THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
The Honorable DeAndrea G. Benjamin
Richland County

Appellate Case No. 2018-001305

John McPartland . . . . . Appellant,

v.

South Carolina Department of Motor Vehicles . . . . . Respondent.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. *DID THE TRIAL COURT ABUSE ITS DISCRETION BY HOLDING THAT THE APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES?*

II. *IF THE TRIAL COURT IS FOUND TO HAVE ABUSED ITS DISCRETION BY FINDING THAT THE APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES, DO ANY OF THE ADDITIONAL SUSTAINING GROUNDS SUPPORT UPHOLDING THE TRIAL COURT'S DECISION?*

STATEMENT OF THE CASE

Prior to moving to South Carolina, the Appellant, John McPartland, was convicted of five different offenses for driving under the influence in New York (R. p. 87, ¶2). On June 15, 2000, Appellant applied for and was issued a driver's license in South Carolina (R. p. 88, ¶3). In making his application for a driver's license on June 15, 2000, Appellant did not disclose that his driver's license and driving privileges were currently suspended/revoked in New York (R. p. 89, ¶10). Further, although the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV") did check the Problem Pointer Driver System (hereinafter, "PDPS"), no hits came back to indicate that Appellant's driver's license and/or driving privilege was currently suspended, revoked, or cancelled in any other state (R. p. 89, ¶9). Significantly, Exhibit 1 from this hearing indicates that New York added a pointer in PDPS for the suspension/revocation at issue in this case on June 30, 1996 (R. p. 83, 3rd item listed under "Activity"). Appellant renewed his South Carolina driver's license on June 15, 2005 and June 11, 2015 (R. p. 88, ¶¶4-5). Again, in making his application to renew his driver's license on June 15, 2005, and June 11, 2015, Appellant did not disclose that his driver's license and driving privileges were suspended/revoked in New York State (R. p. 89, ¶12 and p.90, ¶15).

On the evening of June 11, 2015, SCDMV first became aware that Appellant's

driver's license and driving privileges were actively suspended/revoked in New York State (R., pp. 89-91, ¶¶8, 9, 11, 13, 14, and 16). This awareness came about because a hit was detected in PDPS for Appellant. *Id.* On June 12, 2015, SCDMV sent Appellant a letter notifying him that due to this active suspension/revocation in New York State, SCDMV would have to cancel Appellant's driver's license on August 11, 2015 (R. pp. 90-91, ¶16). This letter further informed Appellant that he could clear (stop) this cancellation by clearing up the suspension/revocation in New York and providing proof of that clearance to SCDMV. *Id.* Pursuant to a written request from the Appellant on August 10, 2015, SCDMV granted Appellant a 60 day extension to clear up his suspension/revocation issue with New York State (R. p. 91, ¶17). SCDMV heard nothing further from Appellant regarding this matter, until this lawsuit was raised, and his South Carolina driver's license was cancelled on October 9, 2015 (R. p. 91, ¶18).

On or about December 24, 2012, New York amended a regulation to make it State policy that a person with five or more alcohol or drug related driving convictions during their lifetime shall have their applications to clear their suspensions/revocations denied unless there are unusual, extenuating, and compelling circumstances present that form a valid basis to deviate from this general policy (R. pp. 91-92, ¶21). Prior to December 24, 2012, Appellant could have cleared his driver's license suspensions/revocations in New York State by completing all of his reinstatement requirements as set out in New York law, but Appellant failed to complete all of these requirements prior to December 24, 2012 (R. p. 91, ¶20). Appellant did not apply to have his New York State suspension/revocation cleared until sometime around December 13, 2016, after the amended New York regulation had gone into effect and nearly a year and a half after

being notified by SCDMV that he had an active suspension/revocation in New York (R. p. 92, ¶22). New York State denied Appellant's application to clear his suspension/revocation and Appellant appealed that decision to the Appeals Board in New York (similar to South Carolina's Office of Motor Vehicle Hearings), but did not further appeal this decision to any other Court (R. p. 92, ¶¶22-23). It appears there were at least three additional appellate levels that could have been utilized by Appellant to pursue clearance of the New York suspension/revocation.[1] Appellant did not pursue these appellant options in New York (R. p. 92, ¶23). Instead, Appellant opted to bring this action in South Carolina against the SCDMV. *Summons & Complaint* filed July 13, 2017 (R. pp. 7-15).

The parties stipulated to the facts in this case (R. pp. 87-94). A hearing was held before the Circuit Court on June 18, 2018, to hear arguments regarding this matter (R. pp. 45-74). On June 26, 2018, the Circuit Court issued an Order dismissing this action on the basis that Appellant had "failed to exhaust his administrative remedies available in New York" (R. pp. 1-3). Thereafter, Appellant filed his *Rule 59(e) Motion to Alter or Amend Judgment* on July 6, 2018 (R. pp. 143-144). That motion was denied on July 13, 2018 at 9:06 a.m. (R. pp. 4-6). Appellant filed his *Notice of Appeal* on July 13, 2018 at 4:52 p.m.

STANDARD OF REVIEW

"Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse

1 The remaining appellate levels that could have been utilized by Appellant are the New York Supreme Court (similar to South Carolina's Circuit Court), the New York Supreme Court, Appellate Division (similar to South Carolina's Court of Appeals), and the New York Court of Appeals (similar to South Carolina's Supreme Court). See N.Y. C.L.P.R. Chapter 8, Articles 55-57 and 78 (McKinney).

thereof." *Hyde v. South Carolina Dept. of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-583 (1994). "A trial judge must have a sound basis for excusing the failure to exhaust administrative relief." *Id.*, 314 S.C. at 209. "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006).

ARGUMENT

I. *DID THE TRIAL COURT ABUSE ITS DISCRETION BY HOLDING THAT THE APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES IN NEW YORK?*

Appellant argues that because he asked the New York State Department of Motor Vehicles (hereinafter, "New York State DMV') to clear his revocation, was denied that clearance, and then appealed that denial to the Appeals Board, he has exhausted his administrative remedies in New York. *Initial Brief of Appellant*, p. 4. This is simply not true. While it is accurate to state that Appellant had no further appellate levels available to him within the New York State DMV, Appellant still had multiple appellate levels available to him within the State of New York (R. p. 92, ¶23). Appellant's argument in this regard would be similar to someone arguing that they had no further appellate levels available to them beyond the Office of Motor Vehicle Hearings (hereinafter, "OMVH") in South Carolina. In South Carolina, after the OMVH issues a decision, a party may appeal to the Administrative Law Court, the Court of Appeals, and the Supreme Court. Similarly, in New York State, if a party receives an adverse decision from the New York Appeals Board, they may appeal to: the New York State Supreme Court; then the New York Supreme Court, Appellate Division; and finally to the New York Court of Appeals.

See Footnote 1. Appellant failed to appeal his case to any court after the New York Appeals Board, leaving three possible appellate options unexecuted in New York. For this reason alone, Appellant failed to exhaust his administrative remedies in New York State.

Appellant argues that the doctrine of exhaustion of administrative remedies only required him to complete review and appeals through the New York administrative agency, in this case the New York State DMV. Appellant cites many South Carolina cases that appear to support this argument. None of the cases cited by Appellant, however, dealt with an administrative case that actually began in another State via that other State's administrative agency, as occurred in this case. For this reason, the cases cited by Appellant are strongly distinguishable from this case. In fact, it appears the overarching issue presented in this case, i.e. how the doctrine of exhaustion of administrative remedies should apply in an administrative case that began in another State via that other State's administrative agency, has never been raised in South Carolina.[2]

It is SCDMV's position that when an administrative case begins in another State via that other State's administrative agency, a person or entity must exhaust all possible levels of appeal with that State to fully exhaust administrative remedies. This position is supported by the case law that developed the doctrine of exhaustion of administrative remedies in South Carolina.

> The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine

2 If this overarching issue has been addressed in South Carolina before, the undersigned has been unable to locate that case law despite exhaustive research on the subject.

> is well established, is a cardinal principle of practically universal application...

Brown v. James, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (2010) (quoting 2 Am. Jr. 2d Administrative Law §595 (1962). Further, it is "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.*, 389 S.C. at 49 (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938)).

"The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law, and is not jurisdictional." *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000). "Thus, the failure to exhaust administrative remedies goes to the prematurity of a case..." *Id.* Further, the courts of South Carolina have "consistently applied the doctrine of exhaustion of administrative remedies to avoid interference with the orderly performance of administrative functions..." *Id.*, 343 S.C. at 17 n. 7. The South Carolina Supreme Court explained that the doctrine of exhaustion of administrative remedies:

> [I]nvolves a policy of orderly procedure which favors a preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative authority and service to prevent attempts to swamp the courts by resort to them in the first instance.... The doctrine is sometimes said to rest upon the presumption that the administrative agency, if given a complete change to pass upon the matter, will decide correctly.

De Pass v. City of Spartanburg, 234 S.C. 198, 203, 107 S.E.2d 350, 352 (1959). In this case, the trial court appears to agree with SCDMV that it was more appropriate for Appellant to seek a full administrative review, including all appellate levels in New York, before filing litigation in South Carolina. In this regard, although not stated in any way,

it appears the trial court was leaning toward the logic set forth in the case *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 8, 56 S.E.2d 576, 579 (1949), which discussed the idea that if there was no legal justification for an administrative action, such an error could have been corrected by utilizing the appeal process ("If there was no legal justification for these awards, the error could have been finally corrected by appeal in the manner prescribed by statute."). Similarly, if the New York State DMV erroneously or incorrectly denied Appellant reinstatement of his New York driver's license and/or driving privilege, such an error could have been (and still could be) corrected through the appeal process in New York, if Appellant had simply given New York the opportunity to review his case.

In South Carolina the determination of whether "administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-583 (1994). See, also, *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973) ("We conclude that there was no abuse of discretion on the part of the lower court in overruling the demurrer...") and *Pullman Co. V. Public Service Commission*, 234 S.C. 365, 368, 108 S.E.2d 571, 572 (1959) ("It was a proper exercise of the discretion of the court to refuse to entertain jurisdiction of the action before appellant had exhausted its administrative remedy.") The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Id.*, 314 S.C. at 208.

Appellant argues that taking his case any further in New York would be futile and, as a result, the trial court's decision in this case was legal error. *Initial Brief of Appellant*, p.

5. South Carolina law does have a "commonly recognized exception to the requirement of exhaustion of administrative remedies" in cases where a "party demonstrates that pursuit of administrative remedies would be a vain of futile act." *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). "Futility is an exception when the administrative body cannot provide the relief requested or when circumstances guarantee a negative result of appeal." *Storm M. H. ex rel. McSwain v. Charleston County Bd. Of Trustees*, 400 S.C. 478, 494, 735, S.E.2d 492, 501 (2012) (Pleicones, J., dissenting) (citing *Ward v. State*, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) and *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'"). Further, Justice Pleicones urged the courts to use exceptions to the doctrine of exhaustion of administrative remedies with "great judicial restraint and only where a question 'of imperative and manifest urgency' truly exists..." *Id.*, 400 S.C. at 495. In this case, Appellant argues that appealing his case in New York was futile because only 4 out of 1,031 waivers to 15 NYCRR §136.5 have been granted by the New York State DMV Commissioner. *Initial Brief of Appellant*, p. 5. The failure of this argument, however, is that the question of whether further pursuit of judicial appeals in New York would be futile is very much one of speculation, particularly in light of the fact that the affidavit that provides the numbers of 4 out of 1,031 is 4-5 years old and does not appear to include any figures for those people who may have been granted a waiver after a judicial appeal in New York Courts, rather than just an application to the New York State DMV (R. p. 125). In fact, no evidence was presented to the trial court that indicates that the

New York appellate courts just "rubber stamp" the decisions of the New York State DMV and Appeals Board. Additionally, the fact that, as of late 2013-early 2014, the New York State DMV Commissioner had exercised his discretion to reinstate the driver's license/driving privilege of 4 out of 1,031 applicants, indicates that such requests for clearance are genuinely considered by the New York State DMV and that the New York State DMV has not taken "a hard and fast position that makes an adverse ruling a certainty."[3] *Law*, 368 S.C. at 438.

Appellant admits that he elected to not seek further review judicial of his case in New York. In this regard, Appellant cites two cases for the proposition that if a party can demonstrate that the pursuit of administrative remedies would be futile, then a court can grant an exception to the requirement of exhaustion of administrative remedies. *Storm M. H. V. Charleston County Bd. Of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012) and *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010). Interestingly, the futility exception is a discretionary matter that is left to the judgment of the trial judge.[4] *Id.* and *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'"). Moreover, the question of whether further pursuit of judicial appeals in New York would be futile is very much one of fact to be considered and weighed by the

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3 Given the age of this data, 4-5 years old, it is reasonable to assume that New York State DMV has reviewed additional applications for such relief, granting some such applications and denying others.

4 Even Appellant admits that the doctrine of exhaustion of administrative remedies by a trial court is a discretionary matter that may only be overturned on appeal if there is an error of law or a lack of factual foundation for the ruling. Initial Brief of Appellant, p. 1 and 6.

trial court, particularly in light of the fact that the affidavit that provides the numbers of 4 out of 1,031 is 4-5 years old and does not appear to include any figures for those people who may have been granted a waiver after a judicial appeal in New York Courts, rather than just an application to the New York State DMV (R. p. 125). Significantly, Appellant cites nothing that indicates a lack of evidentiary support for the trial court's June 26, 2018, *Order*. Further, Appellant has cited no case law or legal principle that states the trial court committed an error of law in weighing whether: 1) Appellant should be required to exhaust his administrative remedies in New York; and 2) should not be allowed to skip the administrative appellate process in New York due to futility (the trial court did not error in determining that the New York appellate courts can provide the relief requested and a negative result from an appeal in New York was not guaranteed).

In addition to Appellant's unexhausted appeals in New York, however, the New York State DMV specifically informed Appellant that he may reapply for clearance of this suspension/revocation at any time[5] (R. pp. 113-114). Exhibit 1 at this trial, the New York State DMV Compass printout for Appellant (similar to a South Carolina driving record), states that Appellant was eligible to reapply to have his New York suspension/revocation cleared as of December 13, 2017 (R. 83, 1st item listed under "ACTIVITY (22)"). There is no evidence in this record that Appellant ever made a second application to have this suspension/revocation cleared in New York. Since Appellant had and still has administrative remedies available to him in New York generally, and at the New York State DMV specifically, he has failed to exhaust those administrative remedies. Thus, for this additional reason, Appellant has still failed to exhaust his administrative remedies

5 Appellant applied only once to the New York State Department of Motor Vehicles to have this suspension/revocation cleared (R. 92, ¶22). That application was denied. *Id.*

even within the New York State DMV.

Appellant argues that the doctrine of exhaustion of administrative remedies does not apply to him in this case because his administrative remedies are only available in another State. In other words, Appellant argues that a challenge may be brought against S.C. Code §§56-1-40(2) and 56-1-240 anytime a driver is suspended in a State other than South Carolina, has applied for a South Carolina driver's license and is denied a South Carolina driver's license due to that out-of-state suspension, and feels the reinstatement requirements or reinstatement procedures in the other State are too harsh.[6] This inventive argument is an attempt, essentially, to get this Court to declare S.C. Code §56-1-40(2) unlawful and unenforceable in South Carolina, presumably in all cases and not just Appellant's case (despite Appellant's arguments otherwise).

Finally, Appellant cites several cases in an attempt to support his arguments. At least one of these cases, when looked at with a closer eye, is actually not supportive of Appellant's arguments. The case *State Dairy Com'n of South Carolina v. Pet, Inc.*, 283 S.C. 359, 324 S.E.2d 56 (1984) is cited for the argument that failure to exhaust administrative remedies may be excused by the trial court in a case that raised only an issue of law. *Initial Brief of Appellant*, p. 7. First, this argument basically reiterates that whether to apply the doctrine of exhaustion of administrative remedies is a decision for the trial court and will not be disturbed on appeal unless the trial court committed an error of law (since the question in these cases is merely a question of law, there could be no issue of lack of evidence to support the trial court's ruling). A closer look at this case,

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6 Florida, for example, permanently revokes the driver license or driving privilege of a person who has been convicted of one count of driving under the influence manslaughter. FL ST §322.28(2)(d). Unlike South Carolina, via Emma's Law, Florida has no mechanism for lifting this permanent revocation. S.C. Code §56-5-2941.

however, reveals that the discussion in *State Dairy* surrounded the fact that the State Dairy Commission of South Carolina initiated an enforcement action against Pet, Inc. in the Circuit Court and then attempted, as the claimant, to assert the defense of failure to exhaust administrative remedies in that case. The Supreme Court held that since the State Dairy Commission of South Carolina was the claimant agency attempting to uphold or enforce an otherwise illegal agency action, the defense of failure to exhaust administrative remedies would not be available to the State Dairy Commission. In this case, SCDMV is the respondent, not the claimant. Moreover, there is nothing illegal in the agency action that has been taken by SCDMV in this case. In fact, as outlined in more detail below, SCDMV was statutorily required to take the action it took in this case.

To frame this case in the simplest terms, it appears that Appellant is attempting to use this case to do an end run around the New York appeals process and the New York State DMV, it appears the trial court saw this was the thrust of this case, and the trial court determined the most appropriate action in this case was to require Appellant to resolve this suspension/revocation with New York.[7]

II. IF THE TRIAL COURT IS FOUND TO HAVE ABUSED ITS DISCRETION BY FINDING THAT THE APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES, DO ANY ADDITIONAL SUSTAINING GROUNDS SUPPORT UPHOLDING THE TRIAL COURT'S DECISION?

The South Carolina Supreme Court has said, "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on

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7 Interestingly, although SCDMV has raised the issue several times now, Appellant has still not addressed the issue that even if he were successful in this case, he would only be legally able to drive in the state of South Carolina and would continue to show up on all national searches as under suspension/revocation in New York. Thus, even if Appellant were to prevail in this case and have a South Carolina driver's license issued to him, Appellant could be legally charged with driving under suspension in any state (due to the New York suspension/revocation).

them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). In this case there are five other grounds upon which this Court may sustain the judgment of the trial court.

A. Application of S.C. Code §§56-1-40(2) and 56-1-240 to Appellant

Appellant asks this Court to strike S.C. Code §§56-1-40(2) and 56-1-240 as-applied because he asserts their application to him is "so manifestly unfair as to amount to a denial of due process." *Initial Brief of Appellant*, p. 8. Appellant cites to only one case for this proposition, although the concept of as-applied unconstitutionality of statutes is frequently litigated, and, in making this citation, Appellant fails to discuss or argue in any manner how he believes his cited case applies to this case. Because Appellant simply states a conclusory argument for this issue, it appears Appellant has abandoned this argument. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.") and *Brown v. Theos*, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct. App. 1999), aff'd, 345 S.C. 626, 550 S.E.2d 304 (2001) (Holding that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal).

Should this Court find that this issue has not been abandoned, SCDMV asserts that as-applied unconstitutionality does not exist in this case. According to Exhibit 1 from this hearing, New York added a pointer in PDPS for the suspension/revocation at issue in this case on June 30, 1996 (R. p. 83, 3rd item listed under "Activity"). South Carolina

had been checking PDPS[8] for approximately four years at the time Appellant moved to South Carolina from New York and SCDMV did check PDPS for pointers for Appellant at the time he made his initial application with SCDMV, but no hits came back from PDPS[9] (R. p. 89, ¶9). The parties have no idea why no hits came back during this search of PDPS, particularly in light of Exhibit 1 from this hearing indicating that a PDPS pointer was added on June 30, 1996. Despite this issue, however, SCDMV also included (and continues to include) on all driver's license applications a question to the applicant about whether their driver's license or privilege to drive is suspended, revoked, or cancelled in any other State and that question is answered under penalty of perjury (R. pp. 89-90, ¶¶10, 12, 15 and pp. 95-100). Appellant was well aware of his multiple driver's license and driving privilege suspensions in New York and should have been aware that he had not cleared the New York suspension/revocation at issue in this case when he applied for his South Carolina driver's license in 2000. Despite the fact Appellant either did know he was still suspended/revoked in New York or should have known known he was still suspended/revoked in New York, Appellant repeatedly answered "No" to the question about out-of-state suspensions on the South Carolina driver's license applications.[10] This repeated failure to disclose the New York

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8 Notably, PDPS is a national database and is not controlled by the State of South Carolina or the SCDMV.

9 At this time, the PDPS check in South Carolina had only progressed to checking initial applications. SCDMV did not have the capability to check renewal applications until 2006-2007 (R. pp. 89-90, ¶¶11 and 13).

10 The concept that "ignorance of the law is no defense" is deeply rooted in American jurisprudence. *Lambert v. People of the State of California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). Following this deeply rooted concept, it is reasonable for a court to believe that a person is familiar with the steps that must be taken to have their driver's license and driving privilege reinstated after a suspension, revocation, or cancellation. Such a belief is even more reasonable when the facts of a case demonstrate that the

suspension/revocation to the SCDMV should, by itself, negate any argument from Appellant that S.C. Code §§56-1-40(2) and 56-1-240 are unconstitutional as-applied to him in this case since Appellant was the only party that knew or should have known that his New York suspension was not reporting through PDPS.[11]

Although it is not discussed or analyzed in any manner in Appellant's Initial Brief, it appears, based on the only case Appellant cited for this conclusory argument, that Appellant's as-applied challenge to S.C. Code §§56-1-40(2) and 56-1-240 is based on the delay that occurred from when Appellant was first issued a South Carolina driver's license and when South Carolina notified Appellant that he was required to cancel his driver's license due to the New York suspension/revocation.[12] Courts generally analyze as-applied constitutional challenges (or equal protection challenges) under one of three standards: (1) rational basis; (2) intermediate scrutiny; or (3) strict scrutiny. *Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017) (quoting *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 917 (2004).). If the classification does not implicate a suspected class or abridge a fundamental right, the rational basis test is used. *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purposes sought to be affected;

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person has had their driver's license and driving privileges suspended and/or revoked multiple times in the same state and successfully ended all of those prior suspensions/revocations, except for one. Finally, such a belief is also reasonable when a court is aware that by law the driver must have been advised of the driver's license suspension and/or revocation and the steps that must be taken to end the that suspension/revocation.

11 Obviously, New York State DMV had every reason to believe the PDPS pointer they entered on June 30, 1996 was active and reporting to other States as it should in PDPS. Additionally, SCDMV had every reason to believe that when PDPS reported back that no pointers existed for Appellant, that information was accurate.

12 Appellant cited to the case *Davis v. SCDMV*, 420 S.C. 98 (Ct. App. 2017).

(2) the members of the class are treated alike under similar circumstances and conditions; and; (3) the classification rests on some reasonable basis." *Id.*

In this case, there is no question that Appellant (and other similarly situated) are not part of a suspect class. Appellant is a person whose license was cancelled due to Appellant not being entitled to the license to begin with as a result of his active out-of-state suspension/revocation. Suspect classes are typically based on race, sex, etc... Moreover, in South Carolina driving is a privilege, not a fundamental right. *Sponar v. S.C. Dep't of Pub. Safety*, 361 S.C. 35, 39, 603 S.E.2d 412, 415 (Ct. App. 2004) ("The license to operate a motor vehicle upon the public highways of this state is not a property right, but is a mere privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare.").

"Those attacking the validity of legislation under the rational basis test... have the burden to negate every conceivable basis which might support it." *Doe*, 421 S.C. at 504 (quoting *Boiter v. S.C. Dep't of Transp.*, 393, S.C. 123, 128 S.E,2d 401, 403-404 (2011).). In this case, the overall legislative purpose of S.C. Code §56-1-40(2) appears to be to ensure that drivers under suspension and/or revocation in other States are not issued a driver's license in South Carolina unless the Legislature has carved out a specific exception in Title 56, presumably to protect South Carolina's citizens and drivers from those that have been deemed unsafe drivers in another State, i.e. to ensure South Carolina does not become the dumping ground of the Nation's worst drivers. Further, the overall legislative purpose of S.C. Code §56-1-240 appears to be to ensure that the SCDMV can cancel a driver's license that is issued in error, with incorrect or incomplete information, or based upon fraudulent information. All of these are legitimate, valid reasons for these

statutes and their validity has not been argued against by the Appellant in any form or fashion. *Initial Brief of Appellant.*

Notably, although the Legislature has given deadlines for when certain types of convictions and/or suspensions must be reported to SCDMV to be recognized in South Carolina, no such deadline exists in the case of a driver's license and/or privilege suspension/revocation that exists in another State where the driver either purposely or mistakenly fails to reveal that suspension/revocation to SCDMV.[13] Thus, for these reasons, even if Appellant's as-applied challenge is considered on the merits, it appears that this argument should fail.

Furthermore, these arguments were ruled on in paragraphs 6, 7, and 8 of the trial Court's June 26, 2018 *Order* (R. p. 2). Although the trial Court did not specifically use the phrase "unconstitutional as applied" or "constitutional as applied" in issuing its ruling, the trial court's findings that SCDMV promptly notified Appellant that the law required cancellation of his driver's license under S.C. Code §56-1-40(2) and that SCDMV was doing so pursuant to S.C. Code §56-1-240, is an implicit ruling that this Court found S.C. Code §§56-1-40(2) and 56-1-240 to be constitutional as applied to Appellant. Further, the trial court specifically cited to the cases *Hipp v. SCDMV*, 381 S.C. 323, 673 S.E.2d 416 (2009) and *Wilson v. SCDMV*, 419 S.C. 203, 796 S.E.2d 541 (2017) in making its ruling with regard this argument. Because Appellant did not flesh out his argument in form or fashion on this issue, he has failed to argue that these

13 For example, S.C. Code §56-1-650(C) requires certain convictions to be reported to SCDMV within one year of conviction to be reported on the SCDMV driving record and S.C. Code §56-25-20 requires an out-of-state failure to pay traffic ticket suspension to be reported to SCDMV within 12 months from the date the ticket was adjudicated to have a failure to pay traffic ticket suspension added to the SCDMV driving record.

findings by the trial court are without factual basis or is grounded in error of law. Thus, there appears to be no basis to re-weigh the factual consideration of the trial court on this matter. Further, the *Hipp*, *Wilson*, *Davis*, and *State v. Chavis*, 261 S.C. 408 (1973) cases, all dealt with criminal convictions that were not timely reported to the SCDMV. None of these cases dealt with a driver's license suspension/revocation in another State that failed to show up in a PDPS search (even though the suspension/revocation pointer was applied to PDPS) and was not revealed to SCDMV by the driver (through either error or design).

Additionally, in this case there is no statutory requirement for New York to proactively inform SCDMV that Appellant is actively under suspension/revocation in their State. Rather, there were statutes that required Appellant to truthfully and accurately report his current licensing status on his application for a driver's license in South Carolina. See S.C. Code §56-1-80 and §56-1-240 ("failed to give the required or correct information in his application") and the applications attached in the exhibits for the *Stipulation of Facts* (R. pp. 95-100). All applications for a driver's license in South Carolina are given under penalty of perjury and state this explicitly on the form just above the applicant's signature block. For these reasons this line of cases are substantially dissimilar to this case and provide no guidance to this Court. For these reasons, Appellant's conclusory argument that the *Davis* case mandates that S.C. Code §§56-1-40(2) and 56-1-240 must be declared unconstitutional as-applied to him should be rejected.[14]

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14 SCDMV notes that it will always be possible for there to be a large delay of time between when an out-of-state suspension begins and is posted to PDPS and when SCDMV may find out about that out-of-state suspension. This is because not all out-of-state suspensions are proactively reported to SCDMV by the other state and SCDMV simply cannot check PDPS for every South Carolina licensed driver each evening. Thus,

B. S.C. Code §56-1-40(2) Explicitly Prohibits the Relief Sought by Appellant

The Appellant is asking this Court to order the SCDMV to violate S.C. Code §56-1-40(2) by requiring SCDMV to reissue a South Carolina driver's license to him when such reissuance is specifically prohibited by that statute. S.C. Code §56-1-40(2)[15] states:

> The Department of Motor Vehicles may not issue a motor vehicle driver's license to or renew the driver's license of a person:...
>
> > (2) whose driver's license or privilege to operate a motor vehicle currently is suspended or revoked in this State or another jurisdiction, except as otherwise provided for in this title;....

There is nothing in Title 56 that provides an exception to S.C. Code §56-1-40(2) under the facts presented in this case. Ironically, this entire case is based on Appellant's argument that SCDMV should not be able to enforce S.C. Code §§56-1-40(2) and 56-1-240 against him, even though he admits SCDMV is required to engage in such enforcement. *Initial Brief of Appellant*, p. 4 and 7.

C. Appellant's Claims are Not Ripe for Adjudication

Appellant's claims are not ripe for adjudication in South Carolina due to Appellant's failure to exhaust his administrative remedies in New York State, as outlined above.

D. Appellant's Claims are Barred by the Principles of Collateral Estoppel and/or Issue Preclusion

Ultimately, Appellant's complaint is with New York State, not the SCDMV. New York State is the where Appellant's driver's license and driving privileges are

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it is always possible for a driver to lawfully and with fully correct information to obtain or renew their South Carolina driver's license, a short time late become suspended in another state, and SCDMV not find out about that out-of-state suspension until the driver renews their driver's license eight years later.

15 Significantly, S.C. Code §56-1-40(2) has been the law in South Carolina, largely in its' current form, since at least 1990 and possibly since 1932. As of the filing of this Final Brief, the undersigned had not be able to locate a copy of the 1932 version of this law.

suspended/revoked. South Carolina is merely honoring that suspension/revocation as required by S.C. Code §56-1-40(2). Appellant engaged in litigation with the New York State DMV, but, after receiving a negative ruling from the Appeals Board, failed to further appeal the case in New York. Thus, this matter has already been ruled on by the Appeals Board in New York (R. pp. 108-109). The New York Appeals Board held that the denial of Appellant's application to clear his New York suspension/revocation was proper and legal. *Id.* Because Appellant failed to appeal that ruling in New York, it is the law of the case and this action against the SCDMV is nothing more than a collateral attack against that New York Appeals Board ruling.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct.App.1984). Appellant's case with the New York State DMV, attached as part of Exhibit F to the Stipulation of Facts, clearly meets all of the requirements for collateral estoppel to apply (R. pp. 106-122). Appellant's case with the New York State DMV regarding his suspension/revocation in New York was litigated and appealed at least one time. Additionally, that litigation directly determined whether Appellant's suspension/revocation in New York should continue or be cleared. Finally, the issue of Appellant's New York State suspension/revocation should be cleared or not was the sole

focus of the litigation and, as a result, was a necessary decision in that litigation. Appellant, via this litigation, is asking this Court to rule that he can be licensed in South Carolina, despite the fact that New York has ruled that his New York State suspension/revocation should continue.

Further, the South Carolina Supreme Court has explicitly ruled that an administrative decision can have a preclusive effect in collateral litigation. *Earle v. Aycock*, 276 S.C. 471, 279 S.E.2d 614 (1981). In this case Appellant undertook an administrative case in New York regarding his New York suspension/revocation and then elected to abandon his appeals in that administrative case. Historically, when a party abandons their appeal in a case, even an administrative case, that last ruling in that case becomes the law of the case and would bar any further litigation regarding that matter. *Action for Rational Transit v. West Side Highway Project*, 699 F.2d 614, 18 ERC 1745 (2nd Cir. 1983).

Additionally, rather than restarting the waiver process in New York, as set forth in the letter to Appellant from the New York State DMV, Appellant has elected to sue the SCDMV, collaterally attack the decision of the New York State DMV and the Appeal Boards' ruling, and attempt to get a Court order in South Carolina that requires SCDMV to ignore S.C. Code §56-1-40(2).

For these reasons, the case Appellant brought against SCDMV should be barred by collateral estoppel.

E. Appellant Has Unclean Hands

Straight v. Goss, 383 S.C. 180,678 S.E.2d 443, 457-58 (Ct. App. 2009) states:

> "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden,* 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App. 207*207 1998). "He

> who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Emery v. Smith,* 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.,* 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945).

In this case, Appellant is the only party in this case that knew or should have known that his driver's license and driving privileges were still suspended/revoked in New York. Like South Carolina, New York sends drivers a notice when they go under suspension and that notice informs the driver of the steps they must take to fully clear and end that suspension. Thus, even though Appellant would testify that he believed this New York suspension/revocation had already ended, Appellant was informed of the steps he had to take to achieve such clearance and he knew he had not taken all of those steps. Essentially Appellant is trying to backdoor an argument that he was unaware of the law in New York related to how to clear this suspension/revocation. It is a well-settled concept that ignorance of the law is no defense for a failure to comply with the law. Traditionally this concept is applied in the criminal law context. It seems patently unfair for Appellant to use a similar argument to try and seek equitable relief from this Court from a party (the SCDMV) that by Appellant's own admission was unaware of the New York State suspension/revocation against Appellant. Appellant admits that SCDMV had no knowledge of Appellant's New York State suspension/revocation until the evening of June 11, 2015. Since Appellant did know or should have known that this New York State suspension/revocation was still active, either through a general knowledge of New York law or through the notification sent to him by the New York State DMV, it was improper

for the Appellant to seek equitable relief from any South Carolina court to regain his unlawfully obtained South Carolina driver's license.

CONCLUSION

For the reasons set forth above, the June 26, 2018 *Order* of the trial court should be affirmed.

Respectfully submitted,

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February 14, 2019
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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The Honorable DeAndrea G. Benjamin
Richland County

Appellate Case No. 2018-001305

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South Carolina Department of Motor Vehicles . . . . . Respondent.

CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

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