

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2018-001788

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APR 02 2019

SC Court of Appeals

Toyota of Greer Appellant

v.

South Carolina Department of Motor Vehicles Respondent.

**RESPONSE TO APPELLANT'S RESPONSE TO MOTION TO
EXCLUDE 2016 DEALER MANUAL FROM RECORD**

SCACR 210 (c)

That a party must comply with the rules of the court is axiomatic. The issue regarding this motion is not whether some portion of the disputed 2016 Manual might potentially be relevant or illustrative. If it was, nothing prevented Appellant from offering it into evidence and arguing the relevance at the hearing before the Office of Motor Vehicle Hearings ("OMVH"). Appellant did not do so.

SCACR 210 (c) provides, in pertinent part:

The Record on shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267

The Record shall not, however, include matter which was not presented to the lower court or tribunal.

(emphasis added)

The Rule is clear. The Rule is not equivocal. The Rule does not suggest that circumstances should create exceptions to the Rule, whether such circumstances are special or ordinary circumstances. Appellant is essentially suggesting that the record that it helped make before the Office of Motor Vehicle Hearings, which was reviewed by the Administrative Law Court, is not sufficient because it has discovered material that it believes makes some of its points better. Scarcely a litigant does not believe after a hearing that some different material, evidence or presentation could have been added or changed to put its case in a more favorable light. Clearly parties that have had the benefit of knowing the results of a trial and an initial appeal have an even more focused idea of what might have been changed to improve their case. But Rule 210 (c) is a close cousin to the law of the case. A party has one hearing and does not get multiple bites at the apple.

Appellant is suggesting that the Court authorize a leapfrog of two tribunals that reviewed the evidence in the record before the Office of Motor Vehicle Hearings and instead add material that is new and not reviewed by either lower tribunal. The issue is not whether the Appellant can make a case that the 2016 Manual could be found relevant in a hypothetical trial. The issue is not whether Appellant has made a compelling case that the evidence could or should have been placed in the record, even though Appellant has not made such a case, for the reasons set forth below. The issue is whether the Appellant may ignore the rules of court after the fact to provide itself some perceived advantage. Appellant cannot violate SCACR 210 (c) to put new material in the record

before this Court.

In page 1 of its Response, Appellant suggests that the Department, “for the first time on appeal to the ALC, raised the issue that Appellant was not prejudiced by its (the Department’s alleged) failure to follow DE-002, because Appellant was unaware.” This statement apparently refers to page to the Department’s ALC Brief at page 19, and somewhat misstates the Department’s argument. Of course, an appellate court can affirm a judgment on any grounds actually appearing in the record, regardless of whether it had been argued or relied on by the prevailing party in the lower court. *Law v. S.C. Dep’t. of Corrections*, 364 S.C. 424, 439-40, 629 S.E. 2d 642, 651 at n. 3 (2006).

The Department actually argued that *Appellant* had not produced any evidence to show that it had reviewed or even possessed Department Procedure DE-002 prior to receiving an Official Notice of Suspension. Appellant had received warning letters telling Appellant that failure to deliver titles could subject it to sanctions of the very sort as the Suspension that was later imposed.

The Appellant presented no testimony or other evidence that Appellant had acquired Department Procedure DE-002, studied it, or made a conscious decision that the provisions of the Procedure were wrong in law or that the Department’s application of it was incorrect. It did not claim that it had changed or refused to change its manner of doing business based on its assessment of the Procedure. The Department has no idea what Appellant knew other than by the contacts its agents had with the Appellant and the warning letters it sent to Appellant. It would seem logical, however, that if the Appellant had reviewed Procedure DE-002 and believed that Appellant was prejudiced by some wrong application of it, it would have presented evidence to that effect.

In the same vein, Appellant has likewise produced *no evidence* that it reviewed either the 2007 Dealer Manual or the 2016 Dealer Manual prior to the hearing, or that the contents of either manual impacted what Appellant did or did not do to comply with the law.

On page 2 of its Response, Appellant states that the Department suggested that the 2007 Manual was the most current version of the Manual. The Department on pages 31 and 32 of its Initial Brief wrote that the Manual offered at the time of the hearing was in effect at the time of the hearing, which was incorrect since there were subsequent versions of the Manual including the 2016 Manual. The Department apologizes for any confusion that may have resulted.

In full context, however, the Department's allegations clearly show when the 2007 Manual was current and why it was offered. It was the version of the Manual in existence prior to the Dealer License Application in which the Appellant admitted that it possessed a copy. The reason was that the 2007 Manual which the Appellant possessed and could have read emphasized the importance of dealers providing titles to their customers (ALCR 363). Appellant's application for 2015 was not dated but indicates that the effective dates were from June 15, 2015 to June 15, 2016. (ALCR 331-332). The 2016 Manual did not exist until June 2016, approximately a year after the application was filed. The Department clearly pointed out that it did not exist when the application was made. Respondent's Initial Brief, p. 34.

The Department also pointed out that the Manual that Appellant was referring to was not even in the record. Respondent's Initial Brief, p. 31. The matter did not become an issue until the Appellant decided request in its Designation of Matter material that

violated SCACR 210 (c) and submit argument in its Initial Brief based on those materials.

Nothing in the Appellant's allegations amounts to the ALC being "presented with the updated Dealer Manual" as Appellant claims (Appellant's Response, p.2). That is why it was not in the Record below. Even if it had been "presented" to the ALC, which it was not, it would have been improper for the ALC to have considered it. Appellant's only observation regarding either Manual was to scoff that the 2007 Manual was "just a manual, and not the law." (ALCR 43, l. 25, through 44, l.1) This observation, of course, is in direct contradiction to its current position that the Procedure was imposed as the force of law, either alone or in combination with the 2007 Manual or any other Manual. The Department has consistently asserted that Procedure does not have the force of law but is merely a guideline to Department employees concerning how to go about enforcing existing law. It did observe that Procedure DE-002 was not signed by Executive Director Shwedo but by Inspector General Karl McClary, the Director who approved the suspension. In fact, although some of its provisions were described in warning letters to dealers and it was available by Freedom of Information request, Department Procedure DE-002 is not published as a subscription document nor was it posted on the Department's website at any time material to this dispute.

Appellant's Argument 1. That the 2007 Manual was Admitted for a Proposition that has not changed in ten years

The Department agrees with this proposition in general. Since Appellant explained why it was unnecessary to offer a later version of the Manual it is unclear how the Appellant believes its argument is advanced. A later yearly application was submitted in which Appellant responded that it did not possess a Dealer Manual. ALCR 333,334. It

would not have made sense to submit a version of the Manual that did not coincide with the Appellant's possession of that version.

Appellant's Argument 2. Sanction Points System has been Published to All Dealers since 2009 (page 2).

This argument contains multiple *non sequiturs* and inaccuracies. As stated above, although Department Procedure DE-002 is made available on demand to dealers or other citizens, and its provisions are described in warning letters, the Procedure is an internal document describing procedures within the Department and is not generally published. The 2016 Manual does make reference to its provisions and sanction points process. While both the 2007 and 2016 versions of the Manual were put on the Department's website, Department Procedure DE-002 is not on the Department's website. The Department did not introduce the 2007 Manual for the purpose of proving the Appellant's knowledge of the Department Procedure DE-002. Instead, it offered the Manual for the reason it explained, that it was the version of the Manual that was current at the time of the application in which Appellant admitted to possessing a Manual. Appellant conflates this evidence with the notion that the Department somehow asserts a relation to the Appellant's knowledge or lack of knowledge of Department Procedure DE-002. That was not the reason the 2007 Manual was admitted. The two concepts of the availability of the 2007 Manual to Appellant and Appellant's knowledge or lack of knowledge of Department Procedure DE-002 have nothing to do with each other. All the Department alleged was that the Appellant *had produced no evidence* to show it had considered the Department Procedure DE-002 prior to the issuance of the Official Notice of Dealer License Suspension.

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

Appellant asserts that somehow it mentioned the 2016 Manual to the Administrative Law Court, and therefore the inclusion of the 2016 Manual in this Court's record is justified. The Record before the ALC is devoid of any proffer of the 2016 Manual. Appellant complains yet again that the Department argued before the ALC that it did not have to comply with Department Procedure DE-002 (twice in one paragraph). The clear position of the Department is that its actions did not conflict with the Procedure on any material way that Appellant has standing to complain about. Appellant's citation to its Reply Brief to the ALC at page 2 appears to reference a passing mention of a subsequent publication of the Dealer Manual in an incoherent footnote. That footnote claims the Department was "disingenuous" because it admitted the 2007 Manual without objection into the record and yet suggested that the Appellant could not have relied on the "willfulness" requirement Appellant asserts even though Department Procedure DE-002 which contained the description did not exist.

First, as has been shown by the Department's Initial Brief, the "willfulness" claim had nothing to do with this case since the defined term in Department Procedure DE-002 clearly excludes the facts of this case from the definition of that violation. Second, as demonstrated above, the Appellant's ability to read a 2007 Manual has no direct bearing on whether Appellant later became familiar with Department Procedure DE-002. Finally, and most importantly, a brief mention in a footnote that a manual has been updated in an appellate response does not constitute submitting the manual as an exhibit at trial.

Attached and marked as Exhibit 1 is the OMVH Hearing Officers Index of matter included in the record. The Exhibits are indicated as consisting of pages 309-513. No

2016 Manual is found in those pages. Copies can be provided if the Court requests.

Appellant has not cited any part of the record in which it proffered a copy of the 2016 Manual. It has not cited a part of the record whereby it actually requested that the Administrative Law Court take judicial notice of it. A search of the ALC Order reveals no request for judicial notice to be taken of anything, or that any sort of judicial notice was made, although Judge Durden did say that Appellant's remaining arguments were either unpreserved or without merit. *Toyota of Greer v. S.C. Department of Motor Vehicles*, 2018 WL 3817537 at 7 (Administrative Law Court 2018).

Again, even if the Appellant had requested judicial notice from the Administrative Law Court it would have been improper and objectionable since the request was not made of the Office of Motor Vehicle Hearings. The cases cited by Appellant on pages 3 and 4 of its Response are unavailing. Criminal sentences as referred to in *State v. Little* are clearly matters of public record. Sanction Procedure DE-002 is an internal guidance procedure.

The Court of Appeals in the *Masters v. Rodgers Development Group* refused to judicially notice the contents of a deed, noting “[u]nless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice.” 283 S.C. 251, 255, 321 S.E. 2d 194, 196. The Court also noted that taking judicial notice of a matter could violate the general principle that appellate review should be limited to the record, and that it was unfair to allow a party to introduce evidence through the back door of judicial notice. *Id.* at 256, 257, 321 S.E. 2d at 197. *Palmetto Homes, Inc. v. Bradley* was limited to taking

notice of malpractice rules where the agreement had indicated it was subject to them. *Jones v. Anderson Cotton Mills* and *Porter v. South Carolina Pub. Serv. Comm'n.* involve judicial notice of rules or regulations having the effect of law or statutory law itself. Appellant has already conceded the 2007 Manual is just a manual and not the law. The 2016 Manual is no more nearly law than is the 2007 Manual.

Appellant's Argument IV. The Relevance of the 2016 Manual

As stated above the potential relevance of the 2016 Manual is immaterial. The above discussed grounds, however are not the only reasons the 2016 Manual cannot be included in the Record. Unless the 2016 Manual was offered at the Office of Motor Vehicle Hearings hearing, *and* its absence from the record was objected to in the OMVH hearing *and* the alleged error of its omission argued *and* ruled on by the Administrative Law Court, the issue was not preserved. None of those events occurred. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled on by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1998). The content of the record below is no different than other issues of preservation. The Appellant's Brief, Motion for Reconsideration/Rehearing and Reply to Return to that Motion all fail to raise any issue regarding judicial notice. In addition to the inclusion of the 2016 Manual being in direct violation of SCACR 210 (c), the issue of its inclusion is simply not preserved.

CONCLUSION

For all the grounds and reasons above set forth, the Department requests its Motion to Exclude 2016 Dealer Manual from the Record be granted.

(the signature is on the following page)

Respectfully submitted,



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March 29, 2019

Blythewood, South Carolina

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Toyota of Greer Appellant,

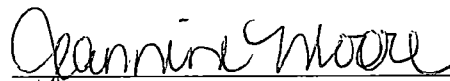
v.

South Carolina Department of Motor Vehicles Respondent.

PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, March 29, 2019,
I served one (1) copy of the Respondent South Carolina Department of Motor Vehicles'
Response to Appellant's Return to Motion to Exclude 2016 Dealer Manual from Record
by depositing with the United States Postal Service, correct postage prepaid, to Counsel
for the Appellant at the address indicated below:

Bradford N. Martin, Esquire
P.O. Box 10410
Greenville, South Carolina 29603



Jeannine Moore, Paralegal
Office of General Counsel

March 29, 2019
Blythewood, South Carolina

Henry McMaster
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

March 29, 2019

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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RE: *Toyota of Greer v. South Carolina Department of Motor Vehicles*
Appellate Case No: 2018-001788

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced action, please find the original and seven (7) copies of Respondent South Carolina Department of Motor Vehicles' Response to Appellant's Return to Motion to Exclude 2016 Dealer Manual from Record. The Response is a proposed Response, subject to the Court's action on a Motion to Enlarge Time filed March 27, 2019. It is being submitted now since I will be out of the office from April 1, 2019, through April 10, 2019.

As evidenced by the attached Certificate of Service, I am serving the parties with a copy of same. Please file the original and return a copy to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

In kind regards,

A handwritten signature in black ink, appearing to read "Philip S. Porter".

Philip S. Porter
Deputy General Counsel

Enclosures

cc: Bradford N. Martin, Esquire



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South Carolina Department of Motor Vehicles

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