THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No: 2014-001025

Jennifer K. Salter, Appellant,

v.

South Carolina Department of Motor Vehicles and Conway Police Department, Of whom South Carolina Department of Motor Vehicles is the Respondent.

FINAL BRIEF OF APPELLANT

Michael O'Sullivan
SC Bar No. 73768
Post Office Box 1785
Conway, SC 29528
Telephone: (843) 957 – 9279
Facsimile: (803) 328 – 2525
Email: mosullivanlaw@gmail.com
Attorney for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. **Did the Administrative Law Court err in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges even though the evidence showed and the officer admitted he failed to follow SLED procedures and admitted he failed to comply with South Carolina Code Section 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure?**

STATEMENT OF THE CASE

On April 11, 2013, Appellant was arrested for driving under the influence by Officer Kendall Dixon of the Conway Police Department. **(R. p. 2).** Officer Dixon then transported Appellant to the J. Reuben Long Detention Center for a DataMaster test. **(R. p. 46).** Once in the Breath Analysis/DataMaster Room, Appellant was advised that she was being audio and video recorded and her Implied Consent Rights were read to her, but she was not provided with a written copy of these Implied Consent Rights. **(R. p. 46, and p. 50).** After Officer Dixon had Appellant remove a lip ring from her mouth, he commenced the twenty minute waiting period. **(R. p. 46 – 47).** Upon observing another individual being properly advised of her Implied Consent Rights and being handed those rights in writing on the other side of the Breath Analysis Room, Officer Dixon then provided Appellant with her written Implied Consent Rights seventeen minutes after beginning the testing procedure. **(R. p. 53-54).** Officer Dixon alleged Appellant refused to submit to breath analysis testing, and her license was suspended. **(R. p. 47).**

Appellant timely requested an administrative hearing pursuant to S.C. Code Section 56-5-2951. A hearing was held before OMVH Hearing Officer H. Phillip Hayes, Jr. on July 16, 2013. Officer Dixon initially testified that he provided Appellant with her Implied Consent Rights, and they were read to her. **(R. p. 46).** The Breath Analysis

Room video recording was reviewed. **(R. p. 52-57).** On cross-examination, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them to her. **(R. p. 50).** He further admitted he did not comply with the written SLED procedures or South Carolina Code 56-5-2950 (2009). **(R. p. 58).**

Counsel for Appellant argued that because Appellant was not advised of her Implied Consent Rights in writing prior to the commencement of the testing procedure as required by South Carolina Code 56-5-2950 (2009), the suspension should be rescinded. **(R. p. 60).** In an order dated July 31, 2013, OMVH Hearing Officer Hayes ruled that Appellant had been properly advised of her Implied Consent Rights and her driving privileges should remain suspended. **(R. p. 9).** An appeal on behalf of Appellant was timely filed with the Administrative Law Court on August 26, 2013. **(R. p. 17).**

The Administrative Law Court decided Appellant's appeal without oral argument on April 9, 2014. In an order from Administrative Law Judge Deborah Brooks Durden, the Administrative Law Court affirmed the findings of OMVH Hearing Officer Hayes. **(R. p. 15).** Appellant timely filed Notice of Appeal with this Court. **(R. p. 35).**

STANDARD OF REVIEW

"The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-610 (Supp. 2008).

ARGUMENT

I. The Administrative Law Court erred in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges even though the evidence showed and the officer admitted he failed to follow SLED procedures and admitted he failed to comply with South Carolina Code Section 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure.

South Carolina Code Section 56-5-2950 is titled "Implied Consent to testing for alcohol or drugs; procedures; inference of DUI," and subsection (B) of this section states:

> (B) No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure the person has been given a written copy of and verbally informed that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
>
> (4) he has the right to request an administrative hearing

> within thirty days of the issuance of the notice of suspension; and
>
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

The failure of Officer Dixon to provide Appellant with her Implied Consent Rights in writing prior to the commencement of the testing procedure is a statutory violation of South Carolina law and resulted in Appellant not being lawfully and properly advised of her rights as intended by the legislature in promulgating this statute. In fact, "SLED Forensic Form # ICS 010, February 2009" entitled "ADVISEMENT OF IMPLIED CONSENT RIGHTS" instructs the officer on the proper legal procedure for advising a subject of his or her Implied Consent Rights, and it clearly instructs the officer to "(B) Provide subject with a written copy of the following advisement and read the advisement to the subject." **(R. p. 66).** On cross-examination during the administrative hearing, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them to her. **(R. p. 50).** He further admitted he did not comply with the written SLED procedures or South Carolina Code 56-5-2950 (2009). **(R. p. 58).** In fact, it wasn't until seventeen minutes after beginning the testing procedure that Officer Dixon provided Appellant with her Implied Consent Rights in writing. **(R. p. 37).** Despite the officer and Appellant agreeing there was not a proper advisement of Implied Consent Rights and the video evidence clearly showing the officer's failure to properly advise, the hearing officer somehow found Appellant was "properly advised of her Implied Consent Rights." **(R. p. 9).** The hearing officer appears to rely on Taylor v.

S.C. Dep't of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009), to support his findings.

In the Taylor case, our state Supreme Court decided in a 3-2 decision that a reading of the appropriate Implied Consent Rights form was all that was necessary to properly advise a defendant of his or her Implied Consent Rights absent a showing of prejudice by the suspended driver. However, reliance upon this case as precedential law governing this matter is misguided. The Taylor case interpreted a statute which no longer exists (56-5-2950 (2006)) and has not existed since it was replaced with the current S.C. Code Section 56-5-2950 in February of 2009. The current S.C. Code Section 56-5-2950 (2009) (of note because it is the applicable law governing this matter) has yet to be interpreted by our state Appellate Courts.

The language of the no longer viable S.C. Code § 56-5-2950 (2006) stated "No tests may be administered or samples obtained unless the person has been informed in writing that . . . ." The current S.C. Code § 56-5-2950 (2009) advances the severity and specificity of this requirement by noting a specific time for when the written rights must be provided in stating "**No tests may be administered** or samples obtained unless, upon activation of the video recording equipment and **prior to the commencement of the testing procedure** the person has been given a written copy of **and** verbally informed that . . . " **(Emphasis added)**.

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). The legislature's

intent should be ascertained primarily from the plain language of the statute. State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

There is absolutely nothing ambiguous about S.C. Code § 56-5-2950 (B) (2009), and the legislative intent has been made even more lucid through the current increased specificity of the statute. If upon activation of the video recording equipment and **prior to the commencement of the testing procedure** the person has not been given a written copy of **and** verbally informed of his or her Implied Consent Rights, **no tests may be administered** or samples obtained. The statute does not state the person must be advised in writing **or** verbally informed nor does it state that tests may be administered if there is no prejudice to the accused. This code section is a requirement placed upon law enforcement to ensure the protection of our citizens in a process where legal counsel is not permitted to aid the accused, and to shift the burden to the citizen to show prejudice where law enforcement has been derelict in their duties is a miscarriage of justice. South Carolina Code § 56-5-2950 (B) (2009) in and of itself provides required actions on behalf of the State and the consequences for failing to perform those required actions. If you

don't provide Implied Consent Rights verbally and in writing prior to commencing the testing procedure, you may not administer any test. Clearly, if a test cannot lawfully be administered by law enforcement, then there cannot be a penalty to a citizen who refuses the unlawful test. In fact, Justice Beatty's dissenting opinion (concurred with by Justice Pleicones) in Taylor, specifically states "In my view, the Department of Motor Vehicles cannot suspend a driver's license because driver refused to take a test that the law enforcement officer was not authorized to administer." Taylor, 382 S.C. at 571.

Although the Taylor case is not binding precedent in this matter because it interpreted a statute which no longer exists, it is possible this court may be influenced by that decision in its interpretation of South Carolina Code § 56-5-2950 (2009). I respectfully submit that for this court, in interpreting the current South Carolina Code § 56-5-2950 (B) (2009), to follow in the footsteps of the Taylor Court's interpretation of South Carolina Code § 56-5-2950 (2006) would be to repeat an error. The Taylor court ignored the rules of statutory interpretation by ignoring the plain language "No tests may be administered" and instead found a different subsection of the statute to impose a requirement that prejudice be shown. The Taylor court utilized the catch all provision of South Carolina Code § 56-5-2950 (2006) (Subsection (e)), to require prejudice be shown. This catch all provision (subsection (J) in the current South Carolina Code § 56-5-2950 (2009)) is included in the statute to encompass the consequences for violations of provisions in the statute where no consequence for failure to comply are noted. This catch all provision was properly applied in State v. Huntley, 349 S.C. 1, 562 S.E. 2d 472 (2002). In that case, the wrong concentration of test solution was used to calibrate the machine and because no specific remedy is proscribed for this violation of the statute, a

prejudice analysis under the catch all provision was proper. However, both South Carolina Code § 56-5-2950 (2006) and South Carolina Code § 56-5-2950 (B) (2009), specifically note the consequence for failure to comply with the Implied Consent advisement requirements: "No tests may be administered or samples obtained."

Since the consequence for failure to properly advise of Implied Consent Rights is specifically noted in South Carolina Code § 56-5-2950 (B) (2009), the analysis in Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is more appropriately compared to this matter than would be the Huntley case. In Suchenski, the Court refused to apply the prejudice analysis noted in Huntley because the statute in question (S.C. Code § 56-5-2953) specifically noted the consequence for failure to comply with statutory requirements and therefore, there was no requirement to show prejudice.

It is note worthy that the catch all provision (South Carolina Code § 56-5-2950 (J) (2009)), provides for the exclusion of "any test results." It would appear it specifically notes exclusion of test **results** in contemplation of the fact that if Implied Consent Rights were not properly advised, no tests would be authorized under South Carolina Code § 56-5-2950 (B) (2009) and there would be no results to exclude.

Lastly, if the legislature had intended for the catch all provision (South Carolina Code § 56-5-2950 (J) (2009)) to apply to the failure to advise individuals of their Implied Consent Rights under South Carolina Code § 56-5-2950 (B) (2009), there would be no reason to include the language "No tests may be administered or samples obtained unless." If the catch all provision of subsection "J" applied, it would render that language meaningless and futile. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. See State ex rel. McLeod v.

Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). It is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing. Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005).

CONCLUSION

Based upon the foregoing, the April 9, 2014 Final Order and Decision of the Administrative Law Court should be reversed, the driver's license suspension of Appellant should be rescinded, and the action should be dismissed.

Respectfully Submitted,

Law Office of Michael J. O'Sullivan

Michael J. O'Sullivan
SC Bar No. 73768
P.O. Box 1785
Conway, South Carolina 29528
Telephone: (843) 957 – 9279
E-mail: mosullivanlaw@gmail.com
ATTORNEY FOR APPELLANT

This 19th day of August, 2014.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief complies with Rule 211 (b) SCACR.

Michael O'Sullivan
SC Bar No. 73768
Post Office Box 1785
Conway, SC 29528
Telephone: (843) 957 – 9279
Email: mosullivanlaw@gmail.com
Attorney for Appellant

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