THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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.

FINAL BRIEF OF APPELLANT

James H. Moss, Esquire, Bar #4220
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843) 524-3373
(843) 524-1301 facsimile
South Carolina Bar #4220

Frank L. Valenta, Jr., Bar # 5682
General Counsel
Philip S. Porter, Bar #4526
Deputy General Counsel
Brandy A. Duncan, Bar # 72052
Assistant General Counsel
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016
(803) 896-9900
(803) 896-9901 (facsimile)

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Statutory Authority:

S.C. Code Ann. §56-1-40

S.C. Code Ann.§56-1-130

S.C. Code Ann. §56-1-270

Rule 802, SCRE

Rule 803 (4), SCRE

Cases:

State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987)

City of Spartanburg v. Parris, 251 S. C. 187, 161 S.E.2d 228 (1968)

Willingham v. Crooke, 412 F.3rd 553 (Fourth Cir., 2005)

Morgan v. Foretich, 846 F.2d 941 (Fourth Cir., 1988)

Hipp v. South Carolina Department of Motor Vehicles, 381 S.C. 323 (2009)

Bell v. Burson, 402 U.S. 535, 91 S.Ct.1586, 29 L.Ed.2d 90 (1971)

Scott v. Williams, 924 F.2d 56 (Fourth Cir., 1991)

Secondary Sources:

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.06[1] (Joseph M. McLaughlin, ed., 2d ed. 2004)

DMV.com, *Senior Drivers in South Carolina* (http://www.dmv.com/sc/south-carolina/senior-drivers

ISSUES ON APPEAL

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IV. DID THE HEARING OFFICER ERRONEOUSLY GIVE GREATER WEIGHT TO DR. MAZZEO'S LETTERS THAN TO THE EVIDENCE THAT THE APPELLANT PASSED ALL STATE REQUIREMENTS FOR LICENSING?

STATEMENT OF THE CASE

By letter dated December 31, 2013, Neurologist Dr. Paul Mazzeo reported to the South Carolina Department of Motor Vehicles (SCDMV) that Herman Vonharten ("Vonharten" or "Appellant") "should have his driver's license revoked." He based this opinion on two examples provided to him by unnamed "family members".

The SCDMV responded to this report by sending Mr. Vonharten a letter dated January 17, 2014, advising that "[t]he SC Department of Motor Vehicles, Driver Improvement Office has received information indicating that your medical condition to safely operate a motor vehicle may be inadequate to warrant continuance of your driving privileges." The letter further communicated that Appellant and his physician were required to complete enclosed medical statements and that he may thereafter be required to demonstrate his "knowledge, skills and ability to exercise ordinary and reasonable control in the operation of a motor vehicle."

Sometime thereafter, Mr. Vonharten went to Beaufort Memorial Hospital's Occupational Therapy Driving Related Skills Assessment. On February 27, 2014, Mr. Vonharten attended the assessment with mixed results. In addition, Mr. Vonharten and his primary physician Samuel Little filled out the forms provided by the SCDMV and returned them to the Department. The Department thereafter notified Mr. Vonharten that it needed additional information and that he would have to be tested for vision, knowledge and skills. Mr. Vonharten provided additional documents and was retested at the SCDMV on June 3, 2014, qualifying him for a noncommercial driver's license. On

June 5, 2014, Dr. Mazzeo (who last saw Mr. Vonharten in March 2014) wrote a second letter to the SCDMV, describing his unnamed "family members" concerns.

On June 6, 2014, SCDMV notified Mr. Vonharten that his records were being forwarded to the SCDMV's Medical Advisory Board ("MAB") for review. The MAB apparently decided (on the materials that it was provided) that Mr. Vonharten was "disqualified" from driving, and the SCDMV notified Mr. Vonharten that his privileges were to be revoked as of August 6, 2014. Mr. Vonharten appealed from that decision, retaining attorney Robert Ferguson to represent him at the Office of Administrative Hearings before Hearing Officer Brigette Autry. A hearing was held on September 24, 2014. Testifying for the SCDMV was Pearl Artis of the Driver Improvement Office. Mr. Vonharten and his daughter Laura Vonharten also testified. No medical professionals were present at the hearing.

Hearing Officer Autry issued her decision sustaining Mr. Vonharten's revocation on December 1, 2014. Mr. Vonharten appealed that decision on December 29, 2014 on several grounds, including a challenge to the admission of Dr. Mazzeo's letters of December 31, 2013 and June 5, 2014. Additionally, Appellant challenged the Hearing Officer's failure to consider that a second opinion was warranted, that she failed to consider other reasonable, less restrictive alternatives to revocation, the crediting of motor vehicle records that were more than ten years old; and her failure to credit that objective fact that Mr. Vonharten had an excellent driving record and had passed all of the requirements that other licensed drivers in South Carolina must pass to retain a driver's license.

Thereafter, Administrative Law Judge Deborah Brooks Durden affirmed Hearing Officer Autry's Final Order and Decision on June 9, 2015. Vonharten requested Reconsideration, additionally citing the fact that the Mazzeo letters were not authenticated. Judge Durden Denied the Motion for Reconsideration on July 7, 2015. Vonharten filed Notice of Appeal to the South Carolina Court of Appeals on July14, 2015.

STATEMENT OF THE FACTS

Herman H. Vonharten is an 84 year old man who was recently separated from his wife. (R. p. 63, lines 20-22.) He has been a licensed driver since he was 16 years old. (R. p. 54, line 22.) He has had no accidents or citations in the past ten years, and has no points on his license. (R. p. 51, lines 6-23.) He lives alone, manages his own financial and legal affairs, and volunteers for a variety of organizations. (R. p. 58, lines 19-25.) His 68 year old daughter sees him daily. (R. p. 58, line 10.). She reports that she has not observed deficits in his ability to operate a motor vehicle, other than stiffness in his neck. (R. p. 58, lines 14-16.)

Other unidentified members of Mr. Vonharten's family, however, apparently expressed concerns to his former neurologist, Dr. Paul Mazzeo that his driving might be impaired by his cognitive deficits. Dr. Mazzeo, prompted by these unidentified family members, and **without Mr. Vonharten's knowledge or consent,** wrote a letter to the Department of Motor Vehicles ("DMV") Driver Improvement Office opining that Mr.

Vonharten should have his driving privileges revoked. By letter dated December 31, 2013, Dr. Mazzeo reported "His family has alerted me to several concerns regarding his driving" and concluded "I believe he should have his driver's license revoked." He closes that letter by asking the Department to "keep this source of information confidential." (R.p. 66.) Dr. Mazzeo did not couch the opinion as one he had to a reasonable degree of medical certainty or to any other objective standard.

In response to Dr. Mazzeo's letter, on January 17, 2014, the Driver Improvement Office ("DIO") requested that Mr. Vonharten complete a medical questionnaire within thirty days. (R. p. 69.) Mr. Vonharten responded by voluntarily submitting to an "Occupational Therapy Driving Related Skills Assessment" on February 27, 2014 at Beaufort Memorial Hospital. He wrote a letter to the Driver Improvement Office on February 17, 2014 informing the Office that he would have an appointment on February 20 and would send a report at that time. Additionally, he noted "I am still curious on what I did while driving." (R. p.72.) In April, Mr. Vonharten voluntarily attended a Defensive Driver Program at Best Driver Training, LLC, and was given a certificate indicating satisfactory performance. (R. p. 80..) He thereafter went to the Department of Motor Vehicles and passed the vision, knowledge and skills tests required for all licensed South Carolina drivers. (R. pp. 91-92.)

Mr. Vonharten also complied with providing medical statements as requested by the Driver Improvement Office, and his driving privileges were restored on June 3, 2014. (R.p.81.)

On June 5, 2014 Dr. Mazzeo, once again apparently at the urging of unidentified family members, wrote a second letter expressing his opinion that Mr. Vonharten should

not be allowed to drive. (R. p. 94.) On June 6, 2014, the DMV referred the matter to its Medical Advisory Board and suspended Mr. Vonharten's privileges in the interim. (R. p. 95.) On July 10, 2014, the Medical Advisory Board, without interviewing Mr. Vonharten, and relying on Dr. Mazzeo's statements, recommended that his privileges be revoked. (R. p. 100.) The DMV then notified Mr. Vonharten that his privileges were being revoked effective August 9, 2014 pursuant to SC Code 56-1-270. (R. p. 101.) In the notice of revocation, the Department gave no indication of what, if anything, Mr. Vonharten could do to reverse the Department's decision. The notice simply instructs that the "ending date" of his revocation was "When you receive a notice from the Department that this action has been cleared". Additionally, the notice indicates "There are no special driving privileges available to you. You may not drive until the suspension period has ended..." The notice goes on to demand additional unspecified "satisfactory medical statements" and successful completion of "the vision, knowledge and skills tests", which Mr. Vonharten had successfully done one month earlier. (R. p. 101.)

ARGUMENT

I. DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE HEARING OFFICER'S ADMISSION OF HEARSAY STATEMENTS OF A DOCTOR PURSUANT TO SOUTH CAROLINA RULES OF EVIDENCE 803(4)?

It is unquestionable that Dr. Mazzeo's letters were hearsay; in fact, the statements he relayed in the letters were hearsay within hearsay. The Hearing Officer's conclusion, and the affirmation of that finding by the Administrative Law Court, that the letters were admissible was plain error, misreading the intent of the medical records exception to the hearsay rule.

Under South Carolina Rules of Evidence:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.

Rule 802, SCRE.

The Medical Records Exception reads as follows:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or the general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after the commencement of litigation is left to the court's discretion.

Rule 803(4), SCRE.

This exception does not permit hearsay statements of a doctor; it applies only to words uttered to a doctor by the patient. *State v. Camele*, 293 S.C. 302, 360 S.E.2d 307 (1987).

The imprimatur of admissible evidence is reliability. The rule against hearsay arises from an acknowledgment that utterances outside of court, when offered in court to prove the truth of the matter asserted, must be subjected to tests of reliability. The prohibition against hearsay is eased by the exceptions to the Hearsay rule. While there are few South Carolina cases extant that address this directly, the Fourth Circuit provides guidance in *Willingham v. Crooke*, 412 F.3rd 553 (2005). In that case, the Court instructed that Federal Rules of Evidence 803(4) "is premised on the notion that a declarant seeking treatment has a selfish motive to be truthful because the effectiveness of medical treatment depends upon the accuracy of the information provided. (Citing Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.06[1] (Joseph M. McLaughlin, ed., 2d ed. 2004). In *Morgan v. Foretich*, 846 F.2d 941 (1988), the Court described the 803(4) exception as "based on the rationale the 'the declarant's motive guarantees [the statements] trustworthiness' since treatment will depend on what is reported," also citing *Weinstein and Berger*.

These cases make it clear that 803(4) exceptions relate only to utterances of a patient to a doctor. The exception does not bootstrap up to include a letter that a doctor sends to the SCDMV. If Dr. Mazzeo wanted to prove that Mr. Vonharten should not drive, he should have been present, under oath, to offer an opinion with reasonable medical certainty, and subject to cross examination. The letters, without more, are akin to gossip, even down to Dr. Mazzeo's request—made in both letters-- that the SCDMV not tell anyone that he told them.

The letters from Dr. Mazzeo to the SCDMV were the only source of the state's concern about Mr. Vonharten's driving. Without Dr. Mazzeo, there simply was no

reason to challenge Mr. Vonharten's driving privileges. He had no points on his license and had no motor vehicle incidents since a failure to yield the right of way in 2005. His last accident (with damage less than $1,000, according to his driver's record) was in 2003. Both of these incidents occurred a decade before his diagnosis for early Alzheimer's. Since those letters were inadmissible in the first instance, and they were central to every administrative decision that led to Mr. Vonharten's revocation, the Administrative Law Court's affirmation of the Hearing Officer's conclusion should be reversed.

Dr. Mazzeo's comments, and his relaying comments made by "family members" is not a Statement for Purposes of Medical Diagnosis or Treatment, which would render the documents admissible. It is an opinion motivated by the bias of family members, untested by cross examination or even adopted by Dr. Mazzeo in a manner that would have allowed Mr. Vonharten to attack it in the Court, his last arena of hope for maintaining his driving privileges. The Administrative Law Court, the Hearing Officer, the Department of Motor Vehicles Office of Driver Improvement and the Medical Advisory Board were in error in their reliance on his statements, and in fact, if they had not, Mr. Vonharten would be a licensed driver today.

II. DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE HEARING OFFICER'S FAILURE TO CONSIDER REASONABLE, LESS RESTRICTIVE ALTERNATIVES TO REVOCATION?

The Hearing Officer was offered a number of reasonable opportunities to stop short of full revocation of Mr. Vonharten's driving privilege. Mr. Vonharten and his counsel acknowledged that Mr. Vonharten has some physical limitations, including hypertension, diabetes, and early dementia. As suggested by counsel, there are a great number of restrictions that could be

imposed on his privileges, similar to those placed on young drivers, in fact that is contemplated as a reasonable alternative in the SCDMV literature at DMV.com, *Senior Drivers in South Carolina* (http://www.dmv.com/sc/south-carolina/senior-drivers). The limitations should reflect a reasonable relationship to his abilities.

As his daughter testified, and as demonstrated by the fact that it has been ten years since he was last cited, and the fact that he passed every aspect of the driver's test in June, 2014, Mr. Vonharten can, and did, drive safely. However, reasonable alternatives to revocation were not addressed in the Hearing officer's findings and conclusions. She settled on full revocation, when other less restrictive measures would have secured the public interest in having safe roads, and Mr. Vonharten's liberty interest in having limited driving privileges. For example, Counsel suggested limiting Mr. Vonharten to:

> "a restricted license. And those would include no night driving, no interstate driving, neighborhood driving not to exceed 50 miles per hour, no driving between 7:30 a.m. and 9:30 a.m., 4:30 to 7:00 p.m., and any other restrictions you deem appropriate." (R. p. 62, lines 2-17.)

The Administrative Law Court Order notes that the Hearing Officer was not *required* to adopt the license restrictions proposed at the hearing. In light of the magnitude of the loss to Mr. Vonharten, however, it would have been consistent with notions of justice to do so. The all-or-nothing approach adopted at the Office of Motor Vehicle Hearings and upheld on appeal to the ALC ignored the tribunal's ability to fashion a remedy that respects Mr. Vonharten's rights while protecting the state's interest in maintaining safety. The disregard afforded to Mr. Vonharten does not comport with fundamental notions of fairness, as is required when one is confronted with losing a

property right such as a driver's license. *City of Spartanburg v. Parris*, 251 S. C. 187, 161 S.E.2d 228 (1968).

III. DID THE ADMINISTRATIVE LAW COURT ERRONEOUSLY RELY UPON A TEN YEAR OLD DRIVING CITATION TO CONCLUDE THAT MR. VONHARTEN IS UNABLE TO OPERATE A VEHICLE SAFELY

Under South Carolina and United States Supreme Court cases, "A person's interest in his driver's license is property that a state may not take away without satisfying the requirements of due process." *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323 (2009), citing *Bell v. Burson*, 402 U.S. 535, 91 S.Ct.1586, 29 L.Ed.2d 90 (1971). In *Hipp*, the South Carolina Supreme Court found that the SCDMV was enjoined from suspending the Plaintiff's driver's license pursuant to a Georgia conviction that occurred some twelve years earlier. The Court noted that inherent in due process is "fundamental fairness", and holding the Plaintiff accountable for an infraction that occurred a decade earlier did not comport with that standard.

In this case the Administrative Law Court, while not specifically commenting, apparently found it persuasive that Mr. Vonharten's Medical and Accident History form was not correct. Mr. Vonharten's recollection of his last accident was that it occurred in 1995, when in fact it occurred in 2003. If the purpose of noting the error was to demonstrate ineligibility to drive, it was inapt. The fact is, Mr. Vonharten has not had an accident or a citation in over a decade. The overwhelmingly reasonable conclusion to reach is that Mr. Vonharten has a tendency in recent years to be a cautious and safer driver. His lack of citations or accidents in the past decade mitigate in favor of a less drastic result than complete and permanent revocation of Mr. Vonharten's privileges.

Moreover, the notion of fundamental fairness is offended by the SCDMV's July 10, 2014 notice of revocation under S.C. Code Ann. 56-1-270. In that notice, Mr. Vonharten is provided with no guidance as to how he might become qualified to drive again. The "ending date" of the revocation period is described as "When you receive notice from the Department that this action has been cleared." It is axiomatic as a matter of due process, that when the government acts to deprive a citizen of a protected property interest, it must prescribe some method by which the deprivation can be lifted. *City of Spartanburg v. Parris*, 251 S. C. 187, 161 S.E.2d 228 (1968).

All that remained for Mr. Vonharten was a series of appeals of the decision. He had already done everything in his power to avoid the revocation, to no avail. Mr. Vonharten's powerlessness to attack the revocation, or at least be told what standard he must meet in order to restore his physical qualification to drive, deprived him of fundamental fairness, and it should be reversed.

IV. DID THE HEARING OFFICER ERRONEOUSLY GIVE GREATER WEIGHT TO DR. MAZZEO'S LETTERS THAN TO THE EVIDENCE THAT THE APPELLANT PASSED ALL STATE REQUIREMENTS FOR LICENSING?

It takes little more than common sense to empathize that a senior citizen faced with permanent revocation of driving privileges feels the loss profoundly. Obtaining driving privileges is a rite of passage for Americans. It represents mobility, freedom, and independence. Those privileges should not be removed from an accident-free, uncited elderly gentlemen on nothing more than the speculative, unproven letter filled with hearsay of one doctor. Dr. Mazzeo's opinion runs in the face of objective evidence available to the Hearing Officer. The objective evidence is that Mr. Vonharten has driven

ten years without an incident, he passed the vision, knowledge and skills tests offered by the trained experts at the DMV, and the daughter who sees him daily says "he's really on top of things." He lives alone, manages his own affairs, and helps non profits with their books. These are objective criteria which were afforded virtually no weight by the Administrative Law Court, if any at all. The speculative, secretive and unsolicited commentary by one doctor should not be allowed to contravene the objective facts in this case.

CONCLUSION

Accordingly, Appellant respectfully requests that the Order of the Administrative Law Court be reversed, and that Mr. Vonharten's driving privileges be restored.

Respectfully Submitted,

MOSS, KUHN & FLEMING, P.A.

James. H. Moss
Moss, Kuhn & Fleming, P.A.
1501 North Street
P.O. Drawer 507
Beaufort, South Carolina 29901
843-524-3373

Beaufort, South Carolina
December 18, 2015

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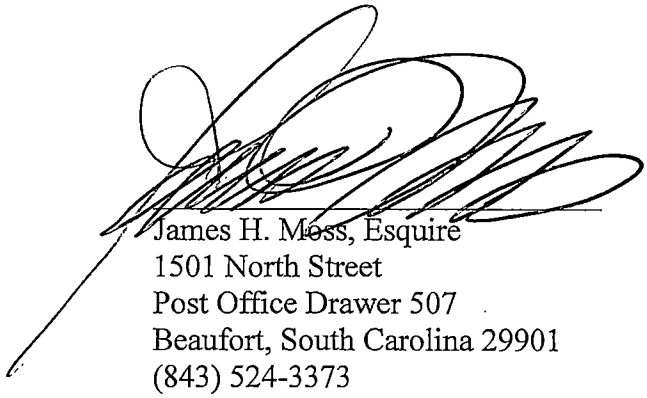
SOUTH CAROLINA
DEPARTMENT OF MOTOR VEHICLES,

Respondent.

CERTIFICATION OF COMPLIANCE

I certify that the foregoing Final Brief of Appellant is identical to the Initial Brief of the Appellant except for changes to references to the Record on Appeal and corrections of typographical errors and misspellings, pursuant to Rule 211, SCACR.



James H. Moss, Esquire
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843) 524-3373
(843) 524-1301 facsimile
S.C. Bar ID 4220

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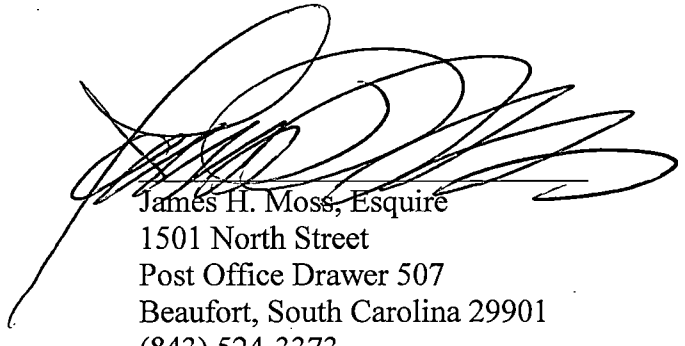
PROOF OF SERVICE

I certify that I have served a copy of the foregoing Final Brief of the 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 18, 2015.



James H. Moss, Esquire
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843) 524-3373
(843) 524-1301 facsimile
S.C. Bar ID 4220