

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2017-002394

RECEIVED

NOV 27 2017

SC Court of Appeals

South Carolina Department of Motor Vehicles Appellant,

v.

Samuel James Respondent.

INITIAL BRIEF OF THE APPELLANT

FRANK L. VALENTA, JR., SC Bar # 5682
General Counsel
PHILIP S. PORTER, SC Bar #4526
Deputy General Counsel
BRANDY A. DUNCAN, SC Bar #72052
South Carolina Department of Motor Vehicles
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, South Carolina 29016-0020
Telephone: (803) 896-9900
Facsimile: (803) 896-9901
Email: hearingsprocessingunit@scdmv.net
Attorneys for the Appellant

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Statement of Issues Presented	1
Statement of the Case	1
Standard of Review.....	4
Argument:	
1) DID THE ADMINISTRATIVE LAW COURT’S <i>ORDER AFFIRMING DECISION</i> AND THE OFFICE OF MOTOR VEHICLES <i>FINAL ORDER AND DECISION</i> ERR IN RESCINDING THIS SUSPENSION ON THE GROUND THAT RESPONDENT’S BREATH SAMPLE WAS COLLECTED TWO HOURS AND THREE MINUTES AFTER RESPONDENT’S ARREST WITHOUT ANY EXPLANATION AS TO HOW THE THREE MINUTE DELAY “MATERIAL[LY] AFFECTED THE ACCURACY OR RELIABILITY OF THE TEST RESULTS OR THE FAIRNESS OF THE PROCEDURE?”.....	6
Conclusion	15

TABLE OF AUTHORITIES

CASES

Chemical Leaman Tank Lines v. South Carolina Public Service Commission, 258 S.C. 518, 189 S.E.2d 296 (1972) 6

Consolo v. Federal Maritime Commission, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966) 5

Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 5

Dorman v. DHEC, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002) 5, 6

Fast Stops, Inc. v. Ingram, 276 S.C. 593, 281 S.E.2d 18 (1981) 5

Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973) 6

Hamm v. American Telephone & Telegraph Co., 302 S.C. 211, 394 S.E.2d 842 (1990) 5, 6

Hamm v. South Carolina Public Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988) 6

Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc., 311 S.C. 295, 422 S.E.2d 118 (1992) 5

Kearse v. State Health and Human Serv. Fin. Comm'n., 318 S.C. 198, 456 S.E. 2d 892 (1995) 6

Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) 7

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) 4, 5

Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992) 7

Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999) 7

Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996) 7

Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994) 7

Mount Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) 7

<i>Schudel v. South Carolina Alcoholic Beverage Control Commission</i> , 276 S.C. 138, 276 S.E.2d 308 (1981)	5
<i>S.C. Dept. of Motor Vehicles v. Nelson</i> , 364 S.C. 514, 613 S.E. 2d 544 (Ct. App. 2005)	6, 12
<i>State v. Sweat</i> , 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)	7
<i>TNS Mills, Inc. v. South Carolina Dept. of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471 (1998)	7

STATUTES

S.C. Code Ann. §1-23-380	4
S.C. Code Ann. § 56-5-2950	3, 8, 9, 10, 11, 12, 14
S.C. Code Ann. §56-5-2950(e)	11

OTHER AUTHORITIES

73A C.J.S. <i>Public Administrative Law and Procedure</i> Section 220(a) (1983)	6
Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers, (2003) ...	13

STATEMENT OF ISSUES ON APPEAL

- 1) DID THE ADMINISTRATIVE LAW COURT'S *ORDER AFFIRMING DECISION* AND THE OFFICE OF MOTOR VEHICLES *FINAL ORDER AND DECISION* ERR IN RESCINDING THIS SUSPENSION ON THE GROUND THAT RESPONDENT'S BREATH SAMPLE WAS COLLECTED TWO HOURS AND THREE MINUTES AFTER RESPONDENT'S ARREST¹ WITHOUT ANY EXPLANATION AS TO HOW THE THREE MINUTE DELAY "MATERIAL[LY] AFFECTED THE ACCURACY OR RELIABILITY OF THE TEST RESULTS OR THE FAIRNESS OF THE PROCEDURE?"

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 October 11, 2017 Administrative Law Court's (hereinafter, "ALC") *Order Affirming Decision*, the November 9, 2017 ALC *Order Denying Motion to Reconsider*, and the Office of Motor Vehicle Hearings' (hereinafter, "OMVH") *Final Order and Decision*, all of which acted to rescind Respondent James' suspension for registering a breath alcohol concentration of .15 or greater. The Appellant, SCDMV seeks to have all three of these orders overturned and Respondent's James' suspension sustained.

Respondent James was arrested on March 6, 2016 for driving under the influence (ALC ROA, p. 12, lines 21-23). Trooper Pence testified that at approximately 3:39 a.m. on Sunday, March 6, 2016, she was dispatched to a possible head-on collision on US-17A/Hendersonville Highway in Colleton County, South Carolina (ALC ROA, p. 9, lines 20-25). Trooper Pence testified that she arrived at the scene of this collision at approximately 4:13 a.m. and observed an SUV on its side in the swamp and a heavily

¹ SCDMV assumes a delay of only three (3) minutes based on the OMVH's factual finding that the arrest in this case took place at 6:45 a.m. SCDMV does not, however, concede that 6:45 a.m. is the correct time of arrest and, as outlined in the Arguments section, asserts that the time of arrest likely occurred at or shortly after 7:00 a.m.

damaged truck that had been pulling a boat trailer on the shoulder of the southbound side of the roadway (ALC ROA, p. 9, line 25 – p. 10, line 7 and p. 18, line 11). Trooper Pence testified that Respondent was the driver of the SUV, was entrapped and the fire department was working to extract him from his vehicle (ALC ROA, p. 10, lines 9-11, p. 18, lines 17-21, and p. 21, lines 5-6). Trooper Pence observed Respondent being extracted from the SUV, but was unable to talk to him because he needed immediate medical attention (ALC ROA, p. 10, lines 11-13 and p. 11, lines 5-9). Respondent was transported to Colleton Medical Center for treatment. *Id.* Trooper Pence testified that she was unsure of what time she arrived at the hospital, but she left the scene of the collision no earlier than 6:30 a.m. (ALC ROA, p. 11, lines 4-5 and p. 23, lines 8-12). As soon as Trooper Pence was able to speak with Respondent, she immediately smelled a strong odor of alcohol as she got close to him (ALC ROA, p. 12, lines 5-7 and p. 20, line 25 – p. 21, line 4). Trooper Pence testified that at that time she had not yet determined whether or not she was going to arrest Respondent for driving under the influence (ALC ROA, p. 21, lines 13-14). Respondent informed Trooper Pence that he did not remember what happened or being in a motor vehicle collision (ALC ROA, p. 12, lines 7-12). Respondent admitted to drinking a couple alcoholic beverages before 11:00 p.m. at an anniversary party (ALC ROA, p. lines 12-15). Trooper Pence was unable to administer standardized field sobriety tests to Respondent because he had been pinned under the vehicle and had an injury to his eye (ALC ROA, p. 12, lines 17-20). While in the hospital, Trooper Pence placed Respondent under arrest for driving under the influence, and at approximately 6:45 a.m., she advised Respondent of his Miranda rights, which Respondent acknowledged he understood (ALC ROA, p. 12, lines 22-24). Respondent

was released from the hospital sometime after 7:00 a.m. (ALC ROA, p. 21, lines 23-25). Once Respondent was released from the hospital, the hospital provided Respondent with clothing and Trooper Pence took him to her car, where she again advised him of his Miranda rights on video (R. p. 12, line 25 – p. 13, line 3). Respondent was transported to the Colleton County jail for a breath test (R. p. 14, line 9-10). Upon her arrival at the jail, Trooper Pence escorted Respondent into a DataMaster room. *Id.* Trooper Pence provided Respondent with a written copy of the driving under the influence advisement of implied consent rights form, and she read the form aloud to Respondent (R. p. 14, lines 12-14 and p. 59). The twenty minute observation period started at 8:22:18 (Petitioner's Exhibit #2 at hearing, an unnumbered page of the ALC Record on Appeal between pages 59 and 60 of the ALC Record on Appeal). At the conclusion of the observation period, the machine performed a series of self-tests, including a simulator test that reflected a reading of .078%. *Id.* Respondent consented to the test and provided a breath sample of .17% at 8:48:21. *Id.* and R. p. 14, lines 14-16.

Respondent was issued a written notice of suspension of the driver's license or driving privileges for violation of *S.C. Code Ann.* Section 56-5-2950 (R. p. 64).

The Appellant requested an administrative hearing (R. p. 63-65). Pursuant to notice to the parties, a hearing was held before OMVH Bridgette Autry on August 5, 2016 (R. p. 6-27). The Appellant appeared and was represented by Margie Bright Matthews, Esquire. By Final Order & Decision dated February 9, 2017, the suspension was rescinded (R. p. 33-40). Appellant filed a Motion for Reconsideration on February 16, 2017 (R. p. 44-47). The OMVH denied the Motion for Reconsideration on March 27, 2017 (R. p. 41). The Appellant then appealed to the ALC (R. p. 32-42).

On October 11, 2017, the ALC issued its' *Order Affirming Decision*. Appellant filed its' *Notice of Motion and Motion for Reconsideration* on October 20, 2017. The ALC denied reconsideration on November 9, 2017.

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 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. *Kearse v. State Health and Human Serv. Fin. Comm'n.*, 318 S.C. 198, 456 S.E. 2d 892 (1995); *S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E. 2d 544 (Ct. App. 2005); 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Appellant 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) DID THE ADMINISTRATIVE LAW COURT'S *ORDER AFFIRMING DECISION* AND THE OFFICE OF MOTOR VEHICLES *FINAL ORDER AND DECISION* ERR IN RESCINDING THIS SUSPENSION ON THE GROUND THAT RESPONDENT'S BREATH SAMPLE WAS COLLECTED TWO HOURS AND THREE MINUTES AFTER RESPONDENT'S ARREST WITHOUT ANY EXPLANATION AS TO HOW THE THREE MINUTE DELAY² "MATERIAL[LY] AFFECTED

² See footnote 1.

THE ACCURACY OR RELIABILITY OF THE TEST RESULTS OR THE FAIRNESS OF THE PROCEDURE?"

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994). Where a statute is ambiguous, however, we must construe the terms of the statute according to settled rules of construction. *Lester v. South Carolina Workers' Compensation Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999). Moreover, in construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998). A statute should not be construed by concentrating on an isolated phrase. *Laurens County School Districts 55 and 56 v. Cox*, 308 S.C. 171, 417 S.E.2d 560 (1992). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks and citation omitted). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Mount Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). Appellate courts will not construe a statute in a way which leads to an absurd result or renders it meaningless. See *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute,

this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

The OMVH Final Order and Decision filed February 9, 2017 stated:

Based upon §56-5-2950(A), clearly, a breath sample is deemed not to be an accurate and reliable indicator the level of alcohol while driving once two hours have passed from the time of arrest. As a result, I conclude that the failure to collect the breath sample within two hours of the arrest as required by § 56-5-2950(A) materially affected the accuracy and reliability of the rest result, and that the test result must be excluded from evidence as a result.

Furthermore, the ALC Order Affirming Decision filed October 11, 2017 stated:

The Hearing Officer concluded that the breath test result is not an accurate or reliable indicator of the alcohol level while driving if administered more than two hours after arrest.

Contrary to these holdings, S.C. Code §56-5-2950(J) states, in part:

The failure to follow policies, procedures, and regulations, **or the provisions of this section**, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure **and** the court trial judge or hearing officer **rules specifically as to the manner in which the failure material affected the accuracy or reliability of the test results or the fairness of the procedure.**

Emphasis added.

Neither the OMVH, nor the ALC have provided any explanation specifying how collection of the breath sample two hours and three minutes³ after the arrest materially affected the accuracy or reliability of the test results or the fairness of the procedure in this case. The OMVH’s *Final Order and Decision* held that because S.C. Code §56-5-2950(A) requires collection of the sample within two hours of arrest, then any sample collected more than two hours after arrest “clearly... is deemed not to be an accurate and

³ See footnote 1.

reliable indicator of the level of alcohol while driving...” The ALC’s *Order Denying Motion to Reconsider*, held that S.C. Code §56-5-2950(J) set “a bright line requirement that a breath sample must be collected within two hours of arrest.”⁴ The ALC further stated the section of the statute which states the court trial judge or hearing officer must rule “specifically as to the manner in which the failure material affected the accuracy or reliability of the test results or the fairness of the procedure”⁵ would “inappropriately require the judge or hearing officer to explain why the legislature added the two-hour time limit.”⁶ This issue, i.e, the meaning of the latter clause in S.C. Code §56-5-950(J), appears to be an issue of first impression in South Carolina. Applying the rules of statutory construction and interpretation, however, SCDMV believes the OMVH’s and ALC’s holdings in this case make no sense given the apparent plain meaning of the latter clause of S.C. Code §56-5-2950(J). Rather than reading this statute as a whole and construing the sections together to give each section effect, the ALC and OMVH have focused on an isolated phrase in S.C. Code §56-5-2950(A) to reach an absurd result. Significantly, S.C. Code §56-5-2950(J) states, “The failure to follow policies, procedures, and regulations, or **the provisions of this section...**” (emphasis added). Thus, it is clear that even if a part of S.C. Code §56-5-2950 was not followed, subsection (J) was to be applied, including the requirement that the hearing officer must rule “specifically as to the manner in which the failure material [to follow the statute] affected the accuracy or reliability of the test results or the fairness of the procedure.” If the legislature intended two hours to be a bright line rule for collection of a breath sample, there would be no

⁴ ALC *Order Denying Motion to Reconsider*, p. 1, ¶2, sentence 3.

⁵ S.C. Code §56-5-2950(J).

⁶ ALC *Order Denying Motion to Reconsider*, p. 1, ¶2, sentence 5.

need to include the phrase "...the provisions of this section..." at that beginning of S.C. Code §56-5-2950(J). Thus, by including the phrase "...the provisions of this section..." at the beginning of S.C. Code §56-5-2950(J), the legislature did intend to the trial judges and hearing officers to have to explain how a delay in collecting a breath sample "affected the accuracy or reliability of the test results or the fairness of the procedure."

Furthermore, the OMVH Hearing Officer's failure to provide a ruling explaining how the delay⁷ in collecting the breath sample "affected the accuracy or reliability of the test results of the fairness of the procedure" is even more important and necessary in this case because there are questions as to the exact time of arrest. Specifically, Trooper Pence testified that she did not leave the scene of the collision until "after 6:30" (R. p. 11, lines 4-5). Trooper Pence then travelled from the collision scene located at Hendersonville Highway in Colleton County to the Colleton Medical Center, approximately a 10-20 minute drive, where she met with and spoke with Respondent (R. p. 9, lines 22-24 and p. 12, lines 1-17). Only after that meeting was Respondent arrested (R. p. 12, lines 22-23). Trooper Pence testified that she had written in her notes that the time of arrest was "06:45," but on the breath test report the time of arrest was noted as "07:17." Thus, there is a significant factual question about whether Trooper Pence could have cleared the collision scene after 6:30 a.m., traveled to Colleton Medical Center (10-20 minutes away), interviewed Respondent, and arrested him by 6:45 a.m. Despite these serious factual issues, the OMVH Hearing Officer did not explain how she determined that 6:45 a.m. was the time of arrest. Then the OMVH Hearing Officer compounded this error by failing to explain how she determined that the collection of Respondent's breath sample

⁷ See footnote 1.

at 8:48 a.m. materially affect the accuracy or reliability of the test results or the fairness of the procedure. Because the OMVH Hearing Officer did not provide rulings, analysis, or findings to explain how she determined the accuracy or reliability of the test results or the fairness of the procedure was impacted, the OMVH's decision was in violation of S.C. Code §56-5-2950(J), made upon unlawful procedure, affected by error of law, and arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion. This error was further compounded and highlighted by the ALC's holding that, essentially, two hours to collect a breath sample is a "bright line requirement."

The OMVH and ALC's rulings in this case are also remarkable given:

- a. S.C. Code §56-5-2950(A) allowing blood and urine samples to be collected within three hours of the arrest;
- b. S.C. Code §56-5-2950(D) allowing blood and urine sample to be collected by a person of the driver's choosing to conduct additional tests at the driver's expense and no time limit is set on when those collections must occur;
- c. Prior to Noon on February 10, 2009, the only time limit affecting the administration of a breath test was the requirement in then S.C. Code §56-5-2953(A)(2)(a) that the videotaping of the breath test be completed within three hours of the person's arrest.; and
- d. Prior to Noon on February 10, 2009, S.C. Code §56-5-2950(e) simply stated:

The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the

exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.

After Noon on February 10, 2009, S.C. Code §56-5-2950(J) stated:

The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.

(Emphasis added, underlining indicates the words that were added to the statute with this revision). Thus, it is clear that the Legislature intended for trial judges and hearing officers to explain why or how they determined a sample taken outside the two hour window was found to be inaccurate, unreliable, or to have affected the fairness of the procedure.⁸ In this case, no such explanation was provided, which violated the requirements of S.C. Code §56-5-2950(J).

These holdings are also notable given the case *S.C. Dep't. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544, 549-550 (Ct. App. 2005), which held, in part, that when a breath test is not performed within the required time frame, "the hearing officer

⁸ In fact, based on how S.C. Code §56-5-2950 is written, when considered in its' totality, it appears that the legislative intent of this statute is that breath tests completed within two hours of arrest are presumed to be reliable and accurate (thus requiring some evidence to the contrary to have these results excluded from evidence) and those breath tests that are completed more than two hours after arrest may lose the presumption of reliability and accuracy if the trial judge or hearing officer "rules specifically as to the manner in which the failure [to complete the test within two hours of the arrest] materially affected the accuracy or reliability of the test results or the fairness of the procedure."

might still have considered the totality of the circumstances and found valid reasons for the Department's failure to comply with the statute."

Moreover, it is common knowledge within the DUI field that:

- 1) peak concentrations of blood alcohol are "generally attained within 30-60 minutes of the cessation of drinking" alcohol. See Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers, (2003). Alcohol Toxicology for Prosecutors, p. 13.
- 2) "When alcohol is consumed successively over time, as in a social drinking situation, peak concentrations are generally attained within 30 minutes of the last drink and may even be attained before the last drink is finished." *Id.*, p. 14.
- 3) "The average rate of elimination [of blood alcohol] (combining metabolism, excretion and evaporation) is between 0.015 to 0.018% per hour." *Id.*, p. 16.

Thus, in this case, with Respondent being unable to consume any alcohol after Trooper Pence arrived on scene at 4:13 a.m., there is no question that Respondent had long since hit peak blood alcohol concentration at the time of his arrest. Moreover, since Respondent had no opportunity to continue drinking after Trooper Pence arrived on scene, there is no question that when Respondent's breath was tested over five (5) hours after this collision, his blood alcohol concentration was doing nothing but dropping, perhaps for several hours. Thus, a delay of an additional three (3) minutes,⁹ scientifically could not have materially affected the accuracy or reliability of the test results or the fairness of the procedure. In fact, the great delay in time between the collision and when Respondent's breath test was finally completed was of great advantage to Respondent

⁹ See footnote 1.

because he had over five (5) hours to reach peak concentration (if he had not already reach peak concentration at the time of this collision) and have his blood alcohol concentration drop by approximately 0.06%-0.072% (assuming no more than 4 hours of drop time and using the average rate of elimination). Despite this commonly understood knowledge about peak alcohol concentrations, average rates of elimination, and the confusion regarding the true and accurate arrest time in this case, the OMVH Hearing Officer ruled that the breath test results in this case were not accurate or reliable based solely on the sample being obtained three minutes beyond the two hour limit.¹⁰ Because the OMVH Hearing Officer made this ruling without any explanation as to how this three minute difference “material[ly] affected the accuracy or reliability of the test results or the fairness of the procedure” as required by S.C. Code. §56-5-2950(J), Appellant SCDMV believes the OMVH Hearing Officer erred in her ruling and, should have either affirmed Respondent’s suspension or explained how the three minute delay¹¹ “material[ly] affected the accuracy or reliability of the test results or the fairness of the procedure.” Moreover, because the ALC ruled that the “legislature added a bright line requirement that a breath sample must be collected within two hours of arrest” and it would be inappropriate for “the judge or hearing officer to explain why the legislature added the two-hour time limit,” Appellant SCDMV believes the ALC’s rulings are also in error.

¹⁰ See footnote 1.

¹¹ See footnote 1.



CONCLUSION

For the reasons set forth above, the OMVH's *Final Order and Decision*, the ALC's *Order Affirming Decision*, and the ALC's *Order Denying Motion to Reconsider*, should all be reversed and Respondent's suspension upheld.

Respectfully submitted,



FRANK L. VALENTA, JR., SC Bar # 5682

General Counsel

PHILIP S. PORTER, SC Bar # 4526

Deputy General Counsel

BRANDY A. DUNCAN, SC Bar # 72052

South Carolina Department of Motor Vehicles

10311 Wilson Boulevard

Post Office Box 1498

Blythewood, South Carolina 29016-0020

Telephone: 803.896.9900

Fax: 803.896.9901

Email: hearingsprocessingunit@scdmv.net

Attorneys for the Appellant

November 22, 2017
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2017-002394

RECEIVED

NOV 27 2017

SC Court of Appeals

South Carolina Department of Motor Vehicles Appellant,

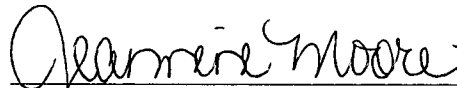
v.

Samuel James Respondent.

CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, November 22, 2017, I served one (1) copy of the Appellant's Initial Brief and Designation of Matter by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

Margie Bright Matthews, Esquire
Bright Matthews Law, LLC
Post Office Box 499
Walterboro, South Carolina 29488



Jeannine (Nina) Moore, Paralegal
Office of General Counsel

November 22, 2017
Blythewood, South Carolina

Henry McMaster
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

November 22, 2017

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

NOV 27 2017

SC Court of Appeals

RE: *South Carolina Department of Motor Vehicles v. Samuel James*
Appellate Case No: 2017-002394

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. Unbound original and two (2) copies of the Appellant's Initial Brief;
2. Original and two (2) copies of the Appellant's Designation of Matter To Be Included In the Record on Appeal with Certificate of Counsel of SCACR, Rule 209(c) compliance; and
3. Certificate of Service of these documents on counsel for the Respondent.

Please file the original and copies necessary for SCACR compliance and return the extra copies to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Sincerely,

A handwritten signature in cursive script that reads "Jeannine Moore".

Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Enclosures

cc: Margie Bright Matthews, Esquire



South Carolina Department of Motor Vehicles

Post Office Box 1498
Blythewood, South Carolina 29016

MV-17



U.S. POSTAGE >>> PITNEY BOWES



ZIP 29016 \$ 006.65⁰
02 1W
0001394666 NOV. 22. 2017



South Carolina Department of Motor Vehicles

P.O. Box 1498
Blythewood, S.C. 29016

Form 103

Forwarding Service Requested

RECEIVED

NOV 27 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211



USPS TRACKING #



9114 9014 9645 0267 9777 02

Label 400 Jan. 2013
7680-16-000-7948

PRIORITY MAIL

TRACKED
INSURED



For Domestic Use Only

Label 107R, July