban has been 200 tubes, and some times its only 120 tubes on a good weekend. TR136 Mrs. Ryals also said she went to the Supervisors to see how she could help keep things down on the river, but that all she got was

a few smart remarks back to her. TR138

She says the effect of the ban on her business is that they are going to have to sell their house, and if they are unable to sell it, they may have to file for bankruptcy. She estimates the effect on her business has been that it rented approximately 5000 tubes per month during the summer, and now is renting only 700 or 800 per month. TR138

Ronald Perry had only been in the tube rental business for a year and a half before the ban. Before the ban he was doing 500 to 600 tubes a day on Saturday. TR145 The Saturday before the hearing on August 1, 2008, he testified, post ban, that he only rented 81. Before the ban, the last check he wrote to the water park for the fees for the tubes, canoes, and kayaks was \$1,300.00. The last check he wrote since the ban was \$232.00. The vendors settle up with the water park each Monday. TR145

### SUMMARY OF THE ARGUMENT

Persons in Pike County and the municipalities in Pike County have been able to legally consume beer and light wines since they were made legal by the legislature in 1934. Likewise, persons in Pike County and the municipalities of Pike County have been allowed to consume wine and spirits since the Local Option Act was passed in 1966.

Light beer and wines are defined by statute as those alcoholic beverages having five percent (5%) or less alcoholic content by weight. Beer and wine coolers are two alcoholic drinks that most persons would recognize that fall into that category. Wines and spirits are defined by statute as having more than five percent (5%) alcoholic content by weight. Table wines, whiskies, Vodka, Gin, etcetera fall under the category of wine and spirits.

With the development of the Pear River Basin Development District, the Bogue Chitto River has a water park that is located approximately one mile south of Highway 98 as it crosses the Bogue Chitto River in eastern Pike County. That park has been there over thirty years, and through the years has grown popular with tubers, canoers, and kayakers. For example, during the months between mid-May and mid-August of each year the vendors adjacent to the water park altogether would rent 4,000 to 5,000 tubes per Friday, Saturday, Sunday weekend. The vendors paid to the water park \$1.25 for each tube that came through, and \$2.50 for each canoe or kayak.

With the growing popularity of the river, the water park, and places from which it is easy to enter and exit the Bogue Chitto River and Topisaw Creek, tubing and canoeing have become very popular in the water park area.

The large number of people attracted to the water park during the weekends of the summer months has put some pressure on law enforcement concerning enforcement of various misdemeanor laws of the State of Mississippi.

Exhibit 8 in the trial transcript is a calculation by an officer of Wildlife and Fisheries (who had the primary enforcement responsibility at the water park from 2000 through 2005) which shows the various offenses committed in the Bogue Chitto River, the Topisaw Creek and the vicinity of the water park. Most of these offenses would have been south of Highway 98 and in the Bogue Chitto River coming to the water park, a stretch of river being approximately one mile long. The compilation of those offenses shows a total of 1,381 from 2000 through 2005. (Wildlife and Fisheries started their enforcement at the water park late

in the year 2000, thus showing the low numbers for that year.)

There were 21 arrests during that five year period for public drunk/intoxication.

Apparently, based upon the 21 arrests for public drunk and anecdotal testimony from police officers that all of the other misdemeanors were some how caused by the consumption of alcohol on the river, the Supervisors of Pike County, Mississippi, enacted a total ban on consumption of alcoholic beverages on the Bogue Chitto River from the Holmesville Bridge south to the water park, and Topisaw Creek to where it entered the Bogue Chitto River, which then formed one stream that came to the Bogue Chitto water park.

In order to pass an ordinance banning the consumption of alcoholic beverages on the Bogue Chitto River and Topisaw Creek in Pike County, the Supervisors borrowed code section 67-3-65, a chapter that only applies to light beer and wines, and applied the authority that they deemed that gave them across the Board to all alcoholic beverages.

The statute in question is as follows:

**§67-3-65. Authority of Local Governments**

Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and of closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide. The board of supervisors of any county may make such rules and regulations as to territory outside of municipalities as are herein provided for municipalities.

Nothing in this chapter shall prohibit the governing body of any municipality from designating what territory surrounding churches and schools in said municipalities, and the board of supervisors of any county from designating what territory surrounding churches and schools outside of any municipality, in which light wines and beer shall not be sold or consumed.

There is no similar section under Chapter 1 of Title 67 which controls alcoholic beverages of more than five percent (5%), or wines and spirits. Nothing in Title 67, Chapter 1 has anything that grants any authority to local governments to make an ordinance for rules and regulations fixing zones and territories, prescribing hours of opening and of closing, and for such other measures as will promote public health, morals, and safety.

Section 67-3-65 is only found in the light beer and wine chapter. However, the Supervisors took that code section and applied it not only to light beer and wines, but also to wine and spirits. In other words, the Board of Supervisors wrote into the wine and spirits chapter, Chapter 1 of Title 67 of the Mississippi Code, a statute that the legislature did not put in that chapter of the code. It is well established under Mississippi law that any conflict between an ordinance and a statute, the statute must prevail. See *City of Armory v. Yielding*, 203 Miss. 365, 34 So.2d 726 (1948); *Watkins v. Naverette*, 227 So.2d 853 Miss. (1969) p. 855.

In the second argument made by the Appellants, the Appellants argue that the decision of the Board of Supervisors was arbitrary and capricious. During the five year period from 2000 through 2005, there were 21 arrests for public drunk. Yet, the Supervisors blamed the other 1,360 during that period of time on the consumption of alcohol. Only 1.52% of the arrests at the water park were arrests for public drunk or public intoxication. One must assume that so many of those 21 that were convicted for the charges arrested, were punished as provided by statute. However, the County now wishes to attempt to punish the other 2,000 to 5,000 persons who float the Bogue Chitto River and Topisaw Creek each week



throughout the summer. The Supervisors, and law enforcement officials, want to blame 1,360 additional arrests on the consumption of alcohol which is done legally by citizens in Pike County, and which they can continue to do until such time as they become publicly drunk or intoxicated. The arrest records just do not support the actions of the Supervisors or the decision of the Court. It is arbitrary and capricious on the part of the Board of Supervisors of Pike County to pass an ordinance banning all alcoholic beverages on the Bogue Chitto River and Topisaw Creek by blaming the other 1,360 arrests for other misdemeanors on the lawful and legal consumption of alcoholic beverages. Only 21 people of the 1,381 arrested had abused the proper consumption of alcoholic beverages, and not remained below the threshold limits of being intoxicated versus not being intoxicated. The ban should be declared null and void as arbitrary and capricious based upon the facts developed at trial.

## ARGUMENT

### POINT I.

#### THE COURT ERRED IN NOT VOIDING THE ALCOHOLIC BEVERAGE BAN ADOPTED BY THE PIKE COUNTY SUPERVISORS WHEN A FOREIGN CODE SECTION WAS USED TO AUTHORIZE THE BAN

##### (A) STATUTORY CONSTRUCTION

The Appellants call to the Court's attention the following principals of statutory construction.

From *Akers v. State of Johnson* 236 So.2d 437 (Miss. 1970) page 440:

In construing this clause we are confronted with the fundamental rule of construction that where a statute enumerates and specifies the subjects or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, or, under a general clause, those not of like kind or classification as those enumerated, *Inclusio unius est exclusio alterius*. *Fisher v. Westmoreland*, 101 Miss. 180, 57 So. 563, Ann.Cas. 1914B, 636; *Parsons-May-Oberschmidt Co. v. Furr et al.*, 110 Miss. 795, 70 So. 895; *Tepper Bros. v. Buttross*, 178 Miss. 659, 174 So. 556; *Redding v. State*, 184 Miss. 371, 185 So. 560.

More recently the Court restated this principal in a case dealing with insurance policies.:

*Shelter Mut. Ins. Co. v. Dale*, 914 So.2d 698 (Miss. 2005) ¶17:

This Court has enunciated the now-familiar principal that “where a statute enumerates and specifies the subject or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned or under a general clause.” *Southwest Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc.*, 320 So.2d 776, 779 (Miss. 1975) (citing *Akers v. Estate of Johnson*, 236 So.2d 437 (Miss.1970)). Since the statute at issue “enumerates and specifies the subject or things upon which it is to operate,” that is, it specifically list bodily injury, death and destruction of property, “it is to be construed as excluding from its effect to all those not expressly mentioned,” that is, punitive damages.

From *City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598 (Miss. 1998), ¶17

It is well settled law in Mississippi that when a statute is clear and unambiguous then there is no room for construction. In *Marx v. Broom*, 632 So.2d 1315, 1318 (Miss. 1994). We stated:

When the language used by the legislature is plain and unambiguous, such as the language here, and where the statute conveys a clear and definite meaning, as here, the Court will have no occasion to resort to the rules of statutory interpretation. *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963). The courts cannot restrict or enlarge the meaning of an unambiguous statute. *City of Hazlehurst v. Mayes*, 96 Miss. 656, 51 So. 890 (1910), ; *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 100 Miss. 544, 56 So. 521 (1911).

“It is well established that in any conflict between an ordinance and a statute, the latter must prevail”. *City of Amory v. Yielding*, 203 Miss. 265, 34 So.2d 726 (1948); *Watkins v. Navarrette* 227 So.2d 853 (Miss. 1969) page 855.

(B) STATUTORY SCHEME

The State of Mississippi controls alcoholic beverages by Title 67 of the Mississippi Code. Title 67 is titled “Alcoholic Beverages”. There are five chapters in Title 67 of the Mississippi Code. Those chapters are set forth in the contents of Title 67, Alcoholic Beverages, as follows:

Chapter	Section
1. Local Option Alcoholic Beverage Control .....	67-1-1
3. Sale of Light Wine, Beer, and Other Alcoholic Beverages .....	67-3-1
5. Native Wines .....	67-5-1
7. Beer Industry Fair Dealing Act .....	67-7-1
9. Possession or Transportation of Alcoholic Beverages, Light Wine, or Beer	67-9-1

The appeal in this case concerns Chapters 1 and 3 of Title 67, Alcoholic Beverages. It is those two titles that concerns themselves with the permitting, sale, possession, and consumption of alcoholic beverages in Mississippi.

The control of alcohol in Mississippi is done by a permitting process. §67-1-1 et seq., known as the “Local Option Alcoholic Beverage Control Law” of the State of Mississippi, is the permitting Title and Chapter for alcohol beverages containing more than five percent

(5%) alcohol by weight.

The sale of light wine, beer and other alcoholic beverages of less than five percent (5%), is controlled by a permitting process set forth in Title 67, Chapter 3 et seq.

§67-1-3 (wines and spirits) reannounces the policy of the State of Mississippi in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquor. §67-1-3 goes on to say that

The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties and municipalities voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties and municipalities, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor under the system of the state licensing of manufactures, wholesalers and retailers, which licenses shall be subject to revocation for violations of this chapter. [Emphasis added]

§67-1-3 then goes on to state that all laws in conflict with this chapter are repealed to the extent that they are in conflict, however, where not in conflict, such other laws remain in full force and effect.

For light wines and beer, the statement of purpose is found in §67-3-1:

The purpose of this chapter is to legalize the manufacture and sale within this state of light wines and beer of an alcoholic content of not more than five percent (5%) by weight, and to regulate the business of manufacturing and of selling such liquors so as to prevent the illicit manufacture, sale, and consumption of liquors having an alcoholic content of more than five percent (5%) by weight, the manufacture and sale of which it is not the purpose of this chapter to legalize. [Emphasis added]

§67-3-3 gives the definitions of “commissioner”, “person”, “manufacture”, “retailer”, and “beer”.

§67-3-5 sets forth what shall be lawful concerning beer and wines.

It shall be lawful, subject to the provisions set forth in this chapter, in this state to transport, store, sell, distribute, possess, receive, and/or manufacture wine and beer of an alcoholic content of not more than five percent (5%) by weight, and it is hereby declared that it is the legislative intent that this chapter privileges the lawful sale and manufacture, within this state, of such light wines and beer. In determining if a wine product is "light wine," or contains and alcoholic content of more than five percent (5) by weight, or is not an "alcoholic beverage" as defined in the Local Option Alcoholic Beverage Control Law, Chapter 1 of Title 67, Mississippi Code of 1972, the alcoholic content of such wine product shall be subject to the same permitted tolerance as it allowed by the labeling requirements for light wine provided for in Section 27-71-509.

§67-3-7 and §67-3-9 provide for the local option by elections by counties and municipalities respectively.

§67-3-13 reiterates that if a county has not elected to make light wines and beer legal, then the possession thereof is illegal, and sets forth the penalty.

Chapter 67-3-15 begins a series of code sections which sets forth the permit and license scheme to control the distribution of light wines and beer in the State of Mississippi.

That the permitting system is used to control the distribution and consumption of light wines and beer in Mississippi is clearly shown by §67-3-53.

In addition to any act declared to be unlawful by this chapter, or by Sections 27-71-301 through 27-71-347, and Sections 67-3-17, 67-3-27, 67-3-29 and 67-3-57, it shall be unlawful for the holder of a permit authorizing the sale of beer or light wine at retail or for the employee of the holder of such a permit: (a) To sell or give to be consumed in or upon any licensed premises any beer or light wine between the hours of midnight and seven o'clock the following morning or during any time the licensed premises may be required to be closed by municipal ordinance or order of the board of supervisors; provided, however,

in areas where the sale of alcoholic beverages is legal under the provisions of the Local Option Alcoholic Beverage Control Law and the hours for selling such alcoholic beverages have been extended beyond midnight for on-premises permittees under Section 67-1-37, the hours for selling beer or light wines are likewise extended in areas where the sale of beer and light wines is legal in accordance with the provisions of this chapter. (b) To sell, give or furnish any beer or light wine to any person visibly or noticeably intoxicated, or to any insane person, or to any habitual drunkard, or to any person under the age of twenty-one (21) years. (c) To permit in the premises any lewd, immoral or improper entertainment, conduct or practices. (d) To permit loud, boisterous or disorderly conduct of any kind upon the premises or to permit the use of loud musical instruments if either or any of the same may disturb the peace and quietude of the community wherein such business is located. (e) To permit persons of ill repute, known criminals, prostitutes or minors to frequent the licensed premises, except minors accompanied by parents or guardians, or under proper supervision. (f) To permit or suffer illegal gambling or the operation of illegal games of chance upon the licensed premises. (g) To receive, possess or sell on the licensed premises any beverage of any kind or character containing more than five percent (5%) of alcohol by weight unless the licensee also possesses an on-premises permit under the Local Option Alcoholic Beverage Control Law.

(C) PIKE COUNTY ORDINANCE

Pike County has adopted an Ordinance which prohibits the consumption of all light wines and beer, and wines and spirits of an alcoholic content of greater than five percent (5%), by the use of said §67-3-65.

**§67-3-65. Authority of Local Governments**

Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and of closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide. The board of supervisors of any county may make such rules and regulations as to territory outside of municipalities as are herein provided for municipalities.

Nothing in this chapter shall prohibit the governing body of any municipality from designating what territory surrounding churches and schools in said municipalities, and the board of supervisors of any county from designating what territory surrounding churches and schools outside of any municipality, in which light wines and beer shall not be sold or consumed.

First, this code section, §67-3-65, is only found in Chapter 3 of Title 67.

Chapter 3 concerns the sale of light wine and beer, of an alcoholic content of not more than five percent (5%) by weight. §67-3-1. There is no corresponding section for the Local Option Alcoholic Beverage Control Law of §67-1-1 et seq., which concerns wines and spirits of an alcoholic content that is greater than five percent (5%).

All of the Court decisions concerning §67-3-65 have taken into consideration the permitting scheme used by Mississippi to control the distribution of alcoholic beverages. *Miller v. Board of Supervisors of Forrest County* (Miss. 1957) 230 Miss. 849, 94 So.2d 604, allowed this code section to be used to prohibit the sale of beer and light wines within a specified zone by order reasonably based on facts and conditions warranting it. In *Herbert v. Board of Supervisors of Carol County* (Miss. 1961) 241 Miss. 223, 130 So.2d 250, the Court held that the mere fact that sale of intoxicating liquor is permitted in some zones or districts while it is not permitted in others does not of itself constitute an unconstitutional discrimination against persons residing or properly located in the latter.

Again, the operative word was sale. In *Alexander v. Graves* (Miss. 1937) 178 Miss. 583, 173 So.2d 417, the Court stated that the Court must consider statute legalizing sale of wine and beer as an entirety and effect must be given to each part of statute, so as to fulfill intent of legislature.

In a case that would not have been decided today, (since the legal age for light wines and beer have been elevated to 21 years of age), there was a case decided in 1997 which again spoke to the on premises sale and consumption. In *Collins v. City of Hazlehurst* (Miss.1997) 709 So.2d 408, certiorari denied, 118 Supreme Court 2060, 141 L. Ed.2d 138, the Mississippi Supreme Court held that a city ordinance that prohibited the holder of a permit from allowing persons under 21 years of age on premises where beer was sold or consumed was validly enacted to promote welfare, morals and safety of citizenry under age of 21 and did not conflict with statute allowing minors to enter premises for retail sales of beer or light wines, when accompanied by parents or guardians or other proper supervision; ordinance was needed to prevent youths from entering premises where patrons were scanned for weapons prior to entering.

Again, our Court speaks to the sale and consumption on premises.

In *Alexander v. Graves*, (Miss. 1937), 178 Miss. 583, 173 So. 417, our Court held held that the powers conferred upon municipalities and boards of supervisors of territory lying outside municipalities with regard to regulating sale of wine and beer must be based upon reasonable conditions, that is, some basis of fact ascertained by board of supervisors which would have a material bearing on whether sale should be by a resident of the State for a period of two years.

In *Herbert v. Board of Supervisors of Carol County*, *supra*, our Court stated that where the requisite power exist, local governmental authorities may prohibit the sale of



intoxicating liquors in certain areas or at certain times, but the exercise of the power must be based upon reasonable conditions. The Court had held that the order of the board of supervisors zoning out the sale of beer and wine in a strip adjoining counties was not invalid as unreasonable and discriminatory and as denying due process where the sale of beer and wine in the area constituted a difficult law enforcement problem.

The annotations under §67-3-65 that are decisions by our Court, have universally considered the sale of light wines and beer, and where consumption was considered, it was the sale and consumption of the light beer and wines on the premises where sold. None of the decisions that are annotated under that code section, with the exception of some attorney general opinions, concern the consumption of beer that is being consumed some place other than where it was purchased.

(D) WINES AND SPIRITS

The appellant has pointed out in another section:

Even though "Attorney General opinions are not binding, they are certainly useful in providing guidance to this Court." *In re Assessment of Ad Valorem Taxes on Leasehold Interest Held by Reed Mfg., Inc. Ex rel. Itawamba County Bd. Of Sup'rs*, 854 So.2d 1066, 1071 (Miss. 2003) (citing *City of Durant v. Laws Constr. Co.*, 721 So.2d 598, 604 (Miss. 1998)).

Having pointed that out, the Attorney Generals opinion number 98-0278, Rutledge, June 5, 1998, is worth noting:

The regulation of sales of alcoholic beverages containing 4% or more of alcohol, or intoxicating liquor, is an area wholly within the authority of the state tax commission, and there is no authority for a municipality to adopt an

ordinance which would further regulate the sale of intoxicating liquors by requiring commercial establishments holding a valid permit issued by the State Tax Commission to sell such beverages to achieve a mandatory ratio of food sales to alcoholic beverage sales; with respect to an ordinance setting a food sales to beer sales ratio, the thorough regulatory scheme implemented by the state light wines and beer laws codified by §67-3-1, et seq., clearly proclaims that, within the exception of §67-3-65, the state, via the State Tax Commission, also sets the only standard regarding issues of the manufacture, sale, distribution, possession, and transportation of light wines and beer, and the authority and municipality to act in this field is limited to adopting an enforcing reasonable rules and regulations in accordance with the authority set forth in §67-3-65.

Since there is no comparable section in the wines and spirits section, §63-1-1 et seq., to §67-3-65 in the Light Wines and Beer code section, the ordinance adopted by the County in which the consumption of wines and spirits of an alcoholic content greater than 4% are prohibited is void because of the conflict in state law and the ordinance.

*Watkins v. Navarrette* (Miss. 1969) 227 So.2d 853 held that in any conflict between an ordinance and a state statute, the latter (state statute) must prevail.

§67-1-7 is clear as to the applicability of Title 67 Chapter 1.

Except as otherwise provided in Section 67-9-1 for the transportation and possession of limited amounts of alcoholic beverages for the use of an alcohol processing permittee, and subject to all of the provisions and restrictions contained in this chapter, the manufacture, sale, distribution, possession and transportation of alcoholic beverages shall be lawful, subject to the restrictions hereafter imposed, in those counties and municipalities of this state which, at a local option election called and held for that purpose under the provisions of this chapter, a majority of the qualified electors voting in such election shall vote in favor thereof.

The next code section, §67-1-9, Alcoholic beverages forbidden; exceptions;

penalties, states:

(1) "It shall be unlawful for any person to manufacture, distill, brew, sell, possess, import into this state, export from the state, transport, distribute, warehouse, store, solicit, take order for, bottle, rectify, blend, treat, mix or process any alcoholic beverage except as authorized in this chapter...."

It is quite clear from the quoted sections and from the entirety of Title 67, Chapter 1, and the code sections therein, that the State Tax Commission regulates wines and spirits and anything to do with wines and spirits.

The possessions of wines and spirits being legal in Pike County, the County is without authority to pass any ordinance which is contrary to §67-1-1 et seq., which allows the lawful possession of wine and spirits.

As code section 67-1-11 subparagraph (4) states:

If, in such election, a majority of the qualified electors participating therein shall vote in favor of the proposition, this chapter shall become applicable and operative in such county and the manufacture, sale, distribution and possession of alcoholic beverages therein shall be lawful to the extend and in the manner permitted hereby.

The County has attempted to enforce many statewide laws by banning wine, spirits, and light wines and beer on portions of the Bogue Chitto River and the Topisaw Creek.

Over a five year period Lane Ball, of Wildlife and Fisheries, had a chart showing 1,381 arrests that had been made on the Bogue Chitto River and Topisaw Creek. As that chart showed, there are laws on the books of the State of Mississippi that authorizes persons to be arrested for the illegal conduct shown on the chart.

Enforcement of laws on the Bogue Chitto River and the Topisaw Creek would prevent the conduct complained up by the Pike County Board of Supervisors, and which said supervisors are attempting to control by an unlawful ordinance, rather than the enforcement of laws that are on the books.

Interestingly, of the 1,381 arrests cited by Lane Ball in a five year period, only 21 had to do with public intoxication. There were another 143 having to do with possession of beer by a minor (not intoxication). Lane Ball noted one minor that was only 13 years of age, but only one. The possession of beer by a minor did not indicate that the minor was drunk. Public drunkenness by the minor, would indicate that, and would fall within the 21 public drunk arrest over a five year period.

The law enforcement officers in their testimony wanted to blame everything that occurred on the Bogue Chitto River and the Topisaw Creek on overuse of alcoholic beverages. But the stark fact is that there were only 21 public intoxication citations in that five year period.

Law enforcement attempted to use a procedure which did not make sense to this writer. Lane Ball, testified about trying to sneak up on tubers and canoers who had committed some crime or were committing some crime. It seems that the solution would be for these law enforcement officials to get into the water and prevent many of these misdemeanors about which they complained. A person in a canoe or a tube that has rented that tube or canoe is going to be going down stream. The nature of the use and rental of

tubes and canoes is that the vendor puts a person in at one place with the tube or canoe and takes them out down stream at another place. The simple solution is for law enforcement to be in the river or on the side of the banks and to observe the tubers and canoers as they come by.

A second solution that perhaps is needed on the river, and would be a lawful ordinance, is to require tubers and canoers to carry identification on their person in the event of injury and in the event of the commission of some misdemeanor. This writer does not understand why law enforcement perceives it their duty to make arrest after a misdemeanor has occurred, rather than to make a real effort to see that no misdemeanors occur and thus no arrest, or very few arrest are necessary.

It is respectfully submitted that without law enforcement doing its job responsibility, properly, and efficiently, any action by the Board of Supervisors is arbitrary and capricious.

Again, this writer must point out that the ban is on alcohol. There were only 21 arrests for public drunkenness over a five year period.

POINT II.  
THE ORDINANCE PASSED BY THE BOARD OF SUPERVISORS  
IS ARBITRARY AND CAPRICIOUS

(A) FACTS SUPPORTING ARGUMENT

The Supervisors acted arbitrarily and capriciously in banning alcoholic beverages.

In his findings of facts the learned trial judge had only one set of verifiable statistics

concerning the arrest that were made on the Bogue Chitto River and Topisaw Creek. The learned trial judge makes reference to the Mississippi Department of Wildlife, Fisheries, and Parks compilation of records from the years 2000 through 2005 concerning arrests made on the Bogue Chitto River and Topisaw Creek. (Exhibit 8) Officer Lane Ball of that agency testified concerning the arrests during the years 2000 through 2005 on the Bogue Chitto River and Topisaw Creek. There were 1,381 arrests during that period of time. Of those 1,381 arrests, only 21 were for public drunk. A review of Exhibit 8 of the chart containing the category of the arrest and the number of arrest is as follows:

Littering (223)

Possession of Marijuana (294)

Possession of Controlled Substance (36)

Possession of Glass On BC River (428)

Possession of Beer by Minor (143)

Public Profanity (53)

Indecent Exposure (7)

Failure to Obey/Disorderly Conduct (22)

Trespassing (154)

Public Drunk (21)

Total 1,381

The learned judge in his findings of fact notes that Sheriff Mark Shephard and other law enforcement officers had made complaints concerning the behavior of persons floating or canoeing on the Bogue Chitto River and Topisaw Creek. There were no statistics given such as those by Lane Ball. However, Lane Ball testified that prior sheriffs did not want to go out to the water park, and that is why Wildlife and Fisheries was out there. The judge also notes that law enforcement complained of limited access to the river and transportation difficulties. The judge notes that people who float the river routinely failed to carry State issued identification. The learned trial judge also notes that since the effective date of the ban, violations only affected area of the Bogue Chitto River and Topisaw Creek have been greatly reduced. The judge then finally notes that the number of persons renting tubes in the effective area have been reduced anywhere from 65% to 90%. (Findings of fact by the trial judge are at R21-23.)

The simple fact is that there were only 21 public drunk arrest out of 1,381 arrests during the years from 2000 to 2005. Only 1.52% of all of the arrests were for public drunk, a/k/a public intoxication. That is hardly an overwhelming number. In fact, the only category with fewer arrest was indecent exposure with seven arrests. That statistic in and of itself supports the argument that the ordinance was arbitrary and capricious.

The ban is not for littering the river.

The ban is not for possession of marijuana.

The ban is not for possession of controlled substances.

The ban is not for possession of glass on the Bogue Chitto River (the largest number of arrests).

The ban is not for possession of beer by a minor.

The ban is not for public profanity

The ban is not for indecent exposure.

The ban is not for failure to obey/disorderly conduct.

The ban is not for trespassing.

There were 21 arrests for public drunk. There were 1,360 arrests for other reasons.

As to the possession of beer by a minor, Officer Lane Ball had this to say:

“Q Now there were twenty-one public drunk and 143 possession of beer by a minor. And just because a minor was arrested for possession of beer, that does not mean that that minor was intoxicated, does it”

A That is correct. That just means that they were in possession of alcohol.” TR 72

The testimony of Lane Ball is clear that the possession of beer by a minor does not equate to being drunk. It simply means that a minor was in possession of alcohol.

Concerning the other categories of misdemeanors, Officer Ball had this to say:



“Q And just as the citations you have issued show, there were laws on the books for the enforcement of everything that y’all saw on the river that was unlawful or illegal, wasn’t there?

A There was; there is. You know, the thing about this, we would go out on a Saturday in 2002 or 2003. We’d make 100 arrests on Saturday. And turn right around the next day and make eighty arrests. It was people from like a different turnover each day. So what you did the day before, the people who came th next day, unless they were local. I mean, they didn’t know about it. So that’s why we had to keep officers in the high numbers that we did there because it was like a different set every Saturday and every Sunday.” TR 74

To put into perspective what was happening on the river and what happens generally in Mississippi on its highways and roads, this question and answer took place between officer Lane Ball and counsel:

“Q Being an officer of Wildlife & Fisheries, you’ve driven the highways and the back roads of Mississippi, haven’t you?

A Yes, sir.

Q We’ve got some of the messiest roads in the nation, don’t we, from trash and litter?

A It’s getting better.

Q And the river was no different than what was happening on the roads and highways in Mississippi, was it?

A It was bad.” TR 75

It was clear in the testimony of the police officers and game and fish officer that these officers wanted to blame everything that happened on the Bogue Chitto River and Topisaw Creek on alcohol. But the facts are that only 21 arrests were made for public drunk or public intoxication. Look at the sequence of questions and answers between game and fish officer Lane Ball and counsel:

“Q I know you want to blame everything on alcohol, but all of these other things could occur without alcohol being on the river, couldn’t it?

A Yes, sir. First of all, I’m not here to blame anybody with anything.

Okay? I’m here to report on our agency’s enforcement efforts on the river. I can say that if you take the two charges that you took, the public drunk and possession of beer by minors, and divide those into the total, you come up with 11%. It seems correct to me. What I’m saying is, the large majority of these other charges were alcohol-related, as you said.

Q In that a lot of people floated down the river and they were taking alcohol with them; alcohol-related in that context, not in the context that they were observably publicly drunk, point-eight-percent or greater. Is that correct?

A That is correct. Now, I say it in the aspect that of the 103 people

charged with trespassing, the majority of that, jumping off that bank, the vast majority of those people were drinking, okay? The people in possession of marijuana, of the 151, I can say that 99% of those were drinking alcohol also. Some thing with controlled substance, possession of beer, I mean, saying alcohol-related. Those people were consuming alcohol.”

TR 70 [Emphasis added]

To counsel the last sentence is telling “Those people were consuming alcohol.” The same officer has earlier said that the river floaters would be arrested if they were drunk.

The possession of consumption of alcoholic beverages is legal in all of Pike County, including its municipalities. The people who were floating the Bogue Chitto River and Topisaw Creek were consuming a beverage that was legal for them to possess and drink.

Yet, based upon on only 21 arrests for public drunk and public intoxication over a five plus year period, and because there were 1,360 arrests for nine other categories of misdemeanors, and at the time these misdemeanors were committed some of the offenders were consuming this beverage that was legal for them to drink, the Board of Supervisors in Pike County, Mississippi, has banned the possession and consumption of all alcoholic beverage on the Bogue Chitto River and Topisaw Creek in certain portions of Pike County. That is as arbitrary and capricious as it can get.

The ban was not done by the supervisors because the statistics supported the ban, but the ban was done by the supervisors because they wanted to ban alcoholic beverages, and they tried to put their statistics in a light that would justify the ban. However, it simply does

not work. There were 21 arrests for public intoxication or public drunk. There were 1,360 other arrests for various other misdemeanors. That is hardly an overwhelming statistic concerning drunkenness on the Bogue Chitto River and Topisaw Creek. The fact that 21 people were charged with public drunk/intoxication does not justify the Board of Supervisors of Pike County, Mississippi, banning up to four thousand plus tubers per weekend through mid-May to mid-August. Nor does it justify the crippling effect it has had on the businesses of the Appellants in this case. Nor does it justify the huge loss of tax revenue to Pike County, Mississippi, that is paid on the beverages, groceries, ice, gas, and other items bought and consumed by the tubers on the Bogue Chitto River and Topisaw Creek. The tubers must have bought a lot of things, because there were 223 arrests for littering and 428 arrests for possession of glass on the Bogue Chitto River. Six Hundred and Fifty-One of the arrests were for items connected with the consumables left in the river or on the river by these four thousand plus tubers that would come each weekend. Based upon the facts, the ruling of the learned trial judge was in error. The action of the Board of Supervisors adopting this ban on consuming alcoholic beverages on the Bogue Chitto River and Topisaw Creek was arbitrary and capricious. The Appellants respectfully request the Court to make null and void the ordinance passed by the Pike County Board of Supervisors in that it was arbitrary and capricious, and that the learned trial judge erred in not voiding the ordinance as being arbitrary and capricious.

(B)

STANDARD OF REVIEW

Judicial review of a board of supervisors's findings and decisions is limited. A board of supervisor's conclusions must remain undisturbed unless the board's order; (1) is beyond the scope or power granted to the board by statute; (2) violates the constitutional rights or statutory rights of the aggrieved party; (3) is not supported by substantial evidence; or (4) is arbitrary or capricious.

*Board of Law Enforcement Standards & Training v. Butler*, 672 So.2d 1196, 1199, (Miss. 1996). If a board of supervisor's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious. *Public Employees' Ret. Sys. V. Marquez*, 774 So.2d 421, 430 (¶ 35) (Miss. 2000). We will review questions of law *de novo*. *McCubbin v. Seay*, 749 So.2d 1127 (¶5) (Miss. Ct. App. 1999).

The Standard of Review was stated this way in *Citizen Ass'n v. Yelvington* 859 So.2d 361 (Miss. 2003).

In reviewing an administrative agency's findings of fact, our courts are limited by the arbitrary and capricious standard of review. *Bd. Of Supervisors of Harrison County v. Waste Management of Miss., Inc.* 759 So.2d 397, 400 (Miss. 2000) (citing *McDermert v. Miss. Real Estate Comm'n*, 748 SO.2d 114, 118 (Miss. 1999)). An action is arbitrary or capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Miss. Dep't of Env'tl. Quality v. Weems*, 653 So.2d 266, 281 (Miss. 1995.).

The Appellants' first contention is that the ordinance is beyond the scope or power granted to the board by statute. The statutory scheme of §67-1-1 et seq., and §67-3-1 et seq., does not authorize the passing of the ordinance as was done by the board of supervisors.

Secondly, the ordinance is arbitrary and capricious. As *Hinds County v. Leggett*, *supra* stated:

If a board of supervisors decision is not based upon substantial evidence, it necessarily follows that the decision is arbitrary and capricious. *Hinds v. Leggett supra* ¶10

Or as stated in *Citizen Ass'n v. Yelvington, supra*:

An action is arbitrary or capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Citizen Ass'n v. Yelvington, supra*, ¶7

Officer Ball admitted that many of the tickets were multiple tickets given to the same individual. Officer Ball also admitted if a canoer or tuber were being ticketed for a nonalcoholic violation, but was found to be publically intoxicated, then the canoer or tuber would also be given a ticket for public intoxication. Again, only 21 arrests out of 1m381 during a five year period were for public intoxication on the Bogue Chitto River.

The supervisors want to blame everything on public intoxication, but that is not consistent with the facts in this case.

Finally, §67-3-1 et seq., has made the consumption of light wines and beer in Pike County legal. State misdemeanor laws provide punishment for those individuals who consume excessive amounts of alcohol and become publically intoxicated. The statutory scheme of this state concerning light wines and beer, and wines and spirits, provide a method for selling and possessing of those alcoholic beverages by citizens of this county and visitors to this county.

There is nothing in that statutory scheme to punish all persons in the county if a few

persons in a county use intoxicating beverages excessively and become publically intoxicated. Those 21 people apparently were punished by such statutes. Now, the county is attempting to punish the 2,000 to 5,000 other persons who float the Bogue Chitto River and Topisaw Creek each week throughout the summer because of 21 arrests over five years for public intoxication. Such conduct is arbitrary and capricious on the part of the board of supervisors.

### CONCLUSION

It is respectfully submitted that the ordinance of Pike County to ban alcoholic beverages on certain portions of the Bogue Chitto River and Topisaw Creek in Pike County, Mississippi, should be declared null and void. Two reasons support this decision. One, §67-3-65 is not applicable to Chapter 1 of Title 67, because it is found only in Chapter 3 of Title 67, and there is no other provision in either of those chapters which would allow §67-3-65 to be applicable to both chapters. Secondly, alcoholic beverages in Mississippi are controlled by permitting process, and the State Tax Commission is given authority for that process and all things to do with alcoholic beverages in Chapter 1 of Title 67.

The Appellants respectfully request this Court to declare null and void the ordinance in Pike County, Mississippi with the short title "Pike County Ban on the Possession and Consumption of Beer, Wine, and Alcoholic Beverages on Portions of the Bogue Chitto River and Topisaw Creek."

The decision by the learned trial judge upholding the ordinance banning alcoholic

beverages on certain portions of the Bogue Chitto River and Topisaw Creek in Pike County, Mississippi, is arbitrary and capricious.

RELIEF REQUESTED

It is respectfully submitted that the board of supervisors acted beyond their authority in passing the ordinance prohibiting the possession and consumption of alcohol of any type on certain portions of the Bogue Chitto River and the Topisaw Creek in Pike County, Mississippi.

It is further respectfully submitted that the acts of the board of supervisors were arbitrary and capricious when the ordinance banned the use of moderate alcohol by 2,000 to 5,000 tubers and canoers per week based upon state agencies issuing only 21 public intoxication tickets from the years 2000 through 2005.

It is respectfully requested that the ordinance passed by the board of supervisors be held void based upon either or both arguments in the brief herein.

RESPECTFULLY SUBMITTED,

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#### CERTIFICATE OF SERVICE

I, Alfred Lee Felder, do hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants to:

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This the 10th day of August, 2009.

  
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