

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-001030

South Carolina Department of Motor Vehicles. Appellant,

v.

Michelle Dover Respondent.

FINAL BRIEF OF APPELLANT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "DMV" or "SCDMV"), which seeks review of the May 4, 2016 Order of the Administrative Law Court (hereinafter, "ALC") upholding the November 25, 2015 Final Order and Decision of the Office of Motor Vehicle Hearings (hereinafter, "OMVH") rescinding the Respondent's habitual offender suspension. The SCDMV seeks to have the Order of the ALC reversed and the suspension reinstated.

STATEMENT OF THE ISSUE ON APPEAL

THE ALC ERRORED IN HOLDING THAT RESPONDENT'S VIRGINIA CONVICTION FOR RECKLESS DRIVING DID NOT CONSTITUTE A MAJOR CONVICTION UNDER S.C. CODE §56-1-1010, ET SEQ.¹

STATEMENT OF THE CASE

Respondent, Michelle Dover, was arrested on July 12, 2012, for driving under suspension (ticket # 21132FV) (R. pp. 80 and 83). She was convicted of this violation on August 14, 2012. *Id.*

Respondent was arrested on March 1, 2014 for driving under the influence (ticket # G697424) (R. pp. 79 and 83). She pled guilty to this violation on August 12, 2014. *Id.*

On May 3, 2015, Respondent was arrested in Virginia for reckless driving (ticket # 1500394200) (R. pp. 81-82). She was convicted of this violation on July 21, 2015. *Id.* This violation was reported to DMV on August 10, 2015 as "RECKLES DRV-SPEEDING EXCESS OF 80MPH-MISD" and as an M84 violation. *Id.* See 23 C.F.R. Pt. 1327, App. A. An M84 violation is reckless driving as defined by the American Association of Motor Vehicle Administrators (hereinafter, "AAMVA") Code Dictionary (hereinafter, "ACD"). *Id.* and R. pp. 86-94.

¹ This is an issue of first impression in South Carolina.



Respondent has not contested her two (2) South Carolina convictions or their classification as major violations for purposes of the habitual offender suspension. R. p. 58, line 6 - p. 60, line 23. Moreover, Respondent has not contested the veracity of the Virginia conviction. *Id.* Respondent has, however, contested the classification of the Virginia conviction as a major violation for purposes of the habitual offender suspension.

In the DMV's view, Respondent was charged and convicted of three separate and distinct major traffic violations within a three year period. *See* S.C. Code §56-1-1020.

Respondent requested a contested case hearing pursuant to a Notice of Suspension issued by the DMV finding that she is a habitual offender as outlined in S.C. Code §56-1-1020 (R. pp. 136 and 96-98). The contested case hearing was held on November 4, 2015 (R. pp. 44-62 and 95). After reviewing the record and considering all the evidence, the hearing officer rescinded the suspension of the Respondent's driving license or driving privileges (R. pp. 67-74). SCDMV appealed to the ALC (R. pp. 65-75). On February 19, 2016, SCDMV filed Brief of Appellant with the ALC (R. pp. 22-43). Pro Se Respondent, Michelle Dover, did not file a brief. On April 7, 2016, SCDMV filed Motion to Resolve Appeal Adversely to Respondent and in Appellant's Favor due to Respondent's failure to file a brief (R. pp. 19-21). On April 13, 2016, SCDMV supplemented its' Brief with a citation to the recently decided ALC case *South Carolina Department of Motor Vehicles v. Ashby Hiser* (R. pp. 118-134), which dealt with the same exact issue presented in this case. On May 4, 2016, the ALC issued its' Order denying SCDMV's Motion to Resolve Appeal Adversely to Respondent and in Appellant's Favor and issuing a final decision on the merits of the appeal (R. pp. 1-8). This appeal followed.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(5).

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

- (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
- (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.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

[Section 1-23-380(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of

administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also*, *Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC, supra*; *Hamm v. American Telephone & Telegraph Co., supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

THE ALC ERRORED IN HOLDING THAT RESPONDENT'S VIRGINIA CONVICTION FOR RECKLESS DRIVING DID NOT CONSTITUTE A MAJOR CONVICTION UNDER S.C. CODE §56-1-1010, ET SEQ.

I. S.C. CODE §§56-1-650 AND 56-1-320 ARE THE PROPER STATUTES UNDER WHICH TO REVIEW THE VIRGINIA RECKLESS DRIVING CONVICTION IN THIS CASE.

- a. The ALC's Reliance on S.C. Code §56-1-790 is erroneous as S.C. Code §56-1-790 is Contained in Article 3 "Point System for Evaluating Operating Records of Drivers."

The ALC held that the DMV should have evaluated how Respondent's Virginia reckless driving conviction was posted to her South Carolina driving record based on S.C. Code §56-1-790, which states, in part:

The Department of Motor Vehicles may enter into a reciprocal agreement with the proper agency of any other state for the purpose of reporting convictions in one state by a person holding a driver's license in the other state. Such convictions in another state of a violation therein, which if committed in this State, would be a violation of the traffic laws of this State, may be recorded against a driver the same as if the conviction had been made in the courts of this State.

The ALC placed great weight on the language "an out-of-state conviction is applied if the offense committed out-of-state 'would be a violation of the traffic laws of this State' if it were 'committed in this State.'" (R. p. 4). S.C. Code §56-1-790, however, is placed in Article 3 of Title 56, which is titled "Point System for Evaluating Operating Records of Drivers."² Given that the suspension at issue in this case is a habitual offender suspension and not a points suspension, the ALC should have looked to S.C. Code §56-1-650(C) to determine whether and/or how this Virginia reckless driving conviction would be placed on Respondent's driving record. S.C. Code §56-1-650(C) states, in part:

...For a conviction that is not required to be reported under subsection (A), the provisions of Section 56-1-320 shall govern the effect of the reported conviction in this State...³

S.C. Code §56-1-320 states:

The Department of Motor Vehicles *may, in its discretion, suspend or revoke* the license of any resident of this State or the privilege of a nonresident to drive a motor vehicle in this State *upon receiving notice of the conviction of the person in another state of an offense therein which, if committed in this State would be grounds for the suspension or revocation of the South Carolina license.*

² The undersigned also erroneously cited S.C. Code §56-1-790 in the DMV's Brief to ALC and assumes this is why the ALC erroneously cited this section of law in its Order.

³ SCDMV agrees that Respondent's Virginia reckless driving conviction was not required to be reported to South Carolina under S.C. Code §56-1-650(A).

Emphasis added. The OMVH Hearing Officer correctly reviewed this case under to S.C. Code §§56-1-650 and 56-1-320, although SCDMV disagrees with the OMVH Hearing Officer's holding that the DMV made a discretionary decision to suspend Respondent's license under S.C. Code §56-1-320. Therefore, if nothing else, the ALC Order should be overturned to the extent that it relies on S.C. Code §56-1-790 for the statute by which SCDMV applies out-of-state convictions in habitual offender cases.⁴

b. The OMVH Hearing Officer's Holding that the DMV Made a Discretionary Decision to Suspend Respondent's License Under S.C. Code § 56-1-1020 is Erroneous.

Although the OMVH Hearing Officer correctly reviewed this case pursuant to S.C. Code §§56-1-650 and 56-1-320, the OMVH Hearing Officer erroneously held that the DMV made a discretionary decision to suspend Respondent's license under S.C. Code §56-1-320. That is not accurate. A reckless driving conviction alone does not lead to suspension of a license in South Carolina. There are several ways a person can have their license suspended or revoked in South Carolina related to a conviction for reckless driving. For example, if a driver: 1) received at least two (2) convictions for reckless driving with a five (5) year period of time (S.C. Code §56-5-2920); 2) lost too many points from their license (S.C. Code §56-1-710 et seq.); or 3) was classified as a Habitual Offender due to multiple convictions only one of which might be a reckless driving conviction (S.C. Code §56-1-1010 et seq.), as occurred in this case. Therefore, it was

⁴ Notably, should this Court determine that the ALC's reliance on S.C. Code §56-1-790 was correct, S.C. Code §56-1-850 specifically states, "Nothing contained in this article shall affect the action of the Department of Motor Vehicles in suspending, revoking, or canceling any driver's license when such action is mandatory under the provisions of any law of this State." S.C. Code §56-1-850 is in the same section of the South Carolina Code of Law as S.C. Code §56-1-790. Therefore, it is clear that the South Carolina Legislature did not intend for any classification of an out-of-state conviction, whether classified correctly or not by the other state, to affect the suspension, revocation, or cancelation of any driver's license when such action is mandatory, as it is under the habitual offender statutes.

error for the OMVH Hearing Officer to hold that SCDMV made a *discretionary* decision under S.C. Code §56-1-320 to suspend Respondent's license.

Rather, what occurred is SCDMV received the notification of a reckless driving conviction from Virginia for Respondent.⁵ Based solely on this notification, SCDMV merely entered the reckless driving conviction onto Respondent's South Carolina driving record. Only after this conviction for reckless driving in Virginia was applied to Respondent's driving record did the SCDMV discover that Respondent's license was required to be suspended pursuant to S.C. Code §56-5-1030(A), which states:

When a person is convicted of one or more of the offenses listed in Section 56-1-1020(a), (b), or (c), the Department of Motor Vehicles **must** review its records for that person. If the department determines after review of its records that the person is a habitual offender as defined in Section 56-1-1020, the department **must** revoke or suspend the person's driver's license.

Emphasis added. Because of how this process actually works and the statutes that each step functions under, the DMV did not make a discretionary decision under S.C. Code §56-1-320 to suspend Respondent's license. Rather, this habitual offender suspension became *mandatory* after the Virginia reckless driving conviction was added to Respondent's driving record. Further, this mandatory suspension was only appealable to the OMVH because S.C. Code §56-1-1030 says habitual offender suspensions may be appealed to the OMVH.

⁵ DMV did not receive a copy of the actual traffic citation/charging document issued in Virginia.

II. THE SCDMV CAN RELY ON VIRGINIA'S CATEGORIZATION OF THIS OFFENSE AS RECKLESS DRIVING AND AS AN ACD CODE M84 CONVICTION.

SCDMV can rely on Virginia's categorization of this offense as reckless driving and as an ACD Code "M84" conviction. Further, public policy demands this suspension be upheld.

a. The SCDMV Can Rely on Virginia's Categorization of this Offense as Reckless Driving and as an ACD Code "M84" Conviction.

The ACD Codes used between states to indicate the violations drivers incur are set forth in federal regulations. See 23 C.F.R. Pt. 1327, App. A. "M84" is specifically listed in these federal regulations as the code for "Reckless driving" under Part I "For Cause Withdrawals" and Part II "Convictions." *Id.* A review of these regulations will reveal that there is only one (1) code for anything related to reckless driving. There is a second code titled "Reckless, careless, or negligent driving:" M80. M80 immediately proceeds four (4) other codes for "Careless driving," "Inattentive driving," "Negligent driving," and "Reckless driving." So, there is no breakdown of codes in the ACD code system to differentiate Virginia's fourteen (14) types of reckless driving, which are discussed in further detail below. The ALC relies on the case *State v. Bennett*, 375 S.C. 165, 173-4, 650 S.E.2d 490, 495 (Ct. App. 2007) to hold that "Administrative codes, such as those used by motor vehicle agencies, are for convenience and are not meant to supersede or replace statutory law." The ALC's reliance on the *Bennett* case is misplaced due to significant differences in the *Bennett* case and this case. The *Bennett* case dealt with CDR codes which

are merely administrative "shortcuts" to actual law. They were created at the time when automated (computerized) systems had very limited

memory, and did not have the capacity to maintain references to specific statutes which could contain many digits.

(South Carolina Judicial Department, CDR Codes – User Instructions, South Carolina Judicial Department (May 23, 2016, 4:40 p.m.), <http://www.sccourts.org/cdr/userInstructions.cfm>). The CDR codes in the *Bennett* case were literally number shortcuts for a computer system, essentially a code to enter in to the computer system that stood for certain crimes. Unlike the *Bennett* case, the ACD codes at issue here are not “merely administrative ‘shortcuts’ to actual law.” Rather, the ACD codes are set forth in federal regulations as a way for states to classify violations and convictions for communication of those violations and convictions to other states, despite the various underlying statutes and minor differences that may exist in the elements of those statutes. See 23 C.F.R. Pt. 1327, App. A. In other words, the ACD codes are a way to match up similar, if not exact, violations and convictions from state to state. So, the ACD codes are not “merely administrative ‘shortcuts’ to actual law” but are a classification system set up via federal regulations. For this reason alone, the *Bennett* case is factually distinct from this case and does not apply to this case.

The ALC also held that “By relying solely on a code that is not part of state law, the Department failed to determine whether the offense committed by Respondent would be an offense under South Carolina law.” This holding patently ignores the fact that the ACD Codes are set out in federal regulations. See 23 C.F.R. Pt. 1327, App. A. South Carolina is still subject to federal statutes and regulations, particularly federal statutes and regulations that South Carolina explicitly stated it will follow. See Driver License Compact, S.C. Code §56-1-610 et seq. So, for the ALC to hold that the ACD Codes are

not part of state law is erroneous in that it fails to recognize the adoption of the ACD Codes through the Driver License Compact.

Additionally, all fifty states in the United States have converted to the National Driver Register's (NDR) Problem Driver Pointer System (PDPS), which is provided for through 23 C.F.R. §1327. Significantly, nothing in South Carolina law or the ACD code regulations place any responsibility on the SCDMV or any South Carolina court to ensure that the other states correctly file reports under the Driver License Compact. *Taddei v. Commonwealth*, 982 A.2d 1249 (2009). Under South Carolina law and the Driver License Compact, SCDMV is merely responsible for determining whether the licensee's conviction requires suspension under South Carolina law. That is exactly what DMV did in this case. DMV used the available interpretive tools, namely 23 C.F.R. §1327 and the ACD Codes to determine that Respondent was convicted of reckless driving in Virginia and that the conviction for reckless driving itself did not require suspension under South Carolina law. Next, SCDMV placed the reckless driving conviction that had been reported by Virginia on Respondent's driving record. It was only after the Virginia conviction for reckless driving was placed on Respondent's driving record and was analyzed in combination with Respondent's South Carolina convictions for driving under suspension and driving under the influence that DMV was required to suspend Respondent's driver's license pursuant to S.C. Code §56-1-1020.

SCDMV must be given the ability to rely on reports from other states made through the PDPS or the Driver License Compact is rendered wholly ineffective.

[S.C. Code §56-1-640] is clearly mandatory for a party state reporting a conviction within its jurisdiction. [S.C. Code §56-1-640] therefore imposes an obligation on [DMV] only when it is the state reporting the conduct, not when it is the home state. It does not prohibit [DMV], as the

licensing authority in the home state, from relying on the information contained in the report even if the report lacks certain information specified in [S.C. Code §56-1-640]. Nor does anything in [S.C. Code §56-1-640] render the [out-of-state] report of conviction inadmissible if defective...

Com., Dept. of Transp. v. McCafferty, 563 Pa. 146, 758 A.2d 1155 (Pa. 2000) (Emphasis added). This same analysis applies in the instant case. Nothing in the Driver License Compact prohibits DMV from relying on information contained in a report from another state, even if the report lacks certain information that would normally be provided under S.C. Code §56-1-640. This is an indication that the legislative intent is for DMV to utilize the information sent to it, even if it is just an ACD Code and the driver information.

Further, in *Siekierda v. Department of Transportation, Bureau of Driver Licensing*, 580 Pa. 259, 860 A.2d 76 (Pa. 2004), the Pennsylvania Supreme Court generally held:

That a court abstract from [out-of-state] was sufficient proof of an out-of-state conviction to authorize DOT to impose a suspension under the [Driver License] Compact. Our supreme court explained that the Compact is to be liberally construed so as to effectuate its purposes, and, upon receiving an out-of-state conviction report, even a report that does not strictly comply with the Compact's requirements, a home state's responsibility is to determine whether the conduct underlying the conviction requires the imposition of a suspension.

Roselle v. Commonwealth, 865 A.2d 308, 311 (2005), citing *Siekierda*. This Court should follow the sound reasoning in the *Siekierda* case and the other case law regarding interpretation of statutes discussed above by construing the requirements of Driver License Compact to effectuate the purposes of the Driver License Compact as expressly stated in S.C. Code §56-1-620:

(A) The General Assembly and the states that are party to the compact find that:

- (1) the *safety* of their streets and highways is materially affected by the degree of compliance with state laws and local ordinances relating to the operation of motor vehicles;
- (2) the violation of a law or ordinance is *evidence* that the *violator engages in conduct which is likely to endanger the safety of persons and property*;
- (3) the continuance in force of a license to drive is predicated upon *compliance* with laws and ordinances relating to the operation of motor vehicles *in whichever jurisdiction the vehicle is operated*.

(B) It is the policy of the General Assembly and of each of the party states to:

- (1) *promote compliance with the laws, ordinances, and administrative regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where the operators drive motor vehicles*;
- (2) *make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the overall compliance as a condition precedent to the continuance or issuance of any license* by reason of which the licensee is authorized to operate a motor vehicle in any of the party states.

Emphasis added.

The ALC Order states "South Carolina law specifically requires that an out-of-state offense must be recorded as if it were a conviction under South Carolina law." (R. p. 4). This statement implies that SCDMV must individually evaluate each out-of-state conviction, the facts that led to that conviction, and then try to fit that offense into the most accurate South Carolina offense for purposes of recording the conviction on the South Carolina driving record. Assuming the ALC was correct in analyzing this case under S.C. Code §56-1-790, rather than S.C. Code §56-1-650, SCDMV asserts that is not what is meant by the words:

Such convictions in another states of a violation therein which, if committed in this State, would be a violation of the traffic laws of this

State, may be recorded against a driver the same as if the conviction had been made in the courts of this State.

SCDMV interprets the above sentence to mean that if South Carolina has a corresponding statute for the one which the driver was convicted of violating in the other state, then South Carolina will record that conviction on the person's driving record. So, for example, South Carolina does have a reckless driving statute and, therefore, will record any out-of-state reckless driving conviction reported to SCDMV on the South Carolina driving record. Alternatively, if another state has an offense for resisting arrest that is accompanied by a driver's license suspension and, therefore, reports the resisting arrest conviction of a South Carolina driver to the SCDMV using ACD code "U02," SCDMV will not place that conviction on the South Carolina driver's driving record because South Carolina does not have a corresponding suspension that occurs when someone is convicted of resisting arrest. So, the ALC Order's implication that SCDMV must individually evaluate each out-of-state conviction, the facts that led to that conviction, and then try to fit that offense into the most accurate South Carolina offense for purposes of recording the conviction on the South Carolina driving record is simply not an accurate interpretation of how S.C. Code §56-1-790 is applied. Nor is there any indication that the South Carolina Legislature intended the SCDMV to have to go through such a convoluted process to simply record an out-of-state conviction on a person's driving record. If the ALC's holding in this regard is correct, then, for the practical reasons explained in further detail below, SCDMV simply would not be able to ever post an out-of-state conviction to anyone's driving record.

b. Public Policy Demands this Suspension be Upheld.

In this case, as is typical of these reports, DMV received minimal information from Virginia. The report did include the ACD code and information regarding Respondent, the driver that received the conviction. The full and complete amount of information received by DMV about this conviction is contained on page 81 of the ROA. DMV did not receive detailed information from Virginia regarding this conviction. If someone is convicted of any of Virginia's fourteen (14) different types of reckless driving, Virginia will report the conviction as an ACD code of "M84" and DMV will likely have no further facts related to that conviction. For example, two (2) different people could receive an "M84" "reckless driving, exceeding speed limit" conviction from Virginia under very different facts and they will both look exactly the same when they arrive at SCDMV. One could have received that conviction for driving 70 miles per hour through a 20 mile per hour school zone, while the other received that conviction for driving 81 miles per hour on a 70 mile per hour highway. To SCDMV, however, the paperwork will look exactly the same. Therefore, if for no other reason, the ALC Order should be reversed and Respondent's suspension upheld for public policy reasons, i.e. DMV simply does not have the resources to individually investigate every M84 violation from Virginia. Despite this lack of resources, this is exactly what the ALC Order suggests the DMV do:

Nothing in this opinion prevents the Department from relying on the ACD Codes in making an initial decision under the habitual offender statute. Instead, the Department must simply compare the statutes involved in a given case when the driver in question successfully challenges the Department's classification in a contested case.

R. p. 6. In other words, the ALC Order suggests the SCDMV continue placing all M84 violations reported out of Virginia on driving records as reckless driving, as is currently done, and only if a driver successfully challenges the SCDMV's classification of that M84 violation as reckless driving should SCDMV take a closer look at the specific facts of that M84 violation. The problem with this logic is that SCDMV would only know about a successful challenge to SCDMV's classification of an M84 violation as reckless driving once the time for submitting evidence has closed, i.e. the contested case hearing will have concluded. So, for example, the driver could appear at the contested case hearing and testify that he/she was driving 81 miles per hour on a highway in Virginia, that the speed limit was 70 miles per hour, and that they were written a ticket for reckless driving rather than a speeding ticket. Upon receiving the order from OMVH finding that driver had successfully challenged the M84 violation, DMV could then contact the officials Virginia and discover the facts are nothing like those relayed by the driver. It could be the situation described above where the driver was going 70 miles per hour through the 20 mile per hour school zone. Unfortunately, using the process suggested by the ALC Order, the time for submission of evidence will already have closed. So, this additional information will not be available to the OMVH Hearing Officer or any appellate court. Thus, the process suggested in the ALC Order is not a workable process and leaves the DMV in situation of either accepting and posting all M84 violations as reckless driving, posting no M84 violations as reckless driving (violating the purpose of the Driver's License Compact and S.C. Code §§56-1-1020 and 56-1-320), or individually investigating all M84 violations reported to SCDMV from out-of-state (resulting in a severe lack of resources issue for SCDMV).

Even if SCDMV had the resources to follow up on the specific facts behind every reckless driving conviction in Virginia prior to any contested case hearing being held, such a review would give each of these drivers more due process rights than are in place had the violation occurred in this state. This would manifest itself via the contested case hearing (a.k.a. essentially a second trial in South Carolina). There is nothing in these statutes that indicate the Legislature intended the OMVH and DMV to be used by drivers in this fashion. Moreover, no driver would be allowed to re-litigate whether his/her South Carolina reckless driving conviction truly constituted reckless driving or not. Thus, allowing Respondent to delve into the specific underlying behavior that led to this conviction has granted Respondent more due process than other drivers facing habitual offender suspensions normally receive.

In addition to the resource issues, it is critical that this Court understand Virginia has numerous reckless driving offenses, which are discussed in more detail below (VA Code §§46.2-852 through 46.2-865). In addition to these numerous reckless driving offenses, Virginia is unique among jurisdictions in setting forth a Table of Speed and Stopping Distances (VA Code §46.2-880). This Table reflects that an automobile travelling at eighty (80) miles per hour will take 481 feet to stop; whereas an automobile travelling at seventy-five (75) miles per hour will take 433 feet to stop. While the difference in stopping between an automobile travelling eighty (80) miles per hour and seventy-five (75) miles per hour may not appear that vast, it could mean the difference between a safe or tragic stop. In fact, this chart reflects that for every five (5) miles per hour in greater speed, the stopping distance for an automobile increases approximately forty (40) to fifty (50) feet. The fact that Virginia felt the need to set forth a Table of

Speed and Stopping Distances and has numerous types of reckless driving is an indicator of the seriousness with which Virginia treats these types of offenses. That seriousness should not be overlooked in this case.

In this regard, the officer that issued the Virginia citation had the option of merely issuing Respondent a speeding ticket pursuant to VA Code §46.2-870 or any other applicable speeding statutes. Had Respondent been issued a speeding ticket pursuant to VA Code §46.2-870, she would have been subject to a fine of \$6 per mile-per-hour in excess of the posted speed limit. VA Code §46.2-878.3. Additionally, the Court or the Commonwealth Attorney could have reduced the reckless driving charge to improper driving (a traffic infraction) if they considered the “degree of culpability” to be slight (VA Code §46.2-869). If either of these occurred, the violations would have transferred to the SCDMV as a charge that is less than reckless driving and the resulting domino effect leading to Respondent’s habitual offender suspension would not have occurred. In this case, however, none of these charging and/or conviction options were elected by the Virginia officials. Therefore, it is unreasonable and erroneous for the ALC or the OMVH Hearing Officer to assume that Respondent’s conviction for reckless driving in Virginia equates to mere speeding in South Carolina. Speeding was an option the Virginia officials had before them, but speeding is not what Respondent was convicted of committing. Respondent was convicted of reckless driving and that conviction should be recognized in South Carolina as reckless driving.

III. EVEN IF THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES CANNOT RELY ON VIRGINIA'S CATEGORIZATION OF THIS OFFENSE AS RECKLESS DRIVING PURSUANT TO THE ACD CODES, A CONVICTION UNDER VA CODE §46.2-862 IS EQUIVALENT TO A SOUTH CAROLINA CONVICTION UNDER S.C. CODE §56-5-2920.

Even if this Court finds the SCDMV cannot rely on Virginia's categorization of this offense as reckless driving pursuant to ACD code M84, this Court should find that a conviction under VA Code §46.2-862 is equivalent to a South Carolina conviction under S.C. Code §56-5-2920 because:

- 1) The rules of statutory construction and the clear Legislative intent of the Driver License Compact demand such a finding;
- 2) It is speculation to assume that Respondent would have been charged with speeding had this offense occurred in South Carolina; and
- 3) The potential penalties in Virginia demonstrate the seriousness with which Virginia take the offenses of reckless driving.

a. This Court Must Follow the Rules of Statutory Construction and Effectuate the Legislative Intent of the Driver License Compact.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature whenever possible. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998) and *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). Statutory provisions should be given a reasonable and practical construction consistent with the purposes and policy of the statute. *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001); see *Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Authority*, 367 S.C. 566, 572, 627 S.E.2d 690, 693 (2006) (citing *Johnston v. S.C. Dep't of Labor, Licensing, and Reg.*, 365 S.C. 293, 617 S.E.2d 363 (2005) for the

proposition that statutes should be interpreted to further, rather than frustrate, the legislature's intention). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Systems Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992). Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992) and *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Therefore, courts should not concentrate on isolated phrases in a statute. *Id.* Rather, the statute should be read as a whole and in a manner consonant and in harmony with its purpose. *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010). Moreover, courts must give consideration to the object which the Legislature sought to attain and the evil which is endeavored to remedy. *Woodward v. State Rural Electrification Auth.*, 190 S.C. 465, 3 S.E.2d 539 (1939).

In this regard, this Court should take a close look at S.C. Code §56-1-1030, which states:

When a person is convicted of one or more of the offenses listed in Section 56-1-1020(a), (b), or (c), the Department of Motor Vehicles **must** review its records for that person. If the department determines after review of its records that the person is a habitual offender as defined in Section 56-1-1020, the department **must** revoke or suspend the person's driver's license.

Emphasis added. It is clear the legislative intent is that an appropriate number and type of convictions for traffic offenses will result in a habitual offender suspension. It is apparent that the evil the Legislature is endeavoring to remedy is dangerous driving. To

assist in this endeavor other statutes provide requirements and authorizations for the SCDMV to recognize out-of-state convictions for reckless driving, specifically through S.C. Code §56-1-320 and the Driver License Compact (S.C. Code 56-1-610 et seq.).

The Legislature specified its findings and intent of the Driver License Compact in S.C. Code §56-1-620, which states:

(A) The General Assembly and the states that are party to the compact find that:

(1) the *safety* of their streets and highways is materially affected by the degree of compliance with state laws and local ordinances relating to the operation of motor vehicles;

(2) the violation of a law or ordinance is evidence that the violator engages in conduct which is *likely to endanger the safety of persons and property*;

(3) the continuance in force of a license to drive is predicated upon compliance with laws and ordinances relating to the operation of motor vehicles in whichever jurisdiction the vehicle is operated.

(B) It is the policy of the General Assembly and of each of the party states to:

(1) *promote compliance* with the laws, ordinances, and administrative regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where the operators drive motor vehicles;

(2) make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the overall compliance as a *condition precedent to the continuance or issuance of any license* by reason of which the licensee is authorized to operate a motor vehicle in any of the party states.

Emphasis added.

This statute makes it abundantly clear that the Legislature's intent in passing the Driver License Compact was to: 1) increase safety; 2) decrease danger to persons and property; and 3) promote compliance with laws, ordinances, and administrative

regulations related to the operation of motor vehicles. Based on the case law discussed above, any analysis of the statutory construction of the habitual offender statutes with regard to out-of-state offenses must keep these intents in mind.

Expanding on these intents are the habitual offender statutes, in which the Legislature specified its findings and intents of the habitual offender statutes in S.C. Code §56-1-1020, which states:

It is hereby declared to be the policy of this State:

- (a) To provide maximum *safety* for all person who use the public highways of this State; and
- (b) To deny the *privilege* of operating motor vehicles on such highways to persons who by their conduct and record have *demonstrated their indifference to the safety and welfare of others and their disrespect for the laws of this State*; and
- (c) To *discourage repetition of unlawful acts* by individuals against the peace and dignity of this State and her political subdivisions and to *impose additional penalties* upon habitual offenders who have been convicted repeatedly of violations of the traffic laws of this State.

Emphasis added.

This statute makes it explicitly clear that the Legislature's intent in passing the habitual offender laws was to: 1) provide maximum safety; 2) deny the privilege of operating a motor vehicle on our highways; 3) to discourage repetition of unlawful acts; and 4) to impose additional penalties. Again, based on the case law discussed above, any analysis of the statutory construction of the habitual offender statutes with regard to out-of-state offenses must keep these Legislative intents in mind.

Further, the legislative intents of S.C. Code §§56-1-1010, et seq., the Driver License Compact, and how these two statutes work in conjunction with each other, must

also be considered. It is obvious that the combined intent of these statutes is to get some of the most egregious, rampant, and dangerous traffic offenders off of South Carolina's roads for safety purposes.

b. Virginia Law and the Driver License Compact Make Clear that this Conviction Must be Recognized in South Carolina as a Reckless Driving Conviction.

As mentioned previously, Virginia law has several different statutes for "Reckless Driving." Each of these statutes has independent elements for conviction, but all are considered a conviction for reckless driving. The reckless driving statutes in Virginia are:

VA Code §46.2-852 "Reckless Driving; general rule"

VA Code §46.2-853 "Driving vehicle which is not under control; faulty brakes."

VA Code §46.2-854 "Passing on or at the crest of a grade or on a curve"

VA Code §46.2-855 "Driving with driver's view obstructed or control impaired."

VA Code §46.2-856 "Passing two vehicles abreast"

VA Code §46.2-857 "Driving two abreast in a single lane"

VA Code §46.2-858 "Passing at a railroad grade crossing"

VA Code §46.2-859 "Passing a stopped school bus; prima facie evidence"

VA Code §46.2-860 "Failing to give proper signals"

VA Code §46.2-861 "Driving too fast for highway and traffic conditions"

VA Code §46.2-862 "Exceeding speed limit"

VA Code §46.2-863 "Failure to yield right-of-way"

VA Code §46.2-864 "Reckless driving on parking lots, etc."

VA Code §46.2-865 "Racing; penalty"

Based on the elements in the Virginia statutes, any of these offenses could be charged as reckless driving under S.C. Code §56-5-2920 in South Carolina. Virginia has simply set these behaviors out as *per se* reckless driving violations via the elements set forth in each statute. Thus, just as driving more than 20 miles per hour in South Carolina could be charged as speeding or as reckless driving depending on the facts of the case, that same behavior could also be charged as speeding or as reckless driving in Virginia depending on the facts of the case. The fact that Virginia has specifically set forth a *per se* reckless driving statute for driving 20 miles per hour over the speed limit has not changed Virginia's charging options. Essentially, Virginia has simply gotten more detailed in setting forth specific behaviors that can be charged as reckless driving. Respondent should not benefit from the fact that the South Carolina Legislature has not also further detailed what constitutes reckless driving in South Carolina.

Moreover, all of these Virginia reckless driving offenses are punished under the same code section, VA Code §46.2-868. Also, all of these statutes are listed in the same article of the Motor Vehicles title in Virginia, Article 7, which is titled "Reckless Driving and Improper Driving." Reckless driving dominates the article, with improper driving only being mentioned in one code section, VA Code §46.2-869. These characteristics further demonstrate that Virginia simply has several specific statutory definitions for what constitutes reckless driving, any of which could also be charged as reckless driving in South Carolina under S.C. Code §56-5-2920.

"Exceeding speed limit" is merely one (1) of fourteen (14) *per se* statutes that allow a person to be found guilty of reckless driving in Virginia. VA Code §46.2-862 "Exceeding speed limit" states:

A person shall be guilty of **reckless driving** who drives a motor vehicle on the highways in the Commonwealth (i) at a speed of twenty miles per hour or more in excess of the applicable maximum speed limit or (ii) in excess of eighty miles per hour regardless of the applicable maximum speed limit.

Emphasis added. Virginia has further defined reckless driving through case law.

In Virginia, the word ‘recklessly’ as used in the statute imparts a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property.” *Powers v. Commonwealth*, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970). “The essence of the offense... lies not in the act of operating a vehicle, but in the manner and circumstances of its operator.” *Id.*; *Hall v. Commonwealth*, 25 Va.App. 352, 355, 488 S.E.2d 651, 653 (1997). *Thompson v. Commonwealth*, 27 Va.App. 720, 723, 501 S.E.2d 438, 440 (1998). Further, “By statute, the speed at which he drove is **reckless driving**.” Emphasis added. *West v. Commonwealth*, 43 Va.App. 327, 343, 597 S.E.2d 274, 283 (2004).

Moreover, according to the case *Commonwealth v. Turner*, 1997 WL 33575416, Virginia also has a statute for speeding more than twenty miles over the speed limit, VA Code §46.2-874.⁶ This statute is wholly different than the reckless driving statute related to speed, VA Code §46.2-862. This difference was explicitly and specifically recognized by the Circuit Court of Virginia in the case *Commonwealth v. Turner*, 1997 WL 33575416, which stated:

Simply because the facts of the case are such that the Defendant could have been charged with either **reckless driving** or speeding more than

⁶ The ALC Order contained a footnote regarding this statute and the discussion of this case. While the undersigned understands the referenced statute does not appear on its face to be applicable, according to the *Turner* case VA Code §46.2-874 deals with speeding more than twenty miles per hour over the speed limit and this particular statute has not been amended since the *Turner* case was issued. So, it appears there may be a difference in the apparent language of this statute and the practical application of the statute within the state of Virginia. This is yet another reason why it makes good sense for SCDMV to rely on the ACD Code categorizations provided by the states of conviction.

twenty miles per hour over the speed limit does not give him the right to elect the offense.

Id. at 1. This distinction was important in the *Turner* case because a conviction under VA §46.2-862 (reckless driving, exceeding speed limit) would have precluded the Commonwealth of Virginia from pursuing a driving under the influence of intoxicants charge against Mr. Turner. By recognizing the specific and explicit differences in VA Code §46.2-862 (reckless driving, exceeding speed limit) and VA Code §46.2-874, the court allowed the driving under the influence of intoxicants charge to go forward against Mr. Turner even though he had already been convicted of VA §46.2-874. Moreover, the logic in the *Turner* case regarding the defendant electing the offense brought against him translates to South Carolina as well. Simply because a South Carolina officer *can* choose to charge only speeding does not mean that a South Carolina officer *must* charge only for speeding. Thus, in South Carolina, as in Virginia, if the driving also supports a reckless driving charge, then the officer can elect whether to charge speeding or reckless driving. This is no different in Virginia. Therefore, the fact that Virginia has elected to charge and *convict* Respondent for “reckless driving, exceeding speed limit” and not speeding or improper driving speaks volumes about how Virginia viewed Respondent’s driving in this case.

Further, many Virginia cases and other legal resources refer to VA §46.2-862 as “reckless driving by speed” or similar terms. See *Chibikom v. Commonwealth*, 54 VA.App. 422, 680 S.E.2d 295 (2009); *Fisher v. County of Roanoke*, 31 Va.App. 215, 522 S.E.2d 392 (1999); *County of Loudoun v. Ofogh*, 68 Va. Cir. 427, 2005 WL 3369222; *MacDonald v. Com.*, 83 Va. Cir. 485; *Ford v. Com.*, 2013 WL 6478583; *Burnside v. Com.*, 2013 WL 1976110; *Com. v. Patton*, 87 Va. Cir. 215; *Com. v. Jones*, No.

04CR00062; and *In the Matter of Kelly Ralston Dennis*, 2014 WL 5115668. Moreover, the use of the term “reckless driving by speed” indicates that the driving is considered reckless driving specifically due to the speed involved.

For all of these reasons, South Carolina should recognize the reckless driving conviction at issue in this case as the equivalent of a reckless driving conviction in South Carolina and, therefore, uphold the habitual offender designation and suspension.

c. It is Speculation to Assume that Respondent Would Have Been Charged with Speeding in South Carolina.

The ALC held that the SCDMV “engages in speculation in assuming that Respondent was driving recklessly when the statute under which she was convicted merely calls for going in excess of eighty miles-per-hour.” Further, the OMVH Hearing Officer held that if Respondent’s offense had occurred in South Carolina rather than Virginia, she would only have been charged with speeding in violation of S.C. Code §56-5-1520(B)(1). These holdings are erroneous and speculative at best. Charges are made in the judgment of the charging officer based on the information the charging officer has before them at the time they make the charge. Simply because South Carolina doesn’t have a *presumptive* charge for reckless driving due to driving 80 miles per hour or more on any roadway does not mean South Carolina is *precluded* from the possibility of such a charge being made and proven under South Carolina’s reckless driving statute. For example, many highways in South Carolina have a speed limit of 70 miles per hour. Given traffic, weather, road conditions, or inability to stop in a reasonable time, however, it may be perfectly reasonable for a driver on a South Carolina highway with a speed limit of 70 miles per hour to be charged with reckless driving under S.C. Code §56-5-2920 for simply driving 80 miles per hour or greater on that highway. So, while Virginia

makes such a charge for reckless driving *presumptive*, that does not mean that South Carolina's failure to make the same charge *presumptive* precludes the charge from being made at all. The ALC's holding that the SCDMV "engages in speculation in assuming that Respondent was driving recklessly when the statute under which she was convicted merely calls for going in excess of eighty miles-per-hour" blatantly ignores the fact that Respondent was, in fact, convicted of reckless driving in Virginia. That is, quite literally, what the statute calls it, "reckless driving." See VA Code §46.2-862, which states:

A person shall be guilty of ***reckless driving*** who drives a motor vehicle on the highways in the Commonwealth (i) at a speed of twenty miles per hour or more in excess of the applicable maximum speed limit or (ii) in excess of eighty miles per hour regardless of the applicable maximum speed limit.

Emphasis added. So, by the very plain and explicit words of the statute, Respondent was convicted of reckless driving in Virginia. For these reasons, South Carolina should defer to and accept Virginia's interpretation of their reckless driving statutes and provided full faith and credit recognition to that conviction as required by Section 1, Article IV of the U.S. Constitution.

d. The Potential Penalties in Virginia Demonstrate the Seriousness with which Virginia Takes the Offense of Reckless Driving and the Seriousness with which Virginia took Respondent's Driving that Led to Her Reckless Driving Conviction.

All of Virginia's reckless driving statutes are punishable as Class 1 misdemeanors. This means, pursuant to VA Code §18.2-11, that Respondent could have been confined in jail for not more than twelve months, fined not more than \$2,500, or both. These penalties demonstrate that Virginia takes the offenses of reckless driving very seriously and, therefore, expect serious consideration be given to such convictions when reported to other states. Further, the potential criminal penalties of not more than

twelve months in jail, a fine of not more than \$2,500, or both for the reckless driving conviction vs. the traffic violation penalty of a fine of \$6 per mile-per-hour over the speed limit demonstrate that Virginia took Respondent's driving violation very seriously. This indicates that Virginia expects South Carolina to also take Respondent's driving violation very seriously.

CONCLUSION

For the reasons stated above, DMV asserts there was substantial evidence to support the suspension of Respondent's driver's license or driving privileges and DMV respectfully requests that the ALC Order issued May 4, 2016 and the OMVH Final Order and Decision issued October 27, 2015, be reversed and Respondent's habitual offender declaration and suspension be reinstated.

Respectfully submitted,



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September 14, 2016
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-001030

South Carolina Department of Motor Vehicles. Appellant,

v.

Michelle Dover Respondent.

CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with
SCACR 211(b).



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September 14, 2016
Blythewood, SC

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SEP 15 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-001030

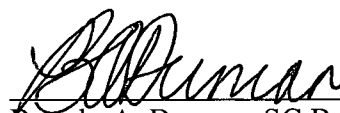
South Carolina Department of Motor Vehicles. Appellant,

v.

Michelle Dover Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with
South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02,
filed April 15, 2104.



Brandy A. Duncan, SC Bar # 72052
Assistant General Counsel
South Carolina Department of Motor Vehicles

September 14, 2016
Blythewood, SC

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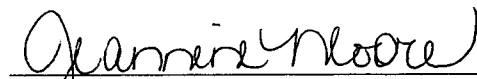
v.

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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, September 14, 2016,
I served one (1) copy of the Final Brief of Appellant by depositing with the United States
Postal Service, correct postage prepaid, to Respondent at the address indicated below:

Michelle Dover, *Pro se* Respondent
35 Railroad Avenue
York, South Carolina 29745


Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Blythewood, SC