

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge **S.C. SUPREME COURT**

Opinion No. 5464 (S.C. Ct. App. filed January 11, 2017)

Anna Dillard Wilson.....Respondent,

v.

South Carolina Department of Motor Vehicles.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made to Court of Appeals on January 26, 2017 and that this Petition was denied on March 10, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that Respondent presented sufficient evidence of prejudice when the record reflects that Respondent merely speculated that she might suffer prejudice?
2. Did the Court of Appeals err in ruling that the suspension of Respondent's driver's license four working days after Petitioner received notification of Respondent's driving under the influence conviction:
 - a. violated the standards of fundamental fairness required by due process;
 - b. will cause the Respondent hardship; and
 - c. the Respondent has no other remedy at law?
3. Did the Court of Appeals err in finding that the Petitioner's arguments regarding Respondent's other remedies at law were not preserved for review?

STATEMENT OF THE CASE

On November 22, 2008, Respondent was arrested for driving under the influence (hereinafter, "DUI"). R. p. 100. On June 11, 2009, Respondent pled guilty to DUI in the Irmo Municipal Court. *Id.* On May 20, 2014, nearly five (5) years after the conviction, the South Carolina Department of Motor Vehicles (hereinafter, "Petitioner" or "DMV") received a copy of uniform traffic ticket number 31588EE from the Irmo Municipal Court reflecting Respondent's conviction. *Id.* Accordingly, on May 27, 2014, a mere four (4) working days¹ later, Petitioner issued Respondent a notice of suspension for the DUI conviction. R. p. 70, lines 10-14. Respondent did not surrender her license to the court on the date of her conviction. Therefore, pursuant to S.C. Code Ann. § 56-1-365, the suspension did not begin until the ticket was received and processed by the Petitioner.

Uniform traffic ticket number 31588EE was included in the Petitioner's audit reports completed by the Irmo Police Department for 2010, 2011 and 2013. R. pp. 101-105. This ticket was reported as being in court on the 2010 and 2011 audits (indicating the charge was still pending) and as signed off (indicating the ticket had been sent to Petitioner) in the 2013 report. *Id.* There was no audit report submitted by the Irmo Police Department in 2012.

Due to the 2013 audit report indicating ticket number 31588EE had been sent to Petitioner, but Petitioner having no record of receiving the same, Petitioner sent Irmo Police Department a listing of tickets, including ticket number 31588EE. R. p. 85, lines 6-10. This listing informed the Irmo Police Department of which tickets they indicated had been sent to Petitioner, but Petitioner had no record of receiving those same tickets. *Id.* This listing also requested Irmo Police Department send certified copies of each such ticket to Petitioner. *Id.* Based on this request, and nearly a year after the request was made, Irmo Police Department sent

¹ The weekend and the state holiday for Memorial were not included in this total.

ticket number 31588EE to Petitioner. R. p. 85, lines 12-13.

On June 9, 2014, Respondent filed a Summons and Complaint and Motion for Temporary Restraining Order in the Fifth Judicial Circuit Court alleging that the lengthy delay in the imposition of the suspension was a denial of fundamental fairness pursuant to *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009). R. pp. 19-35.

On March 23, 2015, the Court ordered that Petitioner was permanently enjoined from suspending Respondent's driving privileges relating to the November 22, 2008, DUI violation. R. pp. 5-16.

On April 21, 2015, Petitioner filed a Notice of Appeal to the Court of Appeals (R. pp. 157-164). On January 11, 2017, the Court of Appeals issued the published opinion at issue in this case (R. pp. 2-7). The DMV filed a Petition for Rehearing with the Court of Appeals and served a copy of the same to Respondent's counsel (R. pp. 112-118). Respondent did not file a return to the Petition for Rehearing. The Petition for Rehearing was summarily denied on March 10, 2017 (R. p. 1).

Petitioner DMV now seeks a writ of certiorari to review the Court of Appeals' finding that "under the facts of this particular case, the imposition of a suspension after a five-year delay is a denial of fundamental fairness in violation of due process...."

STANDARD OF REVIEW

"Actions for injunctive relief are equitable in nature." *Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 324, 673 S.E.2d 416, 416 (2009) (per curiam) (quoting *Shaw v. Coleman*, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct. App. 2007)). In an action in equity, an appellate court may find the facts in accordance with its own view of the preponderance of the evidence. *Id.* at 325, 673 S.E.2d at 416.

ARGUMENT

1. **Did the Court of Appeals err in finding that Respondent presented sufficient evidence of prejudice when the record reflects that Respondent merely speculated that she might suffer prejudice?**

2. **Did the Court of Appeals err in ruling that the suspension of Respondent's driver's license four working days after Petitioner received notification of Respondent's driving under the influence conviction:**
 - a. **violated the standards of fundamental fairness required by due process;**
 - b. **will cause the Respondent hardship; and**
 - c. **the Respondent has no other remedy at law?**

A. Hipp v. Chavis

In this case, the Court of Appeals and Circuit Court relied solely on the case *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009) to find that the standards of fundamental fairness had been violated. In the case *State v. Chavis*, 261 S.C. 408, 200 S.E.2d 390 (1973), however, the South Carolina Supreme Court held that Chavis' license suspension was effected without unreasonable delay and that fundamental fairness and due process were not violated by delays between an implied consent violation (December 1, 1971) and conviction for driving under the influence (March 7, 1972) and when his suspension began (February 8, 1973).² This case, like the *Chavis* case, contains no allegation that Petitioner engaged in any unreasonable delay once it received the notice of Respondent's conviction. In fact, the Petitioner, upon receiving the notice, processed Respondent's suspension within four (4) working days.

Chavis further held that in "the absence of injury or prejudice resulting" from DMV's delay a driver/licensee "has no standing to challenge on constitutional grounds the enforcement of the various statutory provisions by the [DMV]." *Chavis*, 200 S.E.2d at 391. Additionally,

² In the *Chavis* case, the South Carolina Highway Department was not notified of Chavis' implied consent violation or conviction until on or about February 1, 1973.

although the *Hipp* case does not specifically state a prejudice analysis must be completed in a case such as this, the *Hipp* record was replete with references to prejudice and there was no question that was the type of analysis taken on by the lower court.³ Respondent has failed to show or even allege any injury or prejudice resulting from the four (4) day delay between when Petitioner received the notice of conviction and when the notice of suspension was sent to Respondent. Rather, Respondent argues that she was injured and/or prejudiced by the delay in the reporting of the conviction from the Irmo Police Department and/or Irmo Municipal Court to the Petitioner. Petitioner asserts that the facts of this case are more closely aligned to those of the *Chavis* case, than the *Hipp* case. Specifically:

- 1) *Chavis* noted, like here, that from the evidence presented there was no reason to believe the delay was on the part of the SCDMV, but instead was on the part of the law enforcement agency and/or court.
- 2) Like *Chavis*, there is no contention that there was unreasonable delay on the part of the SCDMV once it received the notice of conviction, and no other suggestions of any improper conduct on the part of the Petitioner itself.
- 3) Further, like *Chavis*, Respondent has argued that if she had known about her suspension she would have served the suspension earlier and it would be over.

For the reasons stated above, Petitioner believes this case is more closely aligned to the *Chavis* case, than the *Hipp* case and believes review by this Court is necessary to clarify that matter.

³ Petitioner can provided a copy of the *Hipp* Circuit Court transcript should this Court want to review it for the prejudice references.

B. Unclean Hands

Respondent essentially sought equitable relief from the Circuit Court. In doing so, she needed to seek that relief with clean hands. See, for example, *Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (2004). When the Respondent pled guilty, she knew that her DUI conviction led to a driver's license suspension. (R. p. 64, lines 10-20; p. 57, lines 7-17; and p. 69, lines 10-15). Despite this knowledge, the Respondent did not take any reasonable action to rectify her situation. Rather, Respondent got a temporary alcohol license from December 8, 2008 through June 8, 2009, got a route restricted license on September 22, 2009 through November 11, 2009, and then got a regular license on November 12, 2009. (R. p. 86, lines 2-17).⁴ Respondent, although represented by competent counsel in her DUI case, never contacted that attorney to find out what the issue was with her DUI suspension. In its' decision the Court of Appeals placed significant emphasis on:

- 1) Respondent's testimony that she approached the SCDMV to find out how to obtain a restricted driver's license in lieu of a suspension and was informed that SCDMV had no record of Respondent's DUI conviction;⁵
- 2) Respondent's testimony that she contacted the Irmo Town Clerk to inquire about the status of her conviction; and
- 3) Respondent's insurance agent contacting the SCDMV to inquire about filing insurance forms related to her DUI conviction;⁶

⁴ So, the only times Respondent was without a license of any kind was November 23, 2008 through December 8, 2008 (the time between original arrest and implied consent violation and issuance of temporary alcohol license) and June 8, 2009 through September 22, 2009 (time between expiration of the temporary alcohol license and when Respondent obtained her route restricted license). *Id.*

⁵ R. p. 66, line 23-p. 59, line 2.

⁶ R. p. 78, line 21-p. 72, line 4.

Thus, there is no question that Respondent was aware that Petitioner had not been notified of this conviction. So, out of the parties in this case, Respondent was, at that time, the only party that knew her DUI conviction had not been reported to the DMV as required. Yet, Respondent never brought a copy of her conviction to the SCDMV and, apparently, never asked her defense attorney to find out what was going on with this DUI suspension.⁷

The *Hipp* case held “that imposition of a suspension after more than twelve years delay, where Respondent bears no fault for the delay, is manifestly a denial of fundamental fairness.” (Emphasis added). It is clear from the above facts, that Respondent was the only one that knew, at that time, her DUI conviction had not been reported to the DMV as required. Respondent took no action to correct this error, i.e. she bears fault in this delay by not alerting the DMV or the Irmo Police Department of the error. For these reasons, Respondent did not have clean hands and should have been denied the relief she requested. Additionally, this is why the facts in this case are not more closely aligned to those in the *Hipp* case, than in the *Chavis* case.

C. Laches

Although not stated explicitly, Respondent’s primary argument before the Circuit Court was that her suspension should be estopped by the doctrine of laches. “Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Mid-State Trust, II v. Wright*, 323 S.C. 303, 474 S.E.2d 421 (1996); *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525 (1988); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999). Laches is an equitable doctrine, which arises upon the failure to assert a known right. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 358 S.C. 209, 235, 595 S.E.2d 253, 267 (Ct.App.2004).

⁷ It appears this is one of the primary reasons people hire defense attorneys, to utilize the defense attorneys’ knowledge of the criminal justice system and contacts within the system to resolve issues and problems.

Under the doctrine of laches, if a party, knowing his rights does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. *Muir* at 296, 519 S.E.2d at 599. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. *Hallums* at 199, 371 S.E.2d 525, 371 S.E.2d at 528; *All Saints* at 235, 595 S.E.2d at 267.

“Importantly, delay alone in assertion of a right does not, in and of itself, constitute laches. Rather, so long as there is no knowledge of the wrong committed and no refusal to embrace an opportunity to ascertain facts, there can be no laches.” *Muir* at 296, 519 S.E.2d at 599 (citations omitted); see *Brown v. Butler* 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct.App.2001); compare *Wall v. Huguenin* 305 S.C. 100, 406 S.E.2d 347 (1991) (holding the failure to exercise an option to purchase land for thirteen years was not unreasonable and laches did not apply) with *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 434 S.E.2d 279 (1993) (finding contractor's six-month delay in taking action on its objection to a contract awarded by county to another contractor was barred by laches).

The inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits. *Muir* at 297, 519 S.E.2d at 599. The burden of proof is on the party asserting laches, in this case, Respondent. *Muir*, 336 S.C. at 297, 519 S.E.2d at 599. There is nothing in the record that indicates Petitioner knew of any right prior to May 20, 2014, when Petitioner received notice of Respondent’s conviction from the Irmo Police Department. For this reason, Respondent failed to meet the required elements of laches and, as a result, she should have been denied the relief she requested.

D. No Evidence of Specific Injuries and/or Prejudice

The Court of Appeals found that the record contained evidence of specific injuries and prejudice that might be suffered by Respondent if this suspension were served now, rather than five (5) years ago. Significantly, at the hearing before the Circuit Court, Respondent testified these injuries “could” or “might” occur. R. p. 71, line 7 – p. 64, line 13. Respondent presented no evidence to suggest these injuries “might” or “could” occur beyond her own speculation and belief. Further, Respondent testified that, as part of her job, she is required to travel on behalf of the company, and a suspension of her driver’s license “may” cause her to lose her current job. R. p. 22, lines 14-22. Again, Respondent provided no evidence to support her belief that she might lose her job. Moreover, Respondent did not state how often she is required to travel for her current company, how far or long this travel is, whether or not she is transporting or traveling with others during this travel, whether such travel occurs only within the State of South Carolina, etc.... Based solely on the concern that Respondent “might” lose her job, the Court of Appeals found that Respondent losing her job “would cause severe economic hardship because she has two mortgage payments and would not have a steady stream of income to make these payments.” The problem is that there is no evidence to support Respondent’s speculation that she might lose her job. Moreover, the Court of Appeals and Circuit Court did not address whether these same (or similar) job and financial issues existed at the time this conviction originally occurred. Certainly, if Respondent had two mortgages at the time of her conviction, then there is no additional or no different prejudice than had already existed in this case if the conviction had been timely reported to the SCDMV. For these reasons, there was no evidence of specific injuries and/or prejudice toward Respondent. Rather, there was only speculation that

Respondent might suffer injuries. Thus, Respondent's request for relief should have been denied due to a lack of evidence that she had suffered specific injuries and/or prejudice.

E. Out-of-State Guidance Regarding Late Conviction Reports

The issue of driving convictions being reported in a delayed manner to agencies/organizations like Petitioner is not limited to the state of South Carolina. Several states have tackled this very issue, allowing suspensions to stand even in the face of long delayed reports. For example:

- 1) thirteen (13) month delay between out-of-state and in-state suspensions for the same offense;⁸
- 2) fifteen (15) month delay between conviction and revocation;⁹
- 3) seventeen (17) month delay between refusal to take chemical test and scheduling of hearing;¹⁰
- 4) nineteen (19) month delay between accident and commencement of administrative proceedings;¹¹
- 5) twenty-one (21) month delay between an out-of-state conviction and license revocation;¹²
- 6) a two and a half (2 ½) year delay between an implied consent violation and the license suspension hearing;¹³
- 7) three (3) year delay between conviction and receipt of abstract of judgment;¹⁴
- 8) three (3) year delay between conviction and revocation;¹⁵

⁸ *Boyd v. Division of Motor Vehicles*, 307 N.J.Super. 356 (1998).

⁹ *Lundsten v. Motor Vehicles Div.*, 91 Or.App. 95 (1988).

¹⁰ *Minnick v. Melton*, 53 A.D.2d 1016 (NY 1976).

¹¹ *Dubiel v. Department of Motor Vehicles*, 1993 WL 265500 (Conn. 1993), unpublished opinion.

¹² *Miller v. Cline, Department of Motor Vehicles*, 193 W.Va. 210 (1995).

¹³ *Alvarez v. State, Dept. of Admin., Div. of Motor Vehicles*, 249 P.3d 286 (2011).

¹⁴ *In re Petition of Donley*, 217 W.Va. 449 (2005).

9) three (3) year delay between conviction and revocation;¹⁶

10) three (3) year delay between conviction and revocation;¹⁷ and

11) three and a half (3 ½) year delay between DMV receiving notice of third qualifying conviction for habitual traffic violation and sending notice of ten (10) year suspension to driver;¹⁸

Most of these cases also hold that an administrative delay alone is not enough to violate due process and fundamental fairness. Rather, the driver must show that s/he has suffered some prejudice to a substantial right by the delay. *See Chavis*, 261 at 411 (“If follows that... Chavis here has no standing to challenge on constitutional grounds... in the absence of injury or prejudice resulting to him from the delay”); *Alvarez*, 249 at 293 (“We have never held that administrative delay alone, without prejudice, violates due process.”); *Celata*, 2015 WL 808614 at 3 (“if a substantial right of the appellant’s was prejudiced by the agency’s action, this Court may set aside the agency’s decision”); *Lyver*, 91 at 246 (“Petitioner has suffered no prejudice.”); *State, Div. of Motor Vehicles v. Pepe*, 379 N.J.Super. 411, 416 (2005) (“Delay will not general affect the validity of an administrative determination, particularly where no prejudice is shown.”); *Mullen*, 144 A.D.2d 886, 888 (1988) (“petitioner’s operating privileges were not suspended during the period of delay and she has failed to identify any resulting prejudice”); *Dubiel*, 1993 WL 265500 at 3 (“The court further finds that the plaintiff was not prejudiced by the delay to the extent that he was denied due process.”); *In re Petition of Donley*, 217 W.Va. 449, 453 (2005) (“Although we have found that the delay was unreasonable in this case, Mr. Donley is still not entitled to relief because no prejudice flowed from the delay.”).

¹⁵ *Celata v. Registry of Motor Vehicles*, 1995 WL 808614 (Mass. 1995) (unpublished opinion).

¹⁶ *Lyver v. Motor Vehicles Div.*, 91 Or.App. 244 (1988).

¹⁷ *Hardison v. Orndoff*, 173 GA.App. 630 (1985)

¹⁸ *Thomas v. Indiana Bureau of Motor Vehicles*, 979 N.E.2d 169 (2012).

F. No Evidence of Prejudice to a Substantial Right

In this case, Respondent cannot show any prejudice to a substantial right. The United States Supreme Court has long held that states have the right to regulate the use of state roads. *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971). Furthermore, there is no fundamental “right to drive.” *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999). At the hearing, the Respondent argued that the Petitioner should disregard the mandatory driver’s license suspension for her DUI conviction because:

- 1) the Irmo Police Department had taken too long to submit the conviction to the Petitioner (essentially requesting a per se rule that a five year delay in imposing a driver’s license suspension is always too long and a prejudice analysis should never be required);
- 2) she “could” lose her job (speculation as discussed above);¹⁹
- 3) her employer would have to file a form SR22 with DMV (an erroneous assertion);²⁰
and
- 4) on the date of the hearing she owned two homes with mortgage payments.²¹

(R. p. 71, line 7-p. 64, line 13). The Respondent argued that her constitutional right to due process was denied by the nearly five (5) year delay in reporting from the Irmo Police

¹⁹ This belief was based on the erroneous belief that her employer would have to provide her with “SR22 insurance.” Please see following footnote as well.

²⁰ This belief is incorrect. The form SR22 is required to be filed with the DMV for three years after the suspension ends and is only carried on the driver’s personal insurance policy. Even if a driver that has a form SR22 requirement regularly drives a vehicle for their employer, the employer is not required to also file a form SR22. Additionally, an insurance premium increase is not impacted by the filing of Form SR-22 beyond the cost of actually filing the form (\$25). To the contrary, insurance companies set their premiums based on their assessment of a driver’s risk. Often these assessments are based on the person’s driving record. Therefore, the reporting of Respondent’s DUI conviction on her driving record is what will impact her insurance premiums. Thus, any implication that the filing of Form SR-22 will cause an increase in Respondent’s insurance premiums, beyond \$25, is incorrect.

²¹ Petitioner does not know if Respondent still owns two homes with mortgage payments. Given the fact this hearing was held over two years ago, it seems unlikely the Respondent still owns two homes with mortgage payments.

Department to Petitioner, essentially requesting a per se rule. Respondent failed to address the issue that this delay is not attributable to Petitioner. Rather, Petitioner acted promptly (within four (4) working days) once it received the notice of conviction. Respondent further fails to recognize that Petitioner cannot control the actions of, or delays by, the courts or law enforcement agencies of this state. See reporting requirements in S.C. Code §56-7-30(A). Significantly, the DUI laws, in particular S.C. Code 56-5-2990, do not contain any deadlines or statutes of limitation. Rather, S.C. Code §56-5-2990(F) states “*Except as provided for in Section 56-1-365(D) and (E)*, the driver’s license suspension periods under this section begin on the date the person is convicted...” (Emphasis added). S.C. Code §56-1-365(E) states “If the defendant fails to surrender his license, the suspension or revocation operates as otherwise provided by law.” S.C. Code 56-5-2990(A)(1) states “The Department of Motor Vehicles shall suspend the driver’s license of a person who is convicted for a violation of [DUI]...” The problem is, of course, Petitioner is not going to suspend a driver for a DUI conviction unless and until the driver is convicted of DUI and that conviction is reported to Petitioner. Petitioner can only act, and must act, based upon what is reported to Petitioner. S.C. Code §56-7-30(A) merely facilitates the supplying records to the Petitioner, but the Petitioner’s duty to act is not based upon when the court acts, unless the driver’s license is surrendered to the court. When the driver’s license is not surrendered to the court, Petitioner’s duty to act is based upon when Petitioner receives notice of the conviction. If the legislative intent were otherwise, the statute would have said the Petitioner can only carry out the suspension “provided the department receives notice of the violation within ten days of the conviction” or some other limiting language. The legislature did not use this type of language. The statutory language is not accidental, as it very precisely mandates when the Petitioner must act. Therefore, even though

the Irmo Police Department and/or Irmo Municipal Court failed to timely submit this notice to Petitioner, once Petitioner had the notice, Petitioner acted within four (4) working days. This cannot be considered an unreasonable or prejudicial delay. Additionally, all of Respondent's arguments on this point ignored the fact that Respondent was granted all of the due process protections afforded to all criminal defendants in South Carolina. The delay in reporting the conviction to the Petitioner in no way removes, eliminates, or minimizes the due process protections that were extended to Respondent through the criminal process. The due process protections that are already in place through the criminal process are recognized in state statute and because of those due process protections a DUI conviction is a mandatory driver's license suspension, i.e. there are no additional due process steps that are required to be followed by Petitioner, the Office of Motor Vehicle Hearings, the Administrative Law Court, or any other Court. In fact, S.C. Code §56-1-370 specifically states "The licensee may, within ten days after notice of suspension, cancellation, or revocation, except in cases where the suspension, cancellation, or revocation is made mandatory upon the Department of Motor Vehicles, request in writing an administrative hearing..." Emphasis added. Thus, Petitioner, upon receiving the DUI conviction had no choice but to apply the conviction to Respondent's driving record and begin her mandatory suspension as required by statute. See S.C. Code §§56-5-2970, 56-1-280, 56-1-330, 56-1-350, 56-1-360, 56-1-540, and 56-5-2990.

G. The Delay in Reporting this Conviction & the Retroactivity of Emma's Law have Made this Delay in Reporting a Benefit to Respondent

Respondent relied on the case *In Re Petition of Donley*, 217 W.VA 449, 618 S.E.2d 458 (2005) to argue that the West Virginia Supreme Court held that three year delay was unreasonable as a matter of law. Respondent fails to fully explain that the West Virginia Supreme Court's analysis did not end at this point. The West Virginia Supreme Court explained:

Although we have found that the delay was unreasonable in this case, Mr. Donley is still not entitled to relief because no prejudice flowed from the delay. The record clearly demonstrates that Mr. Donley pled guilty to second offense DUI. Consequently, the only issue at the administrative hearing was whether Mr. Donley was the person named in the abstract. The evidence established this single issue. Insofar as no other factual matters were litigated, Mr. Donley has failed to show any prejudice stemming from the delay in forwarding the abstract to the Commissioner. Moreover, because the circuit court vacated the Commissioner's effective date of revocation, the delay of nearly three years in forwarding the abstract of judgment is simply inconsequential.

In re Petition of Donley, 217 W. Va. 449, 452, 618 S.E.2d 458, 461 (2005). Emphasis added. It is clear, however, that the West Virginia Supreme Court has a two-step analysis: 1) Was the delay itself unreasonable; and, only if the answer to the first question is "yes," 2) Has prejudice stemmed from the delay. The West Virginia Supreme Court made it clear in the *Donley* case that if no prejudice stemmed from the delay, then the suspension should be upheld despite the length of the delay. In this case, the alleged prejudice Respondent will suffer if she is required to serve this statutorily mandated suspension are the same and/or less significant prejudice than those she would have suffered if the conviction had been timely reported to Petitioner. Specifically, Respondent could elect to clear this suspension by obtaining a provisional driver's license for six months. A provisional driver's license allows the driver to drive anywhere, including out-of-state, without any restrictions on movement or time of travel and the provisional driver's license does not require the driver to obtain any special equipment for their vehicle.

In addition to the provisional driver's license option, unlike when Respondent was convicted, a DUI conviction can now also be ended by obtaining an ignition interlock device (hereinafter, IID") for the suspended driver's vehicle and an ignition interlock restricted license. An IID is a device installed on a vehicle that requires a breath sample prior to starting the engine of the vehicle. If the breath sample tests with a breath alcohol concentration above 0.02%, then the vehicle will not start. The ignition interlock restriction is placed on the driver's license in a

similar fashion to an eyeglasses restriction and is simply used to notify law enforcement officers that the driver may only drive vehicles that that an IID installed. See S.C. Code §56-5-2941(T), a.k.a. the Emma's Law retroactivity clause. The IID license option only became available to Respondent via the effective date of Senate Bill 590.²² Thus, the delay in reporting to Petitioner has actually worked in Respondent's favor by granting her the IID license option that was not available to her at the time of her conviction.

Significantly, the provision license and IID license options completely negate Respondent's concerns about the only prejudice alleged by Respondent in this case, i.e. pursuing her livelihood and avoiding financial hardship. Essentially, Respondent speculated she might lose her current employment if this suspension is upheld and then, might not be able to pay all of her bills, in particular, her two (2) mortgage payments. Thus, all of the alleged prejudice relied on by Respondent is shielded by the provisional driver's license and IID license options. Specifically, while Respondent with an IID license would be required to have an IID installed in her personal vehicle, there is no requirement that she have an IID installed in her employer's vehicles. See S.C. Code §56-5-2941(L). Moreover, by having an IID installed on her vehicle Respondent would be able to travel to and from work and on work trips (including out-of-state work trips) with no restrictions on her movement. Therefore, as with the *Donley* case in West Virginia, there is no evidence of any prejudice to Respondent stemming from the delay in reporting this conviction to Petitioner, and, in fact, Respondent has gained a significant benefit from this delay.

²² Effective date for S.590 was June 1, 2015, which is after the date the Circuit Court ruled in this matter. As a result, the IID license clearance option was not available to the Respondent on the date of the Circuit Court's Order. Because of the explicitness of the retroactivity clause, however, it is clear this is an option available to Respondent, was available before the Court of Appeals, and is available to this Court in this case.

3. Did the Court of Appeals err in finding that the Petitioner's arguments regarding Respondent's other remedies at law were not preserved for review?

The Court of Appeals refused to consider whether Respondent had another remedy at law or whether Respondent's hardship was reduced, because she can now install an IID on her vehicle pursuant to the retroactivity clause in Emma's Law. S.C. Code 56-5-2941(T). The retroactivity clause of Emma's law was not passed until June 1, 2015, after the circuit court heard this case on January 20, 2015. Therefore, there was no way for SCDMV to raise this issue until after the circuit court had already heard this case. Thus, the first opportunity for SCDMV to raise this alternative remedy and the issue of Respondent's hardship being reduced due to this change in the law was in the Court of Appeals briefs. Significantly, SCDMV did raise the possibility of Respondent obtaining a provisional license before the circuit court. R. p. 75, lines 17-19. At the time of this hearing before the circuit court, a provisional license was the only option available to Respondent for this suspension, other than serving a "hard" suspension.²³ For these reasons, the Court of Appeals should not have found that other remedies at law were not preserved for appellate review.

CONCLUSION

For the reasons stated above, the Petitioner prays for an order granting the Petition for a Writ of Certiorari.

[SIGNATURE ON THE FOLLOWING PAGE]

²³ A "hard" suspension is a suspension in which the driver is absolutely suspended from all driving and has no special driving privileges.

Respectfully submitted,



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April 5, 2017
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 5464 (S.C. Ct. App. filed January 11, 2017)

Anna Dillard Wilson.....Respondent,

v.

South Carolina Department of Motor Vehicles.....Petitioner.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Appellant's Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on the 5th day of April, 2017, addressed to the attorney for the Respondent as follows:

John D. Elliott, Esquire
Post Office Box 607
Columbia, South Carolina 29202



Brandy A. Duncan, Assistant General Counsel
S.C. Department Motor Vehicles