THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable H. W. Funderburk, Jr., Administrative Law Judge

Case No. 2015-002535

Melissa Spalt . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety . . . . . Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

FINAL REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

Appellant retains the statement of the case set forth in its initial brief. Appellant specifically reminds this Court of the following sections of its statement of the case as originally set forth in its initial brief:

1) On April 14, 2015, the OMVH e-mailed a Notice of Hearing to all parties, including the DMV, for a hearing scheduled for June 23, 2015 (R. pp. 122-126).

2) On Thursday, June 18, 2015, Respondent requested a continuance of the hearing scheduled for Tuesday, June 23, 2015 due to a conflicting Court appearance her Counsel had in the Magistrate's Court (R. pp. 112-115). The DMV, a party to this case, was not copied on this request.

3) On June 24, 2015, an Order of Continuance rescheduled the hearing for August 11, 2015 (R. pp. 110-111).

4) On Friday, August 7, 2015 at 12:30 p.m., Respondent requested a continuance of the hearing scheduled for Tuesday, August 11, 2015 due to a conflicting Court appearance her Counsel had in the Magistrate's Court (R. pp. 104-

109).[1] The DMV, a party to this case, was not copied on this request.

5) On Monday, August 10, 2015 at 8:02 a.m., the OMVH e-mailed Respondent's Counsel a denial of the request for continuance (R. p. 103). DMV and Trooper R. D. Grubbs, both parties to this case, were not copied on this e-mail from the OMVH.

6) Respondent's Counsel responded the same day at 1:28 p.m. and asked the Hearing Officer to reconsider the request for continuance (R. p. 102). This request for reconsideration was not copied to DMV or Trooper R. D. Grubbs, and was sent directly to the Hearing Officer, as well as the Hearing Officer's Scheduling Assistant.

7) On Monday, August 10, 2015 at 4:41 p.m., Respondent's Counsel filed a second Motion for Continuance (R. pp. 90-100). The DMV, a party to this case, was not copied on this request.

STANDARD OF REVIEW

Appellant retains the standard of review set forth in its initial brief.

ARGUMENT

1) THE DECEMBER 1, 2015 FINAL ORDER AND ORDER OF REMAND ISSUED BY THE ADMINISTRATIVE LAW COURT IS IMMEDIATELY APPEALABLE TO THIS COURT.

Appellant retains all arguments under this section set forth in its initial brief and adds the following arguments. Respondent is correct that the undersigned erroneously cited S.C. Code §14-3-330 as the appropriate statute setting forth those cases that may be

[1] In Respondent's Initial Brief, Respondent states she (Respondent Spalt) "was scheduled to be in a jury trial..." As the conflict that existed was for Respondent's *Counsel* and not *Respondent*, Appellant DMV can only assume this is a typographical error that will be corrected in Respondent's Final Brief filed with this Court.

considered by the Court of Appeals for South Carolina and that the correct statute is S.C. Code §14-8-200. S.C. Code §14-8-200 states:

> ...[T]he court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of... a **final decision** of an administrative law judge... This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case...

(Emphasis added). In this case, the order issued by the ALC on December 1, 2015 was explicitly titled "Final Order and Order of Remand." Therefore, there can be no doubt that the December 1, 2015 ALC Order is a "final decision of an administrative law judge" as the title itself proclaims it to be a "Final Order..." For this reason alone, this case is immediately appealable to this Court.

Respondent asserts that the cases cited in Appellant's initial brief do not apply to this case because they deal with the jurisdiction of the South Carolina Supreme Court. This is not accurate. The recently decided case *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, began in the Court of Appeals and was dismissed by the Court of Appeals as interlocutory. This order of dismissal by the Court of Appeals was then appealed to the South Carolina Supreme Court, which decided the appeal was not interlocutory and decided the underlying issue that was original appealed to the Court of Appeals, specifically, whether several defendants in the lawsuit could be severed under the label "bifurcation." In the *Morrow* case the Supreme Court held the order of "bifurcation" went far beyond the Court's understanding of bifurcation, thereby affecting a substantial right of the petitioners. Thus, the Supreme Court reversed the order of Dismissal issued by the Court of Appeals and the order of "bifurcation" issued by the trial court. While the discussion of in the *Morrow* case

focused on S.C. Code §14-3-330, the underlying principle, that the order of "bifurcation" was immediately appealable (including being immediately appealable to the Court of Appeals), is still applicable here for all the reasons discussed in the *Morrow* case. Specifically, because the Order issued by the ALC on December 1, 2015 explicitly remands this case back to the OMVH "for a hearing on the merits" and because this case was already scheduled for a hearing once before (Respondent, nor her Counsel appeared at the hearing), the ALC's Order of Remand has, essentially, granted Respondent a new "trial" via the new hearing. As discussed in the *Morrow* case, to prevent Appellant DMV "from appealing the order immediately would encourage piecemeal litigation and limit [DMV's] appellate remedies."

Respondent also attacks Appellant's cites to the cases *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2d 372 (1964) (An order of the trial court granting or refusing a new trial, when based solely on an error of law, is subject to review by the Supreme Court); and *Daughty v. Northwestern R. Co. of South Carolina*, 92 S.C. 361, 75 S.E. 553 (1912) (This statute does not undertake to make an order granting a new trial appealable, when it is based upon questions of fact; but it can review orders granting new trials when based upon error of law.). Respondent fails to recognize that both the *Knight* case and the *Daughty* case were decided before the South Carolina Court of Appeals was created on September 1, 1983.[2] Therefore, Appellant's arguments that these cases are improperly cited by Appellant is misplaced.

For these reasons, the ALC's Final Order and Order of Remand issued on December 1, 2015 is immediately appealable.

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[2] South Carolina Court of Appeals website at http://www.sccourts.org/appeals/, last accessed on 1/21/2016 at 10:13 a.m.

2) THE HEARING OFFICER PROPERLY DISMISSED RESPONDENT'S CHALLENGE TO HER IMPLIED CONSENT SUSPENSION.

Appellant retains all arguments under this section set forth in its initial brief and adds the following arguments.

In the section of Respondent's Brief that corresponds to this section, Respondent asserts on at least three (3) occasions that "all parties" were notified of her motions for continuance, reconsideration, etc... As evidenced by the documents in the Record on Appeal cited in Appellant's Statement of the Case in Appellant's Brief and Appellant's Reply Brief, this is simply not true.[3] Appellant DMV was repeatedly and consistently left out of all four (4) of Respondent's motions for continuances and/or motions for reconsideration. Further, Trooper R. D. Grubbs was also left out of Respondent's motion for reconsideration sent directly to the OMVH Hearing Officer on Monday, August 10, 2015.[4] Failure to serve motions on opposing parties is no small matter and yet, Respondent did so repeatedly.

Respondent argues that her Counsel promptly notified the OMVH of his conflicting court appearances "as soon as the conflict became apparent." Respondent states that her Counsel did not receive "confirmation that the jury trial which was scheduled in Richland County Central Court would in fact go forward on August 11, 2015" until "August 7, 2015." Despite this assertion, Respondent has failed to ever attach or cite anything regarding a "confirmation that the jury trial which was scheduled

[3] Also, a review of Respondent's *Motion for Reconsideration* dated August 14, 2015 demonstrates that Respondent clearly admits that she only served her August 7, 2015 request for a continuance via e-mail to Trooper R. D. Grubes and the OMVH. See p. 2 of the *Motion for Reconsideration* in the last paragraph. Tellingly, Respondent immediately follows this admission up with the statement "As required by the rules all parties of record were notified of the request for a continuance." Further, a review of the *Certificate of Service by Mail* for Respondent's *Motion for Reconsideration* clearly shows that Appellant DMV was not served with a copy of the *Motion for Reconsideration.*

[4] This means, of course, that for this motion for reconsideration, that no party for the State of South Carolina was copied on/served with the motion for reconsideration.

in Richland County Central Court would in fact go forward on August 11, 2015." So, the only evidence before the OMVH and the ALC of when Respondent's Counsel became aware of the conflicting court appearances was the Summary Court Summons contained on pages 11, 35, 65, and 74 of the ALC Record on Appeal, which all indicate that Respondent's Counsel received the Summons on July 16, 2015. Despite the July 15, 2015 Summons being received by Respondent's Counsel on July 16, 2015, Respondent's Counsel did not notify the OMVH or Hearing Officer of the anticipated conflict until Friday, August 7, 2015 at 12:30 p.m., three (3) weeks and (1) day after Respondent's Counsel received the Summons.

Respondent asserts that several cases cited in this section of Appellant's Brief are not in compliance with Rule 268(d)(2), SCACR and, as a result, should not be considered by this Court and should be stricken from the record. Specifically, Respondent asserts the following cases in this section are not in compliance with Rule 268(d)(2), SCACR:

1) *Brockman v. South Carolina Dept. of Motor Vehicles and Mauldin Police Dept.*, 2014 WL 2895374, 13-ALJ-21-0049-AP (SCALC 2014)
2) *Chadwick Dale Martin v. S.C. Dept. of Motor Vehicles*, 2007 WL 4184375 (2007)
3) *Joseph W. Hiller, Sr., v. S.C. Dept. of Labor, Licensing and Regulation*, 1999 WL 51899 (1999)
4) *S.C. Dept. of Revenue v. Edwin Alewine*, 1997 WL 816208 (1997)

Respondent fails to disclose that none of these cases are South Carolina Supreme Court cases or South Carolina Court of Appeals cases. Each of these cases are final decisions/final orders in ALC cases. Therefore, these are not "memorandum opinions" or

"unpublished orders." Three of these cases are the published opinions of the ALC in its appellate capacity, in fact the *Brockman* case and the *Martin* case are the published opinions of the ALC in its appellate capacity over the OMVH. Only the *Alewine* case was not an ALC appellate opinion, but rather was a final order in a contested case hearing. Given the fact that ALC appellate rulings are binding on the OMVH unless overruled by this Court or the South Carolina Supreme Court, it makes perfect sense for this Court to consider as persuasive authority prior rulings by the ALC in determining the outcome of this case.[5]

Further, Respondent's argument "that cases in Magistrate's Court are often continued for many reasons the week of trial" ignores the fact such logic places the courts, particularly those with lower priority under Rule 601, SCACR, in an untenable position. Following this logic, an attorney could wait until literally one (1) minute prior to a scheduled hearing or trial to inform a court that he/she had an appearance in a court with a higher priority for the same date and time.[6] The attorney would merely have to state that he/she believed one of the court schedules would change. Such a holding would essentially eviscerate Rule 601, SCARC and waste court time and resources.

3) THE HEARING OFFICER DID NOT ERR BY DISMISSING THE CASE WITHOUT HOLDING A HEARING.

Appellant retains all arguments under this section set forth in its initial brief and adds one additional argument. Respondent asserts that several cases cited in Appellant's

[5] While an ALC order is not binding authority on this Court or the ALC, they are binding decisions for the OMVH because the OMVH is a lower court to the ALC. *See* 21 C.J.S. Courts § 212 (2006) ("Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges *of the same trial court.*")(Emphasis added).

[6] For example, if an attorney had oral arguments scheduled for the same day and time before the South Carolina Supreme Court and the South Carolina Court of Appeals, he/she could wait until only minutes before the argument was scheduled to begin at the Court of Appeals to inform the Court of Appeals of the conflict and could simply state that he/she believed the oral argument in the Supreme Court would be rescheduled.

Brief in this section are not in compliance with Rule 268(d)(2), SCACR and, as a result, should not be considered by this Court and should be stricken from the record. Specifically, Respondent asserts the following cases in this section are not in compliance with Rule 268(d)(2), SCACR:

1) *John McGeary v. S.C. Dept. of Motor Vehicles and S.C. Dept. of Public Safety*, 2011 WL 7119316 (2011)[7]

2) *S.C. Dept. of Motor Vehicles v. Willie Pitts*, 06-ALJ-21-0592[8]

3) *S.C. Dept. of Motor Vehicles v. Alana Marie Erwin*, 06-ALJ-21-0591[9]

Respondent fails to disclose that none of these cases are South Carolina Supreme Court cases or South Carolina Court of Appeals cases. Each of these cases are final decisions/final orders in ALC cases. Therefore, these are not "memorandum opinions" or "unpublished orders." All of these cases are the published opinions of the ALC in its appellate capacity over the OMVH. Given the fact that ALC appellate rulings are binding on the OMVH unless overruled by this Court or the South Carolina Supreme Court, it makes perfect sense for this Court to consider as persuasive authority prior rulings by the ALC in determining the outcome of this case.[10]

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[7] Respondent even goes so far as to state that this case "is an unreported opinion and has no presidential value as is stated on the opinion itself." (Emphasis added). A review of this case via Westlaw demonstrates that no such statement is "stated on the opinion itself."

[8] Respondent claims this case is "unreported and unavailable to the Respondent." This is untrue. This opinion is available from the ALC directly (i.e. in person), from the ALC via their webpage at http://www.scalc.net/search.aspx, is online at Westlaw.com at 2007 WL 2377440, and also could have been obtained by requesting a copy from the undersigned.

[9] Respondent claims this case is "unreported and unavailable to the Respondent." This is untrue. This opinion is available from the ALC directly (i.e. in person), from the ALC via their webpage at http://www.scalc.net/search.aspx, is online at Westlaw.com at 2007 WL 2452663, and also ould have been obtained by requesting a copy from the undersigned.

[10] While an ALC order is not binding authority on this Court or the ALC, they are binding decisions for the OMVH because the OMVH is a lower court to the ALC. *See* 21 C.J.S. Courts § 212 (2006) ("Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges *of the same trial court.*")(Emphasis added).

Respondent argues there "is no waste of resources in requiring the State to meet its burden of proof" in this case. Appellant respectfully disagrees. In this case, both the OMVH Hearing Officer and Trooper Grubes were present at the hearing on August 11, 2015 and were ready to go forward with the hearing. This required both the OMVH Hearing Officer and Trooper Grubes to prepare for the hearing, secure a location for the hearing (OMVH only), provide notice of the hearing to all parties (OMVH only), travel to the hearing, wait for the case to be called (Trooper Grubes only), only to discover that Respondent and her Counsel did not appear. Thus, resources of the State have already been expended on this case. If the OMVH is required to hold a second hearing, all of these actions will have to be performed a second time. Thus, there is no question there will be a waste of resources, particularly if this Court finds that this appeal is properly before this Court at this time and that the OMVH Hearing Officer did not commit an error of law by dismissing this case due to Respondent's failure to appear at the August 11, 2015 hearing.

Finally, Respondent's statement that "Neither party will be prejudiced by Respondent having an opportunity to have a hearing" blatantly ignores the impact of Respondent's Counsel's late request for a continuance on the OMVH, the OMVH Hearing Officer, Trooper Grubes, and the DMV. As outlined above, several things were done by the OMVH Hearing Officer, the OMVH, and Trooper Grubes in preparation for the August 11, 2015 hearing. Thus, requiring the OMVH, the OMVH Hearing Officer, and Trooper Grubes to perform these acts a second time, when Respondent's Counsel was already well aware that his requests for a continuance had been denied, does prejudice the OMVH, the OMVH Hearing Officer, and Trooper Grubes due to the simple

repetition of the acts leading to the hearing and the waste of their time on August 11, 2015. Further, the OMVH and the OMVH Hearing Officer would be further prejudiced because Respondent's Counsel (and potentially other attorneys) would then "know" they don't really have to provide any timely notice of court conflicts to lower courts.

CONCLUSION

For the reasons set forth above and in Appellant's initial brief, the order of the ALC is immediately appealable, should be overturned and the OMVH Order of Dismissal issued August 12, 2015 should be reinstated in full.

Respectfully submitted,

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February 24, 2016
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-001622

James Winston Davis, Jr. . . . . .Respondent,

v.

South Carolina Department of Motor Vehicles . . . . . Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b) SCACR.

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February 24, 2016
Blythewood, SC

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In the Court of Appeals

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The Honorable H. W. Funderburk, Jr., Administrative Law Judge

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Melissa Spalt . . . . . Respondent,

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South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety . . . . . Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, February 25, 2016, I served one (1) copy of the Appellant's Final Reply Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

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Office of General Counsel

February 25, 2016
Blythewood, South Carolina