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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski

Appellate Case No. 2021-000007

Andrew Davis Desilet . . . . . Appellant,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety . . . . . Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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STATEMENT OF THE CASE

Appellant was arrested for driving under the influence on March 2, 2020. R. p. 1. Following his arrest for driving under the influence, Appellant was taken for a DataMaster DMT test. R. p. 2. In the DataMaster DMT room, Appellant was read his implied consent rights and then refused to provide a breath sample. *Id.* Trooper Brazell issued Appellant an MV-65 Notice of Suspension following his refusal to provide a breath sample. R. p. 16-17.

Appellant timely requested a contested case hearing before the Office of Motor Vehicle Hearings (hereinafter, "OMVH") to challenge his implied consent suspension. R. p. 16-17. On March 5, 2020, the OMVH scheduled the contested case hearing for April 14, 2020. R. p. 81-82. On April 8, 2020, the hearing scheduled for April 14, 2020 was *sua sponte* continued until August 4, 2020 due to the new and ongoing issues with the COVID-19 pandemic. R. p. 83-85. This contested case hearing was safely held on August 4, 2020 and the *Final Order and Decision* was issued to all of the parties on August 5,

2020. R. p. 1-11 and 118. The Final Order and Decision upheld Appellant's implied consent suspension. *Id.*

On or about August 17, 2020, Appellant promptly filed a *Notice of Appeal* with Proof of Service with the Administrative Law Court (hereinafter, "ALC"). R. p. 18-23. Notably, this *Notice of Appeal* listed the Appellant as Andrew Davis Desilet and "Other Parties of Record" as only Trooper S. Z. Brazell of the South Carolina Department of Public Safety, even though the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV") was also a party of record in the OMVH case. R. p. 20. Even more significantly, however, the Proof of Service stated that SCDMV was served with the *Notice of Appeal* at:

> Office of General Counsel
> South Carolina Department of Motor Vehicles
> **1205 Pendleton Street, Suite 325**
> **Columbia, SC 29201**

R. p. 21-22 (emphasis added). Significantly, the Proof of Service stated that the OMVH was also served with the *Notice of Appeal* at:

> Attn: Clerk
> South Carolina Office of Motor Vehicle Hearings
> **1205 Pendleton Street, Suite 325**
> **Columbia, SC 29201**

Id. (emphasis added). SCDMV never received the August 17, 2020 mailing of the *Notice of Appeal* for this case. On August 28, 2020, the ALC issued a *Notice of Assignment* for this appeal, appointing Judge S. Phillip Lenski to preside.[1] R. p. 24.

[1] SCDMV received the *Notice of Assignment* from the ALC on September 2, 2020. This was the very first notice that SCDMV received from anyone that indicated this case had been appealed. At the time of receiving the Notice of Assignment, SCDMV had no way of knowing who had appealed the case (Mr. Desilet, an attorney on Mr. Desilet's behalf, or some other party) and had no idea what the grounds were for the appeal.

On September 21, 2020, the OMVH filed the *Record on Appeal* with the ALC. R. p. 16-24, 61-76, 81-91. Upon reviewing the *Record on Appeal* and discovering Appellant's fatal service error, i.e. Appellant sending SCDMV's copy of the *Notice of Appeal* to the OMVH, as stated in the Proof of Service, SCDMV filed a motion to dismiss the ALC appeal. R. p. 25-27 and 92. On October 2, 2020, Appellant filed a response to SCDMV's motion to dismiss, admitting that SCDMV's "copy of the Notice of Appeal was inadvertently sent to 1205 Pendleton Street in Columbia, the Office of Motor Vehicle Hearings." R. p. 28-33 and 93. Appellant asserted that his failure to serve the *Notice of Appeal* on SCDMV was an inadvertent clerical error. *Id.* On October 5, 2020, SCDMV filed an *Amended Notice of Motion and Motion to Dismiss* to correct a typo in the first motion to dismiss.[2] R. p. 39-41 and 94.

Also, on October 5, 2020, Appellant filed his *Notice of Appeal with Corrected Service Address* with the ALC. R. p. 34-38 and 95-96. The Notice of Appeal with Corrected Service Address was served on the SCDMV at:

> Brandy Duncan, Assistant General Counsel
> South Carolina Department of Motor Vehicles
> PO Box 1498
> Blythewood, SC 29016

Id. SCDMV received this mailing of the *Notice of Appeal* on October 8, 2020. On October 12, 2020, Appellant filed *Affidavit of Kellie S. Reaves*. R. p. 77-80 and 97. Significantly, this affidavit confirmed that Kellie S. Reaves mailed SCDMV's copy of the

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[2] In the original *Motion to Dismiss*, SCDMV stated the *Final Order and Decision* issued by the OMVH was issued on April 5, 2020, but it was actually issued on August 5, 2020. The use of the word April in place of August was merely a typo, but the *Amended Motion to Dismiss* was filed to ensure SCDMV presented the ALC with accurate information in its motion.

first *Notice of Appeal* to "1205 Pendleton Street, Columbia, South Carolina, which is the Office of Motor Vehicle Hearings." *Id.*

Thereafter, although all deadlines in the ALC appeal were stayed pursuant to Rule 34(B), SCALCR, Appellant filed *Brief of Appellant* on October 21, 2020. R. p. 42-50 and 98. On October 21, 2020 at 4:08 p.m. the undersigned e-mailed Emily Howard of the ALC, copying all parties to this appeal, to confirm that all deadlines in this ALC appeal were stayed pursuant to Rule 34(B), SCALCR. R. p. 99-100. On October 22, 2020 at 9:54 a.m. Emily Howard responded to the undersigned's e-mail, copying all parties to this appeal, and confirmed that all deadlines in this ALC were stayed pending a ruling on SCDMV's motion to dismiss. R. p. 101-102. On December 18, 2020, the ALC issued *Order Granting Respondent's Motion to Dismiss.* R. p. 12-14.

On January 5, 2021, Appellant filed his *Notice of Appeal* and *Motion to Stay Order Pending Appeal* with this Court. R. p. 51-56, 111-112, and 119. On January 5, 2021 at 4:52 p.m. the undersigned and other parties to this appeal were sent an e-mail from Sierra Ritchie of the Court of Appeals issuing the Court of Appeals letter of initial filing. R. p. 106-108. The e-mail from Ms. Ritchie was the SCDMV's first notification that an appeal had been filed with the Court of Appeals in this matter, as Appellant's Counsel did not e-mail a copy of the *Notice of Appeal* to SCDMV until 5:24 p.m. on January 5, 2021. R. p. 111-112. On January 5, 2021 at 5:11 p.m. the undersigned e-mailed Mr. Ritchie, copying the other parties to this appeal, to notify Ms. Ritchie that:

> [A] ruling is not needed on Mr. Marchant's Motion to Stay suspension. Mr. Marchant's appeal on Mr. Desilet's behalf has been timely filed and, as a result, consistent with state statutes, SCDMV has stayed Mr. Desilet's suspension that was scheduled to begin tomorrow. This stay will remain in effect until the Court of Appeals issues a final ruling in this appeal.

R. p. 109-110. Thereafter, at 5:24 p.m. on January 5, 2021, Appellant's Counsel served a copy of the *Notice of Appeal* and *Motion to Stay Order Pending Appeal* upon SCDMV by e-mailing PDFs of both to the undersigned.[3] On January 6, 2021 at 8:37 a.m., Ms. Ritchie confirmed receipt of the undersigned's e-mail sent on January 5, 2021 at 5:11 p.m. R. p. 113-114.

On February 4, 2021, this Court issued an *Order* staying Appellant's suspension pending the outcome of this appeal. *Order* filed February 4, 2021. R. p. 15. On February 4, 2021 at 10:09 a.m., the undersigned e-mailed Ms. Ritchie, copied to the other parties to this appeal, to let her know that SCDMV had already stayed Appellant's suspension on January 5, 2021. R. p. 115-116.

On February 14, 2021, this Court reminded Appellant's Counsel that an initial brief of appeal and designation of matter had not yet been filed in this case and instructed Appellant's Counsel to promptly file the initial brief, designation of matter, and a motion requesting to file and serve both of these documents outside of the filing deadlines by no later than February 22, 2021. On February 22, 2021, Appellant's Counsel filed a *Motion for Extension of Time to File Initial Brief.* R. p. 57-60. This extension was granted until March 24, 2021. *Order* dated February 23, 2021. On March 24, 2021, Appellant's Counsel filed *Motion for Additional Extension to File Initial Brief with Consent of*

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[3] Waiting to serve copies of the *Notice of Appeal* and *Motion to Stay Order Pending Appeal* upon SCDMV until after normal business hours, even though the same had been filed with the Court of Appeals at 2:40 p.m. on January 5, 2021, severely risked Appellant's suspension resuming on January 6, 2021. R. p. 111-112, 103-104, and 119. This risk was greatly increased by Counsel's decision to only serve the *Notice of Appeal* on one of SCDMV's three attorneys. R. p. 111-112. Despite this, the undersigned had already taken action, based on Ms. Ritchie's e-mail, to pull the Notice of Appeal and Motion to Stay Order Pending Appeal from this Court's C-Track system and had Appellant's suspension stayed pending this appeal as of 5:05 p.m. on January 5, 2021. R. p. 105.

Respondents. *Motion for Additional Extension to File Initial Brief with Consent of Respondents* filed on March 24, 2021. This extension was granted until April 23, 2021. *Order* dated March 25, 2021. On April 22, 2021, Appellant filed his Initial Brief of Appellant and designation of matter. *Initial Brief of Appellant* and *Appellant's Designation of Matter to be Included in the Record on Appeal*.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(A)(5).

> (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....
>
> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

> [Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
>
> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

> The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram,* 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc., supra.* In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It

> must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC*, *supra*; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

I. *JUDGE LENSKI CORRECTLY DETERMINED THAT APPELLANT FAILED TO SECURE THE APPELLATE JURISDICTION OF THE OF THE ADMINISTRATIVE LAW COURT DUE TO HIS FAILURE TO SERVE A TIMELY COPY OF THE NOTICE OF APPEAL ON THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES.*

Rule 33, SCRALC directs that a party appealing from the decision of an agency must file **and serve** a copy of a Notice of Appeal upon each other party and the agency whose final decision is subject to the appeal within **thirty days** of receipt of the decision from which the appeal is taken. This Rule encompasses the thirty day jurisdictional requirement set forth in S.C. Code §§1-23-660(D) and 1-23-610(A)(1). Notably, S.C. Code §1-23-610(A)(1) specifically says such a notice of appeal must be "served on the opposing party… not more than thirty days after the party receives the final decision and order…" The *Final Order and Decision* from the OMVH was issued to all of the parties on August 5, 2020. R. p. 1-11 and 118. Although Appellant timely filed his Notice of Appeal ALC, he failed to timely serve a copy of the Notice of Appeal on SCDMV. R. p. 18-23. The Proof of Service for the Notice of Appeal stated that SCDMV was served with the Notice of Appeal at:

> Office of General Counsel
> South Carolina Department of Motor Vehicles
> **1205 Pendleton Street, Suite 325**
> **Columbia, SC 29201**

R. p. 21-22 (emphasis added). Additionally, the Proof of Service for the Notice of Appeal stated that the OMVH was also served with the Notice of Appeal at:

> Attn: Clerk
> South Carolina Office of Motor Vehicle Hearings
> **1205 Pendleton Street, Suite 325**
> **Columbia, SC 29201**

Id. (emphasis added). SCDMV never received the August 17, 2020 mailing of the Notice of Appeal for this case.[4] Significantly, on October 2, 2020, Appellant filed a pleading admitting that SCDMV's "copy of the Notice of Appeal was inadvertently sent to 1205 Pendleton Street in Columbia, the Office of Motor Vehicle Hearings." R. p. 29-33 and 93. Additionally, on October 12, 2020, Appellant filed *Affidavit of Kellie S. Reaves* and confirmed that Kellie S. Reaves mailed SCDMV's copy of the Notice of Appeal to "1205 Pendleton Street, Columbia, South Carolina, which is the Office of Motor Vehicle Hearings." R. p. 77-80 and 97. As noted in both of these filings by Appellant, the address "1205 Pendleton Street, Suite 325, Columbia, SC 29201," is the address for the OMVH. Further, SCDMV is not located at that address, has never been located at that address, does not receive any mail at that address, and has never received any mail at that address. SCDMV's physical address is 10311 Wilson Boulevard, Blythewood, South Carolina 29016. SCDMV's post office box address is Post Office Box 1498, Blythewood, South Carolina 29016.

The OMVH is part of the ALC. See S.C. Code §1-23-660. Significantly, SCDMV and the ALC (and thus also the OMVH) are two separate state agencies. *Id.* and S.C. Code §56-1-5. The OMVH has not been part of the SCDMV since July 1, 2005, nearly sixteen years ago. See 2005 SC Act 128. Therefore, serving SCDMV's copy of the *Notice of Appeal* at the OMVH's address, even if it is addressed to the SCDMV Office of

[4] Shockingly, Appellant argues "there is no evidence that the address on the envelope mailing the Notice to the DMV was also incorrect." This argument is shocking because of Appellant's past admissions that SCDMV's copy of the *Notice of Appeal* was mailed to "1205 Pendleton Street in Columbia, the Office of Motor Vehicle Hearings" and that Kellie S. Reaves mailed SCDMV's copy of the *Notice of Appeal* to "1205 Pendleton Street, Columbia, South Carolina, which is the Office of Motor Vehicle Hearings." R. p. 29-33, 77-80, 93, and 97.

General Counsel, does not constitute proper service on SCDMV. Nor is there any requirement that the OMVH or ALC perfect Appellant's service on his behalf by forwarding the misaddressed mailing to the SCDMV.[5] Additionally, there is no requirement that the OMVH or ALC notify appellants when they mail their Notice of Appeal to the OMVH or ALC in error. Notably, although nearly all other communications in this case were sent by both mail and e-mail (or by only e-mail), the *Notice of Appeal* in this case was only mailed via the U.S. Postal Service.[6]

The South Carolina Supreme Court has held "[T]he requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. " *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 602 S.E. 2d 772, 775 (2004); See also *Southbridge Properties, Inc. v. Jones*, 292 S.C. 198, 355 S.E. 2d 535 (1987) (applying appellate court rules and dismissing case for failure to serve a notice of intent to appeal in a timely manner).

Appellant argues that his error in mailing SCDMV's copy of the Notice of Appeal to OMVH was inadvertent and, therefore, excusable. To support these arguments Appellant points to several cases, including: *Weatherford v. Price*, 340 S.C. 572, 532 S.E2d 310

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[5] To require courts to perfect appeals for parties that failed to properly serve their notice of appeal on the other parties to the case would be costly and burdensome for the courts.

[6] See R. p. 81-82 (Notice of Hearing); 83-85 (Notice of Rescheduled Hearing); R. p. 1-11 and 118 (OMVH Final Order and Decision); 92 (SCDMV's Motion to Dismiss); 93 (Appellant's return to SCDMV's motion to dismiss); 94 (SCDMV's Amended Motion to Dismiss); 95-96 (Notice of Appeal with Corrected Service Address); 97 (Affidavit of Kellie Reaves); 98 (ALC Brief of Appellant); 101-103 (Court of Appeals Letter of Initial Filing); and 111-112 (Court of Appeals Notice of Appeal and Motion to Stay Order Pending Appeal).

(Ct. App. 2000); *Charleston Lumber Co., Inc. v. Miller Hous. Corp.* 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); and *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015). Each of these cases have significant differences from this case that make them inapplicable to this situation.

First, in *Weatherford*, the notice of appeal in question referred only to the order denying a motion for reconsideration but included an attached copy of the original merits order with the notice of appeal. *Weatherford*, 340 S.C. at 577-78. The Court of Appeals determined that it still had jurisdiction to hear the appeal, finding that under those circumstances the error was merely clerical in nature (by referring only to the order denying reconsideration) and that counsel demonstrated no prejudice as a result of the error. Notably, in *Weatherford*, the Respondent was served with the notice of appeal. Therefore, it was reasonable for the Respondent to understand that the Appellant in *Weatherford* was appealing both the denial of reconsideration and the merits order, since both orders were attached to the notice of appeal. Contrary to what occurred in *Weatherford*, in this case SCDMV never received a notice of appeal in this case until after the thirty day deadline for such service had passed. In fact, SCDMV first received a notice of appeal from Appellant in this case on October 5, 2020 when Appellant e-mailed his *Notice of Appeal with Corrected Service Address* to SCDMV. R. p. 34-38 and 95-96.

Since the OMVH's *Final Order and Decision* was served on the parties on August 5, 2020, Appellant only had until September 4, 2020 to properly serve SCDMV with his notice of appeal. Rule 33, SCALCR and S.C. Code §1-23-610(A)(1). October 5, 2020 is more than a month after September 4, 2020, more than two months after the *Final Order*

and Decision was issued by the OMVH, and ten days after Appellant was put on notice by SCDMV that a fatal service error had taken place. R. p. 35-37 and 92. A complete and total failure to serve the notice of appeal on a party is a sizable difference from merely failing to state that you are appealing both a denial of a motion for reconsideration and the original merits order in your notice of appeal, particularly when both the denial order and the merits order are attached to your notice of appeal. By entirely failing to serve the Notice of Appeal on SCDMV, Appellant placed SCDMV in unenviable position of not even knowing an appeal had been filed until it received the *Notice of Assignment* from the ALC on September 2, 2020 and, even then, SCDMV did not know: 1) which party had appealed (although the undersigned assumed it was Appellant); 2) if that party was represented or not; 3) if that party was represented, who the attorney was that was providing the representation; or 4) the grounds for the appeal. SCDMV had no confirmation regarding these issues until SCDMV received the *Record on Appeal* from the OMVH on September 24, 2020, over three weeks after receiving the *Notice of Assignment*. For these reasons, the *Weatherford* case is strongly distinguishable from the facts in this case.

Next, Appellant relies on the *Charleston Lumber Co.* case. In that case, the Court of Appeals rejected the respondent's attempt to have an appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of five cases that were consolidated together for trial and for which the trial judge issued only one final order. *Charleston Lumber*, 318 S.C. at 477. The Court of Appeals held that Appellant did not "technically" appeal from the trial court's original order by referring to it in the notice of appeal, but the Appellant did attach a copy of the order to the notice of appeal and, as a

result, Respondent was on notice that all five cases had been appealed. *Id.* Like *Weatherford*, a complete and total failure to serve the notice of appeal on a party is a significant difference from merely failing to list one of five cases that had been consolidated for trial and for purposes of issuance of a final order. As stated by Judge Lenski in the *Order Granting Respondent's Motion to Dismiss*, "While… the error in this case may have been clerical in nature, the resulting lack of notice to the [SCDMV] gives the error substance and heightens it beyond what could be considered a clerical error" as set forth in the *Weatherford* and *Charleston Lumber* cases. For these reasons, the *Charleston Lumber* case is also strongly distinguishable from the facts in this case.

Appellant also relies on the case *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002).[7] In *Conner*, the South Carolina Supreme Court held that it was improper for the Court of Appeals to have backdated a "corrected" notice of appeal and proof of service naming two new Respondents to the appeal because their names were not included in the caption on the original notice of appeal and the two Respondents were not timely served with the original notice of appeal. *Conner*, 348 S.C. at 460. Similar to the actions taken by Appellant in this case, in *Conner* the Appellant served a "corrected" notice of appeal and proof of service upon the two Respondents that had not be previously named or served with the notice of appeal. *Id.* at 461. This "corrected" notice of appeal and proof of service occurred after the thirty days to file and serve the notice of appeal had passed. *Id.* In ruling that it was improper for the Court of Appeals to allow

[7] SCDMV notes that the issues argued by Appellant with regard to the *Conner* case were never presented to the ALC on appeal and, therefore, these arguments are not preserved for appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (failure to provide arguments or supporting authority for an issue renders it abandoned).

this backdating of the "corrected" notice of appeal and proof of service, the South Carolina Supreme Court said:

> Clearly, Rowe and Langley were not served with a Notice of Appeal naming them as respondents within the 30-day time period prescribed by Rule 203(b)(1), SCACR. Nonetheless, citing *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899), Conner argues that clerical errors on a Notice of Appeal will not defeat the appeal.
>
> In *Moody*, the defendant filed a Notice of Appeal naming "H.J. Moody" as plaintiff. However, "defendant's counsel, having soon afterwards discovered the mistake in the title of his notice of appeal, gave notice to plaintiffs' counsel that he would move ... to amend the notice of appeal by ... adding the names" of the other plaintiffs. *Id.* at 531, 32 S.E. at 565 (emphasis added). This motion was granted, and plaintiffs appealed. The Court held that there was no error "in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced...." *Id.* at 534, 32 S.E. at 566 (emphasis added).
>
> We find the instant case is factually distinguishable from *Moody*. Here, the facts indicate that the Notice of Appeal did not contain a mere clerical error. First, Conner did not "soon" after filing the Notice discover any mistake. Second, the Court of Appeals' first correspondence with Conner advising her of the way the caption should read (i.e., with only the City named as respondent and Rowe and Langley named as defendants) should have alerted Conner to this "mistake." It was not until the Court of Appeals invited Conner to "correct" the Notice that Conner took any action. Indeed, the rule of *Moody* compels us under these facts to find Rowe and Langley were misled into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment.
>
> Accordingly, we hold that the Court of Appeals erred in granting Conner's motion to correct the record and accepting the backdated Notice of Appeal. See *Mears, supra*. Petitioners Rowe and Langley are dismissed from this action.

Id. at 461-462. Appellant relies on the *Conner* case for the assertion that because he named SCDMV as a Respondent in his *Notice of Appeal* that there is no deficiency in this case. While it is true that SCDMV did eventually receive notice of Appellant's notice of appeal in this case, that notice did not come until September 24, 2020 when SCDMV

received the Record on Appeal from the OMVH. Further it is also true that SCDMV was listed as a Respondent on Appellant's *Notice of Appeal* in this case, but merely listing someone as a Respondent in an appeal does not constitute service of the notice of appeal on the party and cannot correct a failure to actually serve a copy of the notice of appeal on the party. *Mears v. Mears*, 287 S.C. 168 (1985); *Elam* and *Southbridge, supra.* Thus, Appellant's assertions that merely listing SCDMV as a Respondent the *Notice of Appeal* satisfied the service requirements for the notice of appeal are grossly misplaced.

Finally, Appellant relies on the case *Mason v. Mason*, 412 S.C. 28, 770 S. E.2d 405 (Ct. App. 2015) to argue that "an appeal was found to be proper because a party to the appeal 'at least had notice he was a party to the appeal within the time required to file an appeal from the [special referee's] decision'".[8] In making this argument Appellant is referring to section "IV. Aiding and Abetting" from the *Mason* decision. *Mason*, 412 S.C. at 59-60. Significantly, in the *Mason* case, the appeal discussed related to the inclusion of a particular Respondent (the Accountant) in the notice of appeal prior to the expiration of the thirty days to appeal. *Id.* The issue appeared to be that although the Accountant was served with the notice of appeal before the thirty days had run, that notice of appeal did not contain a copy of the appealed order attached to the notice of appeal. *Id.* The copy of the appealed order was provided to the Accountant by the Appellant after the thirty days had run. *Id.* Contrary to what occurred in the *Mason* case, Appellant in this case took no action to properly notify SCDMV of this appeal prior to the thirty days running.

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[8] SCDMV notes that the issues argued by Appellant with regard to the *Mason* case were never presented to the ALC on appeal and, therefore, these arguments are not preserved for appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (failure to provide arguments or supporting authority for an issue renders it abandoned).

Rather, Appellant argues that because SCDMV received the *Notice of Assignment* from the ALC prior to the thirty days running, then SCDMV had sufficient notice of the appeal in this case. As previously discussed, because Appellant failed to timely serve his *Notice of Appeal* on SCDMV, until SCDMV received the Record on Appeal from the OMVH on September 24, 2020 SCDMV did not know: 1) which party had appealed (although the undersigned assumed it was Appellant); 2) if that party was represented or not; 3) if the Appellant was represented, who the attorney was that was providing the representation; or 4) the grounds for the appeal. Because SCDMV lacked all of the information set forth in the immediate proceeding sentence due to Appellant's failure to serve the *Notice of Appeal* on SCDMV, the *Notice of Assignment* also did not constitute sufficient notice regarding this appeal. ALC notices of assignment give very little information about what case has been appealed, likely because such notices of assignment are crafted to notify parties that have already been served with a notice of appeal about which administrative law judge has been assigned to the appeal and about the basic deadlines that exist in ALC appeals. As far as identifying what case or matter has been appealed, the ALC notice of assignment only contains the following useful information: the names of the parties. Thus, in this case, while the *Notice of Assignment* from the ALC let SCDMV know that an appeal involving a person by the name of Andrew Davis Desilet had been filed, that is all the information SCDMV had to go off of to identify the case, parties, attorneys, issues, final orders, etc… that might be at issue in the case.[9] For these reasons, the ALC Notice of Assignment issued in this case did not

[9] For all SCDMV knew, Appellant was attempting to appeal the OMVH order related his BAC of .15 of Greater violation/suspension from 2014, any of Appellant's seven traffic ticket convictions since 2010, or any of Appellant's four reportable and two non-

remedy Appellant's failure to timely serve SCDMV with the Notice of Appeal. Thus, Appellant's reliance on the *Mason* case is also ill-placed.

For all the reasons discussed above, and due to Appellant's failure to properly serve his Notice of Appeal on SCDMV until after the thirty days for such service had expired, Judge Lenski correctly and properly dismissed this case due to the Appellant's failure to secure the appellate jurisdiction of the ALC. In fact, if Judge Lenski had ruled to "rescue" Appellant's tardy service of the *Notice of Appeal* on SCDMV, he would have been engaging in the exact behavior that is deemed improper by the *Mears, Elam*, and *Southbridge* cases.

II. APPELLANT WAS GIVEN DUE PROCESS IN HIS APPEAL TO THE ADMINISTRATIVE LAW COURT.

Appellant also argues that because his appeal was not able to be evaluated on the merits, that he has been denied due process and fundamental fairness. Appellant argues that Judge Lenski's finding that the failure to serve the *Notice of Appeal* on SCDMV "heightens it beyond what could be considered a clerical error" denied him substantive due process. Appellant cites no case law for this argument and, as a result, has abandoned the argument.[10] Rather, Appellant cites the COVID-19 pandemic and Judge Lenski's

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reportable collisions since 2010. Because Appellant has a distinctive name and the Notice of Assignment contained the Appellant's first, middle, and last names, the undersigned was at least able to determine which driver this appeal was likely related to based solely on the Notice of Assignment issued by the ALC. A notice of assignment for someone with a name like "John Brown," however, currently returns 1389 driver records in SCDMV's computer system and, as a result, would be complete useless to SCDMV in even trying to determine who the driver is related to the appeal. Even a name like "Betty Smith" returns 689 driver records in SCDMV's computer system.

[10] The only case cited by Appellant in this entire section is the case *Hipp v. S.C. Dept. of Motor Vehicles*, 381 S.C. 323, 373 S.E.2d 416 (2009). This case is cited for the sole purpose of quoting the section of the *Hipp* decision that held due process is violated when a party is denied fundamental fairness. *First Sav. Bank v. McLean*, 314 S.C. 361, 363,

order to state that he had been denied fundamental fairness and is now suffering from threats to his current and future ability to transport himself for gainful employment. Appellant provides no argument or explanation for why he believes he has been a denied fundamental fairness.

Contrary to Appellant's assertions that he has been denied fundamental fairness, the record shows that Appellant was provided with:

1) A full contested case hearing before the OMVH (R. p. 61-76);
2) Issued a full written decision with findings of fact and conclusions of law from the OMVH hearing officer (R. p. 1-11);
3) Provided with instructions from the OMVH about how to either file for reconsideration of the OMVH hearing officer's decision or how to file an appeal with the ALC (R. p. 11); and
4) Provided with just as much of an opportunity to appeal his case to the ALC as any other party to this case (or any other OMVH case).

The fact that Appellant failed to properly and timely serve his *Notice of Appeal* on all the parties to this case is not the fault of the ALC, the OMVH, or any of the other parties to this appeal. Moreover, such a failure does not mean that Appellant has been denied fundamental fairness or due process. It merely means that Appellant failed to take advantage of the appellate opportunities that were available to him, as they are available to all parties. For these reasons, Appellant's arguments in this section should fail in their entirety.

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444 S.E.2d 513, 514 (1994) (failure to provide arguments or supporting authority for an issue renders it abandoned).

III. THERE IS NO EVIDENCE IN THIS RECORD THAT THE COVID-19 PANDEMIC HAD ANYTHING TO DO WITH APPELLANT'S FAILURE TO SERVE A TIMELY COPY OF THE NOTICE OF APPEAL ON THE SOUTH CAROLINA DEPARMENT OF MOTOR VEHICLES.

Finally, Appellant blames his failure to properly and timely serve his *Notice of Appeal* on the U.S. Postal Service and the COVID-19 pandemic. In short, Appellant asserts that because of the COVID-19 pandemic his mailing of SCDMV's copy of the Notice of Appeal to the OMVH offices did not result in the erroneous mailing being returned to his attorney's offices. In the undersigned's everyday experience with the U.S. Postal Service, items of mail are not returned to the senders unless one of the following issues occurs:[11]

1) The address itself does not exist or is improper (e.g., an incorrect zip code)
2) The mail has insufficient postage
3) The specific person to whom the mail is addressed had mail forwarding for a period of time and the mail forwarding period has expired
4) The recipient of the mail writes something on the envelope to indicate the mail was mailed to the wrong location and/or person and puts the mail back into the mailbox for pick up

In this case, there is no question that 1205 Pendleton Street, Suite 325, Columbia, SC 29201 is a real address. It is the address for the OMVH. Moreover, there is no reason to believe that Appellant failed to place sufficient postage on the mailing, as it appears sufficient postage was placed on the copies mailed to the ALC and OMVH since both of those courts received the *Notice of Appeal*. Since SCDMV has never received mail at

[11] There may be other reasons mail is returned to senders, as the undersigned is not an expert in U.S. Postal Service operations.

OMVH's address, there would never have been mail forwarding from the OMVH address to SCDMV's location in Blythewood. If OMVH received two copies of the *Notice of Appeal* in this case, one addressed to the OMVH and one address to the Office of General Counsel for the SCDMV, it is entirely possible that OMVH staff would not notice the difference in the address on the outside of the envelopes (certainly the documents on the inside would be identical) and, therefore, not note the incorrect address to return the mailing to the U.S. Post Office. In short, nothing in this record indicates that the mailing of SCDMV's copy of the *Notice of Appeal* was ever returned to the U.S. Postal Service to return the mailing to Appellant's attorney. In fact, the most likely explanation of events is that OMVH received both mailings, did not notice the difference in the outside of the envelopes, and simply filed both copies of the *Notice of Appeal* in their file.[12]

Despite Appellant attempting to place blame on the U.S. Postal Service and the COVID-19 pandemic, the evidence in this case demonstrates that the real error occurred in Appellant's Counsel's office. The Proof of Service plainly states that SCDMV's copy of the Notice of Appeal was mailed to the OMVH address. Appellant has file two pleadings with the ALC that confirm this and assert that SCDMV's copy of the *Notice of Appeal* actually was mailed to the OMVH. Such an error, placing the wrong address on the Proof of Service and envelope, is not the fault of the U.S. Postal Service and has nothing to do with COVID-19. It is simply a human error that can happen to any of us.[13] For these reasons, this ground for relief should also be denied.

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[12] The undersigned notes, however, that nothing in this record indicates what happened to SCDMV's copy of the *Notice of Appeal* and this sentence is merely an educated guess based on past experience.

[13] As was noted in Appellant's return to SCDMV's first motion to dismiss file with the ALC, the undersigned accidently attempted to serve Appellant's Counsel, Jack Swerling,

IV. ADDITIONAL SUSTAINING GROUNDS

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 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).

A. Video Recordings from Incident Site

In his *Brief of Appellant* filed with the ALC, Appellant argued, essentially, that the OMVH hearing officer error in holding that Trooper Brazell was not required to present video recordings from the incident site to meet his burden of proof. This is a well-settled area of law in South Carolina. *S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (Ct. App. 2005) held that the video requirements set forth in S.C. Code §56-5-2933 do not apply in implied consent hearings because of the limitation of the scope of the hearing as set forth in S.C. Code §56-5-2951(F). As the scope of implied consent hearings has not changed since the *Nelson* case was issued, the OMVH hearing officer correctly ruled that a failure to produce such a video in this case was inconsequential if the matters to be proven were proven by other credible evidence. In that regard, the OMVH hearing officer found that Trooper Brazell's testimony regarding his observations of Appellant's driving and subsequent behavior roadside was sufficient

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at the address for the Richland County Courthouse (1701 vs. 1720 Main Street). R. p. 28-33. Fortunately, the undersigned had also sent a copy of SCDMV's first motion to dismiss to Appellant's Counsel via e-mail and the undersigned served Appellant's Counsel with SCDMV's Amended Motion to Dismiss at the correct address (in addition to sending the Amended Motion to Dismiss via e-mail to parties). R. p. 41. Moreover, accidentally failing to serve a motion to dismiss upon another party at the correct address does not implicate the same jurisdictional concerns as failing to serve a notice of appeal at the correct address.

evidence to support his findings. Notably, no evidence was presented that contradicted Trooper Brazell's testimony.

Since it appears that the OMVH hearing ruled correctly on this issue, this should be treated an additional sustaining ground.

B. Video Recordings from Breath Test Site

Similarly, in his *Brief of Appellant* filed with the ALC, Appellant argued, essentially, that the OMVH hearing officer error in holding that Trooper Brazell was not required to present video recordings from the breath test site to meet his burden of proving that he advised Appellant of his implied consent rights and that Appellant then refused to provide a breath sample. Again, this is a well-settled area of law in South Carolina. *Nelson* held that the video requirements set forth in S.C. Code §56-5-2933 do not apply in implied consent hearings because of the limitation of the scope of the hearing as set forth in S.C. Code §56-5-2951(F). As the scope of implied consent hearings has not changed since the *Nelson* case was issued, the OMVH hearing officer correctly ruled that a failure to produce the breath testing site video in this case was inconsequential if the matters to be proven were proven by other credible evidence. In that regard, the OMVH hearing officer found that Trooper Brazell's testimony regarding him advising Appellant of his implied consent rights and then Appellant refusing to provide a breath sample was sufficient evidence to support his findings. Notably, no evidence was presented that contradicted Trooper Brazell's testimony.

Since it appears that the OMVH hearing ruled correctly on this issue, this should be treated as an additional sustaining ground.

C. Discovery Issues in OMVH Hearing

Finally, in his *Brief of Appellant* filed with the ALC, Appellant argued that the OMVH hearing officer error in holding that in light of Trooper Brazell's testimony the burden shifted to Appellant to demonstrate that the implied consent advisement was not given to Appellant. In this regard, Appellant asserted that his *Rule 5 Discovery Motion* in the criminal case (referring to Rule 5, SCRE) triggered a proactive requirement in this administrative case for Trooper Brazell to provide the documents requested in the *Rule 5 Discovery Motion* to Appellant's Counsel prior to the administrative case going forward. This argument is simply not accurate. As noted by the OMVH hearing officer, administrative cases like this and criminal cases (like the criminal charge for driving under the influence) are two separate and distinct cases. *State v. Kerr*, 330 S.C. 132, 498 S.E.2d (Ct. App. 1998). Therefore, the actions taken in the criminal case have no impact on the administrative case and vice versa. Similarly, a Rule 5 discovery request filed in Appellant's criminal case for driving under the influence does not compel the release of discovery related to the administrative case, just as a subpoena issued pursuant to Rule 12, OMVH Rules does not compel the release of discovery related to the criminal case.[14] The OMVH Rules are very clear that the only discovery available in OMVH cases are subpoenas issued under Rule 12, OMVH Rules. Rule 11, OMVH Rules. Moreover, as already discussed by the OMVH hearing officer, the South Carolina Supreme Court has already ruled on the concept that once sufficient evidence has been presented to that a

[14] Interestingly, if a Rule 12, OMVH Rules subpoena could compel the release of discovery related to a criminal case, then arguably Trooper Brazell could have subpoenaed all kinds of information from the Appellant in this administrative case and then used that information against the Appellant in his criminal case. I believe all of the parties to this action and this Court would agree that using an administrative subpoena in that way (to procure evidence for use in the criminal case) would be improper under the U.S. Constitution (using such information solely in the administrative case, however, likely would not implicate any such issues).

driver was advised of his or her implied consent rights, the burden then shifts to the driver to present evidence that the implied consent rights were either not read out loud to the driver or the driver was not given a written copy of his/her implied consent rights and they suffered some prejudice as a result of this failure. *Taylor v. S.C. Dept. of Motor Vehicles*, 382 S.C. 567, 677 S.E.2d 588 (2009).

Since it appears that the OMVH hearing ruled correctly on this issue, this should be treated as an additional sustaining ground.

Appellant raised no additional issues to the ALC on appeal, therefore, any other issues that may have existed in this case have been abandoned. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (failure to provide arguments or supporting authority for an issue renders it abandoned).

CONCLUSION

For the reasons set forth above, the order of the administrative law judge granting dismissal of the appeal due to Appellant's failure to serve his Notice of Appeal on SCDMV should be affirmed.

[SIGNATURE ON THE FOLLOWING PAGE]

Respectfully submitted,

s/Brandy A. Duncan

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July 23, 2021
Blythewood, South Carolina

RECEIVED
Jul 28 2021
SC Court of Appeals

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In the Court of Appeals

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The Honorable S. Phillip Lenski

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Andrew Davis Desilet . . . . . Appellant,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety . . . . . Respondents.

CERTIFICATE OF COUNSEL

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

s/Brandy A. Duncan
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July 23, 2021
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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, 2014.

s/Brandy A. Duncan
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July 23, 2021
Blythewood, South Carolina