THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

PETITIONER SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES' BRIEF

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STATEMENT OF THE CASE

This matter comes before the Supreme Court pursuant to the grant of a writ of certiorari to the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV" or "DMV"), which seeks review of the November 9, 2016, unpublished opinion from the South Carolina Court of Appeals (hereinafter, "Court of Appeals"). That opinion held that the Administrative Law Court's (hereinafter, "ALC") Order was not a final decision (R. pp. 3-4). SCDMV seeks to have the Court of Appeals' unpublished opinion overturned and the issues presented on appeal to that Court decided on their merits. Ultimately, SCDMV seeks to have the ALC's Final Order and Order of Remand overturned and the Office of Motor Vehicle Hearings (hereinafter, "OMVH") Order of Dismissal issued August 12, 2015 reinstated in full.

Respondent was arrested on April 5, 2015, for driving under the influence (R. pp. 132-133). Upon refusal to submit to a breath sample, Respondent was found to be in violation of S.C. Code §56-5-2950, and the arresting officer issued a Notice of Suspension form pursuant to S.C. Code §56-5-2951. *Id.* Respondent timely requested a contested case hearing on April 10, 2015. *Id.*

On April 14, 2015, the OMVH e-mailed a Notice of Hearing to all parties for a hearing scheduled for June 23, 2015 (R. pp. 127-131). This Notice of Hearing was sent again to Respondent's counsel on June 12, 2015 (R. p. 126). On Thursday, June 18, 2015, Respondent's counsel requested a continuance of the hearing scheduled for Tuesday, June 23, 2015, due to a conflicting court appearance her counsel had in the magistrate's court (R. pp. 117-120). The DMV, a party to this case, was not copied on this request and was not aware the request had been made until the June 24, 2015 Order

of Continuance and Notice of Hearing was issued by the OMVH. The conflicting magistrate's court appearance had been noticed to Respondent's counsel on May 19, 2015 (R. p. 120). On June 24, 2015, the OMVH e-mailed an Order of Continuance and Notice of Hearing to all parties (R. pp. 115-116). This Order rescheduled the hearing for August 11, 2015. *Id.*

On Friday, August 7, 2015 at 12:30 p.m., Respondent's counsel requested a continuance of the hearing scheduled for Tuesday, August 11, 2015, due to a conflicting Court appearance her counsel had in the magistrate's court (R. pp. 109-114). Significantly, the DMV, a party to this case, was not copied on this request and was not aware the request had been made until after it had been denied and the August 12, 2015 Order of Dismissal had been issued by the OMVH. *Id.* Also meaningful is the fact that the conflicting magistrate's court appearance had been noticed to Respondent's counsel three weeks earlier on July 15, 2015 (R. p. 114).[1] On Sunday, August 9, 2015, the OMVH hearing officer denied the request for continuance of the August 11, 2015 hearing (R. p. 108). On Monday, August 10, 2015 at 8:02 a.m., the OMVH e-mailed Respondent's counsel the denial of the request for continuance issued by the OMVH hearing officer the day before (R. p. 107).[2]

Respondent's counsel responded to this denial the same day at 1:28 p.m. and asked the OMVH hearing officer to reconsider the request for continuance. *Id.* This request for reconsideration was not copied to DMV or to the South Carolina Department of Public Safety (hereinafter, "DPS"), and, in fact, was sent directly to the OMVH

[1] An August 10, 2015 e-mail from Respondent's counsel's office to the OMVH stated Respondent's counsel "were notified of a scheduled Jury Trial on July 15th." R. p. 107.
[2] DMV, a party to this case, was not copied on this e-mail from the OMVH and, it appears DPS was also not copied on this e-mail from the OMVH.

hearing officer as well as the OMVH hearing officer's scheduling assistant.[3] *Id.*

On Monday, August 10, 2015, at 4:41 p.m., Respondent's counsel filed a second Motion for Continuance (R. pp. 95-105). Again, the DMV was not copied on this request and was not aware the request had been made until the August 12, 2015, Order of Dismissal was issued by the OMVH. *Id.* On Monday, August 10, 2015, at 5:02 p.m., Trooper R. D. Grubbs, the arresting officer in this case, e-mailed the OMVH staff and Respondent's counsel's paralegal stating "No objections" to Respondent's request for a continuance (R. p. 95). Once again the DMV was not copied on this e-mail and was still unaware of the requested continuance of the August 11, 2015 hearing. *Id.*

On August 12, 2015, the OMVH hearing officer issued an Order of Dismissal ruling that Respondent "did not follow the requirement of Rule 601 or the procedure for requesting a continuance at the OMVH pursuant to Rule 10 (B)," that Respondent's request for a continuance had been denied, the "parties were notified of the denial on the morning of Monday, August 10, 2015," and that neither Respondent nor her counsel appeared at the hearing (R. pp. 61-62). This decision was served on all the parties via e-mail on August 13, 2015 (R. pp. 63-64).

On August 17, 2015, Respondent filed a Motion for Reconsideration of the Order of Dismissal (R. pp. 67-86). Respondent's Motion for Reconsideration was primarily based on two points: 1) that Respondent's second Motion for Continuance e-mailed at 4:41 p.m. on Monday, August 10, 2015 had not been ruled on; and 2) that "attorneys with court conflicts must serve the continuance upon all parties.... As required by the rules all

[3] All prior e-mails from Respondent's counsel regarding this case had been sent only to the OMVH hearing officer's scheduling assistant and never directly to the hearing officer (R. pp. 109-114 and 117-120).

parties of record were notified of the request for a continuance." (R. pp. 68-70). Despite being listed in the caption to the Motion for Reconsideration as a Petitioner, the DMV was not served with a copy of the motion and was not even aware the motion had been made until DMV received the Notice of Appeal on September 15, 2015 (R. pp. 68-86). Further, DMV did not receive any copy of the Motion for Reconsideration until the ALC Record on Appeal was served on DMV by the OMVH on October 7, 2015. *Id.*

On September 11, 2015, Respondent filed her Notice of Appeal with the ALC (R. pp. 45-60).[4] On September 16, 2015, the OMVH hearing officer issued an Order Dismissing Respondent's Motion for Reconsideration (R. p. 65). This Order was served on the parties on the same date (R. p. 66).

The ALC appeal was assigned to the Honorable H. W. Funderburk, Jr. (R. p. 44). The Record on Appeal was filed on or about October 2, 2015 (R. pp. 43 and 138). Respondent filed a Memorandum on Appeal on October 29, 2015 (R. pp. 35-40). DMV filed its Brief in the ALC on November 16, 2015 (R. pp. 20-34). On November 23, 2015, Respondent filed her Reply Brief (R. pp. 14-19). On December 1, 2015, the ALC issued Final Order and Order of Remand (R. pp. 7-12). The ALC Final Order and Order of Remand held, essentially, that the OMVH hearing officer abused his discretion in denying Respondent's counsel's request for a continuance and remanded the case to the OMVH for a full hearing on the merits. *Id.*

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[4] DMV assumes Respondent's ALC appeal focused on the OMVH's Order of Dismissal dated August 12, 2015 and issued on August 13, 2015. DMV bases this assumption on Respondent's statement in her Notice of Appeal that she "gives notice of her Appeal from the Final Order and Decision of the [OMVH] issued on August 12, 2015..." DMV notes that no Final Order was attached to Respondent's ALC Notice of Appeal as required by Rule 33, SCALCR, but that the only order issued in this case on August 12, 2015, as far as DMV is aware, is the Order of Dismissal dated August 12, 2015 and issued on August 13, 2015.

On December 2, 2015, the OMVH scheduled a new hearing for this case pursuant to the ALC's December 1, 2015 Order of Remand (R. p. 139).

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 Court of Appeals opinion held that DMV's appeal was interlocutory. *Id.* 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).

SCDMV sought and was granted a writ of certiorari to review the Court of Appeals' decision.

ARGUMENT

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

S.C. Code §14-8-200 sets forth those cases that may be considered by the appellate courts of South Carolina. S.C. Code §14-8-200 states, in relevant part,

> ...[T]he court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of... a final decision of an administrative law judge.... This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case....

In this case, the order issued by the Administrative Law Court (hereinafter, "ALC") on December 1, 2015 was explicitly titled "Final Order and Order of Remand." Therefore, there can be no doubt that the December 1, 2015 ALC Order is a "final decision of an

administrative law judge" as the title itself proclaims it to be a "Final Order..." For this reason alone, this case was immediately appealable to the Court of Appeals.

Despite the title of the ALC's Final Order, the Court of Appeals held that the ALC's Final Order "is not a final decision." In making this ruling, the Court of Appeals cited the case of *Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894, (2010) quoting:

> A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.... If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory.

Charlotte-Mecklenburg, 387 S.C. at 267, 692 S.E.2d at 894-895. Although not explicitly stated in the Court of Appeals decision, it appears that the Court of Appeals determined this appeal was interlocutory because of the ALC's December 1, 2015 Order remanding this case to the OMVH "for a hearing on the merits." Such a ruling, however, ignores the fact that this case was already scheduled for a hearing on the merits before the OMVH and neither Respondent nor her counsel appeared at the OMVH hearing despite having been fully advised that the Respondent's request for a continuance had been denied. Thus, the ALC's Order of Remand essentially granted Respondent a new "trial" via a new hearing. Instructive in this regard is the recently decided case *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144. The *Morrow* appeal was also dismissed by the Court of Appeals as interlocutory. This Court determined the *Morrow* appeal was not interlocutory and ultimately decided the underlying issue that was original appealed to the Court of Appeals.

Similarly, in this case, because the Final Order issued by the ALC on December 1, 2015, explicitly remands this case back to the OMVH "for a hearing on the merits" and because this case was already scheduled for a hearing once before, the ALC's Final Order has, essentially, granted Respondent a new "trial" via a new hearing. As discussed in the *Morrow* case, to prevent Petitioner DMV "from appealing the order immediately would encourage piecemeal litigation and limit [DMV's] appellate remedies." See also, *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2d 372 (1964) (An order of the trial court granting or refusing a new trial, when based solely on an error of law, is subject to review by the Supreme Court); and *Daughty v. Northwestern R. Co. of South Carolina*, 92 S.C. 361, 75 S.E. 553 (1912) (This statute does not undertake to make an order granting a new trial appealable, when it is based upon questions of fact; but it can review orders granting new trials when based upon error of law.).

The cases cited by the Court of Appeals ignore the similar fundamental issue in this case and in the *Morrow* case: that is, if the only "further act which must be done by the court" is to have a full blown trial or hearing, then the Order is not interlocutory. So, while the factual issue in the *Morrow* case was whether to have a consolidated or bifurcated trial and the issue in this case whether a new hearing should be held at all, the cases are still very similar. Since the only "further act which must be done by the court" is to have a new hearing, as ordered by the ALC, this appeal is not interlocutory and should have been decided on the merits.

Furthermore, it is clear that the legal issue in this case before the ALC was decided by the ALC in full and the facts regarding that legal issue are fully developed in the record. This is further evidence that this appeal is not interlocutory. To find

otherwise would mean that OMVH cases might never be appealed beyond the ALC. To prevent appeals beyond the ALC, all the ALC would have to do is order some further action be taken by the OMVH: a new hearing, an assessment of costs, a review of some factual finding, etc. This is not the intent of S.C. Code §§14-8-200, 1-23-660, or the applicable case law.

Alternatively, in the *Charlotte-Mecklenburg* case, the case needed to be remanded to DHEC "to determine whether any of the applicants were entitled to the certificate of need," a factual question that had not yet been addressed by DHEC or the ALC, and therefore was one that could not be addressed by the appeals courts until that factual question was answered by the lower courts.

In the instant case, no factual development is necessary for the substantive issue to be decided by this Court: whether the OMVH had authority to and did properly dismiss this case due to the Respondent's failure to appear at the OMVH hearing. Requiring a new hearing to be held at the OMVH prior to deciding this legal issue would ultimately eradicate this legal issue in any future action on this case. Further, if the current Court of Appeals and ALC rulings in this case are maintained, the indirect message sent to attorneys that handle cases in the OMVH would be that the OMVH never has authority to deny a request for continuance or to dismiss a case due to a party defaulting. Such a finding would gut the OMVH hearing officers' authority and ability to rule in the cases before them and would cause extreme levels of havoc and delay in OMVH cases.

2. 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?

Rule 601, SCACR states:

(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.

When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose.

(b) Conflict With Federal Courts. When times set for appearances before state and federal courts are in conflict, appearance shall have such priority as is appropriate. Courts and counsel shall have the obligation to adjust schedules to accord with the spirit of comity between the state and federal courts.

(c) Attorney to Give Notice. *An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals as soon as the conflict becomes apparent.* (Emphasis added)

In this case, the conflicting magistrate's court appearance was noticed to Respondent's counsel on July 15, 2015 (R. pp. 107 and 114). Respondent's counsel did not notify the

OMVH or the OMVH hearing officer of the anticipated conflict until Friday, August 7, 2015 at 12:30 p.m., three weeks and one day after the conflict was apparent to Respondent's counsel. Rule 601(c), SCACR requires attorneys to notify affected tribunals as soon as a conflict becomes apparent. Respondent's counsel did not do so. For these reasons, the OMVH hearing officer's finding that "counsel did not follow the requirement of Rule 601" was appropriate and demonstrates no abuse of discretion.

In addition to the lack of notice issue, Rule 601, SCACR does not give magistrate's court greater priority than OMVH hearings. S.C. Code §1-23-660(A), states, in part, "There is created within the Administrative Law Court the Office of Motor Vehicle Hearings..." Therefore, it is clear the OMVH is part of the ALC, which has a greater priority under Rule 601, SCACR than magistrate's courts. For this reason alone, the OMVH hearing officer was justified in denying the request for continuance and, when neither Respondent nor Respondent's counsel appeared for this hearing, was justified in the dismissing the OMVH case.

In South Carolina, the grant or denial of a continuance is within the sound discretion of the OMVH hearing officer and is reviewable on appeal only when an abuse of discretion appears from the record. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) ("The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record."); and *Newman v. Old West, Inc., et al.*, 286 S.C. 394, 334 S.E.2d 275 (1985) ("The trial judge's decision to grant or deny a continuance is a matter within his sound discretion."). See, also, *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957)

> The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed

> on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant. A multitude of cases to this effect will be found in 7 S.C.Dig., Criminal Law, k586 et seq., p. 504 et seq. and supplement. Review of them shows that reversals of refusal of continuance are about as rare as the proverbial hens' teeth.

Thus, unless there was an abuse of discretion, the OMVH hearing officer's ruling must stand.

Furthermore, Rule 10, OMVH Rules states:

> A. Content and Filing. All motions shall be written, contain the caption of the case and the title of the motion, the docket number and the name, address, telephone number and e-mail address of the person or representative filing the motion. The motion shall state with specificity the grounds for relief and the relief sought. All motions pertaining to the hearing shall be filed not later than ten days before the hearing date. Any party may file a written response to the motion within ten days unless the time is extended or shortened by the hearing officer.
>
> B. Motions for Continuance. A motion for continuance shall be in writing, state with specificity the reasons therefor, and be signed by the requesting party or representative. *All motions must be filed at least two business days prior to the scheduled hearing. Motions filed less than two business days prior to the scheduled hearing will be granted only for good cause shown. Motions not served upon all parties will not be granted except in an emergency.* Attorneys with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the attorney received notice of the conflicting court appearance. *Attorneys must notify the Office as soon as possible when a court conflict occurs.* Law enforcement officers with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the officer received notice of the conflicting court appearance. Law enforcement officers with training conflicts must submit documentation that sets out the date, place, and time of training, and the date the officer received notice of the conflicting training. Officers must notify the Office as soon as possible when a conflict occurs.

Emphasis added. Respondent's request for continuance on June 18, 2015; request for continuance on August 7, 2015; request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.; and request for continuance dated August 10, 2015, and e-mailed to OMVH at 4:41 p.m. did not comply with Rule 10(A), OMVH Rules. Each of these requests was sent simply as a letter or e-mail to the OMVH, the OMVH hearing officer, or both. Specifically, none of these requests were written as a motion, none contained the caption of the case, some did not contain the e-mail address of the person or representative filing the motion, and none were signed by an attorney. Rather each of these were signed by "Tori Ford" for Attorney Michael Laubshire or were sent via e-mail from "Victoria Ford, Paralegal." Therefore, Respondent's counsel's attempts to file a "motion for continuance" were, in actuality, not motions. These attempts were merely letters requesting a continuance. While a letter may comply with the requirements of Rule 601, SCACR, it does not comply with the requirements of Rule 10, OMVH Rules.

The failure to comply with the requirements of Rule 10, OMVH Rules is further demonstrated by the explicit requirements of section (B) of Rule 10, OMVH Rules, specifically, the requirement that "All motions must be filed at least two business days prior to the scheduled hearing." Assuming, for argument's sake only, that Respondent's counsel's August 7, 2015 letter is considered a motion, it still did not comply with the requirement that it be filed at least two business dates prior to the scheduled hearing. This hearing was scheduled for August 11, 2015 at 9:00 a.m. August 8 and 9 of 2015 were a Saturday and a Sunday and not business days. Therefore, any motions for the August 11, 2015 9:00 a.m. hearing had to be filed with the OMVH by no later than 9:00 a.m. on Friday, August 7, 2015. Respondent's counsel's August 7, 2015 letter was not

sent to the OMVH until 12:30 p.m. on August 7, 2015, clearly past the two business day deadline. Rule 10(B), OMVH Rules, goes on to discuss how motions submitted less than two business days prior to the scheduled hearing will be evaluated: "Motions filed less than two business days prior to the scheduled hearing will be granted only for good cause shown." Significantly, the ALC Final Order found that the OMVH hearing officer "committed error by concluding that a Motion for Continuance could only be filed with at least two full business days prior to the hearing..." R. p. 11. This finding, however, misunderstands the OMVH Order of Dismissal's second paragraph discussion in its' entirety, most especially the finding that "Counsel requested a continuance on August 7, 2015, three (3) weeks and one (1) day after receiving notice of the conflict." Thus, it is apparent that the OMVH hearing did engage in a good cause evaluation and, due in large part to the significant delay between when Respondent's counsel became aware of the conflicting court appearance and when he notified the OMVH of that conflicting court appearance, the OMVH hearing officer did not find good cause to grant the requested continuance. This discussion in the OMVH Order of Dismissal is significant because the "good cause" standard "primarily considers the diligence of the party seeking the [continuance]." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Furthermore, "If the party seeking the [continuance] was not diligent, the inquiry should end and the motion [for continuance] should not be granted." *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Here it is clear the OMVH hearing officer did not find good cause for the requested continuance, because the OMVH Order of Dismissal took pains to point out Respondent's counsel's failure to request the continuance for three weeks and one day after knowing there was a court

conflict. Moreover, the OMVH Order of Dismissal specifically cited Rule 601(C), SCACR, which states, "An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals as soon as the conflict becomes apparent." Clearly, in addition to the Rule 10(B), OMVH Rules issues, based on the over three week delay, Respondent's counsel also did not comply with this requirement of Rule 601, SCACR.

In addition to the reasons specifically stated by the OMVH hearing officer in his Order of Dismissal, Respondent's counsel's requests also failed to comply with the requirements of Rule 10(B), OMVH Rules. Specifically, due to the delay already discussed above, but also because Rule 10(B), OMVH Rules requires:

> Attorneys with court conflicts must include documentation of the call to court with the motion and the documentation must include the case name, the court, the county, the docket number, the presiding judge's name and telephone number, and the date the attorney received notice of the conflicting court appearance.

Respondent's counsel's June 18, 2015 request did not include the docket number, the presiding judge's name and telephone number, or the date the attorney received notice of the conflicting court appearance.[5] Additionally and significantly, Rule 10(B), OMVH Rules also states "Motions not served upon *all parties* will not be granted *except in an emergency*." (Emphasis added). In this case, Respondent's counsel failed to serve DMV with:

1) the request for continuance on June 18, 2015;[6] [7]

[5] It did contain the date the notice was sent to Respondent's counsel from the Solicitor's Office and later the date of receipt was confirmed by Respondent's counsel to the OMVH (R. p. 107).

[6] R. pp. 117-120.

2) the request for continuance on August 7, 2015;[8]

3) the request for reconsideration of request for continuance on August 10, 2015 at 1:28 p.m.;[9]

4) the request for continuance dated August 10, 2015 and e-mailed to OMVH at 4:41 p.m.; and[10]

5) the Motion for Reconsideration dated August 17, 2015.[11] [12]

Respondent's counsel also failed to serve DPS with the request for reconsideration.[13] There are no statements or indications in any of these letters, e-mails, motions, or attached documents that any of these requests were made due to an emergency, nor has any such argument been put forth by Respondent. The ALC Final Order dismissed Respondent's counsel's failure to comply with the requirements of Rule 10, OMVH Rules as merely "not satisfy[ing] all of the technicalities" of the rule (R. p. 10). Petitioner submits that service of a motion on other parties to a case is not a mere "technicality." By failing to serve all the parties, Respondent removed the parties' ability to respond to or challenge in anyway the motions made to the OMVH. Moreover, by

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[7] Footnote 1 of the ALC's Final Order and Order of Remand states "The Record is unclear as to how this request was made and processed." The ALC Record on Appeal, however, contains a copies of the letters and e-mails regarding this request and how the request was made. See R. pp. 117-120.

[8] R. pp. 109-114.

[9] R. p. 107.

[10] R. pp. 95-105.

[11] R. p. 67-86.

[12] Respondent's ALC Reply Brief stated "Any and all requests for continuances were emailed to all parties of record listed on the original notice of hearing." This statement is false, as shown by the listing above, and as shown in the Record on Appeal. See R. pp. 127-131 and 115-116.

[13] In fact, because this request for reconsideration was not copied to DMV or DPS, and was sent directly to the OMVH hearing officer as well as the OMVH hearing officer's scheduling assistant, DMV believes this e-mail was an improper ex parte communication with the OMVH hearing officer.

failing to serve all the parties, Respondent potentially placed the parties in the unenviable position of showing up to a hearing that may have been continued without the parties' knowledge.[14] These collateral consequences of failure to serve motions on other parties to a case are not mere "technicalities," but, rather, can have a very real impact on the parties and the ultimate outcome of the case. The various rules regarding service of motions and other pleadings are in place specifically to avoid situations such as those suggested above. As a result, if for no other reason than Respondent's counsel's failure to serve copies of these requests on the DMV and DPS, the Court of Appeals errored in failing to rule on the merits of this issue. For the reasons outlined above, SCDMV believes the Court of Appeals should have overturned the ALC Final Order and reinstated the OMVH Order of Dismissal.

Case law also supports overturning the ALC decision in this case. A review of the case *Brockman v. South Carolina Dept. of Motor Vehicles and Mauldin Police Dept.*, 2014 WL 2895374, 13-ALJ-21-0049-AP (SCALC 2014) reveals that the ALC has considered this exact issue in the past. In the *Brockman* case, the ALC specifically rejected a claim of abuse of discretion for a request of continuance under Rule 601, SCACR because the request for continuance was filed with less than two business days' notice and Petitioner was aware of the conflict well before he filed the Motion for Continuance. Thus, the *Brockman* case provides solid, persuasive guidance to this Court in determining the proper outcome of this appeal and demonstrates that the ALC Final Order in this case is a departure from the precedent of the ALC. The ALC Final Order in

[14] For example, a law enforcement officer showing up for a 9:00 a.m. hearing after working a 7:00 p.m.-7:00 a.m. shift or an attorney for the DMV driving 3 hours from Columbia to a hearing in Horry, only to discover the hearing has been rescheduled and no notice was provided to them about the rescheduling.

this case found that the *Brockman* case is not similar to this case because *Brockman* "was represented by substitute counsel and... a full hearing was held" (R. p. 10). What this finding by the ALC fails to acknowledge is that Respondent and/or her counsel or substitute counsel could have appeared at the hearing. If they had done so, the OMVH would have held a full hearing as was done in the *Brockman* case. Therefore, despite the ALC's finding, there are no substantive differences in this case and the *Brockman* case with regard to the continuance request.

Also instructive on this matter is the case of *Chadwick Dale Martin v. S.C. Dept. of Motor Vehicles*, 2007 WL 4184375 (2007). *Martin* found an appeal such as the one initiated by the Respondent in this case in the ALC is more like a Motion to Reopen and analyzed the case under the *Mictronics, Inc. v. S.C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) four part test. In *Mictronics, Inc.*, the Court put forth the following four part test: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics, Inc.*, 548 at 226. In *Martin*, as we have in this case, the Court found there was no information put forth for the Court to make a "tenable judgment on whether a meritorious defense exists" and, thus, the ALC found there was no abuse of discretion in the OMVH's dismissal pursuant to Rule 601, SCACR. Similarly, Respondent has put forth no information upon which any Court could find a meritorious defense exists. Furthermore, looking to the other parts of the *Mictronics* test:

1) *Promptness with which relief is sought*

Respondent waited for three weeks and one day after her counsel received notice of the conflicting court appearance before requesting a continuance of the

OMVH hearing. Then, after being notified that the request for continuance was denied, Respondent and her counsel failed to appear for the hearing. When the Order of Dismissal was e-mailed to the parties on Wednesday, August 12, 2015, Respondent did not file her Motion for Reconsideration until the following Monday, August 17, 2017. Thus, Respondent was not prompt in requesting her continuance of this hearing and did not act quickly with regard to her Motion for Reconsider either.

2) *The reasons for the failure to act promptly*

Throughout all of the motions and appellate briefs in this case, Respondent has failed to provide any explanation as to why her request for continuance of the OMVH hearing was filed three weeks and one day after her counsel received notice of his conflicting court appearance. With no information put forth regarding this failure, Respondent has provided no information upon which any Court could find a reasonable explanation existed for Respondent's failure to timely request a continuance of the OMVH hearing.

3) *The prejudice to the other party*

DPS would be prejudiced if this case was reheard at the OMVH, because Trooper McWhorter would have to prepare for and appear a second time for a second hearing. Such preparation and appearance costs DPS employee time that could be used for other DPS business. See *SCDMV v. Willie Pitts*, 2007 WL 2377440 (2007, S.C.Admin.Law.Judge.Div.), citing *Beit v. Probate & Family Court Dep't*, 434 N.E.2d 642, 646 (Mass. 1982) ("Generally speaking, a last-

minute continuance request, if granted, causes judicial resources to be wasted, litigation expenses to be increased, and opposing parties to be inconvenienced").

Moreover, if this case was reheard at the OMVH now, it would be a hearing for an implied consent case that is now over two and a half years old. Thus, Trooper McWhorter's memory of the events in this case may be fairly fuzzy, which could severely compromise his ability to provide through testimony in this case. Because the burden of proof in these hearings is on the law enforcement agency and DMV, attempting to present such testimony after such a long period of time, in a hearing where all the normal rules of evidence apply, would be difficult, if not impossible due simply to the normal fading of memory. For these reasons, it appears there is significant prejudice to DPS should an OMVH hearing in this matter take place after such a long period of time.

For the reasons discussed above, it appears this case fails all sections of the four part test provided for in the *Mictronics* case and, like in the *Martin* case, the hearing officer was correct to deny Respondent's Motion for Reconsideration.

Another case which provides guidance on this matter is *S.C. Dept. of Revenue v. Edwin Alewine*, 1997 WL 816208 (1997 SCALC). The *Alewine* case focused on:

1) the late notice to the ALC of a conflicting General Sessions court appearance (less than 24 hours);
2) the requirement of Rule 601, SCACR that "an attorney must give notice of a scheduling conflict as soon as it becomes apparent;"

3) that counsel requesting the continuance did not state the date when he was noticed of the Circuit Court trial (notice of the ALC hearing was issued 45 days prior to the hearing);

4) there was no "explanation as to why the request was not made earlier;"

5) the number of prior requests for continuances and the reasons for those requests;

6) that counsel stated he "did not have anyone in his firm that would be able to attend the hearing for him 'because of the short notice;'" and

7) the amount of delay the previous continuances had created in the case (six months in *Alewine* and at least two months in this case, see R. p. 115 & 127).[15]

Emphasis in the original. This case shares many similarities to the *Alewine* case. The original request for a continuance was sent with less than two business days' notice. Respondent's counsel waited for three weeks and one day after receiving notice of the conflicting court appearance before advising the OMVH of the conflict. The original request did not state the date on which Respondent's counsel received the notice of appearance for the conflicting court appearance. No explanation was provided (to the OMVH, to the ALC, or to the Court of Appeals) as to why the continuance request was not made earlier. Respondent's counsel had previously asked for a continuance in this case for another magistrate's court appearance, and the previous continuance had already caused a two month delay in this case. The *Alewine* case also noted "counsel has shown

[15] If the requested continuance had been granted by the OMVH, this hearing likely would have been scheduled 2-3 months from the date of the request putting the total delay time at four to five months.

a predilection for making multiple requests for continuances in other cases adjudicated before this tribunal." While it is not specifically listed as one of the reasons for dismissal in the Order of Dismissal issued by the OMVH, Petitioner suspects, based on the e-mail communications between Respondent's counsel and the OMVH, that Respondent's counsel's "predilection for making multiple requests for continuances in other cases" before the OMVH contributed to the OMVH's decision in this matter. (R. pp. 88-102, 106-112).

Additionally, the ALC's reasoning that "court schedules change, and a conflict may only become apparent when it becomes clear that neither of the cases will be rescheduled"[16] places the courts, particularly those with lower priority under Rule 601, SCACR, in an untenable position. Following the ALC's logic, an attorney could wait until literally one minute prior to a scheduled hearing or trial to inform a court that he/she had an appearance in a court with a higher priority for the same date and time.[17] The attorney would merely have to state that he/she believed one of the court schedules would change. Such a holding would essentially eviscerate Rule 601, SCARC and certainly does not appear to be the intent of Rule 601, SCARC.

The ALC Final Order continued by asserting that the purpose of Rule 601, SCACR "is to prevent an individual from being deprived of counsel in situations similar to the one before the Court in which an attorney is forced to abandon responsibility to one client in order to serve another" (R. p. 10). While the ALC may believe this to be the

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[16] *Id.*

[17] For example, if an attorney had oral arguments scheduled for the same day and time before this Court and the South Carolina Court of Appeals, he/she could wait until only minutes before the argument was scheduled to begin at the Court of Appeals to inform the Court of Appeals of the conflict and could simply state that he/she believed the oral argument in the Supreme Court would be rescheduled.

primary purpose of Rule 601, SCACR, by waiting until nearly the last minute to advise the OMVH of the conflict that existed in this case, Respondent's counsel, not the OMVH hearing officer, is the one that deprived Respondent of his presence at the hearing. Petitioner DMV asserts that the primary purpose of Rule 601, SCACR is to improve juridical economy and efficiency by allowing the prompt rescheduling of trials and hearings and reassignment of court time to other matters when there are conflicts with a court with a higher priority under Rule 601, SCACR. If this assertion is correct, then following the ALC's logic of allowing last minute notification to courts of conflicts, would defeat the primary purpose of Rule 601, SCACR.

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?

Respondent has contended that the OMVH hearing officer erred in issuing an Order of Dismissal when the OMVH hearing officer never initiated the scheduled hearing and, by never initiating the scheduled hearing, did not require Petitioner to present evidence. Respondent has further asserted that the OMVH hearing officer bore the burden of proof in enforcement actions pursuant to Rule 15, OMVH Rules and that in this case, the OMVH hearing officer failed to carry his burden of proof against Respondent.

First, the burden of proof in implied consent actions is on the Petitioner, i.e. the DMV and/or the law enforcement agency, not OMVH hearing officer. Despite this error in Respondent's argument, 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*, 2007 WL 2377440 (2007, S.C.Admin.Law.Judge.Div.), and *S.C. Dept. of Motor Vehicles v. Alana Marie Erwin*, 06-ALJ-21-0591, dealt with this exact

argument. In *McGeary*, the ALC held that because Appellant McGeary failed to appear at the administrative hearing, without the proper consent of the OMVH hearing officer, the OMVH hearing officer clearly had the authority, under Rule 13, OMVH Rules, to dismiss the case adverse to Appellant McGeary. Further, in the *McGeary* case, the 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 and Respondent has consistently failed to provide any argument or grounds for why her case should be treated any differently than *McGeary*. Additionally, to require the OMVH to hold contested case hearings when individuals who requested the hearings do not appear for the hearings would be an unjustifiable waste of time and resources, for the OMVH, law enforcement officers, the governmental agencies involved in the cases, and witnesses involved in the cases. For all of these reasons Respondent's arguments with regard to Rules 14 and 15, OMVH Rules should have been ruled on the merits by the Court of Appeals and should have failed.

CONCLUSION

For the reasons stated above, the DMV prays for an order that continues to empower the OMVH hearing officers with the authority to enforce the OMVH's Rules and Rule 601, SCACR, and an order that upholds the OMVH's August 12, 2015 Order of Dismissal in full.

Respectfully submitted,

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November 27, 2017
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

CORRECTED CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, November 27, 2017, I served one (1) copy of the Petitioner's Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

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November 27, 2017
Blythewood, South Carolina