THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

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Case No. 2017-001575

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

v.

Christopher McMahan . . . . . Respondent.

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# FINAL BRIEF OF THE APPELLANT

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## STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV" or "DMV"), who seeks review of the June 26, 2017 *Order Affirming as Modified* from the Administrative Law Court (hereinafter, "ALC"). The Appellant, SCDMV seeks to have the ALC's *Order Affirming as Modified* reversed, in part. Specifically, SCDMV appeals the contents of the *Order Affirming as Modified* from the ALC, which explained the reasoning for and held that a court delay of seven years to adjudicate Respondent's challenge to his habitual offender suspension was "'manifestly a denial of fundamental fairness'" in violation of *Hipp v. SCDMV*, 381 S.C. 323, 673 S.E.2d 416 (2009).[1]

### A. Respondent was Convicted of Three Major Offenses, as Defined by the Habitual Offender Statutes, within a Three Year Period of Time

The Respondent was arrested on February 25, 2007 for Driving Under Suspension (hereinafter, "DUS") (ticket # Z334691) (R. p. 165-166). He was convicted of this offense on April 3, 2007. *Id.* Subsequently, on March 18, 2007, the Respondent was charged with another DUS (ticket # 64031DW), and was convicted of this violation on April 9, 2007 (R. p. 168-169). Later, the Respondent was arrested on October 26, 2008 for DUS (ticket # 10065EO) (R. p. 182-183). He was convicted of this offense on April 1, 2009. *Id.* Thus, the Respondent was charged and convicted of three separate and distinct major traffic violations, as defined by S.C. Code §56-1-1020, within a three year

[1] R. p. 9.

period of time. As a result of these convictions, on April 17, 2009 SCDMV declared Respondent to be a habitual offender and notified him that in accordance with S.C. Code §56-1-1090(A) his driver's license would be suspended for five years (R. p. 185).

**B. Delay at the Office of Motor Vehicle Hearings**

Upon receiving notice that he had been declared a habitual offender, Respondent timely requested a contested case hearing before the Office of Motor Vehicle Hearings (hereinafter, "OMVH") (R. p. 214-215). The OMVH scheduled the contested case hearing to take place on July 9, 2009 (R. p. 213). Due to unexpected circumstances, the OMVH hearing officer, Tracy G. Holland, that was original appointed to hear this case on July 9, 2009 was unavailable and a different OMVH hearing officer, Robert F. Harley, Jr., held all the hearings in Greenwood that day (R. p. 132, under case history). Hearing officer Harley did not issue a final written order as a result of the July 9, 2009 hearing. Additionally, there was an audio equipment failure on that date. *Id.* Further, the OMVH did not officially reassign hearing officer Harley to this case on the case management system "until sometime much later [and this hearing] did not get rescheduled once the problem with the [audio equipment failure] was determined." *Id.*

In January 2016, the undersigned, an attorney for SCDMV, discovered that SCDMV had not received a final order in this case from the OMVH. The undersigned contacted to the OMVH to determine the current status of the case (R. p. 216). The undersigned was informed that it did not appear a final order had ever been issued in this case. *Id.* Thus, the undersigned sent OMVH hearing officer Holland a letter inquiring about the status of the final order. *Id.* Shortly thereafter, the OMVH issued an *Order of Continuance and Notice of New Hearing* for this case (R. p. 210-211). Following

issuance of that *Order*, the parties had e-mailed discussions with OMVH staff regarding what had occurred during the first hearing and the lack of a recording from the first hearing (R. p. 217-219).

After one additional continuance, which was requested by Respondent, this case was heard on May 19, 2016 (R. p. 204-209). The OMVH issued its' *Final Order and Decision* in this case on June 21, 2016.

**C. Path from the OMVH to the Court of Appeals**

Despite Respondent's three convictions for separate and distinct major traffic violations, as defined by S.C. Code §56-1-1020, within a three year period of time, the OMVH *sua sponte* raised and held that because the statute listed on ticket 64031DW was "56-1-520," rather than "56-1-460" it was "not clear from the evidence what the Respondent was supposed to be convicted of." R. p. 135. For this reason alone the OMVH hearing officer concluded that the Respondent's driver's record as maintained by SCDMV did not meet the criteria of a habitual offender as defined by S.C. Code § 56-1-1020. R. p. 131-137. Appellant timely filed a motion for reconsideration with the OMVH. R. p. 141-149. This motion for reconsideration was granted in part (admitting R. p. 160-190 into evidence) and denied in part. Appellant timely filed an appeal with the ALC. R. p. 120-130.

The ALC held the OMVH Hearing Officer "committed error by ruling *sua sponte* on an issue that Respondent never raised." R. p. 6. Despite this ruling, however, the ALC then affirmed the OMVH's decision solely based upon a finding that the OMVH's delay of seven years to adjudicate Respondent's challenge to his habitual offender

suspension was "'manifestly a denial of fundamental fairness'" in violation of *Hipp*.[2] Since the issue of this delay was fully briefed to and ruled on by the OMVH and the ALC, Appellant did not file a motion to reconsider with the ALC and, instead, timely filed this appeal.

## 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(A)(6).

> (A) 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....
>
> (6) The court shall not substitute its judgment for that 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(g)(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

[2] R. p. 9.

> 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

1) A PERSON CANNOT ESCAPE A STATUTORILY MANDATED SUSPENSION BECAUSE THE OFFICE OF MOTOR VEHICLE HEARINGS TOOK "TOO LONG" TO REVIEW AN ADMINISTRATIVE ACTION.

Prior to the ALC's order in this case, no South Carolina court has ever held that a court delay in adjudicating an appeal, absent a statutory, regulatory, or rule deadline,

automatically means one party wins. That, however, is the substance of the ALC's order in this case, i.e. because the OMVH took so long to adjudicate Respondent's challenge to his habitual offender suspension, the Respondent's habitual offender suspension should be rescinded. Contrary to the ALC's holding in this case, there are numerous cases that have come to the exact opposite conclusion. Interestingly, many of those cases were also issued by Judge John D. McLeod of the ALC.

The case *Starnes v. South Carolina Department of Public Safety*, 342 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000) was the first case that discussed what occurs if an administrative hearing regarding a driver's license suspension is not timely held or a written order timely issued. Specifically:

> Starnes involved the interpretation of S.C. Code Ann. § 56-5-2951(H) (Supp. 1998), which was the precursor to S.C. Code Ann. § 56-5-2951(F) (Supp. 2004). In Starnes, the Department of Public Safety suspended a motorist's license pursuant to S.C. Code Ann. §56-5-2951(A) (Supp. 1998) based on the results of a breath test that the motorist submitted to after being arrested for driving under the influence. The Department of Public Safety's hearing officer sustained the suspension, but the circuit court reversed. The Department of Public Safety subsequently appealed to the Court of Appeals, which affirmed the circuit court's decision. Importantly, the Court of Appeals based its decision on two different grounds.
>
> First, the Court of Appeals held that the Department of Public Safety lacked subject matter jurisdiction to sustain the suspension since it failed to convene the administrative hearing within the time period set forth in Section 56-5-2951(H). Starnes, 342 S.C. at 222, 535 S.E.2d at 668. At the time, Section 56-5-2951(H) stated in pertinent part: "An administrative hearing must be held within ten days after the request for the hearing is received by the department. However, upon a showing of exigent circumstances by either party, a continuance may be granted not to exceed thirty days." Id. at 220, 535 S.E.2d at 667. Because the parties agreed that the motorist's hearing did not occur within the statutory ten-day period and that neither party requested a continuance, the Court of Appeals affirmed the circuit court's decision on this ground. Starnes, 342 S.C. at 220-22, 535 S.E.2d at 666-68.

> Second, the Court of Appeals held that the Department of Public Safety also lacked subject matter jurisdiction to sustain the suspension since it failed to issue a written order to the motorist within thirty days after the administrative hearing was concluded, as was required by Section 56-5-2951(H). Id. at 222, 535 S.E.2d at 668. At the time, Section 56 5-2951(H) stated in pertinent part: "A written order *must* be issued to the person upholding the suspension of the person's license, permit, or nonresident's operating privilege, or denying the issuance of a license or permit *within thirty days after the conclusion of the administrative hearing.*" Id. (emphasis added). Because the Department of Public Safety admitted that it did not meet this requirement, the Court of Appeals affirmed the circuit court's decision on this ground as well. Id.

*South Carolina Department of Motor Vehicles v. Opsahl*, 2007 WL 1365852, p. 4 (SCALC, 2007) (footnotes omitted). At the time *Starnes* took place, administrative hearings regarding driver's license suspensions were held within a sub-unit of the South Carolina Department of Public Safety. The South Carolina Department of Public Safety, at that time, encompassed the SCDMV.[3] Moreover, Starnes involved a statute that was very specific about how quickly the administrative hearings were to be held and how quickly the final decisions from those hearings were to be issued. Unlike the *Starnes* case, however, nothing in any current statute or rule mandates how quickly the OMVH must hold hearings or how quickly after the hearing is held a decision must be issued. For this reason alone, SCDMV asserts the holdings of the *Starnes* case do not apply to this case.

After the *Starnes* decision was issued, the South Carolina Supreme Court issued its' decision in the case *Johnston v. S.C. Dept' of Labor, Licensing, and Regulation, S.C. Real Estate Appraisers Bd.*, 365 S.C. 293, 617 S.E.2d 363 (2005). In *Johnston*, the South Carolina Supreme Court held that although S.C. Code §40-60-150(C)(3) required the

[3] The South Carolina Department of Public Safety and SCDMV split into two separate state agencies at a later date, but prior to the relevant dates in this case.

Real Estate Appraisers Board to serve written notice of its decision on the appraiser within thirty days of issuing its final Order, the Board's failure to do so did not affect the Board's jurisdiction and the Board's decision was still valid, but the decision was "ineffective" until it was served upon the appraiser. In comparing the *Starnes* and *Johnston* cases, Judge McLeod found many similarities in the *Johnston* case to other OMVH cases that did not have their written decisions issued in a timely manner and applied that decision to those cases. See *South Carolina Department of Motor Vehicles v. Opsahl*, 2007 WL 1365852 (SCALC, 2007), *South Carolina Department of Motor Vehicles v. Vera*, 2007 WL 1365849 (SCALC, 2007), *South Carolina Department of Motor Vehicles v. Boyle*, 2006 WL 2827728 (SCALC, 2006), and *South Carolina Department of Motor Vehicles v. Cassels*, 2007 WL 1219335 (SCALC, 2007). Specifically, Judge McLeod found:

1) The relevant statute did <u>not</u> include any language regarding the consequences for the OMVH's failure to issue a final order within the statutory time limit; [4]
2) The relevant statute <u>did</u> include language regarding untimely hearings;[5]
3) The "fact that the legislature did not include similar language with respect to untimely orders is indicative of the Legislature's intent of the [OMVH] to retain its power to act even in situations where the [OMVH] has failed to timely issue a final order;"[6]
4) That the split of the OMVH from the SCDMV, placing the OMVH within the ALC, further warranted the application of *Johnston*, rather than *Starnes* to cases

[4] *Opsahl*, 2007 WL 1365852 at 6; *Vera*, 2007 WL 1365849 at 5-6; and *Boyle*, 2006 WL 2827728 at 5-6. Emphasis added.
[5] *Id.* Emphasis added.
[6] *Id.*

where there is a delay in issuing the final order.[7] Judge McLeod reasoned that following *Starnes* in cases where the OMVH delays in issuing the final order would mean depriving the SCDMV of its power to implement suspensions "not because *the Department* failed to comply with a statutory provision, but because *an unaffiliated agency* failed to comply with a statutory provision;"[8] and

5) "[G]enerally speaking, a delay in the issuance of a final order of the [OMVH] has little prejudicial effect on motorists" because in almost all cases the suspension is stayed pending the outcome of the OMVH hearing.[9]

The same logic used by Judge McLeod in the *Opsahl*, *Vera*, and *Boyle*, cases also applies to this case. No statute or rule lists any consequence for the OMVH failing to issue a final order within a certain amount of time after a hearing has been held. In fact, even the statute at issue in the *Starnes*, *Opsahl*, *Vera*, *Boyle*, and *Cassels* cases has been amended to no longer include a deadline for when the final order has to be issued or when the hearing has to take place.[10] Because the legislature has previously included statutory language with consequences for not timely holding an OMVH hearing, the fact that the legislature no longer includes such language in the relevant statutes with regard to when a hearing is held and when a final order is issued "is indicative of the Legislature's intent of the [OMVH] to retain its power to act even in situations where the [OMVH] has failed to timely issue a final order." See 2008 Act 201, §10; *Opsahl*, 2007 WL 1365852 at 6; *Vera*, 2007 WL 1365849 at 5-6; and *Boyle*, 2006 WL 28277728 at 5-6. Further, because the OMVH is not a part of the SCDMV, if this Court were to follow the

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[7] *Id.*
[8] *Id.* Emphasis in the original.
[9] *Id.*
[10] See 2008 Act 201, §10.

holding as set forth in the *Order Affirming as Modified* in this case, in cases where the OMVH delays in issuing the final order, SCDMV would be deprived of its power to implement suspensions, not because SCDMV did anything erroneous, but because an unaffiliated agency, the OMVH, failed to timely issue a final order.

Another case that addressed an issue similar to the one raised in this case is *Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947). Howell was a probate case that was appealed. As part of the appeal, the probate court was statutorily required to "make a return to the appellate court of the testimony, proceedings, and judgment and file the same in the appellate court" within thirty days after the appeal being filed with the probate court. *Howell*, 211 S.C. at 467. In *Howell*, however, the probate court failed to timely file the return. The *Howell* decision discussed that there was no provision for penalty upon the appellant for the probate judge failing to perform his duty to timely file the return as required by statute and that it was "undisputed in this instance that the probate court's delay was due to mere oversight and the return was filed as soon as the situation was brought to the judge's attention." *Id.* Similarly, none of the parties in this case committed any error with regard to requesting the contested case hearing. Thus, there is no basis for punishing one party over the other due to the OMVH's unintentional error in failing to quickly issue a final order in this case. Additionally, like the *Howell* case, there is no evidence that the OMVH intentionally delayed in issuing a final order. Rather, the OMVH's explanation makes clear that this was an unintentional oversight brought on by unusual circumstances (R. p. 124, under case history).

The ALC attempts to support its' extreme departure from past case law regarding court delays with several cases that are factually very different than this case. The ALC

relies on the following cases to support its' ruling: *State v. Chavis*, 261 S.C. 408, 200 S.E.2d 390 (1973), *Hipp v. SCDMV*, 381 S.C. 323, 673 S.E.2d 416 (2009), *Wilson v. SCDMV*, 419 S.C. 203, 796 S.E.2d 541 (Ct. App. 2017), and *Davis v. SCDMV*, 2017 WL 1717217 (Ct. App. 2017).[11] Each of these cases involved a delay in a court transmitting notice of a criminal conviction to SCDMV so the convictions could be listed on the driver's records of the offenders and the offenders would be subjected to their statutorily required suspensions. None of these cases involved a delay in the OMVH issuing a final order with regard to a suspension a driver had already been notified by SCDMV would take place, as occurred in this case. For this reason alone, these cases do not support the ALC's holding. In fact, OMVH hearing officer Holland summed up the difference between this case and the *Hipp* case as follows:

> I conclude that this matter is distinguishable because this was a delay of the hearing body, not of the department. Hipps [sic] dealt with a time delay in departmental action being taken. This case involves a delay which would be tantamount to a court delay. There is no statutory requirement of when the OMVH must render a decision.

R. p. 128. Further, however, in each of the cases relied on in the ALC's *Order Affirming as Modified*, the driver argued that they were not aware that a suspension might be triggered by the reported conviction or the driver argued that they believed they had already served the suspension. In this case, Respondent cannot and has not argued that he was not aware that he may have to serve this suspension or that he believed he had already served this suspension. SCDMV believes this is due, at least partially, to the notice of suspension that Respondent used to request his contested case hearing before

[11] Notably, SCDMV petitioned for a Writ of Certiorari from the South Carolina Supreme Court in the *Wilson* case. As of the filing of this Final Brief, that petition has not been ruled on.

the OMVH,[12] the requirements of S.C. Code §§1-23-660 and 1-23-600(H) that SCDMV stay Respondent's habitual offender suspension pending the outcome of the OMVH contested case hearing, [13] and the fact that Respondent's was either fully licensed or suspended for other matters during the entire pendency of this OMVH case. So, for these additional reasons, the cases cited by the ALC to support its' holding don't lend the support asserted by the ALC to exist.

Finally, the ALC attempts to support its holding in this case based on the case *Alvarez v. State*, 249 P.3d 286 (Alaska 2011). Since *Alvarez* is an Alaska case, it is not binding precedent in South Carolina, but may still be considered as a persuasive authority. *Alvarez* involved a driver's license suspension after Alvarez failed a breath alcohol test. Alvarez timely requested an administrative hearing, but due to the arresting officer being deployed for military service overseas, that hearing was continued until almost two years later. The *Alvarez* court analyzed the delay in holding the hearing based on factors set forth by the United States Supreme Court in *Mathews v. Eldridge*, 93 S.Ct. 893 (1976). Those factors are: (1) the private interest that the official action affects, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional safeguards, and (3) the government's interest, including fiscal and administrative burdens, in implementing additional safeguards. After analyzing this case in light of the *Mathews v. Eldridge* factors, the ALC determined that:

1) Respondent "has a property interest in his driver's license;"[14]

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[12] R. p. 215.
[13] Respondent was notified of this stay via an automatically generated letter mailed May 18, 2009 (R. p. 186-187).
[14] R. p. 8.

2) that there was "no erroneous deprivation of that interest as a result of the [OMVH's] delay, as Respondent had been driving since reinstating his license in 2009;"[15] and

3) The "State of South Carolina has a fiscal interest in its citizens paying their property tax on their cars."[16]

Thus, the ALC determined, essentially, that under the *Mathews v. Eldridge* factors there was no issue with regard to the OMVH's delay in issuing the final order in this case. Then, despite this analysis, the ALC held that the OMVH's delay of seven years to adjudicate Respondent's challenge to his habitual offender suspension was "'manifestly a denial of fundamental fairness'" in violation of *Hipp v. SCDMV*, 381 S.C. 323, 673 S.E.2d 416 (2009). The ALC stated that it made this ruling because

> Respondent paid his motor vehicle property tax and driver's license reinstatement fees in 2009, thus remediating the underlying issue that resulted in the suspension. Furthermore, Respondent did so under the belief that all the administrative issues pertaining to the suspension would be resolved.

R. p. 9. So, despite the discussion of the *Mathews v. Eldridge* factors between page 9 of the ALC Order and the discussion of the *Davis* case on page 7 of the ALC Order, it appears the basis for the ALC's ruling is this case is the ALC's mistaken belief that the *Davis* case and Respondent's case are factual similar. The ALC asserts that the *Davis* case is more akin to the facts in this case because Davis "had met all the license reinstatement requirements and his license had been reinstated for twenty months." *Id*, p. 7. The ALC reasoned that, similarly to Davis, "Respondent paid his motor vehicle property tax and driver's license reinstatement fees in 2009, thus remediated the

[15] *Id.*
[16] *Id.*

underlying issue that resulted in the suspension." *Id.* at p. 9.[17] This logic entirely disregards a significant factual difference in the *Davis* case and this case. In the *Davis* case, at the time Davis met his license reinstatement requirements and regained his license, Davis had not been notified by SCDMV that he would undergo a habitual offender suspension. Davis was not notified of the habitual offender suspension because SCDMV was not aware of Davis' third major offense that triggered the habitual offender suspension. Thus, the *Davis* court reasoned that Davis suffered prejudice and injury because of his reliance on SCDMV issuing him a driver's license for twenty months after meeting all license reinstatement requirements that were in place at the time of that issuance. In this case, Respondent was notified that he would undergo a habitual offender suspension (R. p. 215). Respondent only cleared up his other suspension issues after receiving notification of the habitual offender suspension.[18] For this reason alone, Respondent could not reasonably rely on clearing up his other, unrelated driver's license suspensions as a basis for why he should not be required to serve his habitual offender suspension. If taking such action created prejudice, then every driver that requested a

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[17] This is an inaccurate statement. Paying his motor vehicle property tax and driver's license reinstatement fees in 2009 only remediated Respondent's suspensions for Failure to Pay Property Tax, Driving Under Suspension – FTPPT (2 suspensions), and Failure to Pay Traffic Ticket (2 suspensions). Respondent paying his motor vehicle property tax and driver's license reinstatement fees in 2009 did not remediate the fact that Respondent's had accumulated three major driving offenses within a three year period of time and had been declared a habitual offender as a result.

[18] See R. p. 188-190. Specifically, see all items marked "SUSP" and see the sub-section that titled "Reinstatement Requirements Met." For example, Respondent completed all of his reinstatement requirements for his Failure to Pay Property Tax suspension on 04/13/2009. Respondent met all reinstatement requirements for most of his active suspension on 04/13/2009. In addition to this habitual offender suspension, which was stayed, Respondent had one additional suspension that did not have its' reinstatement requirements met until December 17, 2009, the date Respondent regained his driver's license. Also, shortly after regaining his driver's license, Respondent was suspended form April 13, 2010 through July 15, 2010 due to "Accident – Uninsured."

contested case hearing could simply clear up their other, unrelated driver's license suspensions and have their habitual offender suspension vacated. Such a system defies logic, is not the law of this State, and would, if it were the law, eviscerate the driver's license suspension system in South Carolina in its' entirety. Moreover, the Respondent had a logical reason for clearing up all of his other driver's license suspension issues while the OMVH case was pending, so he could take advantage of the automatic stay of the habitual offender suspension while the OMVH case was pending.

Second, Respondent had no reason to believe that the habitual offender suspension had been resolved. Respondent's misunderstanding of an alleged oral statement by an OMVH hearing officer does not create prejudice. All OMVH hearings are concluded with a final written order. Rule 15(C), OMVH Rules. No OMVH hearing is resolved with an oral order. Moreover, since Respondent is actually the party that brought this action in the OMVH (SCDMV is merely listed as the petitioner because SCDMV carries the burden of proof at the hearing), if any party bore the responsibility of following up with the OMVH Hearing Officer regarding a written order, it was Respondent.[19] *State v. Adams*, 244 S.C. 323, 137 S.E.2d 100 (1964).

In the *Adams* case the South Carolina Supreme Court held that it is the duty of a moving party on appeal to prosecute the appeal with due diligence and if it becomes apparent to the moving party on appeal that the court has failed to perform a ministerial duty, then it is incumbent upon that party to proceed by way of mandamus to enforce

[19] Appellant does not assert that Respondent had an affirmative duty to seek a final order from the OMVH, although the *Adams* case indicates that may be the law of South Carolina. Rather, Appellant merely asserts that Respondent cannot claim to have suffered prejudice as a result of the OMVH's delay when Respondent took no action to have the final order issued in a quicker manner. Appellant believes the holding in the *Adams* case supports this assertion.

performance of that duty. The *Adams* Court further held that the failure of a moving party on appeal to proceed by way of mandamus means that the appellant is not entitled to have his conviction set aside on the basis of failure of the magistrate to transmit the record. While the *Adams* case dealt with a criminal appeal from the magistrate's court, the same logic prevails in this case. Respondent, the party that brought this action in the OMVH, should not benefit from the OMVH's failure to quickly issue a final order in this case when Respondent took no action get the OMVH to issue a final order. In fact, in this case, filing a writ of mandamus was not necessary to get a final order issued from the OMVH. Rather, as evidenced by the record in this case, the OMVH merely had to be notified that a final order had not yet been issued (R. p. 216).

## CONCLUSION

The crux of this case is that neither party did anything wrong here and the OMVH did not intentionally fail to quickly issue a final order in this case. The OMVH, in considering whether this suspension was properly brought against Respondent, made a human error and was not aware of that error until SCDMV asked about it. Respondent asserts, and the ALC held, that because of that human error Respondent should not be declared a habitual offender and should not have to serve his habitual offender suspension. That is not the law in South Carolina. If it is held that a decision in the OMVH must always be issued within a certain amount of time, even though there is no statute or rule that requires that, then such a requirement is easily translated to other types of courts or appeals. It is doubtful, for example, that anyone would argue that if the South Carolina Supreme Court took seven years to evaluate and decide the issues in a death penalty case, then the defendant in such a case would automatically be entitled to

have the appeal decided in his favor and be released. That is, essentially, what the ALC held in this case. That is why the ALC's decision is erroneous. That is why the ALC's reasoning for and holding that a court delay of seven years to adjudicate Respondent's challenge to his habitual offender suspension was "'manifestly a denial of fundamental fairness'" in violation of *Hipp* should be overturned.

For the reasons set forth above, the ALC *Order Affirming as Modified* should be partially overruled and Respondent's habitual offender suspension should be sustained in full.

Respectfully submitted,

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September 29, 2017
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals



APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

Case No. 2017-001575

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

v.

Christopher McMahan . . . . . Respondent.

**CERTIFICATE OF COUNSEL**

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

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

September 29, 2017
Blythewood, SC

THE STATE OF SOUTH CAROLINA
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**CERTIFICATE OF COMPLIANCE**

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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, 2014.

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September 29, 2017
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