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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. S. Phillip Lenski, Administrative Law Judge

Appellate No. 2013-002614

South Carolina Department of Motor Vehicles,.....Respondent,

v.

Christopher Platt,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE

This action began on July 31, 2012 before the Honorable Bridget Autry, Hearing Officer for the Office of Motor Vehicle Hearings. The hearing was convened at the request of the Appellant, who challenged the Department of Motor Vehicle's decision to declare him a Habitual Traffic Offender as defined in S.C.Code Ann. §56-1-1020. At that hearing, the Appellant was present to testify and was represented by counsel Philip Alan Berlinsky. The Department of Motor Vehicles was not represented at the hearing. The Respondent elected not to make a personal appearance through counsel, and only provided documents to the Hearing Officer in advance of the hearing, which the Hearing Officer made a part of the record. The Hearing Officer issued her Final Order and Decision on October 8, 2012, ordering the suspension of the Appellant's driver's license is sustained and the Appellant be declared a Habitual Traffic Offender. (ALC Order)

The Appellant timely filed his Notice of Appeal of the Hearing Officer's Final Order and Decision to the Administrative Law Court on October 19, 2012. The Appellant filed his initial brief on February 18, 2013 after the Court issued an Order of Continuance extending the filing deadline for the brief. The Respondent timely filed

their brief, and without oral argument, the Administrative Law Court issued an Order on November 4, 2013 affirming the Hearing Officer's Final Order and Decision to sustain the Appellant's Driver's License and declare him a Habitual Traffic Offender.

The Appellant timely filed his notice of appeal of the Administrative Law Court's Order to the South Carolina Court of Appeals on December 9, 2013 and filed an agreement between counsel as to the designated record on appeal on January 27, 2014. The Appellant then filed a request for an extension to produce the record on February 5, 2014.

On March 6, 2014 the Appellant file a motion to file brief out of time in response the Clerk's letter dated February 26, 2014. On March 19, 2014, the South Carolina Court of Appeals granted the Appellant's motion to file out of time and issued an order for the Appellant to file his initial brief and designation of matter no later than April 17, 2014.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT THE APPELLANT CANNOT ESTABLISH THE FIRST TWO ELEMENTS OF ESTOPPEL AGAINST THE GOVERNMENT BY CITING CASELAW THAT IS DERIVED FROM PRECEDENT SEPARATE AND DISTINCT FROM THE CONTROLLING ISSUE IN THIS CASE.

The Administrative Law Court erred in finding the Appellant failed to satisfy two of the three elements of estoppel by relying on case law authority cited from: Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011); Morgan v. S.C. Budget and Control Bd., 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008); American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009). The Court used these cases as a basis for asserting that the Appellant did not establish at the administrative hearing: (1) lack of knowledge and of the means of knowledge of the "truth" as to the facts in question; (2)

justifiable reliance upon the government's conduct. As for the third element, the Respondent agency did not challenge nor did the Administrative Law Court deny that the Appellant suffered a prejudicial change in position. (ALC Order)

In regards to the first element, the Court incorrectly held that the Appellant was charged with knowledge of the law and had the means of knowledge to determine the law applicable to habitual offenders. On this issue, the Court confusingly concluded "lack of knowledge and the mean of knowledge of the *truth* as to the *facts* in question. The Court cites the authority of Ahrens, Morgan, and American Legion; all of these cases hold that "citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." Ahrens and American Legion derive this exact language from Morgan, which directly quotes Smothers v. U.S. Fidelity & Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996).

Appellant's research indicates that the **first use** of the language, "everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interest," is found in Smothers. In Smothers, the court examined whether an insured could rescind a release on the grounds of a unilateral mistake of fact induced by the fraud, deceit, and misrepresentation of respondent. See Smothers, 322 S.C. at 209, 470 S.E.2d at 859. The court in Smothers declined to grant relief when a complaining party took measures to secure knowledge as to the state of the law and, being misinformed placed himself in the prejudicial situation of which he later complains. Id. at 210, 860. However, that court goes on to opine that the particular Appellant in that case was not 'ignorant and unwary' but represented by an attorney and had the opportunity to consult their attorney prior to entering the release in question. Id. Most importantly, in the

Smothers case the parties were adverse and represented by counsel in litigation concerning tort liability - not simply a citizen being misinformed by the government, as was the factual scenario in Ahrens, Morgan, and American Legion.

A closer examination of Smothers, 322 S.C.207 at 210-11; 470 S.E.2d 858 at 860, shows that the cited authority for the assertion that "everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interest", is derived from Maw v. McAlister, 252 S.C. 280, 166 S.E.2d 203 (1969). This 1969 case dealt with a party attempting to rescind a signed release in a tort liability action. ***Importantly***, the citation signal ***"Cf."***, or compare, is used by the court in Smothers to cite Maw. In Maw the court refused to rescind a release based on an insurance adjuster's misrepresentation, when an experienced businessman did not exercise due care and failed to read a release prior to signing, but instead relied on the adjuster who was a stranger representing an adverse interest. Smothers 322 S.C. at 210-11, 470 S.E.2d 858 at 860.

Again, a careful reading of the opinion in Maw raises a ***very important distinction*** from the purported authority cited in Smothers, which is the genesis of other progeny such as Ahrens, Morgan. In Maw, 252 S.C. 280, 166 S.E. 2d 203, the South Carolina Supreme Court held that an illiterate man was barred from rescinding a written settlement agreement after he discovered that the agreement was not simply a release for his property damage claim, but was in fact a total release of the claim. Id. at 282, 204. The court held that the written agreement was unambiguous in its terms. The plaintiff alleged that he had been induced to sign the agreement by fraud and deceit of the insurance carrier's agent who "falsely represented to him that the release which he was requested to

sign related only to his claim for property damage and did not affect his claim for personal injury." The opinion in Maw goes on to expound the case law outlining the duty of a party who signs a written instrument to exercise reasonable care to protect himself by reading the written instrument. That court held that if a person cannot read that they should get someone to read for them. Maw, 252, S.C. at 284, 166 S.E.2d at 285.

Mostly importantly and in distinction from the progeny, Smothers and Maw were cases dealing with two represented parties engaged in civil litigation which made a decision based on either ignorance of or a misunderstanding of the law. The opinion in Smothers does not necessarily make an illogical leap by citing Maw, even considering the court used the *Cf.* (compare) signal, because both cases deal with the duty of represented parties to educate themselves regarding the relevant law in their tort action. However, the holdings in Ahrens, Morgan, and American Legion take the original opinion in Maw and Smothers to an illogical extreme by using those holdings to prejudice unrepresented individuals who have been misinformed by the government or government agents.

The holding in Maw v. McAlister, 252 S.C. 280, 166 S.E.2d 203 (1969), (the original authority that serves as the genesis for the bulk of case law cited by the Administrative Law Court in its order), does not represent a logical legal basis for the assertions made in Ahrens, Morgan, and American Legion. Moreover these opinions **do not represent** the original spirit in Maw opinion. Ahrens, Morgan, and American Legion are completely distinguishable from the facts that gave rise to the holdings first in Maw and then Smothers, therefore the Administrative Law Court erred in using these cases as authority to show that the Appellant failed to meet the first element of estoppel against the Government.

As to the second element of Estoppel, the Administrative Law Court held that the Appellant was not justified in "any reliance he placed upon the letter sent by the Department of Motor Vehicles". (ALC Order pp. 6) This language in the opinion suggests a tongue-in-cheek perspective from the Court. The suggestion, that a citizen of South Carolina should not place any faith in or reliance upon an official letter from the South Carolina Department of Motor Vehicles is bewildering. While public mistrust in the government may be at an all time high nowadays, is the Administrative Law Court suggesting that its South Carolinians should not place any faith in or reliance upon official written notices of South Carolina state agencies?

In the present case, it is patently unjust to hold that the Department of Motor Vehicles should be allowed to use the December 1, 2011 letters they sent to the Appellant as both a sword and shield. This letter, as unchallenged, sworn in the record of the OMVH Hearing, unequivocally caused the Appellant to take actions based on the Departments inaccurate and incomplete legal advice, which actions led to the Respondents classification of him as a Habitual Traffic Offender. (OMVH ROA pp. 9) Any layperson receiving such a letter from the Department of Motor vehicles cannot be expected to consider the contents of an official letter of a state agency to be inherently unreliable to a degree that he bears a duty to expend resources to hire a lawyer or to race down to the public library reference desk before acting on the substance of a official communication.

One of the two letters from the Respondent agency dated December 1, 2011, advised the Appellant: "should you be convicted of any additional major or minor violations, which would classify you as an Habitual Offender, your driving privileges will

be suspended for a period of five years." (OMVH ROA pp. 44-55) The other letter dated December 1, 2011, listed the two major violations referenced in the first letter and the corresponding violation and conviction dates.

It would be a miscarriage of any idea of fairness or justice to hold that the plain language of both letters dated December 1, 2011, regarding the consequences of another "conviction", to mean anything to the Appellant other than "*a conviction of another major or minor violation (conveniently listed below on this letter) within three years of the first conviction date of 3/23/3009 will result in being classified as a habitual offender.*" Both letters take care to cite an exhaustive list of the plethora of driving charges classified as major and minor violations but inexplicably, neither letter simply outlines the application of S.C.Code Ann. §56-1-1020(d) which is indispensible to lawful classification of a person to the method of classifying a person as a habitual offender and is the definitional statutory rule the Respondent itself uses to determine when to declare a driver a habitual traffic offender. The Respondent's communication of legal advice in these letters is an incomplete revelation of the law, omitting a most critical aspect – definition of key terms. This alone constitutes justification for the Respondent to be estopped from declaration of the Appellant as a habitual traffic offender.

In the totality of these circumstances, the ease with which the Respondent could have taken steps to avoid the harm the Respondent has designated the Appellant suffer, five years of the suspension of his driver's license, cannot be ignored. The Department of Motor Vehicles cannot site statutory provisions to South Carolina drivers suggesting it is not aware of this definitional nuance as to the word "conviction" as it relates to the violation date. The statutory operational nuance is one of the key tools it uses to make a

habitual traffic offender declaration. Clearly, the Respondent is well aware of this definitional nuance.

The Respondent could have easily and equitably added to its form letters used here, one sentence: "convicted does not mean the calendar date of conviction but means the date of the offense instead." The cost to do so is too miniscule to estimate. Nothing prohibited the Respondent from adding this single sentence. To fail to do so while suggesting that the duty falls upon a driver-recipient of such a letter to presume that the use of the word "conviction" imposes a duty upon him to search out another "truth" is whole heartedly disingenuous. Such use of an, "ignorance of the law is no excuse" argument should be rejected by this court.

The Appellant, or any other lay person, cannot and should not be expected to believe that such official letters convey partial advice and direction. No person can be expected to anticipate an obscure subsection of law about which the agency has taken the trouble to advise him or her of, would completely change the ordinary and accepted meaning of the word "conviction." It is reasonable for a layperson to believe that if they are convicted of three major violations within three years, they will be classified as a Habitual Offender. For the Administrative Law Court and the Department of Motor Vehicles to hold that a layperson has a duty to tack onto his commonly held understanding of the word "conviction" a qualification of "for purposes of determining the number of convictions for separate and distinct offenses committed during any three-year period, a person shall be deemed to be convicted of an offense on the date the offense was committed if he is subsequently convicted of committing such offense" S.C.Code Ann. §56-1-1020(d), is patently unreasonable.

The Administrative Law court held that "Once the appellant received the notice, it was incumbent upon him to exercise reasonable care to protect his interests by making himself aware of the applicable law...". (ALC Order pp. 6) As supporting authority, the Court cited the Morgan case, which the Appellant has shown to be misguided, supra. This opinion is inapplicable to the unique facts of this case and record from which this appeal is taken.

The Appellant justifiably relied upon the Respondent's incomplete and damaging legal advice establishing the second element of estoppel. For the reasons listed supra, the record of the case supports the establishment of the required elements of estoppel. Therefore the Department of Motor Vehicles should be estopped from classifying the Appellant as a habitual traffic offender.

II. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE APPELLANT WAS BARRED FROM USING THE DOCTRINE OF ESTOPPEL BECAUSE THE DEPARTMENT OF MOTOR VEHICLES WAS NOT EXERCISING POLICE POWER OR APPLYING PUBLIC POLICY PURSUANT TO §56-1-1010 WHEN PROVIDING INCOMEPLETE LEGAL ADVICE TO THE APPELLANT REGARDING APPLICATION OF THE HABITUAL OFFENDER STATUTE.

The Administrative Law Court erred by holding that the Appellant was barred from raising the doctrine of estoppel against the government because this matter involved the exercise of the government's police power or the application of public policy. (ALC Order pp. 4) The appellant does not contend with the principle that estoppel will not apply against Department of Motor Vehicle when the matter concerns the government's police power or the application of public policy. However, the Department of Motor Vehicles was acting in an administrative capacity based on the reasons infra, when it

failed to completely and accurately advise the Appellant in wits written communication dated December 1, 2011, setting forth legal advice as to the danger of being classified as a habitual traffic offender pursuant to S.C.Code Ann. §56-1-1020 and should therefore be estopped from declaring the Appellant a habitual traffic offender based on the Appellant's argument I.

The public policy of the State as related to the Department of Motor Vehicles, is clearly set forth in S.C.Code Ann. §56-1-1010. The Administrative Law Court in the present case concluded: "it is the policy of the State to safeguard the public by denying the Appellant the privilege of driving a motor vehicle" and "this case clearly involves the exercise of the State's police power and the application of public policy". (COA Order pp. 5)

The Department clearly has police power to actually suspend a driver's license in order to carry out the stated public policy in the statute. However, S.C.Code Ann. §56-1-1010 does not provide that it is the policy of the Department of Motor Vehicles to notify a driver who may be in danger of violating a statute when simultaneously providing inaccurate and incomplete legal advice which leads the driver to reasonably rely upon to his detriment which in this instance was the exact consequence the agency warned him could occur. The Administrative Law Court held that notice advising a driver of danger of becoming a habitual offender, while required by statute, was "not even a prerequisite to a Habitual Offender declaration. (ALC Order citing Wilkins v. Taylor, 268 S.C. 371, 234 S.E.2d 212 (1977)) It is clear that the administrative act of posting a letter, not required for an exercise of police power such as driver's license suspension, is not an application of public policy. This action is what it administratively is – the posting of a

letter providing incomplete and inaccurate legal advice. Moreover, how can the rendering of incomplete and inaccurate legal advice be considered consistent with public policy?

Furthermore, if the case law and statutes in South Carolina do not require an agency's written notice as a prerequisite to a habitual offender designation, the act of giving notice cannot be considered as exercise of police power or application of public police. No aspect of public policy outlined in S.C.Code Ann. §56-1-1010 can be considered furthered by the posting of an incomplete and inaccurate warring letter. Such an administrative act is not an exercise of police power. Nor can it be considered an act furthering public policy when, the inaccurate and incomplete legal advice therein hardly constitutes a deterrent when the legal meaning of conviction is concealed. This practice is clearly an administrative action of the Department pursuant to statute and not and exercise of police power or application of public policy.

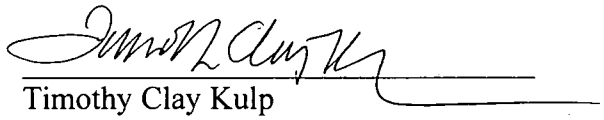
Therefore, a remedy of equitable estoppel can apply to the Department of Motor Vehicles in this narrow instance.

CONCLUSION

The equitable remedy of estoppel is available against the Respondent in this instance because the Department of Motor Vehicles actions in this case were clearly administrative and not an exercise of police power or an application of public policy. Moreover, the Appellant has established that the required elements for estoppel because he detrimentally relied on incomplete and incorrect legal advice of the Department of Motor Vehicles, which significantly and prejudicially changed his position.

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court and rescind the Appellant's habitual offender designation and associated driver's license suspension.

Respectfully submitted,



April 17, 2014

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on opposing counsel Linda Grice, Esquire, Assistant General Counsel, South Carolina Department of Motor Vehicles, by Federal Express, postage prepaid, on April 17, 2014 addressed to, 12312 Wilson Boulevard, Blythewood South Carolina 29016-0020. I also certify that I sent a true and correct copy by email to hearingprocessunit@scdmv.net.

April 17, 2014

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