

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

69168

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge
Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

RECEIVED
JUL 22 2013
SC Court of Appeals

**APPELLANTS' PETITION FOR HEARING
AND SUGGESTION OF REHEARING EN BANC**

Pursuant to Rules 221 and 240, SCACR, the Appellants hereby respectfully petition for rehearing regarding the Order of The Honorable Jasper M. Cureton dated Friday, July 12, 2013 and received by the undersigned via standard mail on Monday, July 15, 2013. This Petition is filed and served well within the fifteen (15) days provided by Rule 221(a) and less than the shortened ten (10) days required in the text of the Order. On information and belief, the Court overlooked or misapprehended the requisites for such Order, the Appellants' argument, and the attendant facts. In the absence of rehearing and revision, such Order has the effect of dismissing the appeal.

Moreover, pursuant to Rule 219, SCACR, the Appellants respectfully suggest that a rehearing en banc is proper to secure uniformity and because the issue addressed by the Order is of exceptional importance: 1. the statute upon which the Order relies has been the subject of only a single reported Opinion, 2. which pre-dates the current statute by over five (5) years, 3. in which the statute cited here was held inapplicable; and 4. the failure of DOR to seek tribunal specificity

required to bring its Motion under any version of the statute and its willful tardiness here are not addressed in the Order of July 12, 2013 nor in the sole reported appellate case.

APPELLATE TIMELINE

1. The underlying case was initiated on **May 11, 2012** (R. p. 18) and the order under appeal (granting Summary Judgment to DOR prior to any DOR response to discovery) is dated **July 26, 2012** (barely seventy-six (76) days after case filing) (R. p. 1). The Order's ruling and directive are bereft of any figure "determined to be due" by the tribunal. (R. pp. 8-9).
2. DOR filed no motion and took no other steps to call tribunal attention to the omission nor did it seek any post-Order specificity regarding any issue and has filed no cross appeal.
3. However, the Rays sought tribunal reconsideration of pre-mature Summary Judgment, lack of DOR evidence, refusal of discovery, etc. DOR did not call the "determined to be due" omission to the attention of the tribunal. The secondary Order Denying the Rays' Motion to Reconsider is dated **August 21, 2012**.
4. On **August 22, 2012**, the Rays served their Notice of Appeal upon DOR and the tribunal. Neither DOR nor the tribunal timely raised the current issue below or in this Court.
5. Both sides filed Motions for Extensions of Time. Both sides eventually filed initial briefs and Designations of Matter (DOR: **January 28, 2013**).
6. On **April 18, 2013**, some nine (9) months following issuance of the Order under appeal and eight (8) months following perfection of the appeal, with no consultation and crediting itself with "due diligence", DOR moved for dismissal. Its Motion was comprised of 3-4 sentences, no attachments, and cited no documentation. Exhibit.
7. On or about **June 26, 2013**, the Appellants' Brief, Respondent's Brief, Reply Brief, the Record on Appeal, and fifteen bound copies of each were filed with the Court.
8. The subject Order was issued, filed, served, and received nearly three (3) weeks later.

ARGUMENT

Preface

Reference is made to the prior filings on this issue (DOR Motion for Dismissal, the Rays' Return to Motion, and the Order of July 12, 2013). The Rays reiterate by such reference the arguments of their Return as fully as if restated verbatim. For the reasons stated therein and in the paragraphs of this Petition, the Appellants respectfully assert that the Order of July 12, 2013 overlooks, misperceives and misapprehends the facts, history and proper status of this matter. It should be reheard, en banc, the July 12, 2013 Order should be vacated, and dismissal disallowed.

Inadequate Motion

It is noteworthy that the DOR Motion for an Order of Dismissal did not contain a single dollar figure. It did not recite, because it could not recite, an amount "determined to be due" by the tribunal. Therefore, the Order grants relief for which DOR does not qualify under the very statute (S. C. Code § 12-60-3370) upon which both solely rely.

DOR did not seek tribunal clarification or specificity, it did not seek a determination below, nor did it cross-appeal the absence of such determination. Therefore, the issue raised in the DOR Motion is unpreserved and DOR cannot raise it for the first time here. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, "[DOR's] short, conclusory statements [are] made without supporting authority are deemed abandoned ...". *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). The absence of an "amount determined to be due" is now the "law of the case".

Sua sponte ruling beyond the relief requested

Again, the "CONCLUSION" AND "ORDER" sections of the Order under appeal contain no figures. Yet, despite the absence of a specific sum in the tribunal ruling and the DOR Motion,

the July 12, 2013 Order, *sua sponte*, requires an \$850 payment or bond. It appears that such additions are beyond the purview of appellate courts. *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, Op. 27257, footnote 16 (S.Ct. May 29, 2013). In addition, this Court has ruled that a trial court is prohibited from going beyond the scope of the motion before it (*Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 499, 730 S.E.2d 328, 335 (Ct.App. 2012)) and, on information and belief, the same proscription applies here.

Synopsis of other oversights and misapprehensions

The DOR Motion was grossly tardy, defied any definition of due diligence, no consultation with opposing counsel was made, and the Motion was not properly before the Court. It did not comply with the requirements of Rule 240, SCACR, evaded the requirements and restrictions of this Court and the Rules of Appellate Procedure promulgated by the Supreme Court as to support. Further, DOR's right to so move (if any it ever possessed, which remains denied) was abandoned, released, waived and voluntarily relinquished by DOR's failure to seek tribunal clarification, multiple submissions here, and willful delay until the 11th hour here.

In addition, had there actually been a July 26, 2012 tribunal determination, DOR's "due diligence" required a Motion within days (Rule 240(b), SCACR) of appeal, not eight (8) months after perfection and nine (9) months after the issuance of the Order under appeal. Instead, the timing of its motion suggests that prior counsel for DOR had completed his research, reviewed the Rays' briefs, recognized the propriety of reversal and remand, and sought only to avoid the scrutiny of this Court to the Appellants' currently egregious and improper prejudice. The Order of July 12, 2013 gives this Court's imprimatur and express approval to DOR's "sandbagging" for eight (8) months, if any right to dismissal it truly had (which remains denied).

More importantly, DOR drafted, presumably researched, and finalized its own Brief. At no time did DOR raise, by motion or argument in its brief, the issues of determination, payment

or bond. At no time did it petition any Court for stay relief. Only as this Appeal approached Court of Appeals review and ruling, did DOR note some claim to an August 2012 right. By its text, the Order of July 12, 2013 overlooks DOR's prejudicial delay and, by its award, approves.

DOR's right to payment or bond, if any it had, was totally dependent upon the tribunal below. DOR sought no relief there, or here, during any reasonable time frame. Rule 240(b), SCACR. DOR failed to preserve and has consequently abandoned its conclusory claim. *State v. Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct.App. 2009).

Finally, the lack of tribunal specificity and the nebulous conclusory text of the DOR Motion should have been fatal to its demand. It is well settled that, regarding the enforcement of tax statutes, like the sole DOR cite here, "... the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989).

CONCLUSION

It is proper to acknowledge that the current attorney of record for DOR inherited this matter some twenty (20) days ago. On information and belief, none of the improprieties of the last twelve (12) months described in the Record, the Appellants' briefs, and the foregoing pages and paragraphs are attributable to him.

Nonetheless, while the Order under appeal granted Summary Judgment against the Appellants and denied even minimal discovery to them, it was not conclusive as to the determination required for the application of S. C. Code § 12-60-3370. The DOR Motion confirmed that defect. Respectfully, Judge Cureton's Order of July 12, 2013 overlooked both absences, misapprehended the effect, and ventured beyond the four corners of the Motion to reach a *sua sponte* determination that was not made below nor even alleged in the DOR Motion.

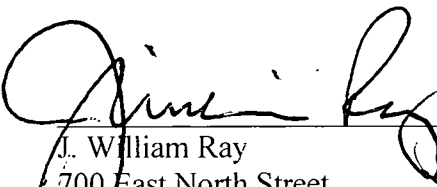
Accepting for argument only, DOR's right to demand payment or bond vested no later than the August 22, 2012 Notice of Appeal. Consequently, DOR failed to preserve any claim for

a right to payment or bond: it sought no Rule 59, SCRCPP, clarification below; it sought no remand for a determination; and it alleged no sum in its Motion. Respectfully, the Order of July 12, 2013 misperceives that DOR was awarded anything beyond Summary Judgment on liability alone and approval for its discovery refusals.

For the foregoing reasons and all those of the Appellants' Return, the Motion for Dismissal should have been refused and its demand denied. It is respectfully submitted that the Order of July 12, 2013 should be revisited and fully withdrawn/vacated. Due to the novel nature of this issue and the absence of reported cases, at least under the attendant facts and the current statute, it is further submitted that the Order should be revisited/reheard en banc.

WHEREFORE, because the Order of July 12, 2013 overlooks and misapprehends: the absence of a sum "determined to be due", DOR's failure to seek such specificity, DOR's dilatory failure to request/demand/move/petition for payment or bond (if any right it truly felt it had) until this appeal was finalized, and by DOR's neglectful and egregiously prejudicial eight (8) month delay, the Appellants respectfully Petition for a rehearing of the Order of July 12, 2013 and submit that it is proper for vacation/rescission. Moreover, due to the absence of precedent as to the current statute and attendant facts, the Appellants also suggest that such rehearing should be En Banc.

Respectfully submitted,



J. William Ray
700 East North Street
Greenville SC 29601-3013
(864) 313-5332

PRO SE/ATTORNEY FOR APPELLANTS

July 18, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 12-ALJ-17-0221-CC
Appellate Case No. 2012-212844

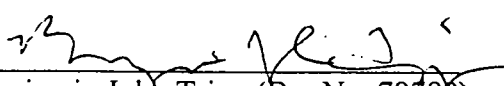
John Ray and Sherry Ray, Appellants,

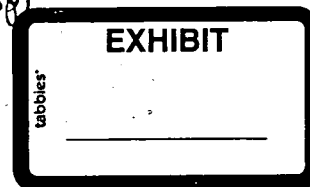
v.

South Carolina Department of Revenue, Respondent.

RESPONDENT'S MOTION FOR ORDER OF DISMISSAL

In accordance with Rule 240(e), SCACR, the Department moves for an order of the Court dismissing this appeal. S.C. Code Ann. § 12-60-3370 (Supp. 2011) required the Rays to post a bond for the taxes determined to be due by the ALC before filing this appeal. After due diligence, the Department understands that the Rays have not posted a bond with this Court or the ALC. Accordingly, the Department requests that the Court dismiss this appeal.


Benjamin John Tripp (Bar No. 79789)
Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Managing Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
Harry T. Cooper, Jr. (Bar No. 1383)
Executive Deputy Director



RECEIVED
APR 19 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge

Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

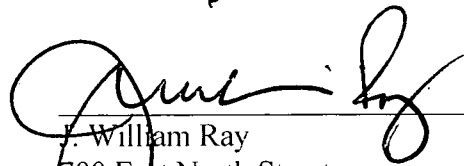
S.C. Department of Revenue,

Respondent.

PROOF OF SERVICE

I do hereby certify that a copy of the Appellants' Petition for Rehearing En Banc in the above captioned case has been duly served on the Respondent by placing the same in an envelope, with adequate prepaid postage affixed thereto, addressed as shown below, and properly depositing such copy of it in the United States Mail on the date below.

Aaron M. Scheuer, Esquire
Attorney for the Respondent S.C. Department of Revenue
P. O. Box 12265
Columbia, SC 29211



J. William Ray
700 East North Street
Greenville SC 29601-3013
(864) 313-5332
PRO SE/ATTORNEY FOR APPELLANTS

July 18, 2013

RECEIVED

JUL 22 2013

SC Court of Appeals

RECEIVED

JUL 22 2013

SC Court of Appeals