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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
DEPARTMENT OF MOTOR VEHICLES

CASE NO.: 2015-001491

H. H. Vonharten, Appellant,

v.

South Carolina Department of Motor Vehicles, Respondent

APPELLANT'S REPLY

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ARGUMENT

I. The SCDMV's "substantial evidence" argument ignores the fact that relied upon evidence, no matter how substantial it seems, must be reliable.

The Respondent SCDMV argues that, even if it was error to rely upon the hearsay statements of Appellant's doctor, there is substantial evidence sufficient to uphold the Hearing Officer's findings. Appellant disagrees.

As Appellant argued in his initial brief, every bit of evidence that the SCDMV relied upon to reach the decision to revoke Appellant's license was bootstrapped up from the poisonous statements of a doctor, who was writing in secret at the urging of unknown "family members". That hearsay evidence is subjective, biased and untested. The objective weight of the evidence is that the Appellant, despite early Alzheimers, passed every objective test that drivers are required to pass in order to be licensed. (See SCDMV Record of Examination Road Test Score Form dated June 3, 2015). Moreover, those tests were administered by SCDMV's trained, experienced employees, who test drivers (presumably failing a number of them) *every day*. The scores that Mr. Vonharten earned in the vision, skills and knowledge tests administered at the DMV testing center are *objective* measures of how he actually performed in actual driving conditions and what is required of every licensed driver—not subjective, conclusory judgments tossed about by a former doctor. Similarly, it is an *objective fact* that Mr. Vonharten had no points on his driving record. It is an *objective fact* that Appellant had no accidents for the past decade.

Moreover, the evidence relied upon by the SCDMV to revoke Appellant's license was insufficient to sustain even a preponderance test, if it were applied in a civil action.[1] If Dr.

[1] Expert testimony regarding causation in South Carolina is subject to the "most probably" rule, in which cause (in this case, Alzheimer's Disease) and consequent effect (inability to drive) must be testified to: It is is not sufficient for the expert...to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data in his professional opinion that the result in question

Mazzeo's comments were to be introduced in a civil action, a judge would not allow it in evidence and would disregard the testimony of any medical witness did not testify about a condition to a *reasonable medical certainty*. In this instance, not only did Dr. Mazzeo not testify to a medical certainty, he did not even testify. The same is true of the Beaufort Memorial Hospital Occupational Therapist relied upon by the MAB.

Mr. Vonharten candidly acknowledges that he has some limitations due to his age and early Alzheimer's. That does not, by itself, signify an inability to operate a vehicle. The conclusion that Alzheimer's immediately and unquestionably renders a driver unsafe is an example of bias. Alzheimer's is a progressive disease with stages ranging from mild to incapacitating. Mr. Vonharten's impairment is described as "early" Alzheimer's. The governmental processes that worked to rob Appellant of his privileges gave far more weight to the doctor's hearsay because of their biased conclusions about Alzheimer's. In so doing, they were blinded to all of the objective evidence of his continued competence.

Respondent appears to disbelieve that the doctor's words were motivated by bias of family members, as well, asserting "the lack of a scintilla of evidence in the record" to that effect. (Respondent's Brief at p. 5). In fact, Mr. Vonharten, mentions in closing that he is separated from his wife. (Transcript at 29). Unfortunately, the Hearing Officer abruptly ended the proceedings without hearing Appellant on that point.

Respondent also asserts that Appellant's view "appears to claim that because the Department's inquiry came about by way of a document he alleges to be hearsay some sort of infectious invalidity should prohibit the Department from further inquiry unless every fact and document involved is supported by testimony at hearing under oath and subject to cross

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most probably came from the cause alleged. Baughman v. American Telephone and Telegraph Co., et al. 306 S.C 101, 410 S.E.2d 537 (1991).

examination." (Respondent's Brief at p. 6). That is patently not Appellant's view. Appellant asserts that all evidence that the SCDMV relied upon should be, in fact, reliable, non-prejudicial, free of bias and subject to tests of reliability such as cross examination. The Respondent relied upon a number of documents that were not authenticated or tested in Appellant's one and only hearing in this matter; Appellant's appeal complains of only two of those: both unsolicited, hidden, secretive and humiliating missives from Appellant's former doctor. The "infectious invalidity" Respondent refers to actually occurred in this matter: One letter started the process of inquiry, and the second letter sealed Mr. Vonharten's fate. He now is spending the remainder of his healthy years fighting an expensive battle to restore his driving privileges.

II. Contrary to Respondent's Assertion, Appellant Was in Fact Prejudiced by the Admission of Dr. Mazzeo's Letters.

Respondent also refers to S.C. Code § 1-23-380(A)(6) in an effort to support its argument, arguing " an appellate court can only reverse or modify the agency's determination when 'substantial rights of the appellant have been *prejudiced* because the administrative findings, inferences, conclusions or decisions are [erroneous or illegal for various stated reasons]'." (Respondent's Brief at p.10). Respondent then goes on to say that "Appellant was not prejudiced by the letters." Respondent's characterization of the applicable statute is not on point, and is in fact the incorrect citation for the correct standard of review.

The applicable statute is actually found at S.C. Code § 1-23-610, *Judicial review of final decision of administrative law judge,* in pertinent part, as follows:

(B) 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.

Driving privileges are a substantive right that Appellant is now deprived of; there is no reading of the facts of this matter that supports a conclusion that Appellant's substantive rights have not been prejudiced. The next point of inquiry is whether or not the right was affected by any of the enumerated factors. Appellant argues that the admission of the hearsay documents constitutes an error of law that warrants reversal.

The decision, initially made by the Office of Driver Improvement, to allow the doctor's letters into the record for review by the MAB and then into the record at the hearing, became very persuasive in all subsequent proceedings. It is one thing to use the doctor's December 2013 letter to initiate inquiry under the Motor Vehicle Code; it is another matter altogether to continue to be influenced by the doctor, six months later, and then to place both in the record to be read by decision makers who never even had a conversation with Appellant. This is offensive to any notion of fundamental fairness.

III. The Respondent's Contention That "The Statutes Involved With The Medical Advisory Board are Inconsistent With The Strict Enforcement of the Hearsay Rule" is Inapt, As Ignoring the Rules of Evidence is Incompatible With our Legal Framework.

In the first instance, Appellant does not object to the Medical Advisory Board, *per se*. What is objectionable from the standpoint of justice and due process is that the Medical Advisory Board relies upon a dry record composed of whatever materials are provided to it. If the materials provided to the MAB are tainted, then the MAB cannot make an untainted decision. In

the instant matter, the MAB was given strong statements of opinion that Appellant didn't even know existed, as he was not so informed. The professionals serving on the Board are, like Dr. Mazzeo, medical professionals. And doctors tend to place great store in the opinions of others in their profession. One need not reach far beyond these facts to see why the two Mazzeo letters were so influential in determining Mr. Vonharten's fate.

However, Respondent's contention—that enforcement of hearsay limitations is "inconsistent" with the Medical Advisory Board statutory scheme—is quite appalling. The Rules of Evidence test reliability of evidence before it taints the conclusions reached by fact finders. Unreliable evidence is not admissible under our Rules because it leads to confusion, prejudice, bias and bad conclusion-reaching. In matters such as the instant case, where a tainted conclusion leads to an apparently irreversible loss of driving privileges, it becomes especially important to ensure that the evidence is reliable. It would seem that Respondent is suggesting that the MAB is just naturally wise enough, smart enough, or careful enough to weed out invalid evidence and assign the appropriate weight to the evidence it reviews, without even interviewing the person whose life will be profoundly altered by its decision making. Appellant would suggest that the MAB is composed of human beings, and humans make mistakes, even when it comes to weighing evidence.

It also should not be ignored that the State of South Carolina is affecting the (constitutional) property rights of its citizens when it exercises its motor vehicle regulatory authority. To suggest that a state actor should be subjected to a lower standard on questions of evidence than a private actor is frankly frightening. It speaks to the legitimacy of the government's exercise of its power. If anything, it is *more* important that the evidence they are reviewing is not hearsay, rather than *less*

IV. The SCDMV Did Not Determine That Appellant Could Not Drive Until After Dr. Mazzeo Wrote a Second Letter To the DMV.

Respondent asserts that "The Department's position was that Appellant should not drive". (Respondent's Brief at 14). That is not correct. "The Department" issued Appellant a driver's license in June 2014 because he passed the vision, knowledge and skills tests at the local DMV. Two days later, Dr. Mazzeo's second inflammatory letter arrived with the SCDMV's Driver Improvement Office. At that point, Appellant was compelled to surrender his privileges again. It is incorrect to say that "the Department" had a single, unified, soundly-arrived at position. The personnel on the ground—the ones who tested Mr. Vonharten and personally interacted with him at the agency—determined that he was eligible for driving because he passed the same tests that every other driver must pass. Dr. Mazzeo's second letter served, through the auspices of the Medical Advisory Board, to overrule the SCDMV personnel who test drivers every single day.

V. The Procedure Deployed With Respect to Revocation of Appellant's License Does Not Comport With Principles of Due Process and Fundamental Fairness.

Mr. Vonharten's appeal of the revocation of his license is not frivolous, as Respondent's brief seems to suggest. This appeal raises issues of real concern for an aging population. As Americans live longer and treatment for illnesses like Alzheimer's becomes more efficacious, we as a society must revise our preconceptions about age, disease and disability.

Appellant was entitled to be treated like other South Carolinians when he interacted with the SCDMV. He should have been able to answer the questions that the SCDMV posed for him (which he did, resulting in his clearance to apply for his license) and take the tests required of other South Carolinians (which he did, and passed all three tests) and be issued a license, which he could then use to drive safely and legally until, if ever, through some fault of his own, he

violated a law or statutory provision that would legitimately call his licensure into question. Instead, Appellant got his license back and almost immediately had to surrender it again—because of his doctor. Other South Carolinians are not treated this way by the SCDMV. Neither should Appellant.

The State has a responsibility to enact procedural safeguards against unassailable phantoms reporting the Mr. Vonhartens, under the color of professional authority, with hearsay reports of hearsay opinions that are then used as evidence to revoke a safe but elderly man's license. This decision of the SCDMV should not stand.

CONCLUSION

Appellant would respectfully request that this Honorable Court inquire into these matters and order the Respondent to restore Appellant's driving privileges in accordance with reliable evidence of his abilities.

Respectfully submitted,

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SOUTH CAROLINA
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Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the foregoing Reply Brief of Appellant on Frank Valenta, Jr., Esquire and Philip S. Porter, Esquire , South Carolina Department of Motor Vehicles, 11311 Wilson Boulevard, Post Office Box 1498, Blythewood, South Carolina 29016-0020, by depositing a copy of it in the United States Mail, postage prepaid, on December 3, 2015 and again on December 16, 2015 in order to correct Deficiency in service per notice of the Court of Appeals dated December 10, 2015.

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December 15, 2015

Honorable Jenny Abbott Kitchings
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Re: H. H. Vonharten v. South Carolina Department of Motor Vehicles
Appellate Case No.: 2015-001491

Dear Ms. Kitchings:

Enclosed please find the enclosed Reply Brief of the Appellant, which I am refiling in response to your correspondence dated December 10, in which deficiencies were observed in the Proof of Service. I am, by copy of this letter, serving Respondent's counsel.

I would greatly appreciate your returning one filed copy to me in the enclosed stamped, self addressed envelope.

With kindest regards, I am

Very truly yours,

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Enclosures

Cc: Frank L. Valenta and Philip S. Porter (with enclosure)

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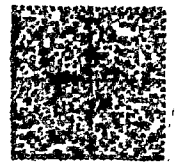

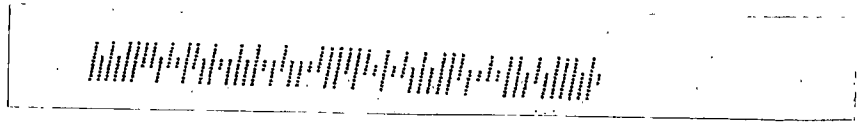

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