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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

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

Case No. 2017-000545

Melissa Spalt.....Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety.....Petitioner,

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the December 1, 2015 Final Order and Order of Remand issued by the Administrative Law Court was an interlocutory appeal?
2. Did the Court of Appeals err in failing to rule on the issue of whether the hearing officer properly dismissed Respondent's challenge to her implied consent suspension?
3. Did the Court of Appeals err in failing to rule on the issue of whether the hearing officer correctly dismissed Respondent's challenge to her implied consent suspension without holding a hearing?

STATEMENT OF THE CASE

Petitioner maintains its' Statement of the Case as already set forth in the Petition for Writ of Certiorari, with the following additions:

Respondent asserts, "Petitioner did not respond to Respondent's request for a continuance." This statement is true. Respondent fails to state, however, that Petitioner was never copied on the August 7, 2015 request for continuance or the August 10, 2015 request for continuance (R. pp. 88-114).¹ It is impossible to Petitioner to respond to a request for continuance when Petitioner is not even aware the continuance has been requested.

ARGUMENT

1. Did the Court of Appeals err in finding that the December 1, 2015 Final Order and Order of Remand issued by the Administrative Law Court was an interlocutory appeal?

Petitioner maintains all arguments set forth in this section in the Petition for Writ of Certiorari, with the following additions:

Respondent asserts that Petitioner has relied on S.C. Code §14-3-330 for purposes of petitioning for a writ of certiorari from this Court. This is not true. The Petition for Writ of

¹ In particular, please see:

- 1) R. p. 88, at the top, showing request was e-mailed to Frances Inabinet (an OMVH employee), Phil Addington (an OMVH employee and the Hearing Officer in this case), andrdgrubbs@schp.org (the Trooper);
- 2) R. p. 91, at the top, showing request was e-mailed to Frances Inabinet (an OMVH employee), Teresa Langford (an OMVH employee at that time), and redgrubbs@schp.org (the Trooper);
- 3) R. p. 95, at the top, showing Trooper Grubbs' response to the OMVH regarding this continuance request was sent to Frances Inabinet (an OMVH employee) and Tori Ford (an employee of Respondent's counsel);
- 4) R. p 103, at the bottom, which indicates none of the opposing parties were served with the August 10, 2017 letter to Hearing Officer Addington;
- 5) R. p. 106, at the top, showing the same information as #1, above;
- 6) R. p. 109, at the top, showing the same information as #2, above; and
- 7) R. p. 113, at the bottom, which indicates none of the opposing parties were served with the August 7, 2017 letter to Hearing Officer Addington.

Certiorari clearly refers to S.C. Code §14-8-200. Thus, Respondent's arguments regarding S.C. Code §14-3-330 are meritless and should be disregarded by this Court in their entirety.

Moreover, even if Petitioner had asserted that the South Carolina Supreme Court (hereinafter, "Supreme Court" or "Court") has appellate jurisdiction in this case under S.C. Code §14-3-330, such reliance would not be misplaced as set forth by Respondent. This is because Petitioner has filed a Petition for Writ of Certiorari with the Supreme Court. This case is no longer in the South Carolina Court of Appeals (hereinafter, "Court of Appeals"). Thus, this Court could, if it desired, issued a Writ of Certiorari under S.C. Code §14-3-310 for any of the issues in which this Court has appellate jurisdiction as set forth in S.C. Code §14-3-330.

Next, Respondent asserts that the case *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 is not applicable because "it deals with the exclusive jurisdiction of the South Carolina Supreme Court pursuant to S.C. Code §14-3-330 in an interlocutory appeal of a motion to bifurcate a trial." First, this Court determined the *Morrow* appeal was not interlocutory, so it is inappropriate to describe the *Morrow* appeal as "interlocutory" in light of this Court's ruling. Second, because Petitioner is now requesting a Writ of Certiorari be issued in this case, the *Morrow* case and its' holdings, including those that deal with the appellate jurisdiction of this Court, are particularly relevant to this Court's determination of whether a Writ of Certiorari should be granted or not.

Similarly, Respondent asserts that Petitioner's reliance on the case *Daughy v. Northwestern R. Co. of South Carolina*, 92 S.C. 361, 75 S.E. 553 (1912) is misplaced because it is "also a case that deals specifically with the jurisdiction of the Supreme Court of South Carolina not the Court of Appeals." Again, because Petitioner is now requesting a Writ of

Certiorari be issued in this case, the *Daughty* case is relevant to this Court's determination of whether a Writ of Certiorari should be granted or not.

Respondent further argues that Petitioner should not rely on the case *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2nd 372 (1964) because the *Knight* case was "tried to conclusion and was appealed to the Supreme Court of South Carolina." It is true that the hearing in this case never went on the record. This is because Trooper J.C. McWhorter appeared for this hearing, but no one appeared for Respondent. As set forth in the cases *John McGeary v. S.C. Dept. of Motor Vehicles and S.C. Dept. of Public Safety*, 2011 WL 7119316 (2011 SCALC), *S.C. Dept. of Motor Vehicles v. Willie Pitts*, 06-ALJ-21-0592, and *S.C. Dept. of Motor Vehicles v. Alana Marie Erwin*, 06-ALJ-21-0591, the driver's failure to appear at the Office of Motor Vehicle Hearings (hereinafter, "OMVH") administrative hearing without the proper consent of the OMVH hearing officer, gives the OMVH hearing officer the authority, under Rule 13, OMVH Rules, to dismiss the case adverse to the driver. Further, in the *McGeary* case, the Administrative Law Court (hereinafter, "ALC") noted that "unlike its treatment of the DMV, the General Assembly has not carved out an exception to OMVH Rule 13 for motorists." The ALC went on to state "nothing in the rules suggest that OMVH Rule 15(B) was intended to limit a hearing officer's authority under OMVH Rule 13 to dismiss a case adverse to a defaulting party" and concluded the *McGeary* ruling by stating:

[I]n light of the fact that the State is not required to present a prima facie case for suspension in situations where the motorist does not request an administrative hearing, the court sees no reason why the State should be required to do so in cases where the motorist does not appear at the hearing. In both situations, it is clear that the motorist is not going to present a defense.

This case is no different. Thus, there was no need to go on the record and have Trooper J.C. McWhorter present testimony when Respondent did not appear for the hearing. For these

reasons, Respondent's argument that the *Knight* case is distinguishable from this case is inaccurate.

Respondent asserts that Petitioner would not be "precluded from appealing a subsequent, and truly final, order." If this case is remanded to the OMVH, as ordered by the ALC, the questions at issue in this appeal will then be moot. This is because the continuance issue will be irrelevant at that point due to the new hearing held by the OMVH. In other words, all of the issues in this appeal will be dead, eclipsed by whatever new issues come out of the new hearing. This is the heart of why this appeal is not interlocutory. Respondent failed to appear for the hearing that was scheduled. The State appeared and won by default. The OMVH's Order of Dismissal was a final order. Then the ALC ordered the OMVH to go back and hold a new hearing. That ALC Order was a final order of that ALC appeal. Thus, the appeal to the Court of Appeals was proper and was not interlocutory. Moreover, to require a new hearing be held by the OMVH now, is, essentially, a statement to the OMVH hearing officers that they have no authority over their own dockets and that their rulings on continuances requests don't matter, don't hold any weight.

Finally, Respondent's statement that

Petitioner has not filed this appeal in the South Carolina Supreme Court, therefore, the statue [sic] and cases cited to support her [sic] position that this matter is immediately appealable to the Supreme Court are not relevant since this matter was filed in the South Carolina Court of Appeals.

is inaccurate. Respondent filed the first appeal in this case with the ALC. Next, Petitioner filed an appeal with the Court of Appeals. Now, Petitioner has filed a Petition for Writ of Certiorari with this Court. Thus, it is not true that Petitioner has "not filed this appeal in the South Carolina Supreme Court." As evidenced by the Petition for Writ of Certiorari, Petitioner has taken the appropriate steps to request a review of this case from the Supreme Court. Moreover, the

Petition for Writ of Certiorari was timely filed in this case. On December 1, 2015, the ALC issued its' Final Order and Order of Remand (R. pp. 7-12). On December 10, 2015, DMV filed a Notice of Appeal to the Court of Appeals (R. pp. 266-274). On November 9, 2016, the Court of Appeals issued the unpublished opinion at issue in this case (R. pp. 3-4). The DMV filed a Petition for Rehearing with the Court of Appeals and hand delivered a copy of the same to Respondent's counsel (R. pp. 142-147). Respondent did not file a return to the Petition for Rehearing. The Petition for Rehearing was summarily denied on February 1, 2017 (R. pp. 1-2) and the Petition for Writ of Certiorari was filed with this Court on Friday, March 3, 2017.² Rule 242(c), SCACR states that a petition for writ of certiorari must be filed must be filed with the Supreme Court Clerk of Court within thirty days after the petition for rehearing is decided by the Court of Appeals. Thus, there is no question that all of Petitioner's filings in this case, including the Petition for Writ of Certiorari, have been timely filed and served.

2. Did the Court of Appeals err in failing to rule on the issue of whether the hearing officer properly dismissed Respondent's challenge to her implied consent suspension?

Petitioner maintains all arguments set forth in this section in the Petition for Writ of Certiorari, with the following additions:

Respondent asserts that August 7, 2015 is when it became apparent to Respondent's counsel that he had a conflicting court appearance. Respondent has failed through all the pleadings filed in this case so far (OMVH motions for continuance, ALC appeal, Court of Appeals appeal) to put forth any evidence to support this argument. In fact, the evidence in the record indicates that Respondent's counsel was aware of this conflicting court appearance on

² The month of February 2017 contained only twenty-eight days. Pursuant to telephonic instructions from the South Carolina Supreme Court staff, an Amended Petition for Writ of Certiorari was filed with this Court on Monday, March 6, 2017.

July 16, 2015 (R. pp. 105 and 114, stamp in bottom right corner, "Court Checklist, Calendar: [Initialed], Client Contact: 7/17 – left msg @ 9:37, Misc: Received 7/16/15"). None of Respondent's requests for continuance ever stated:

- 1) That Respondent's counsel just discovered this conflicting court appearance;
- 2) That Respondent's counsel was under the impression the conflicting court appearance might be continued;
- 3) That Respondent's counsel was under the impression the conflicting court appearance might be resolved some other way that might do away with the conflict; or
- 4) Any other similar statement.

Rather, Respondent asserts that Respondent's counsel received "confirmation that the jury trial which was scheduled in Richland County Central Court would in fact go forward on August 11, 2015, [and that] is when the request for a continuance was sent." Respondent has consistently failed, however, to put forth any evidence supporting this statement. Even after the August 7, 2015 continuance request was denied, Respondent could have provided a copy of a letter or e-mail from the prosecutor or court confirming that this trial would go forward, presumably dated August 7, 2015 since Respondent asserts that is when Respondent's counsel first became aware that the conflicting court appearance would remain on the docket. Alternatively, if Respondent's counsel received confirmation via a telephone call or in-person conversation that the conflicting court appearance would go forward as original scheduled, Respondent's counsel could have provided the OMVH with an affidavit signed by him explaining this communication. Respondent has never provided any such evidence. Nor has Respondent ever asserted, prior to her Brief of Respondent filed with the Court of Appeals, that Respondent's counsel did not receive "confirmation that the jury trial [for the conflicting court appearance] would in fact go

forward on August 11, 2015.” See R. pp. 35-40, 14-19, 88-94, 103-112, and 163-181. In fact, in Respondent’s Reply Brief filed with the ALC, Respondent stated this conflicting court appearance only became apparent on August 7, 2017 because the “notice was calendared in my office and became apparent on or just before August 7, 2015” (R. p. 15, section B). Further, Respondent’s Reply Brief filed with the ALC also stated Respondent’s counsel received notice of the conflicting court appearance by mail “only a day or two before it was put on my calendar which than [sic] showed conflict” (R. p. 16, section B). As noted previously, according to notes made on the Summary Court Summons by Respondent’s counsel’s staff, Respondent’s counsel received this summons on July 16, 2015, nearly a month before the hearing scheduled before the OMVH in this case (R. p. 105 and 114, stamp in bottom right corner). So, there is evidence in the record demonstrating that Respondent’s counsel was aware of this conflicting court appearance on July 16, 2015 and simply did not request a continuance until August 7, 2015 at 12:30 p.m.

Next, Respondent asserts that Rule 601, SCACR places hearings before the OMVH at a lower priority level than magistrate and municipal courts. This is not accurate. Rule 601, SCACR states, in part:

(a) Order of Priority as Between Tribunals. In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of his obligations to those tribunals:

- (1) The Supreme Court.
- (2) The Court of Appeals.
- (3) The Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Committee on Character and Fitness.
- (4) The Circuit Court - General Sessions.
- (5) The Family Court - merits hearings involving child abuse, child neglect and termination of parental rights upon approval of the Chief Judge for Administrative Purposes for the Family Court and notice to the

Chief Judge for Administrative Purposes for the Circuit Court five days prior to the term of the Circuit Court.

(6) The Circuit Court - Common Pleas, Jury Term.

(7) The Family Court – all cases not referenced in (5) above.

(8) The Circuit Court - Common Pleas, Non-Jury Term.

(9) *The Administrative Law Court*.

(10) Alternative Dispute Resolution Conferences conducted pursuant to the SC Court-Annexed ADR Rules.

(11) The Probate Court.

(12) *Magistrates and Municipal Courts*.

(13) Other Administrative Bodies or Officials.

S.C. Code §1-23-660(A), states, in part, “There is created within the Administrative Law Court the Office of Motor Vehicle Hearings...” (emphasis added). Therefore, it is clear the OMVH is part of the ALC, which has a greater priority under Rule 601, SCACR than magistrate’s and municipal courts.

Respondent next argues that her request for continuance was sent to all the parties who were notified of the original hearing date. As already discussed above, specifically in footnote 1, this statement is not true. In addition to the citations to the appendix that are already contained in footnote 1, please see R. pp. 131 and 116, which clearly shows that Petitioner was copied via e-mail at the HearingsProcessingUnit@scdmv.net e-mail address on all Notices of Hearings issued by the OMVH.

Finally, Respondent asserts that this Court cannot consider several cases cited by Respondent in the Petition for Writ of Certiorari because they are “not in compliance with Rule 268(d)(2), SCACR.” The cases objected to by Respondent are:³

1) *Brockman v. South Carolina Dept. of Motor Vehicles and Mauldin Police Dept.*, 2014

WL 2895374, 13-ALJ-21-0049-AP (SCALC 2014)

³ Respondent also objected to reliance on the case *Joseph W. Hiller v. S.C. Dept. of Labor, Licensing, and Regulation*, 1999 WL 51899 (1999), Petitioner, however, did not cite to the *Hiller* case in the Petition for Writ of Certiorari.

2) *Chadwick Dale Martin v. S.C. Dept. of Motor Vehicles*, 2007 WL 4184375 (2007)

3) *S.C. Dept. of Revenue v. Edwin Alewine*, 1997 WL 816208 (1997 SCALC)

It appears that Respondent asserts these cases cannot be cited in the Petition for Writ of Certiorari because they are decisions of the ALC and, therefore, in the view of Respondent, have “no precedential value” under Rule 268(d)(2), SCACR. While Petitioner agrees that any decisions issued by the ALC are not binding authority on this Court, it appears that Respondent’s argument is that this Court cannot even consider those decisions as persuasive authority. Petitioner disagrees with any argument that limits this Court’s authority to consider any case law as a persuasive authority. Simply put, good legal reasoning can appear in any type of case or court and should be allowed to be considered by this Court. Obviously, whether this Court elects to follow a persuasive authority is always within the discretion and good judgment of this Court.

Further undermining Respondent’s argument is the fact that Rule 268, SCACR deals with the form in which citation of South Carolina authority should be given. Significantly, section (d) of Rule 268, SCACR is titled “Appellate Court Decisions” and goes on to discuss:

- 1) how published opinions or orders of the Supreme Court and Court of Appeals should be cited; and
- 2) That memorandum opinions and unpublished orders have no precedential value.

Based on the title of, formatting of, and citation examples given in Section (d) of Rule 268, SCACR, it appears this section, including subpart (2), only addresses opinions and orders of the Supreme Court and Court of Appeals. There is no indication that Rule 268(d), SCACR applies to any of the courts lower than the Court of Appeals. This would make sense given the fact that any opinions issued by a court lower than the Court of Appeals could only be presented as persuasive authority to the Court of Appeals and Supreme Court. Additionally, there does not

appear to be any definition of what constitutes an unpublished order or memorandum opinion. It appears, however, based on the contents of the other rules contained with the South Carolina Appellate Court Rules, that only orders issued by the Court of Appeals and Supreme Court are classified as published opinions, unpublished opinions, and memorandum opinions (see in particular Rule 220, SCACR). Thus, again, there does not appear to any prohibition against citing ALC decisions/opinions as persuasive authority, particularly in a case that originated in the OMVH and had its' first level of appeal through the ALC. Further supporting this interpretation of Rule 268, SCACR, is former Chief Justice Toal's description of Rule 268, SCACR's predecessor rule, Rule 239, SCACR. Former Chief Justice Toal described Rule 239, SCACR as the "citation forms for most South Carolina authorities." Jean Hoefer. Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina, Second Edition (2002), p. 231. For these reasons there does not appear to be any prohibition against this Court considering decisions and reasoning from lower courts, including the ALC, as persuasive authority.

3. Did the Court of Appeals err in failing to rule on the issue of whether the hearing officer correctly dismissed Respondent's challenge to her implied consent suspension without holding a hearing?

Petitioner maintains all arguments set forth in this section in the Petition for Writ of Certiorari, with the following additions:

Respondent asserts that this Court cannot consider several cases cited by Respondent in the Petition for Writ of Certiorari because they are "not in compliance with Rule 268(d)(2), SCACR. The cases objected to by Respondent are:

- 1) *John McGeary v. S.C. Dept. of Motor Vehicles and S.C. Dept. of Public Safety*, 2011 WL 7119316 (2011 SCALC)
- 2) *S.C. Dept. of Motor Vehicles v. Willie Pitts*, 06-ALJ-21-0592

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

Petitioner replies to these arguments with the same exact reasoning set forth in section 2, above (from page 11 just after the listing of cases and through page 13 to just before this section 3).

Further, Respondent asserts that the *Pitts* and *Erwin* decisions are “unavailable” to Respondent. This statement is not true. All ALC decisions may be accessed at <http://www.scalc.net/search.aspx>, on Westlaw, or even via www.google.com⁴ by performing a general search using the case numbers provided in the Petition for Writ of Certiorari.⁵ For these reasons, Respondent’s statement that the *Pitts* and *Erwin* decisions are “unavailable” to Respondent is simply not true.

CONCLUSION

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

[SIGNATURE ON THE FOLLOWING PAGE]

⁴ The undersigned’s google search on April 27, 2017 provided the following link as the first item to appear after a search using only the case number:

1) For the *Pitts* case, using only 06-ALJ-21-0592 as the item to be searched for:
<http://www.scalc.net/decisions.aspx?q=4&id=10303>

⁵ To assist the Court and Respondent, please be advised that these cases may also be accessed on Westlaw using the following citations:

1) *S.C. Dept. of Motor Vehicles v. Alana Marie Erwin*, 2007 WL 2452663
2) *S.C. Dept. of Motor Vehicles v. Willie Pitts*, 2007 WL 2377440

Respectfully submitted,



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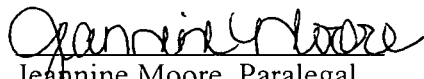
South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety.....Petitioner,

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

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Appellant's Reply to Return to Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on the 1st day of May, 2017, addressed to the attorney for the Respondent as follows:

Michael Laubshire, Esquire
455 Saint Andrews Road, Suite E-1
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