

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Administrative Law Court

The Hon. Deborah Brooks Durden, Administrative Law Judge

SC Court of Appeals Case No. 2018-001788

RECEIVED
MAR 21 2019
SC Court of Appeals

Toyota of Greer..... Appellant,

v.

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

**APPELLANT’S RESPONSE TO RESPONDENT’S MOTION TO EXCLUDE 2016
DEALER MANUAL FROM THE RECORD**

INTRODUCTION

Respondent DMV introduced a ten-year old (2007) copy of the Wholesaler Dealer Manual before the Hearing Officer for a portion of the Manual that has not changed in the ten-year period. The Manual was periodically updated on DMV’s website as changes in DMV’s interpretation of the law occurred. A significant interpretation regarding a new Points Sanction Procedure (DE-002) was added in 2009.

Respondent DMV, for the first time on appeal to the ALC, raised the issue that Appellant was not prejudiced by its failure to follow DE-002, because Appellant was unaware. To the contrary, the Sanction Chart summarizing sanctions from DE-002 has been published in the Dealer

Manual since 2009 and Appellant presented the updated Manual to the ALC to take judicial notice in response to the DMV's argument. Now, the DMV is seeking its exclusion, claiming that the 2007 Manual "...was the most current version of the Manual..." for alleged 2016-2017 violations.¹ Respondent's current arguments are patently untrue. The ALC was presented with the updated Dealer Manual as relevant to Respondent's new argument, therefore Appellant respectfully requests the current Manual to the time of sanctioning be included in the Record.

ARGUMENT

I. The Manual was Admitted for a Proposition that has not Changed in Ten Years

Respondent introduced the 2007 Manual before the OMVH Hearing Officer only for the proposition that Appellant was aware at the time it began operating that title was to be provided to customers within 45 days of sale. (TR. p. 38-39). Respondent's use of the 2007 Manual to support that limited position did not require that a later version of the Dealer Manual be placed in the record at that time. That portion of the Manual had not changed.

II. The Sanction Point System has been Published to all Dealers since 2009

DMV's Zenda Leaks testified that the Point Sanction Procedure was in effect after she first came to work in 2009 but before she became the assistant manager in May of 2011. (TR. p. 43, ll. 14-18). The 2007 version of the Manual cannot have been introduced by the Respondent for the proposition that it represents Appellant's knowledge of sanctions under DE-002, which was not yet in effect. Despite DMV's claim that the 2007 Manual was the "most current version," it is clearly not the case from the testimony of its own witness.

¹ DMV's Designation of Matter; Respondent's Initial Brief, p. 31.

III. Appellant Presented the Most Current Version of the Manual to the ALC

A matter may be included in the Record on Appeal that was presented to the lower court or tribunal.² Appellant referenced relevant portions of the 2016 Dealer Manual available online through the DMV's website to the ALC in response to Respondent's argument that Appellant was not prejudiced by its failure to follow DE-002 because it was not familiar with the Procedure and asked the ALC to take judicial notice of these provisions. (DMV's Response to Appellant's Appeal to the ALC, p. 19). This was the first time the issue had been raised by Respondent.

DMV also stated for the first time to the ALC that it was not required to follow DE-002 because it was only an internal procedure. (DMV'S Response to Appellant's Appeal to the ALC, p. 18). Appellant addressed these erroneous statements before the ALC, where it was raised for the first time, and referenced the current manual available to the public on the DMV's website. (Appellant's Reply to the ALC, p. 2).

The ALC could take judicial notice of the revised version of the Dealer Manual. The 2007 Dealer Manual introduced by Respondent states:

Changes in law or policy may require periodic updates to the Dealer Manual. The manual will be placed on DMV's website.

(TR. p. 343)

The Dealer Manual is posted on Respondent's website as a matter of public record. See *State v. Little*, 227 S.C. 60, 86 S.E.2d 875 (1955) (finding the Court could take judicial notice of a witnesses criminal sentence which is a public record). The accuracy of the 2016 Dealer Manual is capable of verification by reference to readily available sources of indisputable reliability, making it subject to judicial notice. See *Masters v. Rodgers Development Group*, 321 S.E.2d 194, 196, 283 S.C. 251, 255 (Ct. App. 1984). See also *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485,

² South Carolina Rules of Appellate Procedure Rule 210(c)

491, n. 3, 593 S.E.2d 480 (Ct. App. 2003) citing *Hetrick v. Friedman*, 237 Mich.App. 264, 602 N.W.2d 603, 606 (1999) (holding an appellate court may take judicial notice of the AAA medical malpractice rules, where the arbitration agreement stated it would be governed by them); *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 254, 31 S.E.2d 447, 449 (1944) (holding the Supreme Court will take judicial notice of the existence and content of a rule adopted by the Industrial Commission); *Porter v. South Carolina Pub. Serv. Comm'n*, 327 S.C. 220, 223, 489 S.E.2d 467, 469 (1997) (holding the Supreme Court will take judicial notice of South Carolina statutes).

The DMV's own Manual, which it adopted, made it a source of "undisputable reliability." Just like the AAA medical and malpractice rules, the updated Manual was referred to in its 2007 version. Therefore, the current Manual was before the lower court and was relevant in response to Respondent's new arguments.

Respondent appears to be asserting now for the first time that the 2007 Manual shows the information regarding the sanction system that was available to Appellant at the time of the hearing (2017), or when it issued its sanction letters (2016-2017). The 2007 version clearly predated the implementation of DE-002 in 2009. Reference to the Manual in effect in 2016-2017 will show that this assertion is false.

IV. The Current Manual is Relevant to the Appeal

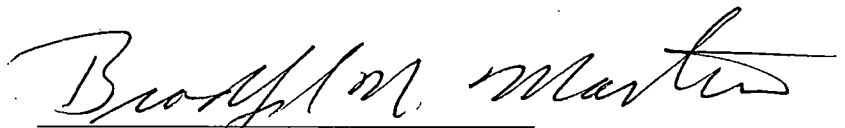
Respondent is attempting to raise new issues after the hearing by referencing the 2007 Dealer Manual even though it is aware that the evidence does not support its propositions. At the same time, Respondent is arguing that Appellant should not be allowed to include the current version of the Dealer Manual that was presented to the ALC in response to an argument raised for the first time before that Court.

South Carolina Rules of Appellant Procedure Rule 209 requires Appellant to include all relevant matter to issues on appeal. The 2016 Dealer Manual is quite relevant to the issue raised by Respondent before the ALC that Appellant was unaware of the Sanction Procedure and that it was only an internal procedure when it had been externally published to all South Carolina dealers in the Manual. It is not like the DMV is unfamiliar with which Manual controls, since it is the author of the document itself.

Appellant therefore respectfully requests that Respondent's Motion be denied and the Court allow the 2016 version of the Dealer Manual to be included in the Record on Appeal.

March 18, 2019

Respectfully submitted,



Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Bradford Neal Martin & Associates, PA
Post Office Box 10410
Greenville, South Carolina 29603
(864) 552-9990

Attorneys for Appellant Toyota of Greer

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Administrative Law Court

The Hon. Deborah Brooks Durden, Administrative Law Judge

SC Court of Appeals Case No. 2018-001788

Toyota of Greer, Appellant

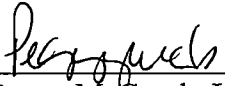
v.

South Carolina Department of Motor Vehicles, Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Response to Respondent's Motion to Exclude 2016 Dealer Manual from the Record by depositing a copy of it in the United States Mail, postage prepaid, on March 18, 2019, addressed to Philip S. Porter, Esq., Frank L. Valenta, Esq., and Brandy Duncan, Esq., South Carolina Department of Motor Vehicles, P.O. Box 1498, Blythewood, SC 29016.

March 18, 2019


Peggy McComb, Legal Assistant to
Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)

Attorneys for Appellant

RECEIVED
MAR 21 2019
SC Court of Appeals

BRADFORD NEAL MARTIN & ASSOCIATES, PA

ATTORNEYS AT LAW

201 West McBee Avenue, Suite 302
Post Office Box 10410 (29603)
Greenville, South Carolina 29601

bmartin@bnmlaw.com
Phone: (864) 552-9990
FAX: (864) 552-9992

March 18, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
MAR 21 2019
SC Court of Appeals

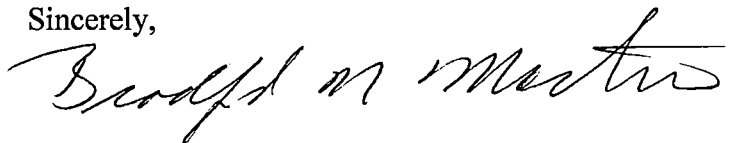
Re: *Toyota of Greer v. South Carolina Department of Motor Vehicles*
ALC Case No. 18-ALJ-21-0011-AP
SC Court of Appeals Case No. 2018-001788

Dear Ms. Kitchings:

Enclosed for filing is an original and seven copies of Appellant's Response to Respondent's Motion to Exclude Dealer Manual and a Proof of Service in the above captioned matter. Respondent filed its Motion after we requested additional time to respond to the Designation of Matter and this Response pertains to both documents. Please file the original with your Court and return a clocked copy to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

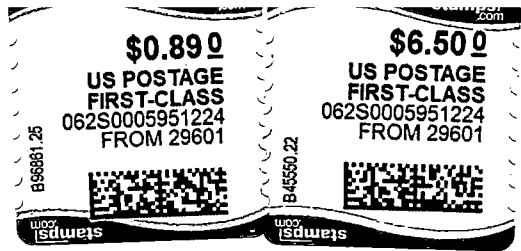
Sincerely,



Bradford N. Martin

/pm
Enclosures

cc: Philip S. Porter, Esq.
Frank L. Valenta, Esq.
Brandy Duncan, Esq.



FIRST CLASS MAIL

RECEIVED

MAR 21 2019

SC Court of Appeals

BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 WEST MCBEE AVE., SUITE 302
P.O. BOX 10410 (29603)
GREENVILLE, SC 29601

TO:

The Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211