THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

South Carolina Department of Public Safety, Respondent-Appellant.

APPELLANT'S FINAL REPLY BRIEF OF APPELLANT-RESPONDENT

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I. DPS MISSTATES THE SCOPE OF ALC AND DPS AUTHORITY IN THIS PARTICULAR SITUATION AS WELL AS ISSUES AND ARGUMENTS WAYNE'S PRESERVED AND HAS NOW PROPERLY RAISED BEFORE THE COURT.

As previously set forth in note 1 of its Appellant Brief, Wayne's submitted its Final Arguments to the ALC, pursuant to Rule 29 (A) (7), SCALC, which is a mandatory requirement in a contested case, and DPS submitted a Post-Trial Brief, as permitted by (A) (8) and the Administrative Law Judge. DPS fails to address or acknowledge this distinction in its Respondent Brief and misstates the scope of ALC and DPS authority, as well as the issues Wayne's has preserved that are now properly before the Court. It has grossly distorted and misrepresented what this case is about in the appeal and cross appeal. Wayne's is confident the Court will see these tactics as reckless and unfounded, as explained more fully as follows for several reasons viewed individually and collectively.

First, as to mootness, while Wayne's acknowledges DPS has authority to pursue disciplinary action in certain situations, the instant situation is not one of them. Bob Watson's complaint to DPS was made in his capacity representing insurance interests that were eliminated with the settlement more than a month before the DPS notice of disciplinary action. Therefore, even if he had standing to make his complaint, he no longer enjoyed standing following settlement. Contrary to the situation in James v. Fast Fare, Inc., 685 F. Supp. 565 (D.S.C. 1988), Wayne's contests any improper action warranting any disciplinary action/suspension. Id. @ 568.

Second, DPS failed to meet its burden of proof the accident occurred in South Carolina. Wayne's included specific facts in its Appellant Brief in note 2 that it also incorporated in its Respondent Brief. As indicated in Fact (b), the Premier driver was charged with "traveling too

fast for conditions" for which he was convicted *in absentia* and, as indicated in Fact (h), the Traffic Collision Report includes a disclaimer of no factual accuracy. In its Statement of the Case in its Respondent's Brief @ 1, DPS acknowledges the accident occurred "on the I-20 bridge over the Savannah River near the South Carolina-Georgia border." In Argument II of its Appellant Brief and note 8 thereof, Wayne's discusses the interstate nature of the accident's occurrence, provides citations to the Transcript and Record proving the accident itself occurred in Georgia and further referencing **Petitioner's Exhibit 15 (R. @ 1011-1012)** in support proffered by Wayne's and excluded by the ALC, as well as now proffered to this Court to take judicial notice of the South Carolina-Georgia border confirming the actual wreck—as distinct from the driving too fast for conditions citation—definitely occurred in Georgia .[1] Therefore, while the ALC had jurisdiction to undertake the contested case proceeding, it erred in concluding any suspension for Wayne's was appropriate, since the DPS 2016 Wrecker Schedule is otherwise inapplicable in the instant situation.

Third, by DPS's failure to comply with (D) (5) of its own Regulation by not creating an Advisory Committee in conjunction with enactment with (D) (2) and (3) regarding enactment of wrecker rotation disciplinary policy, DPS has failed to implement its own Regulation. Furthermore, as pointed out in Appellant's Brief, Section IV (E) of DPS Policy 200.19-- the disciplinary policy—must seek such Committee's review prior to making a decision on an internal appeal of the Notice of Disciplinary Decision (**Petitioner's Exhibit 1 (A) (R. @ 800)**.

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[1] Contrary to DPS's contention in its Respondent Brief @ 13 that Lt. King "testified that the accident occurred in South Carolina," he was never onsite and actually testified:

> From my little understanding is that his vehicle struck the guard face into South Carolina (sic).

R. @ 422, ll. 12-14.

The ALC in its Final Order @ 5-6 **(R. @ 17-18)** erred by invoking the rationale that any procedural or Due Process violation was harmless error in light of Unisys Corp. v. S. C. Budget and Control Bd., 346 S.C.158, 551 S.E. 2d 263 (2001), in light of related errors challenging the adequacy of the de novo review provided, as identified and discussed in Wayne's briefs herein. Condoning DPS's violations of its own Regulation in (D) (3) and its Disciplinary Policy IV (E) while upholding any suspension against Wayne's herein, when it provided third party and other discovery responses as well as hostile witness testimony at the contested case hearing rather than earlier with its invoice, is unduly prejudicial and in violation of its Constitutional rights with respect to Contract Impairment and Due Process, as well as being arbitrary and capricious and constituting an abuse of discretion under the APA.

Fourth, as indicated by the ALC in note 1 @ 2 of its Final Order (**R. @ 14**) and cited in Wayne's Appellant Brief in IV, the ALC could not discern what the Class B rate "is supposed to cover or supply", since it "is not specified." In light of this admission, the ALC should have also acknowledged it could also not discern what the Class C rate is supposed to cover or supply, since it, too, is not specified. It then, however, nevertheless, disregards the Schedule's express reference to "no Special Operations fee is set for Class C tows" and inconsistently references and applies the invoice or receipt actual cost provision, despite the facts that such provision only became effective in the 2015 Schedule without any modification of Regulation 38-600 by the General Assembly and the Class C rate on its face is not established much less tying a vehicle with a driver and allowing no charges beyond actual cost for third-party assistance or for vehicle drivers.[2] See also, note 9 of Wayne's Appellant Brief, asking this Court to take judicial notice

[2] Moreover, DPS never sought nor proffered any evidence as to any definition of "accident" or "occurrence" in either Premier's insurance policy with Sentry Select for the tractor and trailer or the Traveler's policy for the cargo

that none of DPS Wrecker Schedules from 2013-2018 expressly provide Class C towing rates also include labor costs. By failing to address such arguments in its Respondent Brief, the Court should conclude DPS has waived its right to object thereto and accept Wayne's positions, consistent with the "failure to file" provision in Rule 208 (a) (4), SCACR, rather than deem Wayne's has abandoned them. See, Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 282 S.E.2d 858, 860 and n. 1 (1981). In addition, in its Appellant Brief, Wayne's included with the Statement of the Case a separate footnote of its Statement of Facts with citations as to pertinent issues, which DPS would have the Court disregard.

Fifth, in Argument V of its Appellant Brief, Wayne's properly referenced specific examples of the ALC's errors with respect to misconstruction of the Regulation, mistreatment of evidentiary matters, and improper reliance on the 2016 Schedule, which DPS has arbitrarily chosen not to address and thereby should thereby be deemed by the Court to have waived any arguments to the contrary, consistent with Rule 208 (a) (4) as well. Examples include:

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

See also, what the ALC accepted as a DPS Motion to narrow the scope of the proceeding over Wayne's objections, Wayne's Response, and further discussion with the ALC and its ruling (**R. @ 290, l. 14-297, l. 14**) and Opening Statements. **R. @ 297, l. 18-314, l. 3**.

This ALC ruling, Final Order, and Order Denying Motions For Reconsideration (**R. @ 13 and 23)** clearly demonstrate it declined to adopt Wayne's positions.[3]

Sixth, Wayne's also properly and timely raised constitutional issues as to denial of Due Process and Impairment of Contracts and associated binding norms[4] from DPS having exceeded

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[3] Similarly demonstrating its prior opposition, see Petitioner's Motion To Expand Number Of Depositions And Discovery Completion Deadline And Provide Related Relief (with Attachment), filed March 3, 2017, and the ALC's Order Granting, In Part, and Denying, In Part Petitioner's Motion To Expand Discovery, filed March 16, 1017. **R. @ 153 and 11**. The upshot was the ALC declined to allow Wayne's to take more than 3 depositions it had scheduled, despite its showing of good cause to expand it that number to 6 under Rule 21 (A), SCALC. DPS, on the other hand, chose not to take any depositions, although it did propound standard interrogatories and a request for production to which Wayne's fully responded, as information was available and determined to be relevant.

[4] See specific facts referenced in note 2 of Appellant's Brief listed chronologically and the following list of unlawful binding norms (i.e. an agency's creation of regulations without APA compliance as opposed to general policy statements not having the force or effect of law) by application of Joseph v. S.C. Dep't of Labor, 417 S.C. 436, 790 S.E.2d 763, 776-777 (2016), in conjunction with Home Health Serv. Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994), Ryder Truck Lines, Inc. v. U.S., 716 F.2d 1369 (11th Cir. 1983), Article I, §§ 3, 4, 22, and 23 of the South Carolina Constitution and Article I, § 10 and Amendments 5 and 14 of the United States Constitution, and S.C. Code Ann. §1-23-610 (B), as set forth in Appellant's Brief and note 10 therein:

> Specific examples of Respondent's use of unlawful binding norms include, but are not limited to:
>
> using the 2016 Schedule without seeking amendment to its Regulation 38-600 to impose a sanction on Petitioner;
>
> failing to create an Advisory Committee, as required in (D) (5-7) of the Regulation, to review proposed disciplinary action;
>
> finding Petitioner overcharged Premier herein for Petitioner's towing and recovery services rendered;
>
> specifying additional invoices in the Schedule, when the Regulation only allows for a single invoice, subject to its possible revision, as occurred herein covering all respects, consistent with S.C. Code Ann. §56-5-5635 (F);

its scope and exercise of authority in its verified Petition for Contested Case in ¶s 3-5 (**R.** @ 793-796), Prehearing Statement in ¶ 3 @ 4-6 and notes 3-4 (**R. @ 116-118**), Final Arguments @ 10-11 and note 6 (**R. @ 171-172**), and Motion For Reconsideration @ 5 and note 2 (**R. @ 202**) as well as Appellant Brief and herein, including in its Arguments IV, V, and VI, contrary to DPS's contentions. Such issues are, therefore, ripe for review and rulings herein.[5]

(C) (6) of the Regulation expressly requiring the vehicle "owner or owner's designee"--DPS acknowledged to be Premier--to dispute a bill/complain about billing and not an unauthorized third party, such as Bob Watson;

disregarding indisputable photographs taken by Premier's insurance adjustor on the scene and Wayne's personnel showing that the accident was a Class C tow requiring Special Operations tow for which fees are not established and that the accident did not occur in South Carolina but rather between the Savannah River and Augusta Canal in Georgia and for which towing and special operations were undertaken in both South Carolina and Georgia--thereby rendering improper DPS's application of its intrastate 2016 Wrecker Rotation Fee Schedule herein; and

failing to make a rate comparison to assess the reasonableness of Petitioner's charges, as required in (F) (3) of the Regulation, and imposing a 120-day suspension from the Schedule on Petitioner.

[5] See, e.g., specific facts with citations to the Record referenced in Appellant's Brief in note 2 and listed chronologically, as well as discussion in Appellant's Brief of:

Joseph, supra, Home Health Serv. Inc, supra, Ryder Truck Lines, Inc., supra, Article I, § 4 of the South Carolina Constitution and Article I, § 10 and Amendments 5 and 14 of the United States Constitution, Ayres v. Crowley, 205 S.C. 51, 30 S.E.2d 785, 788 (1944), Unisys Corp., supra, 551 S.E. 2d at 272, Commercial Credit Corporation v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E. 2d 481, 484 (1966), and Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 2d 663 (2007) re denial of Due Process, impairment of Contract, use of illegal binding norms, good faith and fair dealing, and non-enforceability of a contract violative of public policy, statutory law, or provisions of the Constitution;

Youngblood v. S.C. Dep't of Soc. Serv., 402 S.C. 311, 741 S.E. 2d 515 (2013), Curtis v. State, 345 S.C. 557, 549 S.E. 2d 591 (2001), and S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 412 S.C. 18, 770 S.E. 2d 399 (Ct. App. 2015) re mootness and no public policy exceptions warranting continuation re exercise of only powers conferred upon State agency by the General Assembly;

Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E. 2d

II. CONSEQUENTLY, DPS'S ARGUMENTS IN SUPPORT OF THE ALC'S RULINGS AS TO ALLEGED OVERCHARGES, DOUBLE-BILLING, FAILURE TO ATTACH ITEMIZED INVOICES TO THE INVOICE, AND SUSPENSION ARE MISPLACED.

Assuming, arguendo, the 2016 Wrecker Schedule is a valid contract between Wayne's and DPS and the disciplinary notice itself was validly issued, DPS failed to meet its burden of proof Wayne's improperly double-billed and/or improperly overcharged rented/subcontracted labor costs charged by Vern's Wrecker and Recovery, since Wayne's failure to attach the Vern's invoice to the initial or settlement invoices, while presenting it in discovery and at the contested case hearing , was harmless error, if any, consistent with DPS's and the ALC's position that the

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13, 14 (1991) and Paschal v. State Election Commission, 317 S.C. 434, 454 S.E. 2d 890, 892 (1995) re clear and unambiguous language requires a court to apply law to the facts without employing rules of statutory interpretation;

Alston v. City of Camden, 322 S.C. 39, 471 S.E.2d 174, 177 (1996), Oncology and Hematology Associates of S.C., LLC v. South Carolina Dep't of Health & Envtl. Control, 387 S.C. 380, 692 S.E. 2d 920 (2010), Sharon v. Kurschner, 376 S.C. 165, 656 S.E.2d 346, 350 (2008), and Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health & Envtl.Control, 305 S.C. 90, 406 S.E.2d 340 (1991) re Contract Clause violation and no suspension supportable since no legitimate governmental purpose served, interstate nature of accident rendered irrelevant applicability of 2016 Wrecker Schedule; and ALC abuse of discretion;

Georgia v. South Carolina, 497 U.S. 376, 383-384, 394-395, 398, 408-410 (1990), **Petitioner's Exhibit 15** (proffered Google boundary map), Pahls v. Thomas, 718 F. 3d 1210 (10th Cir. 2013), and People v. Clark, 940 N.E.2d 765 (Il. App. 2010), Fed. R. Evid. 201 (b) and S.C. R. Evid. 201 (b) and (f) re discussion and delineation of South Carolina and Georgia boundaries and this Court taking judicial notice; and

this Court also taking judicial notice that none of the Wrecker Schedules presented herein from 2013 through 2018 expressly provide Class C towing rates also include labor costs. See People, supra, re appellate court may take notice of facts lower court did not and S.C. R. Evid. 201 (b) and (f). **Petitioner's Exhibit 28** (proffered to the ALC) (**R. @ 1014-1019**) and Petitioner's Petition For Supersedeas Or Other Ruling To Continue Stay Through Appeal Process with Verification And Affidavit Of Walter Jeffrey Corbett attaching the 2016, 2017, and 2018 Wrecker Schedules, filed with the ALC on December 13, 2017, as well as Petitioner's Reply To Respondent's Response To Petition, filed December 27, 2017. **R. @ 280-281**.The ALC thereafter granted the Petition by its Order Granting Petition For Supersedeas, filed December 28, 2017. **R. @ 26.**

contested case proceeding was a de novo review, consistent with Unisys Corp, supra, and DPS's failure to meet its burden of proof the accident itself occurred in South Carolina rendered the 2016 Schedule inapplicable.

Moreover, during his testimony for Appellant-Respondent, Jeff Corbett clarified that the Vern's $720 invoice was for traffic control cones and the $1,000 charge was appropriate, because "we have to pay out on it and we have to insure the equipment. So, in order to do that, we have to charge more than it costs us because we're responsible for it." **R. @ 659, l. 20-660, l. 20.**

Finally, in light of Wayne's settlement with Premier Transportation without any reservation of rights by it, coupled with the absence of any insurance policy evidence presented by DPS and S.C. Code Ann. § 56-5-1210 (B)'s requirement that Premier as the at-fault party and/or its insurer has the duty to "bear all reasonable costs of removal", any billings for charges deemed overbillings should have been deemed harmless errors at worst, as confirmed by Petitioner's expert rate witness Rochester, its expert CPA Rawl, and Petitioner's witnesses Busbee, and Jeff Corbett as to the reasonableness of charges proposed and significantly lower amount paid by Premier than if Premier had paid the amount generated by DPS adjustments of almost $6,000 more. **Appellant Brief Argument I (E)** and **Petitioner's Exhibit 5, pp. 3-5. R. @ 867-869** and **R. @ 458, ll. 5-17.**

III. THE ALC ERRED BY FAILING TO ELIMINATE THE ENTIRE SUSPENSION.

Wayne's diligently endeavored to raise all legitimate issues and provide all relevant information to the ALC in the contested case proceeding process in these particular, unusual circumstances. It has also diligently endeavored similarly both to continue to preserve such issues on appeal and cross appeal and to provide this Court with a more comprehensive approach

in its briefs and designations of matter on appeal than DPS, because the appeal and cross appeal have more underlying issues than DPS would have the Court consider pertinent in an attempt to convince it to keep things more simple than they are.

Wayne's and its counsel in good conscience and in the interests of justice and proper application of the facts and law are accordingly proceeding in good faith and will continue to do so. And we thank the Court in advance for continuing objectively to undertake its review herein.

CONCLUSION

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

September 10, 2018

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211 (b), SCACR.

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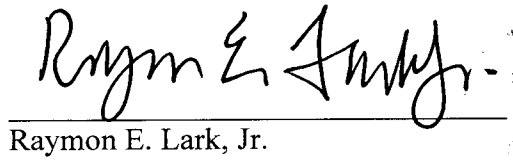

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