ALAN WILSON
ATTORNEY GENERAL

August 5, 2014

Master Deputy Patrick Cockrell
Spartanburg County Sheriff's Office
8045 Howard Street
Spartanburg, SC 29303

Dear Master Deputy Cockrell:

Thank you for your letter received on January 9, 2014 requesting an opinion of this Office pertaining to the offense of criminal trespass, a violation of S.C. Code Ann. § 16-11-620 (2003). Specifically, you ask the following two questions:

> Is there a time limit on the validity of a written or oral notice to a person that they are warned not to enter into a dwelling house, place of business or the premise of another person?
>
> May an employee acting as an agent for, and on behalf of, his employer issue a trespass warning for all property belonging to the employer to include any other location which the employee does not have direct contact with?

In regards to your first question, you indicate that local magistrates differ in their interpretations of how long a trespass notice remains valid, some finding the warning is effective until rescinded by a person with the authority to do so, while others have determined the warning remains active for either six or twelve months. Based on the analysis below, it is our opinion that under the current law governing criminal trespass, a court would find an adequate warning provided to an individual not to enter a dwelling house, place of business, or the premise of another person has no statutory based expiration.

Referencing your second question, you state its basis stems from a policy implemented by Wal-Mart stores that all persons detained and/or charged with shoplifting, and certain other crimes, be provided with a written trespass notice advising the customer that they are indefinitely banned from *all* Wal-Mart properties. Further, you indicate local magistrates differ in their determination of whether an agent of a company can give a valid trespass notice for all retail stores within his or her company or solely the one where he or she routinely works.

We stress that the scope of the authority of an agent or representative acting on behalf of his or her employer must be determined by the facts and circumstances of the case at hand and therefore such factual findings are beyond the scope of an opinion of this office. However, case law among various jurisdictions indicates a court would likely conclude that a lawful warning not to enter any properties owned by a particular retail establishment that has been properly communicated to a patron by an agent with the appropriate authority to do so, would serve as a revocation of the implied authority, or license, to enter the privately owned store or chain of stores, as was specified in the warning. Yet, precedent has upheld permanent bans from retail chains issued by authorized agents acting on behalf of a corporation

involving stores located within the same county and stores located in same state and where a violation of the trespass notice was not extremely remote in time from its issuance. Thus, the reasonableness and constitutionality of permanent nationwide bans from privately owned retail chains is an issue ripe for debate.

Law/Analysis

1. The Right to Exclude: An Essential Stick in the Bundle of Property Rights

The United States Supreme Court has said on numerous occasions that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser v. Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 391 (1979); see also Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S. Ct. 2309, 2316 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044, 112 S. Ct. 2886, 2908 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831, 107 S. Ct. 3141, 3145 (1987). This right has also been identified by South Carolina courts on numerous occasions. See, e.g., Snow v. City of Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991); S.C. Elec. & Gas Co. v. Hix, 306 S.C. 173, 176, 410 S.E.2d 582, 584 (Ct. App. 1991); Stratos v. King, 282 S.C. 501, 504, 319 S.E.2d 356, 359 (Ct. App. 1984). One scholar has gone as far to describe the right to exclude as a right among others that are "valued so highly that their abolishment will result in the offending law being declared unconstitutional." Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers ch. 5, § 5.03[A], p. 5-16 (1999).

In regards to a privately owned business, it is well established that "[t]he implied authority to enter a store's premise is a species of license the owner of the property . . . extends to members of the public in order to transact business." State v. Acevedo, 49 Kan. App. 2d 655, 660, 315 P.3d 261, 267 (Kan. Ct. App. 2013) (citing Dulchevsky v. Solomon, 136 Wash. 645, 650, 241 P. 19 (1925)); see generally Restatement (Second) of Torts § 332 (1965). However, such license can be revoked at will:

> the general public [has] an implied license to enter a retail store, and, perhaps, many other places of business, but one in charge of such place of business has the privilege and right to revoke such license at any time he sees fit as to any person, and to eject such person if he refuses to leave when directed or requested to do so. . . . The same rule also applies to a workshop or factory; that is, those that hold out an implied license to enter.

State v. Martin, 149 S.C. 464, 147 S.E. 606, 614, rev'd on other grounds, State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); See also City of Greenville v. Peterson, 239 S.C. 298, 304, 122 S.E.2d 826, 828 (1961), rev'd on other grounds sub nom., Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119 (1963) (citing Annotation 9 A.L.R. 379; Annotation 33 A.L.R. 421; Brookside-Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240, Annotation 33 A.L.R. 417) ("Although the general public has an implied license to enter any retail store the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so"). However, the common law right to exclude has been overridden by certain constitutional and statutory provisions, including prohibitions against the exclusion of individuals on the basis of race, color, religion, or national origin[1] and the infringement of the constitutional protections of free speech and assembly, in certain instances.[2]

In addition to the common law right to exclude, criminal trespass statutes have been enacted among states to expand the common law remedies available to property owners by adding criminal prosecution by the state to the recovery of damages in tort. Criminal Law: Customer's Permanent Exclusion From Retail Store Due to Prior Shoplifting Arrest Held Enforceable Under Criminal Trespass

[1] See, e.g., 42 U.S.C. §§ 2000a to 2000a-6; S.C. Code Ann. § 45-9-10 (Supp. 2013).
[2] See generally Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219 (1972).

Statute, 1971 Duke L.J. 995, 996 (1971) [hereinafter, Customer's Permanent Exclusion]; see, e.g., S.C. Code Ann. § 16-11-620 (2003). Criminal trespass statutes were commonly used in the 1960s to prosecute what have been referred to as "sit-in" demonstrators, or those who seated themselves to be waited on at lunch counters and other dining establishments that excluded black customers to protest against such policy. Customer's Permanent Exclusion, supra p. 2, at 996, n.6. In addition to the basis for the ejection of unruly patrons, criminal trespass statutes are commonly used today as a means to prosecute habitual shoplifters. Id. at 996.[3]

2. Duration of the Validity of a Trespass Notice

Your first question inquires as to the length of time a written or oral trespass notice remains in effect. As noted above, the statute governing criminal trespass, also referred to as trespass after notice, is S.C. Code Ann. § 16-11-620 (2003). This section, as well as its precursor, § 16-388, previously provided that a charge of criminal trespass could be issued for "the entry of a dwelling house, place of business or the premise of another *within six months after being warned against such entry* or [for] [ ] the failure to leave a dwelling house, place of business or premises of another after having been requested to leave." State v. Cross, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994) (citing S.C. Code Ann. § 16-11-620 (1976) (emphasis added)). In 1996, the South Carolina Legislature amended § 16-11-620 "delet[ing] the requirement that the warning required by this section for the offense of entering the premises of another person after warning must have been made within the preceding six months." Act No. 279, 1996 S.C. Acts 1930-31. Therefore, in relevant part, the current version of the statute reads:

> [a]ny person who, without legal cause or good excuse, enters into the dwelling house, *place of business,* or on the premises of another person *after having been warned not to do so* or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the *person in possession or his agent or representative* shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

S.C. Code Ann. § 16-11-620 (2003) (emphasis added).

It is well established that "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and the language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and courts must apply the literal meaning of those terms. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 486-87, 636 S.E.2d 598, 616 (2006) (citing Carolina Power & Light Co. v. Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)). Thus, like a court, this office must apply the plain meaning of the words contained in a statute when such terms are clear. Rejection of the plain meaning of statutory terms should be done only to escape absurdity that could not have possibility been the intent of the legislature. Id. at 487, 636 S.E.2d at 616 (citing Kiriakides v. United Artists Commc'n, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

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[3] In 1971 the D.C. Superior Court was the first to be called on to apply the common law right to exclude due to a previous arrest for shoplifting in the case of United States v. Bean, Crim. No. 50426-70 (D.C. Super. Ct. 1971), reprinted in 99 Daily Wash. L.Rep. 965, col. 1 (1971). Customer's Permanent Exclusion, supra p. 2, at 996. Bean discusses the constitutional reasoning for upholding a patron's permanent exclusion from a retail store on the basis of a prior shoplifting arrest. See Bean, Crim. No. 50426-70 (D.C. Super. Ct. 1971), reprinted in 99 Daily Wash. L.Rep. 965, col. 1 (1971).

It is our opinion that a court would find that deletion of the six month time period previously included in S.C. Code Ann. § 16-11-620 shows the Legislature's intent not to impose a statutory limit on a trespass notice's validity. Thus, applying the plain language of S.C. Code Ann. 16-11-620 (2003), we believe that when an individual has been provided notice that he or she is not permitted to enter a dwelling house, place of business or the premise of another, there is no statutory time limit on the warning's applicability, and the trespass warning should remain in effect in accordance with the parameters communicated to the individual being trespassed, presuming the agent issuing the trespass notice had the authority to issue the trespass notice and the exclusion does not infringe upon the individual's statutory or constitutionally protected rights.

3. Who Has the Authority to Exclude

Before we address what courts have upheld in regards to bans from private property implemented by an agent of a retail store with various locations, we will briefly discuss who, generally, has the authority to issue a trespass notice. We find this necessary because the argument is frequently made in criminal trespass cases that the person issuing the trespass notice lacked the authority to do so.[4] The language of S.C. Code Ann. § 16-11-620 (2003) indicates that the authority to put a person on trespass notice belongs to the owner of a dwelling house, place of business, or premise, a person in possession, or his agent or representative. Furthermore, in regards to the precursor to § 16-11-620, our Supreme Court has indicated that "[t]he act . . . is clearly for the purpose of protecting the rights of the owners or those in control of the private property." City of Greenville v. Peterson, 239 S.C. 298, 303, 122 S.E.2d 826, 828 (1961), rev'd on other grounds sub nom., Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119 (1963).

Because any determination as to the person or persons having the authority to order someone not to enter or to immediately leave private property and the scope of such authority will in all circumstances be based on the facts of the case, such findings are beyond the scope of an opinion of this Office. See Op. S.C. Att'y Gen., 2010 WL 3896162 (Sept. 29, 2010) ("This Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court"). Nonetheless, in attempt to add clarity to this subject, we will discuss precedent regarding the right to exclude and the transferability of this right to an agent or representative of the owner or person in possession as well as how far one with the right to exclude can extend it.

An agency relationship can be established by evidence of actual or apparent authority. Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004) (citation omitted). Actual authority is expressly conferred upon the agent by the principal whereas apparent authority, while not actually granted, is established when the principal knowingly permits or holds the agent out as possessing certain authorities. Id. (citations omitted). The doctrine of apparent authority centers upon the principal's manifestation to a third party that the agent has certain authority. Id. (citations omitted). Therefore, the principal is bound by the acts of its agents when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority, and they deal with the agent based on that assumption. Id. (citations omitted). It follows that the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. Id. (citations omitted). An agency may not be established solely by the declarations and conduct of an alleged agent.

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[4] See, e.g., Johnson v. State, 277 Ala. 655, 173 So.2d 824 (Ala. 1964); Ex Parte Iron & Coal Co. v. Wright, 212 Ala. 130, 101 So. 824 (Ala. 1924); Woodruff v. State, 170 Ala. 2, 54 So. 240 (Ala. 1911); State v. Marsala, 116 Conn.App. 580, 976 A.2d 46 (Conn. App. Ct. 2009); Woll v. United States, 570 A.2d 819 (D.C. Cir. 1990); State v. Acevedo, 49 Kan. App. 2d 655, 315 P.3d 261 (Kan. Ct. App. 2013); State v. Moler, No. 98,221, 2008 WL 4416035 (Kan. Ct. App. Sept. 26, 2008); State v. Dyer, 769 A.2d 873, 2001 ME 62 (Me. 2001).

Id. at 643, 598 S.E.2d at 721 (citations omitted).

South Carolina Courts have upheld convictions under S.C. Code Ann. § 16-11-620 (2003) where the agent giving the trespass notice was the manager or employee of the business exercising control or custody over the commercial property. See, e.g., Jackson v. City of Abbeville, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005) (attendant at a convenient store ordered patron to leave after patron became "enraged" and refused to leave); Wright v. United Parcel Serv., Inc., 315 S.C. 521, 445 S.E.2d 657 (Ct. App. 1994) (UPS manager had authority to order employee who was not permitted to work due to an on-the-job injury to leave and employee failed to do so); Bryant v. City of Cayce, No. 07-2162, 332 F.Appx. 129 (4th Cir. May 8, 2009) (hotel manager ordered non-registered guest to leave the premises). Moreover, courts in other jurisdictions have expanded on the subject of who, acting on behalf of a company or organization, has the right to exclude. Several examples follow.

In Johnson v. State, 277 Ala. 655, 173 So.2d 824 (Ala. 1964), the Supreme Court of Alabama addressed the issue of whether the pastor of a church had authority to exclude certain individuals as trespassers despite the pastor's lack of express authorization to warn off trespassers. In the Court's ruling that the pastor, who had "managerial authority" and who was the "official in charge," possessed the authority to exclude, it noted that even if the pastor did not have the direct authority to ward off trespassers, his actions were nonetheless ratified by church officials who did have such authority:

> [h]ere, the pastor not only assumed responsibility for the arrest of the defendant, but authorized his arrest in the presence of the congregation, and thereafter went to the solicitor's office with the chairman of the Board of Stewards, who signed the affidavit supporting the warrant; and the pastor appeared at the trial as a prosecuting witness and testified against the defendant. This was a far stronger case of ratification than in the Wright case [ ].

Id. at 659, 173 So.2d at 827 (referencing Central Iron & Coal Co. v. Wright, 212 Ala. 130, 101 So. 824 (Ala. 1924) (see infra p. 6)). The Court went on to note that if the pastor did not have this authority, it would be "neither practical nor useful:"

> [t]o hold that the pastor of a church or a managerial officer of a corporation or other delegated official with authority in excess of that of only an employee, does not have the power to warn off a trespasser, or to warn against trespassing . . . without, as to the pastor, the express authorization of the governing board of the church, or, as to the president, general manager or general superintendent of a corporation, the express authorization of the stockholders or board of directors, is neither practical nor useful . . . .
>
> A tramp or a vandal could trespass on corporate property, ready or threatening to inflict personal or property injury, and under such a holding, the officials in charge would be powerless to warn the trespasser to leave without some prior express authorization.

Id. at 695, 173 So.2d at 827-28.

Also relevant is Woll v. U.S., 570 A.2d 819 (D.C. Cir. 1990). In Woll, the District of Columbia Court of Appeals concluded that the lessee of a clinic was authorized as "a person lawfully in charge thereof" pursuant to the unlawful entry statute to eject protesters blocking patients' access from an interior corridor shared in common with the landlord and other tenants of the office building. Id. at 820. From "ample precedent" the court "distill[ed] several principles," listed as follows:

> first, [ ] more than one person can have the authority to order someone to leave either public or private premises . . .; second, that reasonableness is a factor in determining such authority . . .; third, that someone lacking a possessory interest in the property. . . may have such authority; and fourth, that the person in charge may act through an agent in ordering someone to leave. . . .

Id. at 822.

In Brooks v. City of Birmingham, 389 So.2d 578 (Ala. Crim. App. 1980), the Alabama Court of Criminal Appeals held that the "marketing director" of a mall had the authority to give a valid warning against trespass for one of the mall's merchants. The facts underlying this decision, as provided by the marketing director's testimony, were that she had the duty to "'promote and advertise the Mall and run the offices there at the Mall and also work security;'" that she was "'over the security people that [she] hire[d] in the mall;'" and that she received direction from the Board of Directors of the Merchants Association to tell plaintiffs to stay out of the Mall. Id. at 581. From these facts, the Court concluded that the marketing director:

> had much more than the limited authority of many of the agents and employees of the various tenants of the Mall. In warning undesirable persons not to come on the premises, she was acting within the line and scope of her broad authority. . . .
>
> . . . .
>
> Although [the marketing director] was not the 'president, general manager, or general superintendent' of Eastwood Mall Merchants Association, the nature and breadth of her duties and authority encompassed the implied duty and authority to protect the premises against unlawful intrusion thereon. In addition, she had the express duty and authority to do so by virtue of the action of the board of directors.

Id. at 581-82.

Alternatively, in Central Iron & Coal Co. v. Wright, 212 Ala. 130, 131, 101 So. 824, 825 (Ala. 1924) the Supreme Court of Alabama held that an agent "'engaged in regular duties for the company'" did not have the authority to exclude. Specifically, the Court held that the agent of a company who arrested plaintiff for trespass was not permitted to do so because there was "no general managerial authority conferred upon the agent; nor was he at the head of any department of defendant's business with managerial authority. He was nothing more than an employee; he was therefore not a vice principal. . . ." Id. at 131-32, 101 So. at 825 (citations omitted). Nonetheless, the Court concluded that because the corporation's "'regular attorney'" appeared and prosecuted plaintiff on behalf of the corporation, the jury was authorized to infer a ratification of the act of the agent and may have concluded direct corporation action, as alleged in the complaint. Id. at 132, 101 So. at 825.

As is revealed by the precedent above, the right to exclude depends entirely on the facts of the case. Thus, while it would be a question of fact to determine who, pursuant to our statute is a "person in possession" or his or her "agent or representative," case law suggests most supervisory and managerial employees are deemed to have the authority to exclude. We also mention, as was explained in a prior opinion of this Office,[5] that the scope of the authority to exclude is limited by the language of S.C. Code Ann. § 16-11-620 (2003) itself, which creates an exception when an individual has "good cause or good excuse" to enter the premises. See also 75 Am. Jur. 2d Trespass § 155 ("In an appropriate factual situation, the common-law defense of necessity may be interposed to a criminal trespass action"). Furthermore, our Supreme Court has held that § 16-11-620 does not apply to law enforcement officers

[5] See S.C. Op. Att'y Gen., 2013 WL 3133638 (June 5, 2013).

who fail to leave upon request by the owner where the officers "were responding to a complaint and therefore had legal cause to be on the property." Town of Springdale v. Butler, 299 S.C. 276, 279, 384 S.E.2d 697, 698 (1989).

Once an agent's authority to exclude has been determined, it is also a question of fact how far such authority extends. Yet, case law provides insight as to what a court would likely find as a reasonable extension of the right to exclude, as illustrated below.

4. The Scope of Agent's Right to Exclude

Whether an authorized agent rightfully excluded a patron from all stores within a chain of retail stores seems to frequently arise when a person has been issued a trespass notice for shoplifting and later enters a different store within the chain and commits the same offense. After discovery from the store's database that the shoplifter was issued a trespass notice banning him indefinitely from all of the chain's locations, the shoplifter is often charged with burglary on the basis that the person knowingly entered the store, without authority to do so, and with the intent to commit a felony or theft therein. Thus, the central issue among the precedent we have discovered is whether the trespass notice issued after the first incident by an agent of the company established that the shoplifter entered the second retail store, within the same chain of stores but at a different location, "without authority" to satisfy that element of the burglary charge when prosecuting the second incident. See infra pp. 8-10.

The case of State v. Acevedo, 49 Kan. App. 2d 655, 655-56, 315 P.3d 261, 264 (Kan. Ct. App. 2013), while involving a burglary charge issued after a second shoplifting incident that occurred at the *same location* as the first incident, it is nonetheless helpful in identifying the policy frequently used by Wal-Mart and other large retail stores when issuing a trespass notice and a court's response to the challenges regarding those policies. In Acevedo, a Wal-Mart shopper was advised by the store's manager and assistant manager that he was not authorized to return to any Wal-Mart store for reasons undisclosed by the record. Id. at 655, 315 P.3d 264. The manager of the store read the following trespass notice to the Defendant, however, the form was not signed and the Defendant was not provided with a copy:

> Pursuant to law, Wal-Mart Stores, Inc. chooses to exercise its right to restrict entrance to individuals who have conducted themselves in a manner which is not acceptable to the community, including, but not limited to, shoplifting or destruction of property. It is deemed that the undersigned apprehended subject poses a threat to the future security of Wal-Mart facilities and properties, and therefore, is no longer welcome on Wal-Mart property, within its stores, or on any property under its immediate control. The undersigned apprehended subject is now on notice that should he/she choose to ignore this revocation of invitation and enter onto any Wal-Mart property, he/she places himself/herself in the position to be charged with Criminal Trespass. . . . It is not necessary that the undersigned apprehended subject be caught in an illegal act, including, but not limited to, shoplifting or destroying property; the mere presence of such individual on the property is sufficient.
>
> Acknowledgement
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> I, [Thomas Acevedo] understand that as of the [18] day of – [April], [2009], I have been banned from all Wal-Mart property, and that to enter onto any such property places me at risk for arrest and prosecution for Criminal Trespass. . . . (Bracketed portions were handwritten by [the manager].)[6]

[6] From research for this opinion, this appears to be the standard language used on all Wal-Mart stores' trespass notices. See, e.g., Bates v. Wal-Mart Stores, Inc., 413 F.Supp.2d 763 (S.D. Miss. 2006); Van v. Wal-Mart Stores, Inc., Nos. 11-17040,

Id. at 656-57, 315 P.3d at 265. Almost two years later, the Defendant returned to the same Wal-Mart store and, after removing a grinder wheel from the store without paying, he was charged and convicted of aggravated burglary and misdemeanor theft. Id. at 657-58, 315 P.3d at 265-66.

Among the issues on appeal were the Defendant's allegations that the trespass notice was ambiguous because it did not designate a length of time that he would be prohibited from entering store and that the State presented no evidence that the manager and assistant manager had the authority to ban the Defendant from Wal-Mart. Id. at 659, 315 P.3d at 266. The Court concluded that the notification was not ambiguous stating that it "clearly imposed an indefinite revocation of Wal-Mart's implied invitation to [the Defendant] to enter its stores, the implication being that [the Defendant] could never enter a Wal-Mart store until he was given express authority to do so. There is nothing ambiguous about an absolute revocation of a license to enter upon property." Id. at 660, 315 P.3d at 267 (citing Gilman v. Blocks, 44 Kan. App. 2d 163, 171, 235 P.3d 503 (2010); 25 Am.Jur.2d Easements and Licenses § 117, pp. 611-12).

Second, the Court found that the "[manager and assistant manager] acting as agents of the corporation could clearly revoke [the Defendant's] license to enter the Garden City store they managed." Id. at 661, 315 P.3d at 267 (citing Lewis v. Montgomery Ward & Co., 144 Kan. 656, 660, 62 P.2d 875 (1936) ("[A] store owned by a corporation must be conducted through its agents, that such agents must not only be responsible for seeing that the merchandise to be sold is offered for that purpose and when sold the consideration received, but for seeing that the merchandise is not rendered unsalable by the acts of the customers, and that it is not stolen by shoplifters and thieves"). While silent on an agent's authority to ban an individual from multiple Wal-Mart stores, the Court hinted at the complexity of your question in its final point on agency, stating that "[w]hether [the manager and assistant manager's] authority extended to Wal-Mart stores nationally is a question for another case." Id.

In State v. Ocean, 24 Or. App. 289, 546 P.2d 150 (Or. Ct. App. 1976), rev'd on other grounds, State v. Collins, 179 Or. App. 384, 39 P.3d 925 (Or. Ct. App. 2002), the Oregon Court of Appeals upheld a trespass notice that permanently prohibited an individual from all Fred Meyer locations after he was caught shoplifting at a different Fred Meyer location from the first incident but that was in the same county. After caught shoplifting groceries in a Fred Meyer store, the Defendant signed a trespass notice read to him by a detective with authority issue the notice which indicated the Defendant was banned from all Fred Meyer properties. Id. at 291, 546 P.2d at 151. Approximately seven months later, the Defendant entered a different Fred Meyer store in the same county and was confronted by another store detective for shoplifting. Id. During the Defendant's detainment, the detective realized the Defendant's name was listed among those not authorized to enter any Fred Meyer property. Id. The Defendant was charged and convicted of burglary in the second degree, and this appeal followed. Id.

In part, the Defendant challenged the constitutionality of a retail chain store's ability to permanently bar an individual from any of its premises. Id. at 295, 546 P.2d at 153. In response to this argument, the Court upheld the ban as constitutional, stating that: the "defendant was originally barred because he was found shoplifting, his second entry was made with intent to shoplift, it was seven months later, and it was the same county. On these facts, we find no constitutional violation." Id. (citing Criminal Law: Customer's Permanent Exclusion From Retail Store Due to Prior Shoplifting Arrest Held Enforceable Under Criminal Trespass Statute, 1971 Duke L.J. 995, 996 (1971)). While State v. Ocean has been reversed on the Court's statutory interpretation of the definition of to "enter or remain

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12-15284, 2014 WL 3643958 (9th Cir. July 24, 2014); State v. Moler, No. 98221, 2008 WL 4416035 (Kan. Ct. App. Sept. 26, 2008).

unlawfully" found in Oregon's criminal trespass-second degree statute,[7] there is no indication that its holding on the constitutionality of a permanent ban by retail stores has been overturned.

The Kansas Court of Appeals also upheld a permanent ban of an individual's entry from any of the company's chain of retail stores that was issued by an agent of the company in State v. Moler, No. 98221, 2008 WL 4416035 (Kan. Ct. App. Sept. 26, 2008). Although Moler is an unpublished decision, it provides another example of how a court is likely to address the questions posed in your correspondence. Here, the Defendant appealed a conviction of aggravated burglary on the contention that the State failed to prove the elements of the crime: that the Defendant "knowingly and without authority entered into or remain[ed] within any building . . . in which there is a human being, with the intent to commit a felony, theft or sexual battery therein." Id. at *1.

The record reveals the facts of the case as follows. The Defendant was notified of his ban from all Wal-Mart properties after being read and signing a "Notification of Restriction from Property" issued by the loss prevention officer at the store's Rock Road location in Wichita, Kansas in August of 2004. Id. at *2. Subsequently, in March of 2006, the Defendant entered a different Wal-Mart store in Wichita and exited with a vacuum cleaner he claimed he purchased with a receipt for an identical vacuum purchased earlier that day. Id. at *3. An asset protection associate at the second location discovered the defendant was banned from all Wal-Mart stores after entering his social security number into the company computer system. Id. at *1, *3. In response to Defendant's argument that his entry into to the Wal-Mart was authorized because it was an establishment open to the public, the Court disagreed stating that "[b]ecause sufficient evidence existed to prove that [the Defendant] had been banned from Wal-Mart stores, we determine that [the Defendant] entered the Wal-Mart store without authority on March 10, 2006." Id. at *3. The Defendant's conviction of aggravated burglary was affirmed. Id. at *1.

Last, while not a criminal case, we think Bates v. Wal-Mart Stores, Inc., 413 F.Supp.2d 763 (S.D. Miss. 2006) is also worthy of consideration. Bates involved a personal injury suit against Wal-Mart for negligently maintaining the safety of its premises brought after Plaintiff was abducted from a Wal-Mart parking lot located in Hazlehurst, Mississippi and raped. Id. at 765-66. Prior to this incident, Plaintiff was caught shoplifting from a Wal-Mart in Jackson, Mississippi, and she was charged and convicted of shoplifting as a result. Id. at 766. On the date of the shoplifting incident, Plaintiff singed a "Notification of Restriction from the Property" form acknowledging that she was barred from all Wal-Mart properties and, should she be found on any Wal-Mart property, that she could be prosecuted for criminal trespass. Id. The Court granted Wal-Mart's Amended Motion for Summary Judgment and Newly Discovered Evidence, by which Wal-Mart presented evidence of the trespass notice. Id. at 769. The Court concluded that because the Plaintiff was a trespasser on Wal-Mart's property, as opposed to an invitee as she alleged, Wal-Mart's duty to the Plaintiff was lessened to a duty not to willfully or wantonly injure her. Id. at 768. The Court ultimately found that no evidence was presented that Wal-Mart breach the duty owed to the Plaintiff as a trespasser. Id.

Importantly, in its ruling, the Court stated that: "[i]t is undisputed that new evidence has established the plaintiff has been banned from Wal-Mart property. The plaintiff had no invitation nor

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[7] In Ocean, subsection (3)(a) of Oregon's second degree burglary statute was construed as encompassing either entry into a premises not open to the public or entry into any premises when the entrant was not otherwise licensed or privileged to do so (disjunctive reading of the "or"). State v. Ocean, 24 Or. App. 289, 293, 546 P.2d 150, 152 (Or. Ct. App. 1976), rev'd, State v. Collins, 179 Or. App. 384, 39 P.3d 925 (Or. Ct. App. 2002) (interpreting O.R.S. 164.215(3)(a)-(b)). Alternatively, in State v. Hartfield, 290 Or. 583, 596, 624 P.2d 588, 595 (Or. 1981), the Court held that to prove a criminal trespass in a case that clearly involved entry into a premises that was not open to the public at the time of the entry, the state also had to prove that the entry was not otherwise licensed or privileged (conjunctive use of the word "or"). In State v. Collins, 179 Or. App. 384, 393, 39 P.3d 925, 929 (Or. Ct. App. 2002) the Court upheld the Hartfield interpretation of O.R.S. 164.215 (3)(a)-(b).

lawful right to enter upon Wal-Mart's premises. . . ." The Court went on to note that statutory authority[8]

> grants Wal-Mart Stores, Inc., the right and authority to ban plaintiff from Wal-Mart property, as it did . . . in response to plaintiff's shoplifting activity. Plaintiff does not dispute that she entered upon Wal-Mart's premises in violation of this ban. These undisputed facts persuade this court as a matter of law, namely under Miss. Code Ann. § 97-17-97 [Mississippi's criminal trespass statute], that plaintiff's status of the day of the events alleged in the complaint was that of a criminal trespasser on Wal-Mart property.

Id. at 768-69. Thus, this case concluded that the ban issued by the Jackson, Mississippi agent of Wal-Mart excluding the Defendant from all Wal-Mart stores was authorized when analyzing incidents that occurred within the same state.

While the answer to your second question is fact specific, the examples above illustrate instances where courts of other jurisdictions have upheld trespass notices issued by an authorized agent of a company permanently banning a patron from all chains within the retail store. We reiterate that the analysis by the courts above applied to incidents occurring within the same store, stores within the same county, and stores within the same state. We also note that the incidents initiating the cases above were not extremely remote in time. We presume the courts issuing the holdings discussed above were reluctant to infringe upon the rights of a private property owner or his or her agent to exclude in the absence of a statutory or constitutional violation. This hesitation was articulated by the D.C. Superior Court in United States v. Bean, Crim. No. 50426-70 (D.C. Super. Ct. 1971), reprinted in 99 Daily Wash. L.Rep. 965, col. 1 (1971) when it stated that:

> [t]his Court is not prepared to take the leap that would subject all court-enforced private action to the constitutional guarantees heretofore only applicable against government. There are values to be preserved in a pluralistic society in permitting private individuals in their private pursuits to do as they please, even if they are wrong and even if their actions do not comport with our standards of what is right and just. Freedom includes the right to be wrong or disagreeable as long as the hand of government is not placed on the scales. And under appellate precedent this does not occur simply by virtue of the enforcement of trespass or unlawful entry laws with respect to purely private premises.

Id., reprinted in 99 Daily Wash. L.Rep. at 972, col. 1. We predict other courts will rule in line with the precedent set forth above if presented with cases involving similar factual situations.

Conclusion

It is our opinion that a court would find the 1996 amendment to S.C. Code Ann. § 16-11-620 illustrates the legislative intent not to impose a statutory time limit on the validity of a trespass notice. Secondly, whether an agent can act on behalf of his or her company to exclude a patron, and if so, how far the exclusion can be extended, is entirely fact specific and beyond the scope of this opinion. However, courts from other jurisdictions have held that companies must act through their agents and have noted the practicality of upholding the authority of certain managerial employees' right to exclude on behalf of their employers. Furthermore, courts have determined trespass notices issued to a patron by an authorized agent that permanently bans the patron from any of the company's properties based upon incidents

[8]The Court derived this authority from Miss. Code Ann. § 97-23-17 which grants to every corporation engaged in public business the authority to "refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon, or serve."

occurring at the same store, stores within the same county, and stores within the same state, and that were not extremely remote in time, to be valid.

We conclude with cautioning that this opinion only predicts how a court may rule in regards to your questions. Due to the absence of express direction from the Legislature, clarification is strongly recommended. As the Court noted in Bean, the issues addressed in this opinion involve conflicting policies ridden with constitutional questions most appropriately left for the legislature to answer:

> [o]ne may well have differing views on the policy question of whether a person who has been previously arrested for shoplifting should thereafter be barred from business establishments where shoplifting opportunities exist. On the one hand, the establishments involved might with considerable justification claim an interest in using the means at their disposal to combat the menace which has mushroomed in recent years . . . . On the other hand, it could be argued that one who has merely been arrested for an offense – or, for that matter, one who has been convicted and has served his punishment – should not for that suffer the penalty of being unable even to shop for the necessities of life.
>
> These conflicting policy considerations are most appropriately resolved by those entrusted with making policy, that is, by those having the authority to enact legislation or regulations. The answer does not lie in imposing, by a process of tortured judicial interpretation, an obligation upon private persons which the Constitution imposes only upon official conduct.

Id., reprinted in 99 Daily Wash. L.Rep. at 972, col. 3.

If we can answer any questions pertaining to this opinion, please do not hesitate to contact our Office.

Sincerely yours,

Anne Marie Crosswell

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