THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

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

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

v.

South Carolina Department of Public Safety, ... Respondent-Appellant.

INITIAL APPELLANT'S BRIEF
OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court err in finding that Wayne's Automotive Center was justified in holding the cargo until the owner or its designee or insurer was prepared to take possession where such a ruling is contrary to Section 56-5-3635(F), which was clearly violated by Wayne's Automotive Center and supports the disciplinary action imposed?

II. Did the Administrative Law Court err in analyzing the reasonableness of the charges on the final "corrected" invoice submitted by Wayne's Automotive Center after the initiation of the investigation rather than the reasonableness of the charges on the invoice submitted with Premier Transportation's complaint that triggered the investigation?

III. Did the Administrative Law Court err in several of its findings of reasonable charges on the final invoice, specifically the findings with respect to the communications equipment and the supply truck?

STATEMENT OF THE CASE

This is an appeal from a contested case hearing and Final Order issued by the South Carolina Administrative Law Court.

The Appellant-Respondent Wayne's Automotive Center ("Wayne's") operates a wrecker service in Aiken, South Carolina. By letter dated April 25, 2016, the South Carolina Highway Patrol, which is a division of the Respondent-Appellant South Carolina Department of Public Safety ("SCDPS"), notified Wayne's of a proposed disciplinary action arising out of a towing operation performed on February 9, 2016, when a tractor-trailer owned by J.H.O.C., Inc. d/b/a Premier Transportation ("Premier") overturned on the I-20 bridge over the Savannah River near the South Carolina-Georgia border. Wayne's was on the Wrecker Rotation List that is maintained by the Highway Patrol. Wayne's received the rotation call on February 9, 2016, which it accepted.

On February 10, 2016, Wayne's issued an invoice to Premier for the tow and clean-up totaling $69,017.19. (Petitioner Exhibit 6). Robert Watson of Recovery Resolution Specialists was retained by Premier and its insurer, Sentry Insurance Company, to review the tow invoice. As part of his work, Watson made a complaint on behalf of Premier to Lt. Nichlous King, who was the wrecker coordinator for Troop 7 of the Highway Patrol. Lt. King conducted an investigation into the complaint which included contacts with Jeffrey Corbett, a

principal of Wayne's, to discuss the charges on the invoice and the release of the cargo of dog food.

As a result of that investigation, a Notice of Proposed Disciplinary Action signed by Captain A.K. Grice was sent to Wayne's notifying it that the Highway Patrol had determined that violations of the applicable regulations, as codified at Section 38-600 of the South Carolina of State Regulations, had occurred. In addition, the Highway Patrol had determined that Wayne's had violated Section 56-5-5635(F) of the South Carolina Code of Laws by its failure to timely release the cargo of dog food.

Wayne's requested and received a hearing from SCDPS on August 8, 2016. Thereafter, a Notice of Disciplinary Action Decision was issued on September 26, 2016, whereby SCDPS imposed the suspension and removal from the Wrecker Rotation List for a period of 120 days as a disciplinary sanction. An appeal was filed with Colonel Michael R. Oliver who upheld the decision.

Wayne's then sought a contested case hearing in the Administrative Law Court. An evidentiary hearing was held on July 31, 2017 and August 1, 2017 before Judge H.W. Funderburk, Jr.

By Final Order issued September 19, 2017, Judge Funderburk ordered Wayne's to be suspended and removed from the Wrecker Rotation List for a period

of sixty days. The parties both filed motions for reconsideration that were denied by Order filed October 31, 2017.

Wayne's subsequently filed a Notice of Appeal with this Court. SCDPS filed a cross-appeal only to preserve and assert its position on certain legal and factual errors that are discussed in detail below.

ARGUMENTS

I. The Administrative Law Court erred in finding that Wayne's Automotive Center was justified in holding the cargo until the owner or its designee or insurer was prepared to take possession where such a ruling is contrary to Section 56-5-3635(F), which was clearly violated by Wayne's Automotive Center and supports the disciplinary action imposed.

In the Administrative Law Court, the Respondent-Appellant SCDPS argued that the 120-day suspension and removal of Wayne's Automotive from the Wrecker Rotation List was warranted based upon its deliberate refusal to comply with Section 56-5-3635(F). Section 56-5-3635(F) provides as follows: "The proprietor, owner, or operator of the towing company, storage facility, garage, or repair shop must release any personal property that does not belong to the owner of the vehicle to the owner of personal property." S.C. Code Ann. § 56-5-3635(F).

The evidence in the record is clear and undisputed to show that Wayne's was requested on numerous occasions to release the tractor-trailer's cargo, which consisted of hundreds of bags of dog food which was perishable and contained an expiration date. (Tr. 62-63, 249-250). The emails that were admitted into evidence verify that Wayne's, through Sherry Corbett, knew that the owner of the dogfood sought the immediate release of the cargo, and nonetheless, Wayne's refused to comply with Section 56-5-3635(F) until it had received payment from Premier Transportation, the owner of the tractor-trailer.[1] The accident occurred on February 9, 2016, and the cargo was not released until almost a full month later on March 7, 2016.[2] The requests for the release of the cargo came from numerous persons including Lt. Nichlous King, Robert Watson, and the Travelers adjuster.

Wayne's fully conceded in testimony that it held the cargo until payment was made despite the many requests for its release. (Tr. 247). As an initial position, Wayne's pleaded ignorance of the law, which is no excuse and frankly disturbing

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[1] Specifically, on February 16, 2016, Sherry Corbett emailed Watson at 9:52 a.m. stating that "[t]he cargo, trailer, and tractor will be released when monies are paid for services already rendered as previously stated to the company representative and the insured on site the day of casualty." (Respondent Exhibit #13). It was Watson's understanding that Wayne's would not release the cargo.

[2] The record reflects that payment of $48,633.19 to Wayne's was made by check dated March 4, 2016, and as a result, the cargo was available for release on that date. March 4th was a Friday. The cargo was claimed on the following Monday, March 7th.

given the years that Wayne's has been in the towing business.[3] *See*, *Smothers v. U.S. Fidelity and Guaranty Co.*, 322 S.C. 207, 470 S.E.2d 858, 860 (Ct. App. 1996) ("[e]veryone is presumed to have knowledge of the law ").

Wayne's also argued that the reference to "personal property" in Section 56-5-3635(F) exempted the cargo of dogfood at issue. Wayne's argued that dogfood is "commercial property" rather than "personal property." The Administrative Law Court correctly rejected this argument. (Final Order). While the term "personal property" is not defined in Title 56, the term is defined in other Code sections and has a well recognized and accepted meaning. "Personal property" is defined in Title 15 to include "money, goods, chattels, things in action and evidences of debt." S.C. Code Ann. § 15-1-40. "Personal property" has an identical definition in Title 18. *See*, S.C. Code Ann. § 18-1-20. Likewise, "personal property" is defined in Title 12 to mean "all things, other than real estate, which have any pecuniary value." S.C. Code Ann. § 12-37-10. Moreover, the plain and ordinary meaning of the term is obvious as well. Clearly, the use of the term "personal property" in Section 56-5-3635(F) is intended to mean any goods or chattels, and is only to be distinguished from real property.

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[3] Sherry Corbett testified that she did not know that South Carolina law required the cargo be released despite being in the towing and storage business for thirteen years. (Tr. 242-243).

Consequently, the cargo of dogfood constitutes "personal property" which Wayne's had no right to withhold from the owner for almost a month. The undisputed fact that the cargo was withheld is a clear violation of Section 56-5-3635(F), and that statutory violation alone, justifies the 120-day suspension and removal from the Wrecker Rotation List for that time period.

Despite Wayne's deliberate refusal to comply with Section 56-5-3635(F), the Administrative Law Court found no wrongdoing by Wayne's in deliberately holding the cargo from February 9, 2016 until March 7, 2016, based upon the "complexity" of determining who owned the cargo. The Court explained that "Respondent's directive to release the cargo without resolving the ownership issue left Petitioner in a legal limbo." (Final Order). Yet, the Court also concluded that "Petitioner is justified in holding the cargo until its owner, the owner's designee, or the owner's insurer is prepared to take possession." (Final Order). These rulings were in error for several reasons.

First and foremost, the Administrative Law Court disregarded the clear evidence that Wayne's held the cargo only until payment was made by Premier and not until there was a determination of ownership of the cargo. Wayne's intentions in holding the cargo were unmistaken. As indicated above, on February 16, 2016, Sherry Corbett emailed Bob Watson at 9:52 a.m. stating that "[t]he cargo, trailer, and tractor will be released when monies are paid for services already rendered as

previously stated to the company representative and the insured on site the day of casualty." (Respondent Exhibit #13). There was never a request for proof of ownership for the dog food to be released. And indeed, the cargo was released without Wayne's ever making a determination of ownership or that the property was being released to the rightful owner.

Second, the Administrative Law Court suggests that SCDPS had some duty to determine ownership of the cargo. That is not the case. SCDPS did not put Wayne's in "legal limbo."

Third, with respect to the cargo, it is clear that Section 56-5-3635(F) envisions the release of the cargo (as personal property not attached to the vehicle) when the request is made to the towing company. The cargo may be released to the trucking company that remains under contract and the legal duty to deliver the cargo; that is the party that was in lawful possession of the personal property. It truly makes no difference to the towing company who the "owner" of the cargo is; what is relevant is the party who has lawful possession on behalf of the owner or as the owner's designee. The Administrative Law Court, in fact, recognized this very point in stating that "Petitioner is justified in holding the cargo until its owner, the owner's designee, or the owner's insurer is prepared to take possession." (Final Order). Premier, as the owner's designee, as well as the insurer of the cargo sought its release, i.e., they were prepared to take possession of the cargo long before March 7, 2016;

yet, Wayne's refused to comply to several such requests and only did so after payment was received from Premier. That conduct was in violation of the clear intent and purpose of Section 56-5-3635(F).

In sum, the indisputable evidence in the record demonstrates a violation of Section 56-5-3635(F). The Administrative Law Court erred in refusing to uphold the sanction on that additional basis.

II. The Administrative Law Court erred in analyzing the reasonableness of the charges on the final "corrected" invoice submitted by Wayne's Automotive Center after the initiation of the investigation rather than the reasonableness of the charges on the invoice submitted with Premier Transportation's complaint that triggered the investigation.

In its Final Order, the Administrative Law Court correctly determined there was evidence of at least four different versions of the invoice submitted by Wayne's to Premier Transportation. Wayne's presented testimony that the first version, which was divided into three invoices, was the result of a "rush" request from Premier. That invoice totaled $67,912.19 and was submitted on February 11, 2016. (Respondent Exhibit #20). The primary focus of the testimony in the case as well as the SCDPS investigation was the next invoice dated February 10, 2016,[4] and submitted on

[4] All the invoices except the first invoice were dated February 10, 2016. As a result, the different invoices cannot be differentiated by date.

February 15, 2016, in the amount of $69,017.19. (Petitioner Exhibit #6).[5] The next invoice was submitted on or about February 16, 2016, in the amount of $64,783.19. (Respondent Exhibit #25). The final invoice was submitted on February 26, 2016, in the amount of $48,633.19, and it was that invoice that was ultimately paid by Premier on March 4, 2016. (Respondent Exhibit #24).

In its analysis of the reasonableness of the invoices submitted by Wayne's, the Administrative Law Court evaluated only the reasonableness of the final invoice in the amount of $48,633.19. The Court reasoned that Lt. King of the Highway Patrol had advised Wayne's to make corrections to the invoice and that "Respondent must take revision[s] into account and evaluate the final bill." (Final Order). There is no indication in the record that Wayne's followed any recommended changes made by Lt. King. Yet, it is irrelevant whether Wayne's did or did not follow Lt. King's directions in mitigation. What is relevant is whether Wayne's submitted an unreasonable invoice for payment in the first place. SCDPS correctly focused its investigation and ultimately its disciplinary action on the invoice submitted on February 15, 2016, in the amount of $69,017.19. (Respondent Exhibit #6). It was that second invoice on which the complaint was initially made by Premier and which triggered the SCDPS investigation.

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[5] This invoice is hereafter referred to as the "second invoice."

Without citing any legal authority, the Administrative Law Court determined that only the final invoice could be evaluated. The Court reasoned that "Petitioner prepared and submitted revised bills as directed; therefore, it cannot be held responsible for alleged violations that it subsequently corrected." (Final Order). This ruling is in error in two key aspects.

First, the evidence does not support the conclusion that Wayne's "corrected" the $69,017.19 invoice as directed by Lt. King. The original issues that were identified by Lt. King in his investigation remained in the final invoice.

Second, and most importantly, there is no legal authority for the proposition that attempts to mitigate or correct original wrongdoing after that wrongdoing is raised by an administrative complaint will bar or prevent the continued investigation and/or prosecution of the original wrongdoing. Indeed, the Administrative Law Court's ruling suggests that, had Wayne's immediately corrected every unreasonable charge in the original invoice sent to Premier after the complaint was first lodged with SCDPS (and assuming there was no other wrongdoing by Wayne's), there would have not been any basis for SCDPS to have continued its investigation nor any basis for finding that disciplinary action was warranted.

Frankly, if that is indeed the law, that would have significant and detrimental public policy repercussions. It would effectively allow a wrongdoer to escape culpability as well as disciplinary action by simply correcting its wrongdoing on each

occasion that it got caught. And, the wrongdoer could continue to commit the wrongdoing without any fear of retribution -- again because it could avoid negative consequences by simply correcting the wrongdoing whenever it got caught. Clearly, that is not the law nor should it be.

As an illustration of this, SCDPS would point to the typical scenario involving the utterance of a fraudulent check. South Carolina law recognizes that the utterer of a fraudulent check enjoys a fifteen day "grace period" as provided by statute to make good on a bad check. However, that does not negate the original wrongdoing such that the utterer escapes all culpability. Indeed, the law recognizes that the payment of the bad check within the "grace period" "does not prevent a prosecution for issuing a fraudulent check." *James v. Fast Fare, Inc.*, 685 F.Supp. 565, 567 (D.S.C. 1988). In effect, the payment of the fraudulent check does not preclude criminal prosecution or the imposition of criminal sanctions.

Likewise, where there is misconduct by a towing company in submitting an unreasonable towing invoice, the fact that the company agrees to reduce its invoice in response to a consumer complaint does not and should not insulate the company from the investigatory and disciplinary actions taken by SCDPS. The company remains culpable and subject to disciplinary action for its original wrongdoing despite any attempts to mitigate that wrongdoing.

In short, SCDPS was correct in focusing its analysis of the reasonableness of the fees charged by Wayne's on the invoice that was submitted as part of Premier's complaint. Wayne's actions in later reducing that invoice for whatever reason did not negate any original wrongdoing, although like any mitigating evidence, it may be considered in assessing the appropriate sanction.

Thus, SCDPS requests that this Court find that it was correct in evaluating the reasonableness of the charges included in the $69,017.19 invoice rather than the charges included in the final invoice for $48,633.19 that Premier ultimately paid. Moreover, it is appropriate to evaluate the unreasonable charges included in the $69,017.19 invoice that support and justify the disciplinary action imposed by SCDPS, including the following examples that were rejected in error by the Administrative Law Court because they had been deducted, altered or otherwise "corrected" in the final invoice:

Airbags

Wayne's used two airbags on the job. Both were ruptured. Sherry Corbett priced new airbags on February 9th, the date of the incident, and was given a price of $3,350 for a new air bag. Two news airbags would have cost $6,700. Wayne's charged $4,000 each for a total of $8,000 on the second invoice. The used airbags were being replaced by new airbags. There was no basis for charging $1300 more than the sales price for the new airbags. Later, the airbags charge was deducted from

the final invoice which was the basis for the Administrative Law Court not to consider this charge as a basis for the disciplinary action. That was error. The Court should consider the reasonableness of the charges included in the $69,017.19 invoice, which includes the $8,000 charge for the airbags.

Backhoe

Wayne's owned the backhoe used. On the second invoice, it was billed at $350 per hour for 11.5 hours for a total of $4,025. (Petitioner's Exhibit #6). Watson testified a backhoe could be rented for $350 for a day. Later, on the final invoice, the backhoe charge was lowered to a total of $600. (Respondent's Exhibit #24). The reasonableness of the backhoe charge should be determined based on the original charge of $4,025.

Orange Traffic Cones

On the second invoice, Wayne's charged $1,000 for the use of 48 orange traffic cones (26 inch in height). The charge was $50 per hour for 20 hours. (Petitioner's Exhibit #6). The cones are obviously reusable for other jobs, and new cones cost approximately $17 each. (Tr. 17). In effect, Wayne's charged in excess of the cost of the cones for essentially one day of use. The charge for the cones was reduced on the final invoice from $1,000 to $700, which reflects a charge of $35 per hour for 20 hours. (Respondent's Exhibit #24). The Administrative Law Court ruled as follows: "There is no evidence that fewer cones should have been used or that

seventy-five (75) cents [per cone] is an unreasonable hourly rate for a traffic cone at an accident site." (Final Order). However, a charge of almost $15 per cone for essentially one day of use is patently unreasonable.[6]

III. The Administrative Law Court erred in several of its findings of reasonable charges on the final invoice, specifically the findings with respect to the communications equipment and the supply truck.

In addition, SCDPS submits that several additional findings by the Administrative Law Court are not supported by the evidence. In particular, the findings that the following items were reasonable charges based upon the evidence were in clear error:

<u>**Communications Equipment**</u>

Wayne's -- more specifically a separate entity identified as South Carolina Incident Management (SCIM) owned by Sherry Corbett -- purchased the communications equipment in 2015 for $4,850. (Tr. 405). The equipment is reusable on other jobs and is, in fact, utilized on any job with three or more employees on the scene. Both the second invoice to Premier as well as the final invoice included a lump sum charge of $1,785 for the use of that equipment for a period of 21 hours. That charge for one day of use is 37% of the sales price. That is patently unreasonable, and the ruling to the contrary is not supported by the evidence.

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[6] SCDPS never argued that the number of cones was excessive.

In addition, the charge for 21 hours was clearly unreasonable in that the bridge was open to traffic by noon. Jeff Corbett testified that the tractor-trailer was cleared by 10:05 a.m. and that the bridge was re-opened to traffic by noon at the latest. (Tr. 351, 355).

Supply Truck/Response Unit

Wayne's -- more specifically SCIM -- purchased the Response Unit (which is a supply truck) in 2015 for $4,516. (Tr. 406). The Response Unit carried supplies to the scene. On both the second invoice as well as the final invoice, it was charged to Premier at $175.00 per hour for 20 hours for a total of $3,500. (Petitioner's Exhibit #6; Respondent's Exhibit #24). For the use of the Response Unit for 20 hours, the Petitioner received 78% of the sales price. That cannot be deemed a reasonable charge. In addition, there is no evidence that the Response Unit was needed at the scene for 20 hours when, as explained above, the bridge was re-opened to traffic by noon at the latest. (Tr. 355).

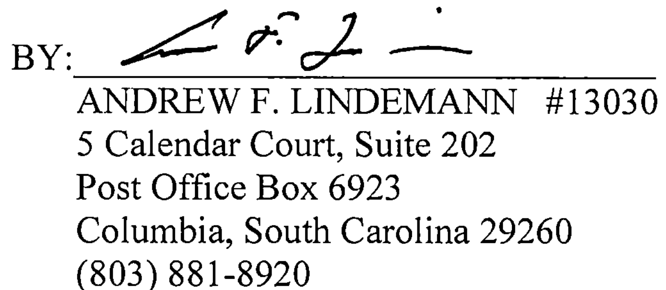
CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant South Carolina Department of Public Safety respectfully requests that this Court affirm the suspension and removal of Wayne's Automotive from the Wrecker Rotation List but also requests that the Court correct the legal and factual errors identified in this brief.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

BY:



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South Carolina Department of Public Safety, ... Respondent-Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent-Appellant South Carolina Department of Public Safety, does hereby certify that service of the **Motion to Accept Filing Out of Time, Initial Appellant's Brief of Respondent-Appellant** and **Respondent-Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 30th day of May 2018:

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The Honorable Jenny Abbott Kitchings
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RE: Wayne's Automotive Center, Inc. v. South Carolina Department of Public Safety
Appellate Case Number: 2017-002455
ALC Docket Number: 16-ALJ-30-0410-CC
Our File Number: 107.10114

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Motion to File Out of Time**, along with my firm's $25.00 check for the filing fee, as well as the originals and one copy each of the **Initial Appellant's Brief of Respondent-Appellant** and **Respondent-Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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cc: (w/ Enclosures)

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