THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
H.W. Funderburk, Jr., Administrative Law Judge

Case No. 16-ALJ-30-0410-CC
Appellate Case No. 2017-002455

Wayne's Automotive Center, Inc., Appellant-Respondent,

v.

South Carolina Department of Public Safety, Respondent-Appellant.

INITIAL BRIEF OF APPELLANT-RESPONDENT

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1. DID THE ADMINISTRATIVE LAW COURT ERR IN UPHOLDING A 60-DAY DISCIPLINARY SUSPENSION OF APPELLANT-RESPONDENT (APPELLANT OR PETITIONER) AS PETITIONER IN A CONTESTED CASE WHEREIN:

(A) the Court and parties agreed Respondent-Appellant (Respondent or DPS) had the burden of proof, consistent with Rule 29 (B), SCALC;

(B) Petitioner and Premier Transportation, the owner of the tractor and trailer involved in the accident on the I-20 Savannah River Bridge into Georgia (accident), had settled the billing and payment in full without any reservation of rights by Premier to Petitioner for wrecker towing and special operations services provided almost two months prior to Respondent's issuance of its 120-day disciplinary order against Petitioner providing Petitioner with notice of disciplinary action;

(C) in connection with such issuance Respondent relied on a "Civil Court" action against Petitioner as being underway that was not;

(D) Respondent nevertheless applied its 2016 Wrecker Rotation Fee Schedule in a Class C tow involving Special Operations for which expressly "no fee will be set" without approval of the General Assembly to require additional invoices or receipts for certain equipment and/or labor to be includable, even though Respondent's Regulation 2 S.C. Regs. 38-600 (C) (15) expressly requires "(o)nly one bill is to be submitted to the owner or operator for the work performed";

(E) by having made full settlement with Petitioner without any reservation of rights, Premier and/or its insurer concluded the amount of $48,633.19 paid to Petitioner by Premier—not its insurer--satisfied Premier's and/or its insurer's duty to "bear all reasonable costs of removal", as required by S.C. Code Ann. § 56-5-1210 (B), as Petitioner's expert rate witness Rochester, its expert CPA Rawl, and Petitioner's witnesses Busbee, Sherry Corbett, and Jeff Corbett confirmed; and

(F) the Court allowed Respondent to discipline Petitioner retroactively after such settlement even though such sanction resulted in impairment of Petitioner's constitutional Contract Rights and violation of its Due Process Rights under S.C. Constitution Art. I, §§ 4 and 22, respectively, as raised in Petitioner's Final Arguments, as directed by the presiding judge as part of the contested case hearing and as distinct from Respondent's Post-Hearing Brief?

2. DID THE ADMINISTRATIVE LAW COURT ERR IN APPLYING THE 2016 WRECKER ROTATION FEE SCHEDULE AND PROVISIONS OF 2 S.C. REGS. 38-600 (2011), ESPECIALLY, WITHOUT MAKING ANY FINDING OF FACT THE ACCIDENT OCCURRED IN SOUTH CAROLINA AND WITHOUT MAKING A RELATED CONCLUSION OF LAW IT DID, WHEN RESPONDENT FAILED TO SHOW THE ACCIDENT OCCURRED IN SOUTH CAROLINA, CONSISTENT WITH REFERENCES TO RESPECTIVE STATE BOUNDARIES IN GEORGIA V. SOUTH CAROLINA, 497 U.S. 376

(1990), AS WELL AS ACCIDENT PHOTOGRAPHS, DEFINITIONS OF INTERSTATE COMMERCE, INTRASTATE COMMERCE, MOTOR CARRIER, AND MOTOR VEHICLE IN 2 S.C. REGS. 38-402 (6) (1998) AND DEFINITIONS OF INTERSTATE COMMERCE AND INTRASTATE COMMERCE IN 49 CFR 375/390.5 (1988), THEREBY RENDERING IT AN INTERSTATE MATTER BEYOND THE SCOPE OF THE APPLICATION OF SUCH SCHEDULE AND REGULATION AS TO APPLICABLE RATES AND CHARGES?

3. DID THE ADMINISTRATIVE LAW COURT ERR IN RULING WHILE RESPONDENT "MAY HAVE ERRED IN FAILING TO CREATE AN ADVISORY COMMITTEE, IT IS NOT OBLIGATED TO USE THE COMMITTEE OR TO FOLLOW ITS RECOMMENDATIONS", AND "(I)N ANY EVENT THE CONTESTED CASE HEARING AND ITS *DE NOVO* REVIEW HAS CURED ANY PROCEDURAL OR DUE PROCESS VIOLATIONS", DESPITE THE FACT THAT THE REGULATION IN (D) (2) INCORPORATES RESPONDENT'S WRECKER DISCIPLINARY POLICY (200.19) (2004) BY REFERENCE AND NEITHER SOUTH CAROLINA STATUTORY OR CONSTITUTIONAL PROVISIONS CONTEMPLATE SUCH SHORT-CIRCUITING OF THE SCOPE OF THE REQUIRED *DE NOVO* REVIEW?

4. DID THE ADMINISTRATIVE LAW COURT FURTHER ERR BY INCONSISTENTLY AGREEING PETITIONER SHOULD NOT BE SUBJECTED TO DISCIPLINARY ACTION FOR ITS REVISION OF INVOICES PRIOR TO THE FULL SETTLEMENT INVOICE BUT STILL IMPOSING A 60-DAY SUSPENSION?

5. DID THE ADMINISTRATIVE LAW COURT FURTHER ERR BY MISCONSTRUING EVIDENCE OF RECORD, LIMITING EXPERT TESTIMONY, AND REFUSING TO ALLOW INTRODUCTION OF EXHIBITS CONFIRMING THE ACCIDENT HEREIN OCCURRED IN GEORGIA RATHER THAN SOUTH CAROLINA AND WAS THEREBY INTERSTATE IN NATURE, RENDERING THE 2016 SCHEDULE INAPPLICABLE HEREIN?

6. DID THE ADMINISTRATIVE LAW COURT FURTHER ERR BY EFFECTIVELY SANCTIONING RESPONDENT'S IMPROPER EMPLOYMENT OF BINDING NORMS AGAINST PETITIONER HEREIN, AS RAISED IN PETITIONER'S FINAL ARGUMENTS, WHICH VIOLATE THE REGULATION, S.C. CONSTITUTION ARTICLE I, §§ 4, 22, AND 23, AND THE SOUTH CAROLINA ADMINISTRATIVE PROCEDURES ACT IN S.C. CODE ANN. § 1-23-610 (B) AS BEING ARBITRARY AND CAPRICIOUS, AND CONSTITUTING ABUSES OF DISCRETION?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This contested case concerned issues set forth above, as developed during the hearing, which extended through receipt by the Administrative Law Court of Final Arguments by Appellant-Respondent, pursuant to Rule 29 (A) (7), SCALC, as a mandatory requirement in a

contested case, and a Post-Trial Brief, as permitted by (A) (8) and the Administrative Law Judge.[1] They relate to a decision by Respondent to discipline Petitioner by suspending it for 120 days from its 2016 Wrecker Rotation List for all classes of tows for which Petitioner had applied

[1] On December 14, 2016, Appellant-Respondent as Petitioner initially filed and served a Petition For Contested Case Hearing And Motion For Temporary Restraining Order (TRO) and Injunctive Relief with Memorandum of Law, **Exhibits A-D**, and Verification and Affidavit Of Jeffry Corbett. **Petitioner's Exhibit 1. R. @** . By Order, filed December 19, 2016, the Court directed the parties to file their Prehearing Statements by January 18, 2017. **R. @** . On December, 29, 2016, Petitioner filed and served its Amended Motion For Writ Of Mandamus and/or Summary Judgment and/or Stay and/or TRO And Injunctive Relief And Proposed Order As Memorandum of Law, Supplemental Verification And Affidavit, Petitioner's 2017 Wrecker Rotation Schedule (**Exhibit E**) and Petitioner's 2015 Wrecker Rotation Schedule (**Exhibit F**). **R. @ and** . On January 17, 2017, Respondent filed its Notice and Motion For Extension of time. **R. @** .By its Order, filed January 18, 2017, the Court granted Respondent's Motion For Extension, until February 2, 2017, for submission of Prehearing Statements and granted Petitioner's Motion and Amended Motion to extend the stay of suspension of Petitioner through the pendency of litigation before the SCALC. **R. @** . By its Order, filed January 27, 2017, the Court otherwise denied Petitioner's Motion and Amended Motion. **R. @** .

Following discovery, the contested case hearing was held July 31-August 1, 2017, with the Court indicating the parties "can" submit briefs. **Tr. @ 505, ll.22-24. R. @** .Appellant-Respondent submitted its Final Arguments on August 21st in writing in lieu of oral arguments, as is mandated by Rule 29 (A) (7). Respondent-Appellant, on the other hand, knowingly waived its right to submit Final Arguments and, instead, submitted its Post-Trial Brief August 28th. See, **R. at** . Appellant-Respondent (Petitioner) therein also requested the Court to allow the parties to submit proposed Orders with Findings of Fact and Conclusions of Law under Rule 29 (A) (8) (**R. @**), which the Court did not order. The Court issued its Final Order, filed September 19, 2017 (**R. @**), the parties timely filed Motions For Reconsideration (**R. @** and), and the Court issued its Order Denying Motions For Reconsideration, filed October 31, 2017. **R. @** . Petitioner as Appellant filed its Notice of Appeal on November 29th (**R. @**), and Respondent as Respondent-Appellant filed its Notice of Cross Appeal on December 4th. **R. @**

This Court thereafter directed Appellant-Respondent to seek a writ of supersedeas from the Administrative Law Court to suspend any suspension from the applicable 2018 Wrecker Rotation Schedule (**R. @**), which it did by Petition with Verification and Attachments on December 13th. **R. @** . Following Respondent-Appellant's Response, filed December 27th (**R. @**), the Administrative Law Court thereafter issued its Order Granting Petition For Supersedeas, filed December 28th and received by this Court on December 29, 2017. **R. @** . The Court received the original Transcript of the hearing on March 28, 2018, and the parties also received their copies of it then. The Court granted extensions to file initial briefs in the cross appeals to May 29, 2018, consistent with recently amended Appellate Rules and Form 13.

to be included and Respondent had approved such inclusion for allegedly overbilling the carrier/owner Premier Transportation whose tractor and trailer with cargo were overturned in an accident on Interstate 20 near the South Carolina-Georgia border before daylight on February 9, 2016.

Petitioner's name came to the top of the Wrecker Rotation List and the Highway Patrol in SCDPS summoned Petitioner to assist in this Class C tow and recovery operation, which it did. Petitioner is a South Carolina corporation, which--through its Registered Agent, Walter Jeffry Corbett--operates an automotive service center, including towing and recovery and clean-up operations, at its facilities located at 1997 Richland Avenue East, Aiken, SC 29801. Mr. Corbett is also currently serving a second term as President of the Towing And Recovery Association Of South Carolina (TRASC). Petitioner has been in business for over 30 years, has over 30 employees, has approval in both South Carolina and Georgia to provide wrecker services, including both towing and special recovery operations, as herein, and has significant investments in towing and recovery equipment in use and at stake herein. SCDPS conducted a faulty investigation and erred in disciplining Petitioner, concerning the incident at issue.[2]

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[2] Additional specific facts include but are not necessarily limited to:

(a) according to the SCDPS Traffic Collision Report of the accident, it occurred at approximately 1:05 am on February 9, 2016, and resulted both the Premier tractor and trailer being overturned and totaled (**Petitioner's Exhibit 5, pp.1 and 9-12 (R. @)**;

(b) the driver was charged with "traveling too fast for conditions" for which he was convicted *in absentia*, according to Lieutenant King during his testimony at the contested case hearing (**Tr. @140, l. 23-141, l.6 (R. @)**;

(c) Premier is the owner/carrier of the tractor/trailer (**Petitioner's Exhibit 5, pp. 1 and 11) (R. @)**;

(d) the cargo was over 40,000 lbs. of dog food in different sized bags,

which Petitioner saved and removed from the scene in its trailer **(Petitioner's Exhibit 9 and Tr. @ 302, l.6-303, l.15) (R. @ and)**;

(e) within a few hours from the time of the accident, Chancey's Wrecking Service from Augusta, GA and insurance adjuster for Premier were already onsite prior to Petitioner; the adjuster assisted by taking photos generally and by helping Jeff Corbett for Wayne's specifically in the towing and recovery process; and the adjuster provided Respondent with 69 photographs relating to it, which Petitioner received on July 19th as parts of its Responses to a FOIA Request **(Tr. @ 279, l. 20-280, l. 17) (R. @)**, and **Petitioner's Exhibit 5, pp. 1 and 36-71 (R. @)**;

(f) Jeff Corbett and crew were also onsite for Petitioner beginning special recovery and towing and clean-up operations **(Tr. @ 281, l. 1-285, l.2) (R. @)**;

(g) neither Col. Oliver, Captain Grice, Captain Hughes, Lieutenant King, nor Robert (Bob) Watson was ever on the scene of the accident during such operations;

(h) Respondent presented no DPS witness who was ever on the scene—including Bob Watson or Lt. King—and, therefore, was incapable of documenting where it occurred. Even the Traffic Collision Report (**Petitioner's Exhibit 5 pp. 1 and 9-12**) by Corporal Deering, includes a disclaimer that "NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF";

(i) Respondent admitted in its Post-Trial Brief @ 4-5 that Petitioner provided towing and recovery operations and services in both South Carolina and Georgia **(R. @)**;

(j) Petitioner generated and issued a joint invoice for Wayne's Automotive Service, Inc., owned by Jeff Corbett, and its affiliate partnership, South Carolina Incident Management, jointly owned by Jeff and Sherry Corbett, on Feb. 10th in good faith for $69,017.19 **(Petitioner's Exhibit 6, pp.5-6) (R. @)** that included an $8,000 entry for Air Cushions, which it thought had been lost due to having been punctured **(Tr. @ 206, l. 22-207, l.14) (R. @)**, and Petitioner also provided Watson a copy at his request and representation he was the authorized designee for Premier Transportation/Sentry Insurance Co. **(Respondent's Exhibit 6) (R. @)**;

(k) after additional recovery was completed Petitioner revised its initial invoice downward several times in good faith **(Petitioner's Exhibit 1(B)(2) and (6)) (R. @)**;

(l) Petitioner owner Jeff Corbett and Premier President Tim Pilato negotiated a complete, mutually agreeable settlement by final invoice, dated Feb. 10th and transmitted on March 4th with no reservation of rights by anyone **(Petitioner's Exhibits 1(B)(6) and 27) (R. @ and)**;

(m) on or about March 8th, Petitioner received payment in full in the amount of $48,633.19 by Premier check—not Sentry Insurance Co. **(Petitioner's Exhibit 1(B)(4)) (R. @)**;

(n) despite such complete settlement, Respondent nevertheless issued its Notice of

Proposed Disciplinary Action by letter, dated April 25, 2016, which Petitioner timely challenged **(Petitioner's Exhibit 1(B)(5)) (R. @);**

(o) according to Lt. King's memo to Captain Grice, dated March 4th, on Feb. 16th Lt. King received an email from the Captain directing him to make contact with Bob Watson about the accident, which he did; Watson sent him a copy of the initial invoice and called the Lieutenant on February 19th; and King recommended Petitioner be permanently removed from the Wrecker Rotation List **(Petitioner's Exhibit 5, pp.1 and 3-5) (R. @ and);**

(p) Watson then emailed a complaint about the billing to the Lieutenant as President of Recovery Resolution Specialists in North Carolina **(Petitioner's Exhibit 5, pp. 1 and 6-8) (R. @);**

(q) by memo, dated March 10th, Captain Grice thereafter advised Captain Hughes he recommended Petitioner be removed from the Wrecker Rotation List **(Petitioner's Exhibit 5, pp. 1 and 2) (R. @);**

(r) by letter, dated April 25th, Respondent notified Petitioner of proposed disciplinary action and scheduled a hearing for August 8th at its Blythewood office at which Captain Grice presided and Lt. King, Captain Hughes, Respondent General Counsel Ganjehsani and Assistant General Counsel Gore; and Sgt. Borkowski attended for Respondent and Jeff and Sherry Corbett, Doug Busbee, and undersigned counsel attended for Petitioner **(Petitioner's Exhibit 1(B)(5)) (R. @);**

(s) in advance of that hearing Petitioner through undersigned counsel had submitted legal memoranda identifying issues, defects, and supporting authorities and also submitted additional supporting documentation within 5 days of the close of the hearing, as permitted by Respondent **(Petitioner's Exhibit 1(C)) (R. @);**

(t) thereafter Respondent issued its decision, dated September 26th, imposing a suspension of Petitioner for 120 days, beginning December 12th, and continuing through a point in time in the future when Petitioner had SCDPS approval of its 2017 Wrecker Rotation List Application (Application) **(Petitioner's Exhibit 1(B)) (R. @);**

(u) Respondent approved Petitioner's 2017 Application on November 30, 2016, proffered at hearing and attached to Petition For Supersedeas **(R. @ and);**

(v) Respondent began its suspension of Petitioner from all classes of tows on December 12th and it continued until the afternoon of December 16th at which time Respondent and Petitioner counsel had mutually agreed the suspension would be stayed through January 31, 2017, as approved by the Court in its Order Granting Extension, supra **(R @);**

(w) on January 17, 2017, Respondent and Petitioner through their counsel advised the Court they had agreed to a 15-day extension until Feb. 2nd to serve and file their respective Prehearing Statements and an extension through February 2017 to stay the suspension without waiver of any

Respondent's approach to investigation and regulation of the instant towing contested case included its blatant failure to submit any request to Premier, Watson, Sentry Insurance, or anyone else for documentation for Premier's transportation contract and pertinent supporting cargo, insurance and related information. Therefore, in the absence of any testimony or evidence at the hearing from DPS personnel onsite or anyone else or any advance assistance or other timely guidance to Petitioner as to specific billing concerns without investigation on the scene, there is a lack of sufficient, supportive evidence to impose any suspension.

STANDARD OF REVIEW

As the Supreme Court recently reiterated in Kiawah Island Development Partners, II v. S.C. Dept of Health and Envtl. Control, Opinion No. 27790, Advance Sheet No. 16, filed April 18, 2018, at 15-16:

> The Administrative Procedures Act establishes the standard of review in appeals from the ALC. S.C. Code Ann. § 1-23-610 (B) (Supp. 2017). The Act constrains an appellate court from reweighing the evidence presented to the ALC, but the appellate court may reverse or modify a decision if the ALC's findings or conclusions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

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rights, as approved by the Court, and, thereafter, the Court issued its Order Granting Extension, supra (**Id.**); and

(x) by its Order Granting Petition For Supersedeas, filed December 28, 2017, the Administrative Law Court continued the stay without further condition through the appellate process. **R. @ .**

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

In determining whether the ALC's decision is supported by substantial evidence, the Court need only find evidence from which reasonable minds could reach the same conclusion as the ALC. Hill v. S.C. Dept. of Health and Envtl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

Cf., Hock v. South Carolina Department of Revenue, Opinion No. 5547, Advance Sheet No. 13, filed March 18, 2018, 74, 76 (Ct. App.) as to the Court's reversal of an ALC's decision in violation of a statutory provision or affected by an error of law under -610 (B) (a) and (d), and Clemmons v. Lowe's Home Ctrs, Inc., 420 S.C. 282, 803 S.E. 2d 268 (2017), as to lack of substantial evidence to support Workers' Compensation Commission's findings of fact.

The Administrative Law Court and parties agreed the Department of Public Safety as Respondent had the burden of proof before it, consistent with Rule 29 (B), SCALC. It provides:

(B) Burden of Proof. In matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.

S.C. Code Ann. § 1-23-600 (A) (5) provides:

Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence. The South Carolina Rules of Evidence apply in all contested case proceedings before the Administrative Law Court.

In the first paragraph of its Final Order @ 1, the Court stated this contested case hearing was "to challenge a violation found and a penalty imposed by (Respondent)", citing S.C. Code Ann. §§ 1-23-600 (Supp. 2016) and 1-23-505 (Supp. 2016. (**R. @**) and next indicates it is making findings of fact by a "preponderance of the evidence."

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT ERRED IN ONLY REDUCING THE SUSPENSION FROM THE WRECKER ROTATION LIST FROM 120 TO 60 DAYS INSTEAD OF NO ADDITIONAL DAYS FOR SEVERAL REASONS.

The SCDPS disciplinary proceeding and contested case proceeding in review failed to constitute "(a)n adequate *de novo* review", consistent with S.C. Constitution Art. I, §§ 3, 22, and 23, and Unisys Corp. v. S. C. Budget and Control Bd., 346 S.C.158, 551 S.E. 2d 263, 272 (2001), to render "harmless a procedural due process violation based on the sufficiency of the lower administrative body." Furthermore, in South Carolina, every contract includes a covenant of good faith and fair dealing. Ayres v. Crowley, 205 S.C. 51, 30 S.E.2d 785, 788 (1944), Unisys Corp., supra, and Commercial Credit Corporation v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E. 2d 481, 484 (1966). Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 2d 663, 671 (2007), and authorities cited therein, and S.C. Constitution Art. I, § 4 as to prohibition of impairment to contract.

A. The Court and parties agreed Respondent had the burden of proof, consistent with Rule 29 (B), SCALC.

In its Final Order at 3-4 of its Findings of Fact, the Administrative Law Court characterizes Robert Watson as having been retained by "Sentry Insurance, the insurer of Premier's rig" and as Travelers Insurance, the insurer of the cargo, having authorized Petitioner to "deal with Mr. Watson." Even assuming, arguendo, those statements are correct, the evidence of record shows Wayne's and Premier fully settled this matter, it is moot, and no policy exceptions warrant its continuation. Youngblood v. S.C. Dep't of Soc. Serv., 402 S.C. 311, 741 S.E. 2d 515 (2013), Curtis v. State, 345 S.C. 557, 549 S.E. 2d 591 (2001), and S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 412 S.C. 18, 770 S.E. 2d 399 (Ct. App. 2015).

In fact, Premier's owner and Wayne's settled all issues almost two months before DPS even issued its Notice of Proposed Disciplinary Action, dated April 25, 2016. **Petitioner's Exhibit 1 (B) (5), pp.25-27) R. @** . Moreover, at the contested case hearing, Watson did not

formally testify on behalf of Premier or any insurance company, including Sentry Insurance and Traveler's Insurance involved, since none of them sought to intervene or participate therein.

Furthermore, there was no credible evidence offered to suggest Premier's—not Sentry's--payment of $48,633.19 to Wayne's was anything less than the "final resolution" between them.

Finally, Lt. King's testimony the driver for Premier was convicted in absentia for driving too fast for conditions provides additional evidence Premier is not contesting and has never contested the settlement. **Tr. @ 140, l. 23-141, l.6. R. @ .**

B. Petitioner and Premier Transportation, the owner of the tractor and trailer involved in the accident on the I-20 Savannah River Bridge into Georgia (accident), had settled the billing and payment in full without any reservation of rights by Premier to Petitioner for wrecker towing and special operations services provided almost two months prior to Respondent's issuance of its 120-day disciplinary order against Petitioner providing Petitioner with notice.

Petitioner and Premier had settled their billing and payment without any reservation of rights of potential pursuit of additional litigation by Premier, and there was no dispute between the parties herein as to this fact. **Petitioner's Exhibit 27**, email from Premier's owner confirming total settlement. **R. at** . Therefore, this Court should agree the Administrative Law Court's Orders upholding any further suspension of Petitioner from Respondent's Wrecker Rotation Schedule are not supportable.

C. In connection with such issuance Respondent relied on a "Civil Court" action against Petitioner as being underway that was not.

At the contested case hearing, Respondent witness King acknowledged he on behalf of DPS as the case investigator, understood Petitioner was involved in a separate "Civil Court" action, concerning the Premier accident, which somehow justified pursuit of it by DPS, even though issuance of the late September disciplinary order against Petitioner **(Tr. @ 165, ll. 5-25** occurred after early March settlement whereby Petitioner had adjusted its amount due, based on

revisions requested by Respondent and known to Petitioner. **Petitioner's Exhibit 1 (B)(6), pp. 27-28. R. @** .

Therefore, this Court should agree the Administrative Law Court's Orders upholding any further suspension of Petitioner from Respondent's Wrecker Rotation Schedule are not supportable.

D. Respondent nevertheless applied its 2016 Wrecker Rotation Fee Schedule in a Class C tow involving Special Operations for which expressly "no fee will be set" without approval of the General Assembly to require additional invoices or receipts for certain equipment and/or labor to be includable, even though Respondent's Regulation 2 S.C. Regs. 38-600 (C) (15) expressly allows "(o)nly one bill is to be submitted to the owner or operator for the work performed".

Despite the express prohibition that (1) "no fee will be set" in the Schedule, (2) express allowance of "(o)nly one bill is to be submitted" in 2 S.C. Regs. 38-600 (C) (15) (subject to revision), and (3) unambiguous limitations on Respondent's authority pointed out by Petitioner, the Administrative Law Court's Orders fail to recognize and give effect to Respondent's failure to seek amendment of its Regulation and approval by the General Assembly of its insertion in its contractual Schedule with Petitioner and other towing companies subject to such Regulation and Schedule.

In its Prehearing Statement at 7-8 (as Revised) **(R.@)**, Petitioner cited the following applicable cases and principles: Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E. 2d 13, 14 (1991) (As a state administrative agency, SCDPS can only exercise those powers conferred upon it by the General Assembly.); and Paschal v. State Election Commission, 317 S.C. 434, 454 S.E. 2d 890, 892 (1995) (When the language of a statute (or regulation) is clear and unambiguous, a court in its application of the law to the facts is to impose the meaning therein without employing the rules of statutory interpretation.). **(R. @**

). This Court should apply these principles herein to reverse the imposition of any further suspension of Petitioner by Respondent herein.

E. By having made full settlement with Petitioner without any reservation of rights, Premier and/or its insurer concluded the amount of $48,633.19 paid to Petitioner satisfied Premier's and/or its insurer's duty to "bear all reasonable costs of removal", as required by S.C. Code Ann. § 56-5-1210 (B), as Petitioner's expert rate witness Rochester, its expert CPA Rawl, and Petitioner's witnesses Busbee, Sherry Corbett, and Jeff Corbett confirmed.

Respondent proffered no witness or evidence showing the proposed charges in its initial invoice or subsequent settlement invoice agreed to by Premier and Petitioner were unreasonable or otherwise improper. DPS has never provided any guidance as to what rates it considers to be reasonable, despite the criteria in Reg. 38-600 (F) (3), which state:

> The Troop commander will complete a review of the fees for the Highway Patrol rotation wrecker services for the Troop during inspection and qualification to determine its (sic) validity and reasonableness.
>
> Validity will be based upon telephone quotes, posted rates, charges to retail customers, etc. Reasonableness will be determined as compared to other rates.

Petitioner, however, proffered and the Court accepted Gaynell Rochester as an expert witness on towing/special operations rates and regulation. Ms. Rochester explained she has a team of experts working day-to-day through the INA Towing Network that undertake under her supervision extensive research in the marketplace nationally to show prevailing rates that enable her to assist in billing resolutions around the country. **Tr. @ 433, l. 10-435, l. 23 and @ 442, ll. 5-23. (R. @ and)**. She also testified that the industry customary standard for all heavy response is from the time of the request for service (3:00 am on 2/9/16) until completion of the call (12:00 midnight on 2/9/16), i.e. 21 hours and that in her opinion Petitioner's proposed charges and settlement charges were reasonable, based on her knowledge and experience concerning towing and recovery rates in the United States. **Tr. @ 457, ll. 7-14. R. @** . She further emphasized being ready to serve is part of the costs involved for towers/recovery providers like Petitioner

that require significant investments in personnel, resources, and equipment. **Tr. @ 447, l. 4-448, l. 15. R. @ .** Finally, she confirmed reasonableness of the charges by the combination bill Wayne's/SCIM:

> (I)t's not just a tow bill. It is a spill management fee bill, it is a recovery bill, and it is a traffic control bill rolled into one. And so with all that being regarded, I can tell you that that bill was in line for the services that were rendered at the scene.

Tr. @ 451, ll. 17-23. R. @ .

Moreover, Respondent's attack on Ms. Rochester during here cross examination was unwarranted and concerned a complaint she had filed with the West Virginia PSC matter contesting a tower's rates as excessive in 2010 in light of the West Virginia PSC's established rates. **Respondent's Exhibit 29. R. @ .** DPS misunderstood that Commission's regulation of towing rates. As Ms. Rochester made clear, her objections were based on the prevailing rate methodology employed by the West Virginia PSC. **Tr. @ 483, l. 18- 493, l. 7. R. @ .**

Furthermore, she explained Petitioner's invoice primarily under review includes charges for traffic control, fuel remediation, special recovery of cargo, and tow of tractor and trailer; whereas that West Virginia complaint did not encompass traffic control or fuel spill remediation.

DPS witness Watson produced or provided no credible quotes for services or equipment and was never onsite. Similarly, DPS witness King testified he conducted the DPS investigation and made rate reasonableness determinations without any knowledge or experience or even being onsite or obtaining quotes or comparing rates for any other Class C/Special Operations approved wrecker service provider of services or equipment. He stated he did the investigation, although his quantification of the allegedly unreasonable charges looked remarkably similar to Watson's unsupported amounts. While King referred to amounts of time in the initial invoice,

based on other Troopers' views, they did not testify; and King reduced certain rates without any comparison with "other rates." **Tr. @ 166, l. 7-167, l. 21. R. @ .**

Petitioner witness Doug Busbee, however, verified Petitioner's rates were consistent with his approved rates as being reasonable in addition to the opinion of Petitioner's expert witness Rochester.[3] Respondent clearly failed to comply with its own Reg. 38-600 (F) (3)'s requirement that "(r)easonableness will be determined as compared to other rates."

Finally, Jeff Corbett, as the onsite supervisor, testified the additional time past the re-opening of I-20 was reasonable and primarily attributable to getting the cargo properly loaded and stored in more than one location for safe-keeping. **Tr. @ 302, l. 2-310, l. 24, Petitioner's Exhibit 9, Tr. @ 317, l. 13-318, l. 7, and @ 334, l. 2-337, l. 6. R. @ , , , and .**

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[3] Moreover, Petitioner demonstrated through cross examination of Mr. King that application of his specific adjustments to charges would have increased Premier's settlement payment to Petitioner by almost $6,000. **Tr. @ 178, ll. 5-17. .R. @** . This calculation included all of Lt. King's reductions in his internal memo for Respondent. **Petitioner's Exhibit 5, pp. 3-5. R. @** .

Petitioner also offered Bill Rawl, CPA, as an accounting expert witness. He reviewed the 2015 Tax Returns for Petitioner and South Carolina Incident Management (SCIM) and confirmed SCIM had elected to expense rather than depreciate $4,850 in mobile communications equipment and $4,516 for a recovery truck used in the Premier towing/recovery operations that flowed through Petitioner's Returns on K-1s back to the Corbetts' Joint Return. **Tr. @ 403, l. 3-406, l. 24. R @** . Mr. Rawl explained that under 26 U.S.C. §179 expensing such business assets is permissible. Petitioner, however, did not include the entire amounts of such expenses in invoices to Premier, as it could have. This approach demonstrated Petitioner was acting in good faith in billing Premier concerning this accident.

Moreover, on cross examination Ms. Rochester stated the mobile equipment billed amount was proper and reasonable in her opinion. **Tr. @ 480, ll. 1-14. R. @** . And Sherry Corbett testified she reviewed the time entries submitted by Wayne's personnel and adjusted some of them. **Tr. @ 206, ll. 2-13. R. @** . On one hand, Petitioner worked diligently to clear I-20 and take care of the cargo and in good faith endeavored to generate invoices quickly, as prematurely urged by third-party Watson, and then diligently followed up. On the other hand, DPS cast a blind eye to such diligence and improperly imposed its sanction on Wayne's.

F. Allowance for Respondent to discipline Petitioner retroactively after such settlement results in impairment of Petitioner's constitutional Contract Rights and violation of its Due Process Rights under S.C. Constitution Art. I, §§ 4 and 22, respectively, as raised in Petitioner's Final Arguments, as directed by the presiding judge as part of the contested case hearing and as distinct from Respondent's Post-Hearing Brief.

As referenced in n. 1, supra, at 3, Petitioner exercised its right to submit Final Arguments, consistent with SCALC Rule 29 (A) (7). Over Petitioner's objections, the Administrative Law Court disregarded the express requirement in Regulation 2 S.C. Regs. 38-600 (C) (15) that "(o)nly one bill is to be submitted to the owner or operator for the work performed" and permitted Respondent's 2016 Schedule inclusion requirement of additional invoices or receipts, based on (1) its citation of that requirement itself to support its Conclusion of Law. Final Order at 5 (**R.** @),[4] (2) its acknowledgement that Respondent "must take into account and evaluate the final bill," and (3) the fact that "Premier ultimately paid $48,622.19, the amount specified in the final bill," based on potential issues raised by Respondent to Petitioner at the time of Petitioner's payment.

The Administrative Law Court's Orders violated Petitioner's rights to contract without impairment under the South Carolina Constitution. See Article I, § 4 of the South Carolina Constitution and Article I, § 10 and Amendments 5 and 14 of the United States Constitution. "The United States Supreme Court has formulated a three-step inquiry for analyzing cases under the federal Contract Clause." Alston v. City of Camden, 322 S.C. 39, 471 S.E.2d 174, 177 (1996). And, "[i]n interpreting the Contract Clause of the South Carolina Constitution, [the South Carolina Supreme Court] has followed federal precedent construing the federal Contract Clause."

[4] Contra, The lower court in its Final Order at 6 (**R.** @) cited Unisys Corp, supra, as to Respondent's failure to create an Advisory Committee and "the contested case hearing and its *de novo* review has cured any procedural or due process violations....Therefore, this error, if it is an error, is harmless (*sic*)."

Id. at 176. The test for a Contract Clause violation, is "the law being challenged must actually impair the contract at issue. Second, the impairment must be substantial. Finally, a law that substantially impairs a contractual obligation violates the Contract Clause unless the law is 'reasonable and necessary to carry out a legitimate governmental purpose'." Id. at 177.

The Administrative Law Court's orders constitute unsupportable impairments of contract rights for several reasons, regardless of whether they are viewed as based on misconstruction of provisions of the South Carolina Administrative Procedures Act, SCALCRP, relevant constitutional provisions, and/or case law, which are subject to the same scrutiny.[5]

First, the Orders resulted in actual impairments to Petitioner. Second, they are substantial, because they have unduly harmed Petitioner, since they directly, completely, and retroactively undermine its 2016 Wrecker Schedule contract with Respondent, which is subject to the provisions of Respondent's 2 S.C. Regs. 38-600. Finally, such suspension does not further a legitimate governmental purpose in light of the Administrative Law Court's own rationale that would have resulted in no further suspension, if the Court had applied it correctly, and because the interstate nature of the accident herein rendered irrelevant applicability of the 2016 Wrecker Schedule to the matter before the Court. Accord, Oncology and Hematology Associates of S.C., LLC v. South Carolina Dep't of Health & Envtl. Control, 387 S.C. 380, 692 S.E. 2d 920 (2010) (cited in Petitioner's Prehearing Statement, as revised @ 7). **R. @ .**

In the present case, Petitioner has protected liberty and property interests in the practice of its profession. Cf, Joseph v. S.C. Dep't of Labor, 417 S.C. 436, 790 S.E.2d 763 (2016), wherein the Supreme Court overruled Sloan v. South Carolina Board of Physical Therapy

[5]See Ward v. The State of South Carolina, 343 S.C. 14, 538 S.E.2d 245 (2000), stating that Administrative Law Judges fall under the executive branch.

Examiners, 370 S.C. 452, 636 S.E.2d 598, 614 (2006), yet reconfirmed its recognition a medical professional's interests in practicing his profession are protected by Substantive and Procedural Due Process in S.C. Const. Art. I, §§ 3 and 22. 790 S.E. 2d @ 771-773. Petitioner has already been deprived of 4 days of suspension—reflecting a loss to date of its liberty and property interests. Moreover, there is no possible cure for that specific harm already incurred by Petitioner. And, as pointed out above, even though the Final Order of the Administrative Law Court provides for revisions, based on alleged errors raised by Respondent, it based its 60-day suspension of Petitioner from the Rotation Schedule on revisions demanded by Respondent only after Petitioner and Premier had consummated their full agreement to settle this matter before the Court thereby exceeding its authority. Captain's Quarters Motor Inn, Inc., supra, and Paschal, supra.

While the lower court herein relied upon Unisys Corp., supra, the South Carolina Supreme Court subsequently recognized albeit prior to Joseph, supra:

> Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.

Sharon v. Kurschner, 376 S.C. 165, 656 S.E.2d 346, 350 (2008) (Emphasis in original). In the instant case, given the Administrative Law Court's acknowledgements it nevertheless provided Respondent relief and thereby erred and abused its discretion. See S.C. Const. Art. I, §§ 3 and 22, Joseph, supra, Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health & Envtl. Control, 305 S.C. 90, 406 S.E. 2d 340 (1991), and Oncology and Hematology Associates of S.C., LLC, supra.

II. THE ADMINISTRATIVE LAW COURT ERRED IN APPLYING THE 2016 WRECKER ROTATION FEE SCHEDULE AND PROVISIONS OF 2 S.C. REGS. 38-600 (2011), ESPECIALLY, WITHOUT MAKING ANY FINDING OF FACT THE ACCIDENT OCCURRED IN SOUTH CAROLINA AND WITHOUT MAKING A RELATED CONCLUSION OF LAW IT DID, WHEN RESPONDENT FAILED TO SHOW THE ACCIDENT OCCURRED IN SOUTH CAROLINA, CONSISTENT WITH REFERENCES TO RESPECTIVE STATE BOUNDARIES IN GEORGIA V. SOUTH CAROLINA, 497 U.S. 376 (1990), AS WELL AS ACCIDENT PHOTOGRAPHS, DEFINITIONS OF INTERSTATE COMMERCE, INTRASTATE COMMERCE, MOTOR CARRIER, AND MOTOR VEHICLE IN 2 S.C. REGS. 38-402 (6) (1998) AND DEFINITIONS OF INTERSTATE COMMERCE AND INTRASTATE COMMERCE IN 49 CFR 375/390.5 (1988), THEREBY RENDERING IT AN INTERSTATE MATTER BEYOND THE SCOPE OF THE APPLICATION OF SUCH SCHEDULE AND REGULATION AS TO APPLICABLE RATES AND CHARGES.

Respondent proffered no evidence to support the Premier accident having occurred in South Carolina through direct or other testimony or evidence, while Petitioner through the cargo shipment confirmation, Petitioner's and Premier adjuster's photographs, and Jeff Corbett's testimony related thereto provided uncontested evidence the accident occurred on the Savannah River I-20 Bridge. While the transport of dog food by Premier was in interstate commerce rather than in intrastate commerce is not at issue, where the accident occurred is one for which Respondent had the burden to prove and failed to do so, thereby rendering inapplicable application by Respondent of its intrastate-only 2016 Wrecker Service Rotation Fee Schedule herein. See, e.g., 2 SC Code Regs. 38-402 (1998) (6) re definitions of Interstate Commerce, (7) re Intrastate Commerce, (8) re Motor Carrier, and (9) re Motor Vehicle,[6] as well as 49 CFR

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[6] As used herein, the following terms shall be accorded meaning as indicated:

* * *

6. Interstate Commerce. 'Interstate Commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state.

7. Intrastate Commerce. 'Intrastate Commerce' means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation

375/390.5 (1988) re definitions of Interstate commerce and Intrastate commerce,[7] and Georgia v. South Carolina, 497 U.S. 376, 383-384, 394-395, 398, 408-410 (1990), re Georgia-South Carolina Savannah River boundaries in which the Court basically clarified the boundary is the mid-stream point between riverbanks, except where there are islands it is the mid-stream point between the island and South Carolina riverbank.[8]

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which has been exempted by Congress from federal regulation in interstate or foreign commerce.

8. Motor Carrier. 'Motor Carrier' means both a common carrier by motor vehicle and a contract carrier by motor vehicle.

9. Motor Vehicle. 'Motor Vehicle' means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways of this State.

[7] *Interstate commerce* means trade, traffic, or transportation in the United States—

(1) Between a place in a State and a place outside of such State (including a place outside of the United States);

(2) Between two places in a State through another State or a place outside of the United States; or

(3) Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.

Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term 'interstate commerce'.

[8] Petitioner witness Jeff Corbett, who was onsite and supervised the wrecker, special operation, and related clean-up and cargo retrieval and removal operations, testified the location of the accident involving the Premier tractor and trailer and damaging the bridge structure on the westbound lanes of the I-20 Savannah River Bridge was more than halfway past the middle of the Savannah River and the Augusta Canal. His testimony was further supported by on-the-scene-photos in evidence. **Tr. @ 291, l. 2-301, l. 15 and @ 314, ll. 5-24**, and **Petitioner's Exhibit 13** (photos) **@ 569-570, 582-587, and 593-594. R. @ and** . Mr. Corbett also testified Georgia Department of Transportation workers were onsite assessing the repair work to the Bridge that Department would be undertaking. **Tr. @ 283, l. 9-285, l. 2 and @ 291, ll. 16-20. R. @ and .**

III. THE ADMINISTRATIVE LAW COURT ERRED IN RULING WHILE RESPONDENT "MAY HAVE ERRED IN FAILING TO CREATE AN ADVISORY COMMITTEE, IT IS NOT OBLIGATED TO USE THE COMMITTEE OR TO FOLLOW ITS RECOMMENDATIONS", AND "(I)N ANY EVENT THE CONTESTED CASE HEARING AND ITS *DE NOVO* REVIEW HAS CURED ANY PROCEDURAL OR DUE PROCESS VIOLATIONS", DESPITE THE FACT THAT THE REGULATION IN (D) (2) INCORPORATES RESPONDENT'S WRECKER DISCIPLINARY POLICY (200.19) BY REFERENCE AND NEITHER SOUTH

Moreover, in conjunction with issues relating to where the accident occurred, Petitioner offered for admission as **Petitioner's Exhibit 15**, a corroborative Georgia-South Carolina Google boundary map identifying the respective state boundaries under the I-20 Savannah River Bridge on which the accident occurred, which showed the Georgia-South Carolina boundary was well less than halfway through the middle of the stream in light of the natural bend of the riverbed beneath the Bridge. **R. @** .

Following this offer of proof, which the Court declined, Petitioner again offers it herein to show Respondent failed to meet its burden of proof the accident occurred in South Carolina. The Court may also take judicial notice of the boundary on a Google map, even though the lower court did not do so. See, e.g., People v. Clark, 940 N.E. 2d 765, 766-67 (IL App. 2010). Accord, Pahls v. Thomas, 718 F. 3d 1210, 1216, n. 1 (10th Cir. 2013), citing Fed. R. Evid. 201 (b), and S.C. R. Evid. 201 (b) and (f).

Respondent presented no DPS witness who was ever on the scene—including Bob Watson or Lt. King—and, therefore, was incapable of documenting where it occurred. Even the Traffic Collision Report (**Petitioner's Exhibit 5 @ 9-12**) by Corporal Deering, includes a disclaimer that "NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF."

Respondent further admitted in its Post-Trial Brief @ 4-5 that Petitioner provided towing and recovery operations and services in both South Carolina and Georgia.

Finally, as Respondent argued in its Post-Trial Brief @ 5-7 **(R. @)**, 49 U.S.C. § 14501(c) does not preempt State regulation of intrastate tow truck operations "performed without the prior consent or authorization of the owner or operator of the motor vehicle." DPS presented no evidence the driver of the Premier tractor was already away from the scene, and no evidence indicated whether the Highway Patrol complied with the Reg. 38-600 (C) (2) requirement that the owner or driver of the vehicle "has no preference as to which wrecker service he/she desires, a wrecker will be called from the appropriate wrecker rotation list." In fact, Petitioner showed Chancey's Wrecking Service from Augusta, GA **(Tr. @ 278, l. 10-280, l. 19) (R. @)** and insurance adjustor for Premier were already onsite prior to Petitioner; and the adjustor assisted by taking photos generally and by helping Jeff Corbett for Wayne's specifically in the towing and recovery process. **Tr. @ 281, l.-283, l. 8, and -291, l. 21-292, l. 22. R. @** . Premier, therefore, consented or authorized Wayne's to provide its services, which preempted application of the 2016 Wrecker Service Rotation Fee Schedule herein, were the Court to find and conclude this is an intrastate matter.

CAROLINA STATUTORY OR CONSTITUTIONAL PROVISIONS CONTEMPLATE SUCH SHORT-CIRCUITING OF THE SCOPE OF THE REQUIRED *DE NOVO* REVIEW.

The Administrative Law Court's Final Order makes no Findings of Fact as to the requirement of creation of an Advisory Committee set forth in 2 S.C. Code Ann. Regs. 38-600 (D) (5-7); however, Respondent through its attorney in resting its case at the hearing admitted there is no Advisory Committee. While §(D) (5) unequivocally states "An advisory committee... will be created...," the Order @ 5-6 **(R. @)** refers not to the Advisory Committee's creation but only to a "review" by it "upon request by the Department" in (D) (5) and concludes:

> ...its review would be limited to 'specific issues raised in a complaint or appeal,' and its 'recommendations regarding the validity of the complaint as well as a fair and reasonable resolution' cannot 'supercede (sic) Department of Public Safety policy.' Hence, while the Department may have erred in failing to create an Advisory Committee, it is not obligated to use the committee or to follow its recommendations. In any event, the contested case hearing and its *de novo* review (have) cured any procedural or due process violations. Unisys Corp. v. South Carolina Budget & Control Board, 346 S.C. 158, 551 S.E.2d 263 (2001). Therefore, this error, if it is an error, is harmless.

As Petitioner pointed out in n. 1 @ 1 of its Final Arguments **(R. @)**, the Supreme Court in Unisys Corp. expressly required an "adequate *de novo* review" to render such error harmless. 551 S.E.2d at 272 (Emphasis added.)

To assist the Administrative Law Court and parties herein Petitioner attached both 2 S.C. Code Ann. Regs. 38-600, effective April 23, 2004, as published in the State Register, and DPS Policy 200.19, the 2004 Wrecker Rotation Disciplinary Policy (Policy), referencing S.C. Code § 23-6-20 and Regs. 38-600, effective September 14, 2004, to its Petition For Contested Case Hearing. Regs. 38-600 (D) (2) and (3) state:

* * *

> 2. The Department will enact a Wrecker Rotation Disciplinary Policy setting out the procedures for enforcing this regulation.

3. Failure of any wrecker service to comply with this regulation *will result in disciplinary action in accordance with the South Carolina Department of Public Safety Wrecker Rotation Disciplinary Policy.*

(*Emphasis added*).

* * *

In addition, in the last paragraph of Notice of Disciplinary Action Decision by Troop Commander Hughes @ 7, herein, dated September 26, 2016 (**Petitioner's Exhibit 1 (A) (R. @**), Petitioner was provided information as to how to seek an internal "appeal" within the Department, which was to submit a written request with the grounds for it to Col. Oliver, Patrol Commander, within 10 calendar days following receipt of it, consistent with Section IV (D) of the Policy concerning Disciplinary Procedures, which is entitled "Appeal of Troop Commander's Decision." Petitioner timely submitted its written "appeal" internally. Next Section IV (E) of the Policy, entitled "Patrol Commander's Action On Appeal," states:

> When an appeal from a troop commander's decision is received, the patrol commander may summarily concur, modify, reverse, or order another disposition of the complaint consistent with the facts substantiated in the record, department policy, and applicable law. The patrol commander shall request that the advisory committee review the appeal and make recommendations before making a final decision.

(Emphasis added). Patrol Commander Oliver made no such request herein and could not do so in light of DPS's failure to have met its duties to create such an Advisory Committee. Remand at this juncture does not appear to be a viable option for the Court to follow.

In this matter Respondent failed to meet its burden of proof that it fulfilled its express statutory, regulatory, and policy duties and related duties in prosecuting its action against Petitioner and failed to proffer either Troop Commander Hughes or Patrol Commander Oliver as witnesses, although their respective signed decisions, dated September 26 and December 1, 2016, are in the record as parts of its Petition For Contested Case Hearing in **Petitioner's**

Exhibit 1 (A) and (B). R. @ and . Respondent further violated its own 2 S.C. Code Ann. Regs. 38-600 (D) (3) and Disciplinary Policy IV (E) in prosecuting Petitioner herein and would have this Court do so as well by continuing to pursue this action and impose disciplinary action by suspension of Petitioner from the Wrecker Rotation List in a manner not "in accordance with" Disciplinary Policy (E), since there is no Advisory Committee in existence to review the appeal and make recommendations before the Patrol Commander made a final decision, consistent with DPS Regs.38-600 (D) (3) and Policy IV (E). Therefore, there was not any "adequate *de novo* review" herein to satisfy Respondent's violations of its own Regulation, Policy, and Petitioner's rights regarding Contract Impairment and Due Process as well. Accord, Sharon, supra, and Oncology and Hematology Associates of S.C., LLC, supra.

Furthermore, Petitioner fully responded to Respondent's discovery in good faith and provided the Vern's invoice and accident photos among several hundred other pages of discovery responses. The Administrative Law Court's reliance on Unisys Corp., was, therefore, misplaced. However, through its reliance, Petitioner should not otherwise have been penalized for providing third-party information to Respondent in discovery in the instant contested case proceeding instead of attaching it to its invoice(s) to Premier, since such inconsistency would be arbitrary, capricious, and an abuse of discretion; and such continued prosecution and any penalty violate and be inconsistent with the express provisions (D) (2) and (3) of 2 S.C. Code Ann. Regs. 38-600, which expressly incorporate by reference in (D) (2) the Wrecker Rotation Disciplinary Policy (200.19).

IV. THE ADMINISTRATIVE LAW COURT FURTHER ERRED BY INCONSISTENTLY AGREEING PETITIONER SHOULD NOT BE SUBJECTED TO DISCIPLINARY ACTION FOR ITS REVISION OF INVOICES PRIOR TO THE FULL SETTLEMENT INVOICE BUT STILL IMPOSING A 60-DAY SUSPENSION.

The first two paragraphs in the Findings of Fact of the Final Order @ 1 state:

> Having observed the witnesses and exhibits presented at the hearing and passed upon their credibility, taking into consideration each party's burden of proof, the Court makes the following findings of fact by a preponderance of the evidence.
>
> Petitioner applied to be included on the 2016 Wrecker Rotation Schedule. Petitioner was approved and recommended for the rotation list. The 2016 Wrecker Rotation Fee Schedule does not set a fee for special operations in Class C tows. These are described in 2 S.C. Code Ann. Regs. 38-600 (E) (3) (2011) as heavy duty tows for vehicles in excess of seventeen thousand (17,000) pounds. The Fee Schedule also notes that 'a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job.' Proof of these costs must be provided by including an itemized invoice or receipt from the provider with the towing bill. A standard Class C tow is approved for $436.00 per hour. Special operations for a Class B tow sets an hourly rate of $174.00. [1] The Schedule also allows (sic) a separate invoice if additional services are performed, such as hazardous waste cleanup or transportation of vehicle, cargo, or occupants.
>
> [1] What that rate is supposed to cover or supply is not specified.

R. @ . That Order next addresses as parts of its Findings of Fact labor and towing rates and confirms Spill Containment Incident Management (SCIM), owned by Jeff and Sherry Corbett, "provided communication equipment and a truck with cleanup supplies used at the accident scene" and also states:

> (L)abor was obtained from Vern's Wrecker and Recovery ('Vern's'). Equipment and labor from SCIM and Vern's was 'marked up' from its actual cost allegedly to cover Petitioner's liability, taxes, and insurance expenses. Equipment invoices included an operator for the equipment. These operators were also included in labor charged for recovery technicians.

Id. @ 3. R. @ . In the Conclusions of Law, the Final Order states in applicable part:

> Charges for services furnished through Respondent's wrecker rotation list are subject to the regulations:
>
> > Fees charged for rotation list calls shall be reasonable and not in excess of rates charged for similar services provided in response to requests initiated by any other public agency or private person.
>
> 2 S.C. Code Ann. Regs. 38-600 (F) (2) (2011).
>
> This subsection creates a correlation between the fees set by the annual Wrecker Rotation Fee Schedule and the overall charges for services performed. The schedule, to which

> Petitioner is subject, sets an hourly amount for a Class C Standard Tow at $436.00 an hour. No fee is set for Special Operations. However, the following explanation is included in the Fee Schedule:
>
> > Although no Special Operations fee is set for Class C tows, a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job. Proof of these actual costs in the form of an itemized invoice or receipt from the third part(y) providing such equipment or labor must accompany the tow bill.
>
> Respondent, therefore, has the authority to investigate complaints and to determine whether a tow bill is proper and reasonable. However, special operations may require additional labor and equipment that could be provided without obtaining them from third parties. Reasonable costs might be added that could be in excess of the $174.00 an hour allowed for Class B tows.

Id. @ 5 (R. @). See also, the 2016 Schedule in **Petitioner's Exhibit 1 (B) (1). R. @ .**

From this review the Court can readily see that the Administrative Law Court erred by: (a) failing to apply the only one invoice provision in the Regulation; (b) failing to permit discussion and introduction into evidence as **Petitioner Exhibit 28 (R. @)** of prior DPS Wrecker Schedules for 2013, 2014, 2015, and 2017, which show—without any change of the Regulation—that Respondent only introduced the "one invoice provision" in such Schedules, beginning with its 2015 Schedule; (c) failing to apply the similar fees and charges provision in the Regulation; (d) otherwise ignoring the no fee for Special Operations provision in the 2016 Schedule; (e) failing to utilize evidence presented at the contested case hearing in lieu of an invoice or receipt, even if deemed acceptable by this Court; and (f) failing to take into account that there is no double-billing by Petitioner, since the 2016 Schedule on its face does not indicate the Class C towing rate also includes labor costs, as Petitioner pointed out to the Administrative Law Court. Accord, ¶ 5 of Petitioner's Motion For Reconsideration Of Final Order @ 8:

> As to the equipment and labor discussed by the Court in its Order @ 3, as to Vern's Wrecker Service and Petitioner's $280 mark-up in the settlement invoice to $1,000, the Order further fails to take into account that Vern's and its personnel are located in Georgia instead of South Carolina, and they worked in both states as part of their

involvement, as did other laborers and equipment operators referenced as to alleged 'duplicated' charges.

In addition, contrary to Respondent's contention, the Schedule—even if applicable—does not specify an operator charge is also included in each of the wrecker and rotator vehicle charges. Moreover, Respondent failed to provide prior notice it took the position they do and/or meet its burden of proof they do, while Respondent admits both of these vehicles, their operators, and laborers worked in both Georgia and South Carolina in undertaking towing and recovery services. Therefore, there was no double billing that constitutes any specific abuse or violation of Regs. 38-600 herein.

Finally, while Petitioner did not separately charge for creating the several versions of invoices, for example, at the insistence of Robert Watson, such costs were definitely incurred. They should be recoverable. Petitioner, therefore, requests the Court to eliminate this violation for this reason as well as those above.

(R. @). [9]

V. THE ADMINISTRATIVE LAW COURT FURTHER ERRED BY MISCONSTRUING EVIDENCE OF RECORD, LIMITING EXPERT TESTIMONY, AND REFUSING TO ALLOW INTRODUCTION OF EXHIBITS CONFIRMING THE ACCIDENT HEREIN OCCURRED IN GEORGIA RATHER THAN SOUTH CAROLINA AND WAS THEREBY INTERSTATE IN NATURE, RENDERING THE 2016 SCHEDULE INAPPLICABLE HEREIN.

In the first full paragraph of page 2 in the Findings of Fact of its Final Order, the Administrative Law Court stated:

> On February 9, 2016, the South Carolina Highway Patrol placed a routine (sic) rotation call to Petitioner's Aiken location for a Class C wrecker to tow an overturned tractor-trailer on the I-20 bridge over the Savannah River near the South Carolina-Georgia border.[2] The tractor-trailer belonged to J.H.O.C, Inc., d/b/a Premier Transportation ("Premier") and contained a customer's shipment of dogfood. Between 2:20 A.M. and 4:30 A.M. Petitioner sent individuals to the scene and began to dispatch trucks and

[9] Petitioner otherwise requests the Court to take judicial notice that none of the Wrecker Schedules presented herein from 2013 through 2018 expressly provide Class C towing rates also include labor costs. See People, supra, re appellate court may take notice of facts lower court did not and S.C. R. Evid. 201 (b) and (f). **Petitioner's Exhibit 28** (proffered to the Administrative Law Court) (**R. @**) and Petitioner's Petition For Supersedeas Or Other Ruling To Continue Stay Through Appeal Process with Verification And Affidavit Of Walter Jeffrey Corbett attaching the 2016, 2017, and 2018 Wrecker Schedules, filed with the Administrative Law Court on December 13, 2017, as well as Petitioner's Reply (**R. @**)To Respondent's Response To Petition (**R. @**), filed December 27, 2017. The Administrative Law Court thereafter granted the Petition by its Order Granting Petition For Supersedeas, filed December 28, 2017. **R. @** .

equipment including apparatus for traffic control such as digital signs and cones. Between noon and 2:00 P.M., the interstate and the bridge were reopened to traffic. The cargo recovery and removal continued into the evening. Petitioner's records show that its vehicles finished at the scene around 11:38 P.M. Petitioner's operations manager disputed the accuracy of this record and contended that vehicles and workers remained engaged until a later time. In any event, the Court has no basis to reject Petitioner's claim that some vehicles and workers were involved in the recovery for approximately twenty-one (21) hours.

[2] S.C. Code Ann. Regs. 38-600 (F)(2)(a)(1) (2011) defines a "standard tow...as responding to the scene, hooking up the vehicle, performing a general clean up if the call involves responding to a collision scene...." Section (F)(2)(a)(2) defines "special operations" as "involving the process of uprighting an overturned vehicle or returning a vehicle to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle and/or recovery of a load which has spilled, or the off-loading and reloading of a load from an overturned vehicle performed to right the vehicle."

(R. @).

Examples of the Administrative Law Court's misconstruction of evidence include matters discussed above in Arguments I – IV, as well as this Argument and limitations unduly placed on the scope of testimony by witnesses for Petitioner and related offers of proof, including Wrecker Rotation Schedules for prior and subsequent years to the 2016 Schedule, showing recent addition of the additional receipt or invoice provision without approval by the General Assembly and absence of guidance by DPS or any Advisory Committee as to reasonableness of rates, as required in the 2 S.C. Code Ann. Regulation 38-600. Other improper limitations by the Court included restrictions on testimony by Petitioner witnesses concerning the interstate nature of the accident and reasonableness of the rates used by Petitioner, which showed the 2016 Schedule and rates were thereby inapplicable to the instant accident.

VI. THE ADMINISTRATIVE LAW COURT FURTHER ERRED BY EFFECTIVELY SANCTIONING RESPONDENT'S IMPROPER, RETROACTIVE EMPLOYMENT OF BINDING NORMS AGAINST PETITIONER HEREIN, AS RAISED IN PETITIONER'S FINAL ARGUMENTS, WHICH VIOLATE THE REGULATION, S.C. CONSTITUTION ARTICLE I, §§ 3, 4, 22, AND 23, AND THE SOUTH CAROLINA ADMINISTRATIVE

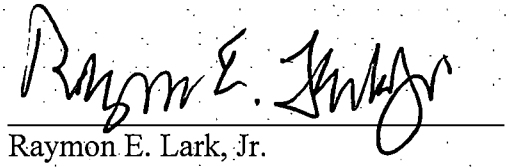
PROCEDURES ACT IN S.C. CODE ANN. § 1-23-610 (B) AS BEING IN VIOLATION OF STATUTORY AND/OR CONSTITUTIONAL PROVISIONS, AS BEING ARBITRARY AND CAPRICIOUS, AND/OR AS CONSTITUTING ABUSES OF DISCRETION.

In consideration of the above Arguments, Respondent otherwise should be characterized as improperly and retroactively employing binding norms against Petitioner herein, which violate DPS Reg. 38-600, S.C. Constitution Article I, §§ 3, 4, 22, and 23, and are also arbitrary, capricious, and constitute abuses of discretion under the SCAPA, supra, and can, thus, have no force or effect. See Home Health Serv. Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375, 378 (1994), citing Ryder Truck Lines, Inc. v. U.S., 716 F.2d 1369 (11th Cir. 1983), as well as Joseph, supra, citing both cases, discussing SCAPA rulemaking violations and characterizing administrative agency rulemaking as the "so-called Fourth Branch of government". 790 S.E. 2d @ 771-773.[10]

[10] Specific examples of Respondent's use of unlawful binding norms include, but are not limited to: using the 2016 Schedule without seeking amendment to its Regulation 38-600 to impose a sanction on Petitioner; failing to create an Advisory Committee, as required in (D) (5-7) of the Regulation, to review proposed disciplinary action; finding Petitioner overcharged Premier herein for Petitioner's towing and recovery services rendered; specifying additional invoices in the Schedule, when the Regulation only allows for a single invoice, subject to its possible revision, as occurred herein covering all respects, consistent with S.C. Code Ann. §56-5-5635 (F); (C) (6) of the Regulation expressly requiring the vehicle "owner or owner's designee"--DPS acknowledged to be Premier--to dispute a bill/complain about billing and not an unauthorized third party, such as Bob Watson; disregarding indisputable photographs taken by Premier's insurance adjustor on the scene and Wayne's personnel showing that the accident was a Class C tow requiring Special Operations tow for which fees are not established and that the accident did not occur in South Carolina but rather between the Savannah River and Augusta Canal in Georgia and for which towing and special operations were undertaken in both South Carolina and Georgia--thereby rendering improper DPS's application of its intrastate 2016 Wrecker Rotation Fee Schedule herein; and failing to make a rate comparison to assess the reasonableness of Petitioner's charges, as required in (F) (3) of the Regulation, and imposing a 120-day suspension from the Schedule on Petitioner.

CONCLUSION

For the foregoing reasons, Appellant-Respondent respectfully requests this Honorable Court to reverse the Administrative Law Court's rulings and to grant such other relief for Appellant-Respondent deemed appropriate by the Court.



May 29, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

Case No. 16-ALJ-30-0410-CC
Appellate Case No. 2017-002455

Wayne's Automotive Center, Inc., Appellant-Respondent,

v.

South Carolina Department of Public Safety, Respondent-Appellant.

PROOF OF SERVICE

I, Raymon E. Lark, Jr., attorney for Appellant-Respondent herein, hereby certify I have served on Respondent-Appellant through its counsel via hand delivery and email and co-counsel via email Initial Brief Of Appellant-Respondent And Designation Of Matter For Record On Appeal today, May 29th, as follows:

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May 29, 2018

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Initial Brief Of Appellant-Respondent, Designation Of Matter For Record On Appeal, And Proof Of Service In *Wayne's Automotive Center, Inc., Appellant-Respondent, v. South Carolina Department Of Public Safety, Respondent-Appellant*, Appellate Case No. 2017-002455, Our File No. 16145

Dear Ms. Kitchings:

Enclosed are our Initial Brief Of Appellant-Respondent And Designation Of Matter For Record On Appeal with Proof Of Service in the above case. Please stamp the extra set for the courier.

Thank you for your assistance.

Sincerely,

AUSTIN & ROGERS, P.A.

Raymon E. Lark, Jr.

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cc: SCDPS Attorney Andrew F. Lindemann Esquire (**Via Hand Delivery And Email**)
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