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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

Watertoys, LLC, d/b/a Tidalwave Watersports, ……Appellant,

v.

South Carolina Department of Revenue,……... Respondent.

RETURN TO MOTION TO DISMISS

On June 7, 2024, the Appellant filed a Notice of Appeal simultaneously with an appeal bond, by which the Appellant deposited $33,296.00 into escrow (I.O.L.T.A. account) to be held in trust in accordance with § 12-60-3370, S. C. Code, ann.,[1] S. C. Code, ann. On June 19, 2024, the Department of Revenue filed a motion asking this Court to dismiss the appeal with prejudice because it contends the appeal bond is $702.00 short and because it does not include interest. In its zeal to block the Appellant's access to the Court and to prevail by sharp practice, the Department makes the demonstrably false statement that Appellant "neither paid these taxes nor posted a bond for such taxes," which it contends defeats appellate jurisdiction. (Department's motion at page 1.

[1] Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals.

The Respondent softens its assertion in footnote 1, saying in its opinion, the appeal bond does not "constitute" a bond, which is far different than saying Appellant did not post a bond. The Department of Revenue repeats the misleading statement on page 2, saying again "Appellant has not paid or posted a bond for the amount of the tax including interest," and repeats the false statement again on page 4, "Appellant has neither paid nor posted bond for the tax determined by the ALC." The June 7th filings establish that Appellant irrefutably filed an appeal bond with the Notice of Appeal on June 7th. This is an undisputed fact. The Department's real argument is that the appeal bond is deficient because it does not include interest and the disputed funds are escrowed and not tendered to the Department. As discussed in detail below, the statute authorizing appeals gives a taxpayer the option to do either—pay the taxes or post a bond—and does not require a taxpayer to pay interest as condition of filing an appeal. The Department also asserts the appeal bond is deficient because it is short $702.00, an oversight Appellant admits and immediately corrected.

While the Department of Revenue seeks a dismissal with prejudice on the ground that this Court lacks appellate jurisdiction, it acknowledges in a correct statement of law (Motion to Dismiss page 3) that questions raised about the sufficiency of an appeal bond are appellate questions, not jurisdictional ones, and the fact that Department seeks to turn an immaterial and immediately corrected miscalculation in the amount of the appeal bond or the omission of interest in the appeal bond escrow as failing to invoke proper appellate jurisdiction is not only extreme sharp practice, but also at variance with the very authority it cites on page 3, explaining that alleged deficiencies in appellate pleadings are appellate questions for the Court to decide—they do not deprive the Court of jurisdiction.

Finally, the Department of Revenue should be sanctioned for violating the fundamental tenet of the attorney's oath of office—to refrain from misleading the Court or counsel about the state of the law. (See Attorney's Oath of Office and/or the *S. C. Rules of Professional Conduct*, Rule 3.3, Candor Toward the Tribunal and Rule 3.4, Fairness to Opposing Party and Counsel.) In footnote 3, the Department of Revenue cites two cases for the proposition that this Court twice dismissed tax appeals for failure to post an appeal bond. While the Department's representation about the Court's action is 100% correct, the Department obfuscates the fact that the Court dismissed the two cases because the appellant refused to file an appeal bond and, in fact, argued it was not obligated to file one. This Court dismissed the two cited cases (*CDT, Inc. v. S.C. Dep't of Rev*., 2021-001528 and *Patel v. S.C. Dep't of Rev.*, 2021-001547) because in each case, the two appellants decided the law relieved them from filing an appeal bond, contending each was excused from filing an appeal bond by operation of other statutes. The Respondent misplaces its reliance—again misleading both the Court and counsel—on *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004), an appeal dismissed because the appellant filed the Notice of Appeal outside of the time allowed for filing, which is a jurisdictional issue. Thus, reliance on these cases is dishonest, and citing those cases as controlling here is an affront to a lawyer's duty to speak honestly, especially when a lawyer is speaking for the vast power of the State, which has an obligation to treat all citizens fairly. (See the Department of Revenue's mission statement quoted in the Conclusion below.)

Discussion of the alleged deficiencies

The $702.00 error in computation of the appeal bond.

In providing the amount to Appellant to deposit in trust, the Appellant's counsel made a minor arithmetical miscalculation caused by relying on imperfect memory. In June, Belk, Cobb,

Infinger & Goldstein, P.A. sold its building and began the process of winding up, an incredibly stressful process that involved (and still involves) boxing up files and disconnecting from the firm server that managed all e-mail and file storage. (These difficulties continue.) Because counsel's computer network system was (and still is) disconnected and paper files boxed up, Appellant's counsel operated on a faulty memory for the amount necessary to for the appeal bond, inadvertently understating the amount in dispute by $702.00.[2] This minor error was immediately corrected by the attached amended appeal bond, attached here as Exhibit 1. Such a minor and temporary mistake is both excusable neglect under such circumstances and, more importantly, not a jurisdictional basis to prevent an appeal when there is no prejudice to the Department of Revenue in moving forward.

The putative prejudice the Department identifies in its motion to dismiss is a vague, undifferentiated allegation of harm to the people of South Carolina. ("Such action harms the State and its citizens." Motion to dismiss at page 5) The Department's ontological speculations overlook the definition of "escrow" and do not meet the legal definition of prejudice, which means the loss of an ability to defend (in this case, assert) a claim such as losing witnesses or evidence:

> **"Legal Prejudice**. A condition that, if shown, by a party, will usually defeat the opposing party's action; especially a condition that, if shown by the [respondent] will defeat a plaintiff's motion to dismiss a case without prejudice. The [respondent] may show that dismissal will deprive the [Department of Revenue] of a substantive property right or preclude the [Department of Revenue from raising a defense that will be unavailable or endangered." *Black's Law Dictionary*, 5th Ed.

In other words, the Department of Revenue seeks to short circuit the process because it is unwilling to defend its legal position on the merits, including, but not limited to the undisputed fact that from 1996 until 2018, the Department of Revenue agreed with the Appellant's legal

[2] On page 1 of its Motion to Dismiss, the Department states that it e-mailed the correct amount of the bond to Appellant's counsel. There is no dispute about this, but the Department was not aware that Appellant's counsel was in the chaotic midst of shutting down a law office.

position. Because the Administrative Law Court ended the case on summary judgment, the record is wholly undeveloped on what changed the Department's view in 2018. The Court of Appeals has never dismissed a case with prejudice because a Respondent objected to the sufficiency of the initial pleadings. To be fair to the Department of Revenue, with the benefit of hindsight, Appellant's counsel realizes the better practice would have been to telephone opposing counsel and verify the correct amount prior to filing the appeal bond instead of relying on memory, but the stress and confusion generated in vacating an office and closing a 50-year law firm makes for difficult operations, and the Department of Revenue cannot identify any legal prejudice flowing from the initial appeal bond being $702.00 short. The amount of taxpayer's tender into I.O.L.T.A. escrow was materially correct and immediately corrected upon first notice. Appellant respectfully submits that the $702.00 short fall is not a substantial deficiency, has already been corrected, and did not prejudice the Department of Revenue (or the people of South Carolina) in the slightest.[3]

The fundamental issue raised by the Department's motion to dismiss is whether South Carolina jurisprudence allows a complaining Respondent to defeat appellate jurisdiction because of its challenge to the sufficiency of Appellant's pleadings. The law is both well-developed and uniform in allowing litigants access to the Courts despite immaterial defects in pleading, especially those that are easily corrected. Coincidentally, in another tax exemption case, this Court addressed such sharp practice in its analysis of a dismissal in *Mictronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). There, the taxpayer missed a rescheduled court date because, like here, the taxpayer relied upon his memory for the new court

[3] The Department of Revenue displays sharp practice. Since the original appeal bond deposit into escrow—as allowed by statute—was for a slightly incorrect amount, ordinary courtesy would generate a phone call identifying the slightly insufficient deposit, which could have been immediately corrected and relieved both the parties and the Court of having to address this issue in an already overburdened system. Instead, the Department laid in wait and now seeks to profit by sharp practice.

date and missed the hearing. The Administrative Law Judge dismissed the case with prejudice. The taxpayer appealed to the circuit court, and the circuit court remanded the case to the Administrative Law Judge to make findings of fact and conclusions of law "about whether Mictronics should be relieved of its default." *Mictronics* at page 509. Before the Administrative Law Court the second time, the administrative law judge affirmed the dismissal, concluding Mictronics received "adequate notice of the hearing and that its failure to attend could not be excused based on mistake, inadvertence, surprise, or excusable neglect." The circuit court reversed a second time for obvious reasons, and the Department of Revenue took an appeal to this Court, which affirmed the circuit court's decision to allow the taxpayer an opportunity to be heard. In affirming the circuit court, this Court said:

> Here, Mictronics made an error with respect to the hearing date and immediately sought relief from the dismissal. In *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986), this court found that a trial judge abused his discretion in refusing to grant a motion to set aside a default judgment granted after an answer was received one day late. The court there held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." 288 S.C. at 61, 339 S.E.2d at 525. This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. *Id.*; see also *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct. App. 1990) (finding sanction dismissing counterclaim too severe). We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.

Here, the Appellant made an inconsequential ("good faith") error in posting a slightly incorrect appeal bond amount (the legal issue of interest is discussed separately below) because counsel relied on an imperfect memory while temporarily disconnected from files by the unusual circumstances brought about by selling a building and closing a law office. The pleadings demonstrate the existence of a meritorious defense, and only prejudice identified by the Department of Revenue is a vague, philosophical speculation about the citizens of South Carolina

metaphysically affected by a taxpayer having his day in court. Appellant easily meets all the four criteria established by this Court in *Mictronics* to qualify for relief: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics*, page 511, citing *New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993 (quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 82 (1985). The immaterial discrepancy in the appeal bond coupled with counsel's immediate correction demonstrates Appellant meets the *Mictronic* criteria with ease, especially since Appellant did not fail to post an appeal bond as the Department misrepresents the facts, but rather, it simply tendered the wrong amount, short by $702.00. (Interest is addressed on page 9 in detail.) Upon receiving the Department of Revenue's motion to dismiss, filed without consultation[4] with opposing counsel, the undersigned immediately telephoned counsel, explained the reason for the mistake and informed counsel the $702.00 deficiency would be immediately corrected. South Carolina law does not require dismissal, especially with prejudice, when an omission is minor, and the application is timely filed. Even the *South Carolina Appellate Court Rules* make clear that appeals will not be dismissed for correctible errors in filing. See Rule 204: "Improperly Filed Cases. In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." There is no dispute that Appellant timely filed an appeal bond simultaneously with the Notice of Appeal as required by statute, and the inadvertent tender of a slightly incorrect amount does not deprive this Court of appellate jurisdiction.

Is a taxpayer required to pay the disputed funds to the

[4]There is no duty to consult prior to filing a motion in the Court of Appeals. There is in circuit court: Rule 11(a). The undersigned's policy is always to consult prior to filing any motion except summary judgment.

Department of Revenue before appealing?

The Department asserts a demonstrably frivolous argument, ignoring the rules of statutory construction and obfuscating the plain meaning of the statute. The Department of Revenue does this by ignoring the General Assembly's clear and unambiguous **disjunctive** statement, quoted in boldface by the Department of Revenue on pages 2-3 of its Motion to Dismiss: "Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals." The Department puts its bold face emphasis on "**before appealing the decision to the court of appeals**," (Motion to Dismiss, page 3) and ignores the disjunctive, "or," where the emphasis belongs. The General Assembly gives taxpayers an option—either "pay" or "post a bond" for the disputed taxes. It is one thing for the Department of Revenue to allege the appeal bond is not properly executed, but it loses credibility when it says the Appellant failed to file one. When the Respondent forces the taxpayer and this Court to spend unproductive time and energy on a statute so clear, it burdens everyone with unproductive work and is anathema to judicial economy. As discussed in more detail in the next section further addressing the rules of statutory construction, the Department plows over the disjunctive "or" in the statute. The General Assembly gives the taxpayer the option of either paying the taxes to the Department under protest **or** posting an appeal bond. Notably absent from the Department's Motion to Dismiss is any supporting authority that escrowed funds are not sufficient surety for an appeal bond. Even in cases of interpleader (Rule 22(b) *S. C. Rules of Civil Procedure*), a litigant has the option of tendering money to the Clerk of Court **or** providing a bond "payable to the clerk of the court in such amount and with such surety as the court may deem proper, . . ."**)** (emphasis on "or" added) An appeal bond is nothing more than a pledge to pay, while the deposit into an I.O.L.T.A. account

is more available and more liquid than a pledge from a bonding company. The deposit is a sufficient surety—and Respondent identifies no authority or reason otherwise—and it is troubling that the Department of Revenue prefers to manufacture a sideline controversy instead of making its concern or objection known and suggesting a solution before burdening an already overworked judicial system, especially where the applicable statute is so clear in giving taxpayers the option to pay or post. Instead, the Department defaults to sharp practice adding to the workload of an already overtaxed judicial system—not to mention forcing a struggling small business to divert resources to respond—all to defeat a litigant's access to judicial review without making the slightest effort address the issue with a taxpayer. Such conduct is at variance with the Department's published mission statement to "administer the revenue and regulatory laws of the state with integrity, effectiveness and fairness to all taxpayers." This Court should not condone State sharp practice.

Is interest a penalty?

A central pillar of the Department's motion to dismiss is Appellant's putative failure to include "interest" in the appeal bond. The Department contends the Appellant must pay the interest in full as a precondition to filing the appeal and the failure to do so defeats the Court's jurisdiction. The Department's contention is wrong for two reasons.

The Rules of Statutory Construction

Just as the Department misrepresents § 12-60-3370, S. C. Code, ann. by disregarding the disjunctive "or," it also adds an invisible requirement that the appeal bond include all interest even though the statute is clear and unambiguous that the appeal bond includes only the taxes the Department claims are due. The governing statute, §12-60-3370, quoted **in full** above is both clear and concise about the appeal bond required. The statute requires an appeal bond for "all taxes, **not**

including penalties or civil fines." (emphasis added) The Department of Revenue contorts the ordinary rules of statutory construction and seeks to deprive the Appellant of the fair right to be heard[5] because it contends that "interest" is categorically different than a "fine" or a "civil penalty," and the General Assembly meant to include interest in its statute. The entire world knows that statutory interest is a penalty for noncompliance, *i.e.* damages—no one voluntarily pays interest. The General Assembly omitted the word "interest" from the statute, and the General Assembly knows how to write statutes to mean what they say, and the Courts of this state are equally clear in how to read them, including a prohibition of adding words that are absent. See *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). In explicating the rules of statutory construction, the Supreme Court said:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd*., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).
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> . . .
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> The canon of construction *"expressio unius est exclusio alterius"* or *"inclusio unius est exclusio alterius"* holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its

[5] This case also demonstrates a surprising failure to provide basic, fundamental due process. Appellant's counsel has been tossed out of Court more than once, but never in 42 years of an active trial practice has counsel been thrown out of court on summary judgment without affording the resisting party an opportunity to appear. Even during the COVID pandemic when courthouses were closed, judges still provided hearings by computer and telephone. In preparing this Return, counsel polled active trial practitioners, and has not yet discovered an anecdotal, historical instance in which a judge ended a case on summary judgment without allowing counsel to speak before pronouncing judgment.

> operation, as it does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

The statute allowing an appeal from a Department's claim could not be clearer, and the Department of Revenue cannot defeat a taxpayer's access to judicial review by resetting the appellate procedure to its liking. To avoid the clear holding of §12-60-3370, the Department shifts direction and cites a collection statute §12-54-25, S. C. Code, ann. as authority for its argument that the appeal bond must include interest. First, §12-54-25, S. C. Code, ann. is a collection statute—it says nothing about appellate jurisdiction or appellate practice. Second, it says "interest is due on the unpaid portion from the time the tax was due until paid in its entirety." Assuming *arguendo* the Department's misplaced reliance on this collection section overrules § 12-60-3370 as the appellate jurisdictional statute, according to the Department of Revenue, the date the tax became due is the date the Administrative Law Court determined them to be due, which at the earliest is the date of the Order for Summary Judgment, April 18, 2024, or the latest, May 14, 2024, when the Administrative Law Court denied Appellant's motion for reconsideration.

Interest is obviously a form of penalty.

There are only two ways debtors pay interest on money, and neither is voluntary. (No one ever walked into a bank and said: "I want to borrow money, but I do not agree to pay interest.") The first is by negotiated agreement, loans, mortgages, *etc.* All loans include a negotiated (and amortized) rate of return, which the courts enforce. With credit card debt, interest rates often increase as punishment or penalty for late payment. A negotiated rate of return is not implicated in this case, and neither are reoccurring credit charges, but even in those purely contractual civil

disputes, the law imposes pre and post judgment penalties in the form of interest, and it is impossible to characterize the imposition of such interest, whether statutory or negotiated, as anything other than a penalty, *i.e.* damages:

> Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. Such interest is merely another element of pecuniary damages and is in the nature of compensatory damages.
>
> *Am. Jur. 2d* "Damages" § 426 Interest Generally

The interest implicated in this case is the second form of interest: statutory interest, which if not "punitive," are clearly coercive, designed to compel taxpayers to adhere to the State's demands, which is, as identified above, the State's analogue to the civil court's compensatory damages. Just as interest is a punitive consequence for late payment in the civil context, the law imposes a statutory punishment in the form of interest on taxpayers as an administrative cudgel to compel citizens to obey the law, and no litigant must be punished first (in a civil case) as a condition to judicial review. The purpose of interest is to compel a debtor to perform, and interest may continue to accrue as the case progresses, but it is not collectible unless the taxpayer's appeal fails, and the General Assembly is clear that the only condition a taxpayer must meet to gain access to judicial review is either payment or an appeal bond for the taxes allegedly due. As the Supreme Court said in *Sears*: "The reason most frequently given for the majority's position is that the purpose of post judgment interest is **to penalize** nonpayment of a judgment by a judgment debtor." *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) (emphasis added) Interest as a form of penalty is so obvious that the Department's assertion to the contrary is frivolous.

Conclusion

While the taxpayer made an immaterial computational error in the amount in the timely filed appeal bond, and the circumstances under which the error occurred are both extraordinary and excusable, and the taxpayer immediately corrected the deficiency by tendering an additional

$702.00 into the I.O.L.T.A. escrow account, and the Department can demonstrate no legal prejudice flowing from the minor error, it is unconscionable—and inconsistent with its mission statement—that the Department of Revenue seeks to prevent the taxpayer from judicial review for a small error in a timely filed appeal bond. This bellicose and aggressive strategy is especially galling where the Department's claim of an alleged sales tax deficiency is a recent change in its policy, which it asserted for the first time in 2018. From 1996 until 2018, the Department of Revenue agreed with the taxpayer's exemption even though it put Tidalwave through an audit in 2014. This undisputed fact is in Michael Fiem's May 6, 2024, affidavit which the Administrative Law Judge refused to consider: "Even though we were in business since 2005, and audited by the Department of Revenue in 2014, it was not until late 2018 that the Department of Revenue made for the first time, a demand that we collect an admissions/amusement tax for parasailing passengers." (Affidavit of Michael Fiem, attached here as Exhibit 2.) The taxpayer has no idea what changed from 1996 until 2018, and the taxpayer has no idea why the Administrative Law Court determined that there is not a genuine issue of material fact in a highly disputed matter. However, it is indisputable the taxpayer timely filed an appeal bond in accordance with the governing statute, and any deficiencies in the filing are easily correctible without the slightest prejudice to the Department. As the Department states repeatedly, its mission is to collect taxes fairly and not oppress a taxpayer, but its ultra-aggressive position on procedure in this case suggests otherwise. There is no principle that justifies dismissing a properly filed appeal, and the Appellant respectfully requests that the Motion to Dismiss be denied, and if the Court finds deficiencies in the appeal bond, that the Appellant be afforded a reasonable time to correct them.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that I served the within Return to Respondent's Motion to Dismiss upon the Department of Revenue, by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, S. C. Department of Revenue, 300 A Outlet Pointe Blvd., Columbia, South Carolina 29210 and via electronic mail to marcus.antley@dor.sc.gov this 26th day of June, 2024.

June 26, 2024

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