THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No. 2018-001788

Toyota of Greer ..... Appellant,

v.

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

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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STATEMENT OF THE ISSUES ON APPEAL

1. *WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE HEARING OFFICER'S ORDER SUSTAINING THE SUSPENSION FOR FAILING TO DELIVER TITLES FOR THREE SOLD MOTOR VEHICLES WITHIN THE STATUTORILY ALLOWED PERIOD IN A MANNER THAT DAMAGED APPELLANT'S CUSTOMERS BY PREVENTING THEM FROM LEGALLY OPERATING OR SELLING THOSE VEHICLES.*

    a. *WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE HEARING OFFICER'S DETERMINATION THAT THE ENTIRE CIRCUMSTANCES OF APPELLANT'S THREE INSTANCES OF FAILURE TO DELIVER TITLES TO ITS CUSTOMERS CONSTITUTED ARBITRARY ACTION AS DESCRIBED IN SECTION 56-15-40 (1).*

    b. *WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLE TO ITS CUSTOMERS CONSTITUTED BAD FAITH AS DESCRIBED IN SECTION 56-15-40 (1) AS AN ADDITIONAL SUSTAINING GROUND.*

    c. *WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLES TO ITS CUSTOMERS CONSITUTED UNFAIR OR DECEPTIVE ACTS OR PRACTICES FORBIDDEN IN SECTION 56-15-30 (A) AS AN ADDITIONAL SUSTAINING GROUND.*

    d. *WHETHER SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLES TO ITS CUSTOMERS CONSITUTED FRAUD AS DEFINED IN SECTION 56-15-10 (m) AS AN ADDITIONAL SUSTAINING GROUND.*

2. *WHETHER DE-002 CONSTITUTED A BINDING REGULATION.*

3. *WHETHER APPELLANT HAS PRESERVED ITS ISSUES FOR APPEAL.*

4. *WHETHER APPELLANT'S ADDITIONAL EXCEPTIONS HAVE MERIT.*

STATEMENT OF THE CASE

This matter commenced when the South Carolina Department of Motor Vehicles ("SCDMV" or "Department") issued Appellant Toyota of Greer an Official Notice of License Suspension on June 27, 2017, citing specific complaint numbers and Code Sections alleged to have been violated by the Respondent, asserting that the Respondent had committed violations justifying suspension for a period of seven calendar days by the accumulation of sanction points. The Department's Notice cited specific complaint numbers and Code Sections alleged to have been violated by the Respondent.

The matter came before the South Carolina Office of Motor Vehicle Hearings ("OMVH") upon timely request by Appellant for a contested case hearing. A hearing was scheduled to be held before Hearing Officer Phil Addington on October 2, 2017 at the Greer Municipal Court at 100 S. Main Street, Greer, South Carolina. That hearing took place at that place and time and evidence was taken.

On December 12, 2017, Hearing Officer Addington issued a Final Order and Decision sustaining the suspension. Toyota of Greer filed a Motion to Reconsider on December 12, 2017 but served the Hearing Officer without serving the Respondent Department. Thereafter, on January 11, 2018, Toyota of Greer filed a Notice of Appeal to the South Carolina Administrative Law Court, and Hearing Officer Addington filed an Order dismissing the Motion for Reconsideration due to want of jurisdiction.

The Honorable Deborah Brooks Durden issued an Order on July 31, 2018 sustaining the Hearing Officer's decision and affirming the suspension of the seven day suspension of the Appellant. The Appellant filed a Motion for Reconsideration/Rehearing on August 10, 2018. The Department filed a Return to Appellant's Motion for

Reconsideration on August 24, 2018. On September 4, 2018 Judge Durden filed an Order denying reconsideration. On October 1, 2018, Appellant filed Notice of Intent to Appeal with this Court.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, *S.C. Code Ann.* § 1-23-380 (5) (Supp. 2017).

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

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

> [then Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
>
> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v.*

> *Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside [at 136, 276 S.E. at 306].

The Court further noted that:

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

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

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

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

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

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

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. *Kearse v. State Health and Human Serv. Fin. Comm'n.*, 318 S.C. 198, 456 S. E. 2d 892 (1995); *S.C. Dep't. of Motor Vehicles v. Nelson*, 364 S.C. 514, 613 S. E. 2d 544 (Ct. App. 2005). Therefore, the burden is on the Appellant to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

SUMMARY OF ARGUMENT

1. *THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT SUPPORTS THE HEARING OFFICER'S ORDER SUSTAINING THE SUSPENSION FOR FAILING TO DELIVER TITLES FOR THREE SOLD MOTOR VEHICLES WITHIN THE STATUTORILY ALLOWED PERIOD IN A MANNER THAT DAMAGED APPELLANT'S CUSTOMERS BY PREVENTING THEM FROM LEGALLY OPERATING OR SELLING THOSE VEHICLES.*

    a. *SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE HEARING OFFICER'S DETERMINATION THAT THE ENTIRE CIRCUMSTANCES OF APPELLANT'S THREE INSTANCES OF FAILURE TO DELIVER TITLES TO ITS CUSTOMERS CONSTITUTED ARBITRARY ACTION AS DESCRIBED IN SECTION 56-15-40 (1).*

The inescapable bottom line of this case is that the Hearing Officer found the actions of the Appellant to be arbitrary as contemplated by *S.C. Code Ann.* § 56-15-40 (1). Final Order and Decision ("FOD") at 13, R. pp. 43-56. The Administrative Law Court found that there was sufficient evidence in the record to uphold this finding. If all of Appellant's long list of insisted assumptions, except for one, are accepted at face value, this appeal still fails. That single erroneous assumption is that because the failures to title were alleged to be unintentional, that because the failures are alleged to be someone else's fault, the failures cannot be found to be arbitrary no matter how long the customer is without a title or how long the customer is left without assistance or mitigation. This insistence is maintained by the Appellant despite a multitude of circumstances pointing to an opposite conclusion. Ms. Leaks testified that the Department would not have assigned sanction points for a failure to deliver title that was within a few days of the forty-five day statutory deadline (R. p. 237, ll. 5-10).

It should be pointed out here that as much as Appellant seeks to force the Department to a standard of "willful failure" and simultaneously claim that the Department cannot meet the standard, "willful failure to deliver title" is a defined term in DE-002. The

definition makes absolutely clear that it did not remotely apply to the complaints in this case. It applies only when the prior seller *delivers* the title within forty-five days of the sale and the dealer nevertheless fails or refuses to deliver, such as when a dealer sells out of trust having received title and payment but willfully fails to title or cannot because the dealer provided title is held by an unpaid floor planner even though the dealer has been paid to arrange the release of lien. Appellant insists that it should escape any sanction *precisely because* prior sellers or lienholders *did not* provide titles or releases of record, a situation totally different from the defined term "willful failure" on which it relies (Petitioner's Ex. 5, at 4 and 6, R. pp. 505, 507). Appellant further, however, wishes to use the inapplicable violation definition as a Monopoly game get out of jail free card, regardless of other circumstances of the sale and regardless of what happened afterward.

In fact, Appellant is in the car selling business. Providing title, so the vehicle may be legally registered and driven or sold, is its most fundamental duty. Respondent signed documentation that the there was no undisclosed liens or allowed third parties in on its behalf in an auction or otherwise to do so in its name to support the sales in a chain of title. Having made these representations, its customers could not get titles until well past the statutory limit, at least twice the statutory limit, precisely because Respondent did not produce a release of lien. Moreover, Appellant was unwilling to devote sufficient resources to acquire the releases or offer alternatives. In one case, the McCallister complaint, the Appellant bought the vehicle on January 7, 2017, and sold it Ms. McCallister on February 10, 2017, still not only not having the title, but also not knowing what State the vehicle was titled in and not knowing that the person purportedly selling to Appellant was not even the owner, as well as apparently not having required identification from that person despite

having a policy requiring identification. Petitioner's Ex. 11, R. p. 568; R. pp. 342 l. 11-345, l. 18; Respondent Ex. 9, R. p. 388. Ms. McCallister's creditor's lien went unperfected until the vehicle was titled on May 15, 2017.

In the Gilliam complaint, Appellant bought the Explorer from the prior owner on January 25, 2016. Respondent's Ex. 3, R. p. 380. It knew that there was a still recorded lien and the lienholder was Ford Motor Credit not later than February 4, 2016. (Respondent's Ex. 4, R. p. 382). It sold the vehicle to Ms. Gilliam approximately two months later on March 29, 2016. Petitioner's Ex. 8, R. p. 541. It took an additional ninety-nine days for Ms. Gilliam to get her title (*Id.* at 540, 541), or a total of one hundred and fifty-four (154) days total to acquire a release from the well known national finance company. In the case of Mr. Bocook of Quality Auto, the Chrysler 300 he bought on February 26, 2016 still had a lien of record to a title lending company. Allegedly the particular office of the lender closed and when another branch was located, Appellant had to wait for a manager to return from vacation (Petitioner's Ex. 6, R. p. 524). That wait took one hundred and forty-three (143) days.

There is no evidence that Appellant offered to buy any of the vehicles back after the forty-five day limit passed and the customers could no longer legally drive or sell their vehicles. There is no evidence Appellant offered rentals. There is no evidence that Appellant offered alternative vehicles for which it could provide titles. The Appellant had been warned that failure to deliver title could lead to suspension in letters that used the same terminology. *Compare* R. pp. 35-37 *with* Petitioner's Ex. 4, R. pp. 496-501. The Hearing Officer apparently disregarded additional warning letters warning the Appellant that it risked suspension by failing to deliver title based on the objection that such letters

had to be disclosed in the Official Notice of Dealer License Suspension (R. pp. 216, l. 8.-221, l. 24). In fact, those letters were admissible specifically because the Appellant had been previously warned that failure to deliver title could result in suspension but chose to continue doing business in a way that put its customers and their prospective lienholders at risk. The Department was sufficiently concerned about the Appellant's accumulation of points that it arranged a special meeting with Appellant's representatives in an attempt to avoid the necessity of sanctions (R. p. 233, l. 20 through R. p. 235, l. 25).

Regarding all these circumstances, Appellant breezily suggests "Every single time, there's nothing that we could have done," (R. p. 191, ll. 8, 9) as if all of the above mentioned alternatives are not only impossible for dealers but likewise unheard of. Appellant likewise offered "[a]nd remember, the customer gets the car and they're very happy to have the car because they get to use it." (R. p. 188, ll. 22-25). They get to use it, *except* when they don't and they have to file complaints with the Department so they can eventually have a vehicle they can legally drive. With all this, Appellant insists that its behavior was not "arbitrary." But not only that, Appellant also insists that the Hearing Officer could not reasonably have found its acts to be arbitrary. The notion that these activities are not at the very least arbitrary takes some mental gymnastics not every person is capable of.

Appellant is incorrect. The Hearing Officer specifically found that Appellant's actions were arbitrary. Arbitrary conduct of a motor vehicle dealer, prohibited under Dealers Act, is readily definable and includes acts which are unreasonable, capricious or nonrational, not done according to reason or judgment, depending on will alone. *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 105-06, 777 S.E.2d 208, 210-11 (2015); *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E. 2d 399, 404 (Ct. App. 2000).

The record, taken as a whole, supports a finding that the Appellant's actions were arbitrary.

b. SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLE TO ITS CUSTOMERS CONSTITUTED BAD FAITH AS DESCRIBED IN SECTION 56-15-40 (1) AS AN ADDITIONAL SUSTAINING GROUND.

Despite the pejorative common understanding of the term, the legal definition of "bad faith" for purposes of the Dealers Act may actually fit the actions of the Appellant just as well as the term "arbitrary."

> Bad faith conduct of a motor vehicle dealer, prohibited under Dealers Act, is the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, *or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested* or sinister *motive.* (Emphasis added) *Brown v. Dick Smith* at 106, 777 S.E. 2d at 211; *deBondt v. Carlton Motorcars, Inc.* at 263, 536 S.E 2d at 404.

In deflecting the responsibility for the for its lengthy failures to deliver title, Appellant blames everyone conceivable but itself: creditors that it says it called or tried to call a few times but did not produce releases, and a dealer whom it sold a "piece of junk" who had the temerity to want the title that Appellant was required to provide. One case involved a mystery man "seller" of Ms. McCallister's vehicle from whom Appellant not only did not require a title, but apparently did not require sufficient identification to determine that the "seller" was not the owner nor even require a copy of a registration to determine in what State the vehicle was titled (Petitioner's Ex. 11, R. p. 563, R. pp. 341 l. 21 through 345, l. 18; R. p. 568).

For Ms. Gilliam's purchase, however, Appellant makes the most jaw-dropping claim of all, that the former owners of Ms. Gilliam's Explorer violated the law. "They failed to deliver the title as required by the law." Appellant's Brief at 8. One must ask who

the dealer is here. Whatever opinion Appellant may harbor about whether its actions meets a defined term of "willful failure to deliver title" that never applied to the transaction to begin with, nothing absolves Appellant of its duty to deliver titles to its customers. Appellant is a dealer. It effectuates sales of vehicles. *See, S.C. Code Ann.* §§ 56-15-10 (h), (l). It is required to provide a title to its buyers within forty-five days of the sale. *S.C. Code Ann.* §§ 56-15-210, -240, -360 and -370. Moreover, as a dealer, it impliedly warrants to its buyers that it has good title to provide them in a legal manner. *S.C. Code Ann.* § 36-2-312 provides:

> (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that:
>
> (a) the title conveyed shall be good, and its transfer rightful; and
>
> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
>
> (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
>
> (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

While it is nearly inconceivable that the Appellant did not inquire from its customers as to the status of the title and the ability to acquire a duplicate (who were trading in the Explorer to make purchase a different vehicle from Appellant), regardless of any representations the former sellers may have made, the Appellant, as a merchant in goods of the kind, warranted that it could provide title. In addition, the record reflects that the Appellant acquired powers of attorney for the specific purpose of facilitating the transfer

involved in the trade so that the sellers would not have to be physically present (Petitioner's Ex. 9, R. pp. 557, 558; Petitioner's Ex. 10, R. p. 575, 576). If in fact the Appellant claims it was relying on the prior sellers to directly produce a duplicate title, and the sellers failed or refused to do so, it simply makes the fact that it then sold the vehicle to Ms. Gilliam the more blameworthy.

Appellant had both a contractual and legal duty to provide title. In each of the cases it took no less than double the statutorily allowed time to provide title, and for periods of time ranging from forty-five (45) days to ninety-eight (98) days its customers were unable to legally drive or sell the vehicles. Accepting for the moment Appellant's explanation, that the creditors had been paid but could not be found to release the lien and there was nothing inherently illegal about selling the vehicle before the dealer had the title in hand, once the sale was more than forty-five days old the Appellant had lapsed into illegality.

Each title was delayed double or in one case more than triple the statutory authorized time for titles to be provided. There is an absence of evidence that Appellant took remedial measures of any sort to assist its customers other than eventually providing title after each customer had filed a complaint with the Department. These delays were taken out of the realm of innocent errors. How much passage of time in failing to title (nor offering refunds or alternative deals) would Appellant suggest is sufficient to be considered "not *prompted by an honest mistake as to [its] own rights or duties, but by some interested motive*"? Would quadruple the time allowed by statute be regarded as the tipping point? Would it have been excused in failing to title up to the current time if the customers had not ended up complaining to the Department?

The Hearing Officer was allowed to accept an inference that even if third party creditors were unresponsive, the Appellant had a responsibility for the sale it made to its customers that was more than just waiting for action by those third party creditors in whatever time they might find convenient to respond. In addition, it is noteworthy that in each case title was provided shortly after the customers' complaints were filed and in only one of them was the release acquired prior to the complaint being received by the Department. The Hearing Officer also knew that, as Ms. Powell admitted to the Department's agent in the Bocook complaint, the problems were caused by turnover and terminations resulting from bad deals (Petitioner's Ex. 6, R. p. 521). In short, the Hearing Officer was allowed to infer and apparently did infer that Appellant could have acquired the titles earlier if sufficiently motivated. Instead, since the Appellant had been paid, it was content to let the inability to legally drive or sell the vehicles be its customers' problems. Though Appellant was not sufficiently motivated by violating the titling laws, the complaints to the Department may have turned the corner. Thereafter, sufficient resources were provided to belatedly title the vehicles.

As for the suggestion regarding the McCallister vehicle that "there was nothing [Appellant] could have done," a few modest suggestions may come to mind in addition to having the title in hand or offering the customer a buy back or a different deal before the double or in excess of double the allowable titling period has passed. These suggestions might be might be: Know who is purporting to sell you a car. Get a copy of identification of the person purporting to sell you a car. Get a copy of the registration of the vehicle the person is trying to sell you so you can know whether the person actually owns to the vehicle and know what State you might search to determine how to pay off a lien or get a lien

release. Finally, do not sell the vehicle to another customer until you get this basic information.

Bad faith, at least as defined in the case law for the Dealers Act, is not confined to transactions originated entirely by evil motives. The case law definition specifically recognizes "*a neglect or refusal to fulfill some duty or some contractual obligation*" of which Appellant clearly did as a matter of contract as well as statutory requirement to title. It is evidence that Appellant's self interest in avoiding the trouble or expense of making the titles available outstripped its known legal duty to provide them or even offer an alternative in mitigation of the customers' inability to drive or sell their vehicles.

c. *SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLES TO ITS CUSTOMERS CONSITUTED UNFAIR OR DECEPTIVE ACTS OR PRACTICES FORBIDDEN IN SECTION 56-15-30 (A) AS AN ADDITIONAL SUSTAINING GROUND.*

Appellant of course, insists that the sole means of proving a Dealer Act violation is by channeling the analysis through the "action which is arbitrary, in bad faith, or unconscionable" standards mentioned in Section 56-15-40 (1). While a number of reported cases discuss the standard, Appellant has not cited any cases that suggests that the "arbitrary, in bad faith, or unconscionable" standard is the exclusive way of showing a Dealer's Act violation by a dealer. Appellant even took this argument to the extent of alleging Judge Durden was in error by "substituting" the requirements of the Unfair Trade Practices Act, apparently because [u]nfair methods of competition or unfair or deceptive acts or practices" are asserted to mean something different in Section 56-15-30 (a) than "[u]nfair methods of competition or unfair or deceptive acts or practices" in Section 39-5-

20 (a) apparently because of the mention of Section 56-15-40 (1).[1] Of course, Judge Durden actually did not so much as mention the Unfair Trade Practices Act. Here is no evidence that Judge Durden based her holding on the Unfair Trade Practices Act. She simply and correctly observed that Sections 56-15-30 and 56-15-40 (1) were to be construed together, and that Section 56-15-30 (a) directs courts to be guided by the "definitions" of the FTC Act. [Order of D. Durden of July 31, 2018, R.pp. 21, 22; 2018 W.L. 3817537 at 4, n. 2., and 6). Far from ruling that the Unfair Trade Practice was "substituted," she suggested that the Hearing Officer's Order could be sustained on the basis of the "arbitrary" or "bad faith" standards of Section 56-15-40 (1). *Id.* R. 22 at n. 3; 2018 W.L. 3817537 at 4 and n. 3. Though Judge Durden did not make the holding Appellant accused her of, if she had she would not have been in error.

Appellant believes that the jurisprudence of "unfair or deceptive acts or practices" as used in both Sections 56-15-30 (a) and 39-5-20 (a) are to be abandoned because of the terminology "as defined by Section 56-15-40 (1)." The assertion is illogical on its face, but momentary observation clearly shows that the terms "defined" and "definitions" as used in 56-15-30 cannot be analyzed strictly by the terms of the language within the two sections.

As stated above, there are no definitions within the Section that relate to unfair methods or competition and unfair or deceptive trade practices or attempt to define unfair methods or competition and unfair or deceptive trade practices. Likewise, Section 56-15-40 does not attempt to "define" unfair methods or competition and unfair or deceptive trade practices, although it does *describe* certain actions by dealers deemed to be recognized as violations of Section 56-15-30 (a). A more logical construction of the statute would be that

[1] Appellant's Brief at 28, Item A.

courts are to be guided by actions found to violate of the FTC Act, which would also suggest that Section 56-15-30 (b) has a similar meaning to Section 39-5-20 (b). Appellant, on the other hand, suggests that Section 56-15-40 (1) somehow walls off Dealer Act matters from any FTC Act analysis of "unfair or deceptive acts or practices" even though Section 56-15-30 (a) uses that precise terminology. Not only is the Appellant's assertion illogical, but it has been tried before and it also appears to be at directly odds with the Supreme Court's most recent analysis on the issue.

In *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 788 S.E. 2d 902 (2015), Justice Beatty, now Chief Justice, wrote the opinion for the 3-2 majority upholding a finding of Dealer Act violations in a class action concerning dealer "closing fees." While the opinion did analyze the case under the Section 56-15-40 (1) "arbitrary, bad faith or unconscionable" standard, Justice Beatty also reviewed a challenged jury charge in which the trial court defined for the jury "unfair and deceptive" acts. The Supreme Court held there was no error because Section 56-15-30 (a) specifically made "unfair" acts in the sale of vehicles unlawful and quoted with approval case law under the Unfair Trade Practices Act defining "unfair" as "when it is offensive to public policy or when it is immoral, unethical or oppressive" *Freeman at* 385, 788 S.E.2d at 914. Obviously, if the only means for finding an act to be unfair or deceptive is to apply the strict "arbitrary, in bad faith or unconscionable" standard of Section 56-15-40 (1) instead the charge allowing the jury to consider the definition of "unfair" would have been in error.

A review of the record of that case shows that the question was actually directly put before the Supreme Court. J.L.H. Investments, LP a/k/a Hendrick Honda of Easley requested the trial court to charge a number of jury charges including request to charge

number 5 which merely quoted Section 56-15-30 (a) "[u]nfair methods of competition and unfair or deceptive acts or practices are unlawful." [Defendant's Proposed Request to Charge, Vol IV. *Freeman* Trial Court Record at R. 001626 (at https://ctrack.sccourts.org/public/caseView.do?csIID=56306)]. It also offered request number 6:

> Under the Manufacturers, Distributors and Dealers Act, an "Unfair or deceptive act or practice [] is defined as conduct which meets both of the following two requirements:
>
> (1) the action must be arbitrary, in bad faith or unconscionable, as those terms are defined; and
> (2) the action must cause damage to the Plaintiff
>
> A dealer who does no more than it is entitled to do under the law is in compliance with the Dealer's Act. (*Id.* at R.001627).

Judge Early's actual instruction on unfairness did not include Hendrick's request. Instead, the instruction went as follows:

> A trade practice is deemed to be unfair when it is offensive to public policy. An action which violates a statute violates public policy and a practice is deceptive when it is—when it has a tendency to deceive. An act is unfair, as I said, when it is offensive to public policy or when it is immoral, unethical or oppressive. (Jury Charges, Vol. IV. *Freeman* Trial Court Record at R. 001659).

In its brief, Hendrick criticized the instruction in a number of ways. One challenge appeared to be the very argument that Appellant Toyota of Greer puts forward in this case, that even though Section 56-15-30 (a) makes unfair or deceptive acts or practices in commerce in the sale of motor vehicles illegal, the only way those acts can be found to be in violation of the Dealers' Act is to abandon the jurisprudence of the "unfair or deceptive" standards as developed under the near identical language of unfair trade practices acts as developed under FTC Act precedents. Hendrick also claimed that the Court erred because

the provision of Section 39-5-20 (b), in its instruction to courts to be guided by FTC Act precedent is mandatory whereas the instruction in Section 56-15-30 (b) it was said to be discretionary. *Freeman* Appellant's Brief of Respondent-Appellant Hendrick Honda of Easley, at 62 (also available at https://ctrack.sccourts.org/public/caseView.do?csIID=56306). Hendrick complained that the Court erred in instructing the jury on unfairness in the first place, but also because a FTC Act procedural limitations required a finding that the particular injury involved could not have been reasonably avoided by the consumer and an "unfairness" instruction should have in any case contained such restrictions. (*Id.*). Hendrick argued that notwithstanding that the particular subsection 15 U.S.C. § 45 (n)[2] was an amendment added well after the last amendments to either Sections 56-15-30 and -40. Hendricks thus effectively argued that the General Assembly had delegated its legislative responsibility to the most recent Congressional enactment.[3] Hendrick alleged that the wording of the sections as found in

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[2] *See* Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, § 9 (August 26, 1994).

[3] Interestingly, Section 39-5-20 (b) instructs courts to be guided by precedent of the FTC Act Section 5 (1) "as from time to time amended" whereas no such provision exists in Section 56-15-30 (b). Nevertheless, there is also legislative history suggesting that Congress never intended the 1994 FTC Act Amendments to change State "unfairness" jurisprudence based on those amendments:

> The Committee is aware that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.
>
> Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while many States also prohibit unfair practices. . . . Many of the States direct courts to be guided by the interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal Law. . . .
>
> The Committee intends no effect on those or other developments under State law. This section represents a consensus view of appropriate codification of Federal standards, undertaken after careful consideration of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the FTC only.
>
> Sen. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994) reprinted in 1994 U.S.C.C.A.N. 1788.

the 1962 Code were evidence that the Legislature intended to limit "unfair and deceptive" to the examples found in Section 56-15-40. *Freeman* Appellant's Brief. at 61. Hendrick challenged the charge with an unqualified assertion that to be actionable, "unfair or deceptive" as used in Section 56-15-30 can only mean "arbitrary, in bad faith or unconscionable" as the examples in Section 56-15-40 (1) state.

That position was rejected by Justice Beatty. He found no error in the definition of "unfair" in the charge by Judge Early, noting that since the term "unfair" was specifically used in the statute, case law defining the term could logically be used as guidance. He even quoted with approval a case decided under the Unfair Trade Practices Act that defined an unfair act as one that is offensive to public policy or when it is immoral, unethical or oppressive. *Freeman*, at 385, 778 S.E.2d at 914. Nor is it evident that the dissent would not have agreed with that particular charge. The dissent criticized Judge Early's construction of the closing fee statute in a way that it claimed forced the dealer to predetermine its future incurred costs. The only charges the dissent found to be erroneous were charges concerning the calculation of the closing fee. *Id.* at 394, 395, 778 S.E.2d at 918, 919.

Appellant Greer can argue all it wants that "unfair or deceptive" cannot mean anything that is not mentioned in Section 56-15-40, but in doing so it is arguing against applicable Supreme Court precedent.

Even so, South Carolina courts have consistently applied the pre-1994 unfairness standard "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive" *Wright v. Craft*, 371, S.C. 1, 23, 640 S.E. 2d 486, 498 (Ct. App. 2006); *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App.2000).

As stated in note 3, the Court of Appeals has defined an act to be "unfair" when it is "offensive to public policy, or when it is immoral, unethical or oppressive," and defined an practice to be "deceptive" when "it has a tendency to deceive." *Wright, supra* at 26, 640 S.E.2d at 500; *deBondt, supra,* at 326, 396 S.E.2d at 108, (citing *Young v. Century, Lincoln–Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105, 108 (S.C.Ct.App.1989), *aff'd in part, rev'd in part on other grounds,* 309 S.C. 263, 422 S.E.2d 103 (1992)

The failure to deliver title to Appellant's customers was unfair because it was offensive to public policy, violating a law designed to protect the interests of vehicle buyers. The failure to deliver title was likewise unfair because it was oppressive, having extracted an agreed price from its buyers but neither providing them with the benefit of their bargain nor offering refunds or other mitigation for an extended period of time. It was also unfair because in each of the sales were accompanied by a written statement that there were no undisclosed liens. In the case of Mr. Bocook's Chrysler 300 M a person allegedly unknown to Appellant, apparently an auction employee, signed the statement and the bill of sale on Appellant's behalf (Petitioner's Ex. 7, R. p. 531). Mr. Bocook paid his money and the auction fee with the intent to resell and took possession (R. p. 197, ll. 6- 16). Appellant allegedly knew that a lien of record remained on the vehicle, but being confident that the lien would be released timely did not disclose its existence to Mr. Bocook nor did the auction employees. Title was delivered one hundred and forty-three (143) days later.

In the case of Ms. Gilliam's compliant regarding the Explorer, Appellant delivered an Affidavit & Notification of Sale of a Motor Vehicle, in the form of a sworn statement that there were no liens or encumbrances on the vehicle, Petitioner's Ex. 8, R. p. 544. Likewise, Appellant provided a sworn Affidavit & Notification of Sale of a Motor Vehicle

stating the only lien involved on Ms. McCallister's Masda was the creditor that financed her purchase. Petitioner's Ex. 11, R. p. 567. In both of these sales the statements proved literally untrue.

Despite Appellant's insistence that there really was no lien because the creditor had been paid or was being paid, a lien is a lien until it is released of record. If it were sufficient for a dealer to say "it's okay, we know the lien has been paid" there would be no need for recording or titling statutes. The only thing customers, other creditors and other dealers can rely on is that a vehicle has a lien free title of record. One means by which a dealer can be near certain that such situations will not arise is to have the title in hand with any liens clearly released before putting the vehicle on the market. While Appellant may be technically correct it is not inherently illegal to sell a vehicle without the title in hand, the dealer is still responsible to provide that title, and there is no use in claiming after double the statutory time limit has elapsed to claim it is not responsible because someone else was supposed to do something.

The three titling failures, accompanied by the literally untrue Affidavits & Notifications of Sale and Bill of Sale were deceptive. Appellant had to either know that the statements were literally true or not or at least know that it did not know. Even if it knew that a lien was paid but not released of record, it was misleading to issue an unqualified sworn statement that there was no lien. The lien exists until there is no longer a lien of record. If Appellant did not know whether there was a lien it was deceptive to issue a sworn statement that there was no lien. Those forms are designed to have the seller make truthful declarations to the buyer to allow the buyer to make an informed buying decision. So ultimately Appellant's state of mind does not enter into it. The standard is whether or

not the documents had a tendency to deceive. *Wright, supra* at 26, 640 S.E. 2d at 500; *deBondt, supra,* at 326, 396 S.E.2d at 108. There is no need to show that a representation was intended to deceive but only that it had the tendency or capacity to do so. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E 2d 691, 692 (1989); *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334 (1984).

d. SUBSTANTIAL EVIDENCE IN THE RECORD ALSO SUPPORTS A FINDING THAT APPELLANT'S THREE FAILURES TO DELIVER TITLES TO ITS CUSTOMERS CONSITUTED FRAUD AS DEFINED IN SECTION 56-15-10 (m) AS AN ADDITIONAL SUSTAINING GROUND.

S.C. Code Ann. 39-5-10 (m) states:

> As used in this chapter the following words shall, unless the text otherwise requires, have the following meanings
> . . . . .
> (m) "Fraud," shall include, in addition to its normal legal connotation, the following: *a misrepresentation in any manner*, whether intentionally false *or due to gross negligence, of a material fact*; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.

"Fraud" is also a pejorative term in public understanding. This definition, however, is far broader than common law fraud or fraud related torts. The deceptive representations contained in the Affidavits & Notifications of Sale and the Bill of Sale are fully discussed above. In addition, the Appellant's failures to deliver title within forty-five days of sale tainted the sales with illegality. When that failure is further exacerbated by continued failure to deliver title for between double to triple the statutorily allowed period of time, it is something more than mere illegality. Whatever comfort Appellant may have taken in blaming others for its failure to deliver evaporated when it violated the law for lengthy periods of time and failed to remedy those situations. Just because the Appellant's violations do not fit the defined violation of "willful failure to deliver title" in DE-002,

does not mean its actions were not willful or grossly negligent. Mr. Bocook affirmatively testified he could not get Appellant's personnel on the phone to address his problem. R. pp. 195, l. 14 through 197, l. 6. In Ms. McCallister's case the vehicle was sold to her well before the Appellant knew which State it was titled in, much less whether it had a title to provide her. R. p. 568; Petitioner's Ex. 10, R. pp. 343 , l. 10 through 345, l. 18; Respondent Ex. 9, R. p. 387. Her complaint and Ms. Gilliam's complaint of the Appellant's non-responsiveness were not independently verified (Petitioner's Ex. 8. R. p. 542; Petitioner's Ex. 11, R. p. 564), but the delay in titling their vehicles, however, is easily verified. This treatment shows willfulness, gross negligence and recklessness. In negligence law, the violation of a statute, while not conclusively proving willfulness, is some evidence that the party acted recklessly, willfully or wantonly. *Wise v. Broadway*, 315 S.C. 272, 276, -77, 433 S.E, 2d 857, 859 (1993). Combining the violation of law with the extended period of violation and other factors, the trier of fact could reasonably have concluded that the violations met the standard *S.C. Code Ann.*§ 39-5-10 (m), above and sustained the suspension on that basis.

2. *DE-002 IS NOT A REGULATION NOR IS THE SUSPENSION INVALIDATED BECAUSE IT WAS NOT PROMULGATED AS A REGULATION.*

A review of the cases cited by Appellant in its Motion shows no support for finding that the procedure had the effect of a regulation or of a "binding norm" for which an agency could be found to have wrongly failed to promulgate as a regulation.

Appellant cites *Joseph v. S.C. Dep't. of Labor,* 417 S.C. 436, 790 S.E. 2d 763 (2016) for the proposition that the Board of Physical Therapy created a binding norm that it was required to follow and that it violated the APA by adopting the Position Statement without promulgating it as a regulation. The reason the Supreme Court found the Position

Statement to be a binding norm was because the Chairlady of that Board had presented the Position Statement to the Board in letter form, that the governing board itself had voted to adopt the position stated in her letter on August 17, 2011 [at 445, 790 S.E. 2d at 768] and the gist of the Position Statement as interpreted by the Court was "merely . . . anti-competitive protectionist legislation intended to protect personal financial interests . . . rather than actual benefits to patients" and that the Position Statement was to protect PTs and PT Groups and specifically "was intended to have the force of law" [at 452, 453, 417 S.E. 2d at 771, 772]. In fact according to Justice Toal the reversal was justified by the finding of an equal protection violation alone.

DE-002, on the other hand, makes no claim on having the force of law, filling in gaps in the law nor even *interpreting* any law. It merely provides guidance for Dealer Licensing and Audit personnel in how to go about imposing sanctions specifically referred to in the law.

Further evidence that DE-002 is not a regulation or a binding norm for which promulgation of a regulation is found in *Home Health Services, Inc. v. South Carolina Tax Commission*, 312 S.C. 324, 440 S.E. 2d 375 (1994). In that case, the Tax Commission charged a bingo operation with a violation of the bingo statutes at *S.C. Code Ann.* §§ 12-21-3320 (16) and -3410 (1), (4) and (5) based on the Commission's interpretation of those statutes to prohibit the bingo establishment employees from covering squares on behalf of players who had temporarily left the game. The bingo establishment appealed, claiming in part that the Commission's interpretation of the law had given it no notice of the illegality and because the Commission had improperly failed to promulgate its determination as a

regulation in violation of the Administrative Procedures Act. The Supreme Court rejected these positions.

As a preliminary matter it should be noted that in the *Home Health Services* case, the appellant there at least had a plausible argument that the Commission's interpretation was legally incorrect or its enforcement beyond the authority of the Commission. No such issue is genuinely presented with DE-002, which makes no claim to expand, fill in the gaps of or even interpret the statutes that impact on dealer sanctions. It merely sets up an internal framework to guide the Department in enforcing sanctions.

In any case, in *Home Health Services* Justice Finney rejected the bingo establishment's claim that the APA required promulgation of the Commission's interpretation as a regulation:

> Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. In our view, the document issued was similar to a policy statement as opposed to a binding norm given that the document was not issued by the commissioners and thus, no final agency approval had been given. Therefore, we do not find that the APA was violated in this instance.
>
> at 328, 440 S.E. 2d at 378 (citation omitted).

As with the Commission in *Home Health Services,* in the present case the chief executive authority of the agency did not give final agency approval of DE-002. *See S.C. Code Ann.* § 56-1-5 (C), (D) and (E). As with *Home Health Services* (at 328, 440 S.E. 2d at 378) subordinates including a deputy made the position into an internal memorandum yet did not promulgate a regulation but circulated the memorandum to applicable staff. *Id.* As with the present case, the appellants in *Home Health Services* sought to invalidate the Commission's action with the claim that the Commission had failed to follow its own procedures (at 329, 440 S.E.2d at 378). This allegation was rejected by the Court's finding

that neither the Commission procedures, nor by extension its revenue regulations mandated the issuance of guidelines.

Appellant likewise cites two 1980s INS cases, *Moret v. Karn*, 746 F. 2d 989 (3rd Cir. 1984) (Motion at 4) and *Piper v. Crosland*, 519 F. Supp. 962 (E.D. N.Y. 1981) (Motion at 5) for the proposition that the Department cannot depart from its procedures. They likewise are unavailing to the Appellant. Under the Federal Administrative Procedures Act definitional section, 5 U.S.C. § 551 defines a "rule" as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to *implement, interpret, or prescribe law or policy* or *describing the organization, procedure, or practice requirements of an agency* and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; . . .
>
> (Emphasis added)

The Federal definition of "rule" has a comparatively broad scope, which is a main reason for the extent of Federal regulations generally and the pervasiveness of the regulatory documentation of the Federal Government. As was stated by Mr. Justice Blackmun in *Morton v. Ruiz*, 415 U.S. 199 (1974), a case cited in *Piper v. Crosland* by the Appellant:

> [The Federal APA] states in pertinent part: 'Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public—
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.' 5 U.S.C. s 552(a)(1).
>
> The sanction added in 1967 by Pub.L. 90-23, 81 Stat. 54, provides: 'Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.'
>
> 415 U.S. at 232-33.

The South Carolina Administrative Procedures Act, *S.C. Code Ann.* § 1-23-10 (4) defines a "regulation" somewhat differently:

> "Regulation" means each agency statement of *general public applicability* that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law*. The term "regulation" includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, *but does not include descriptions of agency procedures applicable only to agency personnel*; . . . . *advisory opinions of agencies*; and other agency actions relating only to specified individuals.
>
> Emphasis added (Supp. 2017)

Clearly, the South Carolina General Assembly contemplated not just procedural but also policy statements as lying outside the definition of "regulation," even though under the Federal law such statement might be required to be published in the Federal Register for public comment. In fact, it is noteworthy that although the South Carolina version of the APA is not regarded as a jurisdiction where the full Revised 1961 Model Act was adopted [15 U.L.A. Model State Administrative Procedures Act, Revised 1961 Act (West 2000) at 174; Cum. Pocket Part (2018) at 102] the first sentence of Section 1 of the Uniform Act is identical to the first sentence of *S.C. Code Ann.* § 1-23-10 (4) except for changing the term "rule" to "regulation." Nevertheless the second sentence of subsection (4) in italics quoted above is a non-uniform South Carolina addition, which has not changed since its enactment in 1977.

Clearly this was an effort on the part of the General Assembly to avoid having policies or internal directives go through the full process of comment period, promulgation and legislative approval. In addition, a review of Chapter 15 of Title 56 of the South Carolina Code of Laws shows there is not legislative authorization for the Department to promulgate regulations under it, or under the Title generally. It only has authority to

promulgate regulations in select provisions of Title 56 of the South Carolina Code of Laws. *See, e.g. S.C. Code Ann.* § 56-23-100, specifically authorizing the Department to promulgate regulations for licensed driving schools.

Acting Justice Toal recognized the above quoted italicized language of Section 1-23-10 (4) regarding policy of guidance quoted above in *Joseph* at 453-54, 790 S.E. 2d at 772. The difference here is that the Position Statement in *Joseph* was specifically found to be based on an unconstitutional interpretation of the statute to protect one class of health care providers from disciplinary action and to the potential detriment of trade and public health, and specifically intended to have the force of law. That is what Acting Justice Toal said made it a binding norm *Id.,* at 453, 790 S.E. 2d at 772. The difference is that in the case of DE-002, the Department has made no attempt to change law, fill in the law, or impose any added burden on dealer licensees or any member of the public. Its practical effect is simply to make the sanction process more uniform and orderly than if the process depended on unfettered *ad hoc* discretion and make it somewhat more difficult to sanction a licensee quickly.

Thus, the DE-002 process itself, as well as the Department's forebearance Appellant complaints of in assessing the four sanction points rather than the full six points that DE-002 allowed, all accrued to the Appellant's *benefit* as opposed to Appellant's characterization that the Department is violating Appellant's rights or creating the "danger of the leviathan" of agency action.

Where the Department does seek to sanction a licensee, it is based on established statutory law. The licensee also has the right to test whether a particular act violates the established statutory law, which the Appellant has done vigorously. DE-002 is, as it

specifically says it is, a guidance document. Petitioner's Ex. 5, R. pp. 502, 503. *See, also, M. Asimov, Guidance Documents in the States: Toward a Safe Harbor,* 54 Admin. L. Rev. 631, 642 at n. 62 (Spring 2002) (author commending States such as South Carolina that had written exceptions to the 1961 Model APA, which he claimed ill- advisedly provided no exceptions for guidance or advisory documents from full notice, hearing and promulgation procedures).

3. APPELLANT HAS FAILED TO PRESERVE ITS ISSUES FOR APPEAL.

It is axiomatic that 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). To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.,* 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007); *Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 507, 682 S.E. 2d 565, 569 (Ct. App. 2010).

If a losing party has raised an issue in the lower court, but the court fails to rule on it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *I'On L.L.C, v. Town of Mt.* Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The Appellant did file a Motion to Reconsider based on a number of grounds, most particularly, for example, the allegations that the Hearing Officer wrongfully considered hearsay. Evidently the exception in the Statement of Issues on Appeal XXV. at page 3 of Appellant's Brief is a regurgitation of that argument. That particular ground illustrates the absurdity of Appellant's position. First, the statement was an admission from

title clerk Powell that the dealership had a lot of turnover and movement within they finance departments due to employee terminations that were the result of bad deals. This admission clearly fits within the definitions of non-hearsay admissions by a party opponent alternatively by one authorized to make statements concerning the subject or by an agent or servant concerning a matter within the scope of the agency or employment under SCRE 801 (d) (2) (C) and (D). Ms. Powell clearly fit both descriptions because she was *called* to testify for the *Appellant* concerning matters within the scope of her employment as a title clerk. So the admission was clearly not hearsay, and was recorded as a part of the Department's official records of investigations of complaints. And the record made clear that even with disregarding alleged hearsay, the record more than adequately supported the suspension based on the Department's review of Appellant's records, non-hearsay admissions and the Department's official records of when the vehicles were bought and titled. The apparent suggestion is that in context there *may* have been more than one person that Agent Benjamin spoke to and that person *may* not have been an authorized representative. But the context also suggests more likely Benjamin only spoke to Ms. Powell and the Hearing Officer was entitled to infer that. In addition, it is clear that Appellant not only made no contemporaneous objection, but also specifically consented to the admission of the report. R. p. 270, ll. 12-16; R. p. 521.

But this ignores that Appellant did not preserve the issue. Appellant made a nine line motion for a directed verdict. R. p. 368, ll. 6-15. Appellant made its closing argument (R. pp. 370, l.18 through 373, l. 2). Neither contained a reference to hearsay. To the extent the Appellant thought it was necessary to be certain that the Hearing Officer rule a certain way on the issue, or even ascertain that a certain part of the evidence in the record alleged

to be hearsay was relied on or not, it was incumbent on the Appellant to clarify the issue with a post-trial motion. It filed a Motion to Reconsider but neglected to serve it on the Department and thereafter the Notice of Appeal was filed before the Hearing Officer ruled. Nevertheless, the Appellant appears to attempt to raise the same issue before this Court. Indeed the entire repetitive and scattershot approach of naming thirty separate issues on appeal where no more than twenty-three separate labeled argument headings are listed, none of which describe a hearsay argument, should itself be considered abandonment of the argument.

A review of the Appellant's thirty "Statement of Issues on Appeal" reveals that most of them do not correspond to a discrete labelled argument within the text of the brief itself and should likewise be regarded as abandoned.

4. *APPELLANT'S ADDITIONAL EXCEPTIONS LACK MERIT.*

Appellant appears to claim there is some sort of error in or coercive force in the Dealer Manual itself. The heading on subparagraph I. 3. in Appellant's Brief at 15 states: "The South Carolina DMV Dealer and Wholesaler Manual Makes it binding on the dealers." Evidently the Appellant is once again of multiple minds on yet another issue. When the Dealer Manual actually in effect at the time of the time of the hearing was offered into evidence by the Department and Appellant was asked if there was an objection Appellant's position was "[o]ther than the fact this is just a manual, and not the law, with that objection I'm glad to let it in." (R. pp. 215, l. 25 through 216, l.2). Somehow it was not legally binding, and then it was. But the portions quoted by Appellant clearly were not in the pages of the Manual placed in evidence. It does indicate that the Manual will be placed on the Website, which it was. It also states: "Sections of law appearing in the may be paraphrased

for simplicity or to reflect the Department's interpretation. Customers wishing to research specific sections of the law may do so by visiting our website at: www.scdmvonline.com." Petitioner's Ex. 2, R. 409. The additional quotes attributed to the Manual in Appellant's Brief at page 15 are nowhere to be found in the pages cited by Appellant in the Dealer Manual that was effective at the time of the hearing and are in the record. *See,* Dealer Manual pages 5-3 and 5-4 (Petitioner's Ex. 2, R pp. 449-452). Likewise, the "table" of possible sanctions said to be in the Dealer Manual that Appellant asserts in page 7 of its Brief is actually not to be found in the Dealer's Manual placed in evidence. The mention of sanctions in the Manual is limited to a general list of possible actions from verbal warning to revocation. *Id.* at page 5-4 (R. p. 452).

On Appellant's Brief page 8, Appellant attempts to explain the Gilliam Complaint. While bizarrely suggesting the Derricks had violated the law by failing to deliver title, Appellant suggested it heroically "took it upon itself to solve the problem." Except that the Appellant almost immediately learned that a lien was still showing of record to Ford Motor Credit. Of course, this means that the Derricks could not have had the title until the lien was clear, since as Appellant acknowledges, the lienholder holds title until the lien is cleared. It also means that the Derricks' either told Appellant that there was no lien, in which case they likely knew the vehicle was actually paid off, or Appellant bought the vehicle without actually knowing the status of the lien.

It is also noteworthy that in the Gilliam case (R. p. 550), the ultimate releases were letters from the creditors rather than release acknowledgements on the titles themselves. That is not to suggest that letters are not routine, the Department accepts letterhead letters of release routinely, as Appellant must have known when presenting it to

the branch. In that case Appellant claimed prompt research to determine the facts and early acknowledgment from the creditor that they had records that the liens had been paid. The extent and frequency of the alleged attempts to acquire the releases are not clear, but the long delay in getting the releases were not due to the inability to produce the prior titles themselves, but by release letter, based on information the creditors had allegedly told the Appellant much earlier. As shown on page 8, above, the Appellant knew that there was an outstanding lien to Ford Motor Credit on February 4, 2016 and sold to Ms. Gilliam on March 29. Ms Taylor testified that she contacted Ford Motor Credit and was told almost immediately after getting the report that the lien was no longer active. R. p. 309, ll. 2-10. It took until June 28 for Ford Motor Credit to confirm in writing what Appellant claims it was told in February.

On Appellant's Brief, page 11, Appellant suggests that under DE-002, sanction points should have been reduced from 8 to 4. That is simply wrong. The Bocook complaint 16/746 was posted on July 27, 2016, and the third and last complaint was the McCallister compliant posted 5/25/17. So Appellant accumulated twelve sanction points within a single year. Per DE-002 G. and 4. (R. p. 508), once sufficient points are accumulated for suspension, the suspension ensues without regard to the process of dropping points over time.

On Appellant's Brief, page 14, Appellant asserts that DE-002 is signed by the agency director. That is absolutely wrong, and self-evidently so. The Executive Director is Kevin Shwedo. The person who signed DE-002 is Karl McClary, the Inspector General who is in charge of internal investigations and security, Dealer Licensing and driving schools. It explicitly states his position. R. p. 502. He is the man who was specifically

consulted about Appellant on the issue of whether or not to suspend Appellant. R. 233, l. 6 through 238, l. 25.

On Appellant's Brief page 15, Appellant alleges that because the Department requires dealers to answer affirmatively that they have a Dealer Manual it indicates they must follow DE-002. The assertion is absolutely wrong in multiple ways. The application was introduced to show that the Appellant, if it was willing to read the Manual, would understand the necessity of titling vehicles within forty-five days. Manual at 2-2, R. 429. The Department does not refuse applications that indicate that the applicant does not have a Dealer Manual, although perhaps it should. Most importantly, DE-002 *did not exist* when the Dealer Manual in the record was published. *Compare* R. p. 408, *with* R. pp. 502, 503. Appellant's argument is a red herring.

On Appellant's Brief page 18, Appellant pointed that the Hearing Officer found that the Department had found that Appellant had engaged in "willful failure to deliver title." Of course, this was not alleged, and the Department did not make such a finding and as has been demonstrated, it did not fit the facts of the case from the outset and was merely asserted to give the Appellant an arguable defense. At most it is an inconsistency in the Hearing Officer's order. The issue is whether substantial evidence supports the Hearing Officer's finding of arbitrariness, and it does.

On Appellant's Brief page 23 the Appellant alleges that because the record does not contain three separate Sanction Reports the Appellant should not be suspended. What Appellant is really suggesting is that an internal agency processing form within an internal agency processing procedure should be treated as a *sine qua non,* or literally as an evidentiary disqualifier to prevent the Hearing Officer from considering evidence of

sanctionable conduct. Nothing in law or in DE-003 suggests that the absence of an internal processing report invalidates a suspension.

On Appellant's Brief page 24 Appellant claims that the Department "chose to administer the statutes entrusted to it by promulgating DE-002." DE-002 was not promulgated, but merely adopted as an internal procedure. There is no evidence in the record that Appellant had any familiarity with it whatever until Appellant's counselors started studying means of defending the one week suspension. Notably, Appellant's references to authorities are primarily cases involving Federal agencies under the Federal APA and fail to mention *S.C. Code Ann.* § 1-23-10 (4) in its entirety.

On Appellant's Brief page 27 Appellant again argues that, pursuant to *Taylor v. Nix,* a dealer's actions only have to have some reasonable basis to avoid being arbitrary. Implicitly, this means that Appellant is asserting that allowing its customers to go without legal means of driving or selling the vehicles it sells for double to triple the statutorily allowed time is reasonable. But just to up the ante, Appellant appears to assert that it is "authorized" to exceed the forty-five days as long as it is not "willful" or there is someone else to blame. Appellant's Brief, Statement of the Issues on Appeal, XI. and XII. at 2.

On Appellant's Brief page 34, Appellant claims that the Department failed to show that its customers were damaged. The General Assembly has not authorized the Department to go to court to sue for customers' damages. Appellant is essentially suggesting that the Department should be placed in a position making it impossible to sanction dealers for violations of law. The customers were damaged by not getting the benefit of their bargains. The reason was that the Appellant violated a law designed to protect them from that very problem. That is sufficient proof.

CONCLUSION

For all the reasons set forth above, the order of the ALC sustaining the order of the OMVH Hearing Officer should be affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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Toyota of Greer . . . . . Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

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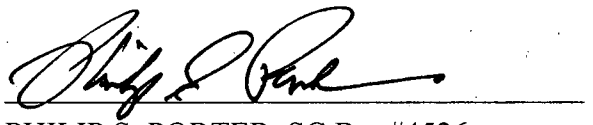
CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2014.



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