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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

Appellate Tracking Number: 2024-000962

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.

INITIAL BRIEF

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> Did the Administrative Law Judge misapply the rules of statutory construction to Exemption No. 13, of § 12-21-2420 S. C. Code, ann.?
>
> Did the Administrative Law Court misapply the rules of statutory construction in requiring the appellant to post interest as a condition of judicial review when the statute requires only taxes, not including "fines and penalties"?

STATEMENT OF CASE

Tidalwave Watersports began in 1996. It rents jet skis and conducts sightseeing water tours, some of which include an option to parasail from the vessel while it is underway. As discussed in detail below, this distinction is important because the admissions/amusement tax statute addressed in this case exempts businesses from collecting the admissions/amusement tax: "On admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter." § 12-21-2420 (13), S. C. Code, ann. Title 12 is the Title on "Taxation," and Article 17, which begins at § 12-21-2410, is the Article on "Admissions Tax." § 2410 assesses a 5% tax on "paid admissions to places of amusement." The statute lists 16 exemptions. Number 13 exempts: "(13) On admissions to boats which charge a fee for pleasure fishing, excursion, sightseeing and private charter."

The current owners purchased the business as a going concern in 2005. From 1996 until 2021, the department of Revenue did not require Tidalwave to collect or remit the admissions/amusement tax despite conducting an audit in 2014. (R.O.A. page ___[affidavit of Michael Fiem]) Because § 12-21-2420, S. C. Code, ann. imposes a 5% tax on "admission to places of amusement," the Department of Revenue refers to these collections as both an "admissions tax" and/or an "amusement tax" in various administrative publications. Therefore, appellant uses the terms interchangeably.

On September 16, 2021, the Department of Revenue notified appellant it would conduct a sales tax audit on October 20, 2021. (R.O.A. page ___[notice of audit]) Thereafter, on February 17, 2022, the Department of Revenue notified the appellant that it calculated Tidalwave was allegedly in arrears in the principal sum of $34,511.15 for failing to collect and remit the

amusement tax. The Department also alleged Tidalwave owed interest in the amount of $1,527.66 and penalties of $11,476. (R.O.A. page ___[notice of tax deficiency]

In accordance with Department of Revenue procedure, the taxpayer challenged the decision administratively on March 17, 2022, pointing out that the General Assembly exempted "sight-seeing, excursion and private charter" on boats. (R.O.A. page ___[protest letter]) On June 15, 2022, the parties convened at the Department of Revenue for a settlement conference, and when that failed to resolve the issue, the Department of Revenue notified the appellant by mail on August 29, 2022, that the Department would not adjust his alleged tax deficiency. (R.O.A. page ___) The Record is silent as to the Department of Revenue's motivation to abandon its 25-year legal position (1996-2021) on the admission/amusement tax.

On January 24, 2023, the Department of Revenue denied Tidalwave's administrative appeal and reaffirmed its decision that the taxpayer owed an alleged tax deficiency in the amount of $34,511.15 (plus interest of $1,527.66 and penalties of $11,476.39) and transferred the case to the litigation department. (R.O.A. page ___[Cardona ltr. Jan. 24, 23]) The Department of Revenue issued its Department Determination on august 18, 2023, alleging Tidalwave owed $53,163.55, $33,98.40 in taxes, $4,808.41 in interest, and $14,356.74 in penalties.

On September 15, 2023, the taxpayer filed an appeal with the Administrative Law Court, and after pre-hearing briefing, the appellant moved for summary judgment on March 26, 2024, and the Department of Revenue moved for summary judgment on March 29, 2024. (R.O.A. pages ____, _____, and _____[Notice of Appeal, motions for summary judgment]) Both parties filed pre-hearing briefs, a joint stipulation of 8 facts, and supplemental briefing. (R.O.A. pages __, __, __, & __.[Pre-hearing briefs, Memoranda of Law, Stipulation of Facts])

The Administrative Law Judge never scheduled a hearing on the motions for summary judgment either in person, via WebX, or by telephone. The Court never notified the parties that the Court would decide the summary judgments without affording the parties an opportunity to address the Court. As discussed in more detail below, Rule 56(c), *South Carolina Rules of Civil Procedure* guarantees a party resisting summary judgment a minimum of ten days' notice prior to the **hearing** to decide the issue. The Supreme Court reversed a grant of summary judgment when the prevailing party failed to provide ten days' notice of the hearing to the party resisting summary judgment. *Dedes v. Strickland*, 307 S.C. 152, 414 S.E.2d 132 (1992) The *Rules of Procedure* are applicable to the Administrative Law Court by Rule 68 *Administrative Law Court Rules*.

On April 18, 2024, the Administrative Law Court entered an Order denying the taxpayer's motion for summary judgment and granting summary judgment for the Department of Revenue. On April 24, 2024, the taxpayer timely moved for reconsideration, which the Administrative Law Court summarily denied on May 14, 2024. (R.O.A. ppgs. ___ and ____) On June 7, 2024, the taxpayer filed a Notice of Appeal, and in accordance with §12-60-3370, S. C. Code, ann, appellant filed a properly executed appeal bond and deposited the disputed taxes of $33,296.00 into counsel's *I.O.L.T.A.* account. (R.O.A. pages ___-___[Notice of Appeal and appeal bond])

§12-60-3370, S. C. Code, ann., S. C. Code, ann. Says: "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." On June 19, 2024, the Department of Revenue filed a motion asking this Court to dismiss the appeal with prejudice because it correctly identified the tender into escrow of the $33,296.00 disputed taxes was $702.00 short and because the tender did not include interest. (R.O.A. page ___) As to the $702.00 shortfall, appellant's counsel admitted the error and took responsibility for

the mistake, correcting the shortfall by depositing an additional $702.00 into escrow on June 24, 2024, and filing an amended appeal bond reflecting the corrected amount of $33,998.00.[1] (R.O.A. page ___[amended appeal bond]) In its motion to dismiss, the Department of Revenue alleged appellant forfeited appellate jurisdiction because it failed to pay the disputed taxes to the Department as required by its interpretation of § 12-60-3370, S. C. Code, ann. (R.O.A. page ____[motion to dismiss]) In its push to prevent judicial review, the Department infelicitously asserted appellant "neither paid these taxes nor posted a bond for such taxes." (Department's motion to dismiss at page 1, R.O.A. page ___) Obviously, as the Department of Revenue's pleadings conceded, appellant "posted a bond for such taxes," so the Department of Revenue hedged its bet by softening its assertion in footnote 1, saying, **in its opinion**, the appeal bond did not "constitute" a bond for reasons it has yet to identify, which is far different than saying appellant did not post a bond. The Department of Revenue doubled down on its misleading representation, saying on page 2, "Appellant has not paid **or** posted a bond for the amount of the tax including interest," and repeats the inaccurate statement again on page 4, "Appellant has neither paid nor posted bond for the tax determined by the ALC." The disjunction "or" in § 12-60-3370 is controlling, for while it is true appellant did not post interest, there is no doubt it posted the disputed tax and whether interest must be included is an appellate question properly raised to this Court in the September 26, 2024, Amended Notice of Appeal. (R.O.A. page ___) As the Record on Appeal demonstrates (R.O.A. page ____[appeal bond]), appellant filed its initial appeal bond on June 7th along with the Notice of Appeal. This is an undisputed procedural fact. The Department's real argument is that the appeal bond was deficient because it originally did not include interest, and the disputed funds are escrowed rather than tendered to the Department. On July 18, 2024, this

[1] Counsel relied on imperfect memory in making the initial deposit because we were relocating from our office and temporarily separated from files.

Court remanded the case to the Administrative Law Court to set the appeal bond amount. On remand, the Administrative Law Court issued its Order on September 4, 2024, requiring the appellant to include interest in the appeal bond. R.O.A. page ___[Order] As set forth above, on September 26, 2024, appellant filed an amended Notice of Appeal challenging the Administrative Law Court's decision that interest must be included in an appeal bond, and, in an abundance of caution, filed a supplemental appeal bond on September 26, 2024, including the disputed interest deposited into the *I.O.LT.A.* account. R.O.A. page ___[amended appeal bond] As mentioned above and discussed in detail below, the statute authorizing appeals gives a taxpayer the option to do one or the other—either pay the taxes to the Department of Revenue or post a bond—and specifically excludes "fines and penalties" from the bond.

The *Rules of Appellate Procedure*, Rule 208(b)(1)(C), require that the Statement of Case "not contain contested matters," but it is an important, non-argumentative procedural statement of case to disclose that even though the Department of Revenue sought a preemptive dismissal with prejudice on the ground that this Court lacks appellate jurisdiction, it later acknowledged on page 3 of its Motion to Dismiss (R.O.A. page ____) that questions about the sufficiency of an appeal bond are appellate questions, not jurisdictional ones, and thus the question is properly before the Court.

STANDARD OF REVIEW

On review of an order granting summary judgement, the appellate court applies the same standard as that used by the trial court. *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016) Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d

537, 543 (1991), *Murphy v. Tyndall*, 384 S. C. 50, 681 S.E.22d 28 (Ct. App. 2009) When the evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury, rather than resolved at the summary judgment stage. *Murphy v. Tyndall, ibid*. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed by the court considering a motion for summary judgment in the light most favorable to the nonmoving party; if triable issues exist, those issues must go to the jury. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006)[2] "In determining whether any triable issues of fact exist, a court considering motion for summary judgment must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Quail Hill, LLC. v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010) This is so because summary judgment is a "drastic remedy," and should not be imposed to deprive a litigant of a trial on disputed factual issues: "Since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999), *Gary v. Askew*, 813 S.E.2d 717, 423 S.C. 47 (S.C. 2018). As stated by this Court in *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003):

> Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Hedgepath v. American Tel. & Tel. Co*., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Bayle v. South Carolina Dep't of Transp*., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is

[2] There is no jury in this case, but the absence of a jury does not alter the analysis of whether appellant created a genuine issue of material fact that can only be resolved by a trial on the merits.

no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co*., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co*., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt's injury are not disputed, application of the law to the facts is disputed, and is a novel issue.

See also *Wade v. Berkely County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998) where this Court held a question of whether the plaintiff was or was not acting in the scope of his employment at the time of an automobile collision could not be decided at summary judgment even though the facts were not in dispute:

Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. *Id.* Summary judgment is not appropriate if facts are conflicting, or if the inferences to be drawn from the facts are doubtful. *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 417 S.E.2d 631(Ct. App. 1992). Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. *Carolina Prod. Maintenance, Inc. v. United States Fidelity and Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992)

ARGUMENTS

Argument 1. The Administrative Law Court erred in granting summary judgment without affording appellant a hearing before imposing the "drastic remedy" of summary judgment.

Rule 56 (applicable to the Administrative Law Court by *Administrative Law Court Rule* 68) requires that the Court grant the non-moving party a hearing prior to imposing the "drastic remedy" of summary judgment: "The motion shall be served at least 10 days **before the time fixed for the hearing**." *Dedes v. Strickland*, 307 S.C. 152, 414 S.E.2d 132 (1992), emphasis added, quoting Rule 56(c), *S. C. Rules of Civil Procedure.* There, the Supreme Court reversed a grant of summary judgment because the moving party failed to provide the necessary 10-day notice of the date and time

fixed for the hearing. Here, the Administrative Law Court granted summary judgment (and denied reconsideration) without a hearing. This was error because the Administrative Law Court prevented appellant an opportunity to address the Court, which is a denial of the right to be heard at a meaningful time and in a meaningful manner. See Article 1, § 22, S. C. Constitution: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.

The U. S. Supreme Court held such a failure is the definition of legal prejudice because it is a denial of fundamental due process that cannot be cured by an after-the-decision opportunity to address the Court. See *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972). *Fuentes* is both relevant and instructive because that case involved a replevin action for repossessed furniture, and the important holding in that case is the Supreme Court's emphasis that even a post decision hearing does not cure the legal prejudice flowing from being deprived of an opportunity to be heard in a meaningful manner, which means at a meaningful time. A meaningful time means **before** the Court decides the case, not after. In short, the Administrative Law Court imposed the "drastic remedy" of summary judgment without appellant's full participation. While appellate courts routinely decide cases without oral arguments, they do so only on a fully developed record that necessarily includes a litigant's right to participate in the process by addressing the trial Court. This is especially critical here because while many (but not all) of the underlying facts are not in dispute, there is a wide gulf between the inferences to be drawn from them. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003), citing *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 and many other cases.

When the Administrative Law Court deprived appellant of an opportunity to present its case on summary judgment, appellant suffered foundational legal prejudice because the definition of due process is the right to be heard at a meaningful time in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972). This denial of due process is a salient issue here because in granting summary judgment, the Administrative Law Court grounded its decision on a palpably erroneous and highly disputed premise: "In this case, the parties **agree that there is no genuine issue of material fact relevant to the transactions at issue**." (R.O.A. page ___[Order page 2], emphasis added) This erroneous and highly disputed statement is refuted by the record, but appellant had no opportunity to address the Court's misapprehension until after the Court declared it. As *Fuentes* holds, even a post-decision hearing does not cure the prejudice, a prejudice compounded here when the Court later held in denying reconsideration that appellant never raised the central issue in the case! The erroneous misreading of the record shines a bright light on the prejudicial harm resulting when courts exclude litigants from addressing the issues. The record shows that on March 20, 2024, the parties submitted to the Administrative Law Court 8 stipulated facts, R.O.A. page ___, but neither party stipulated there is no genuine issue of material fact, and each party asserted "the conclusions or inferences to be drawn from them" were diametrically opposed, thus making summary judgment for the Department of Revenue inappropriate. See *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 468 (S.C. Ct. App. 2003):

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). . . . Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)."

Thus, the Administrative Law Court's statement is both erroneous and highly prejudicial. The Administrative Law Court's error demonstrates why litigants should not be frozen out of the litigation

process, and why the give-and-take of courtroom debate is the essential, *sine qua non* of advocacy. Such a clearly erroneous statement is guaranteed legal error when trial courts freeze litigants out of the process.[3] Because the parties agree on what taxes were or were not collected and remitted does not bridge the gap that the parties are widely divergent on both the definition of parasailing and the application of Exemption 13 to appellant's operation. There is no definition of parasailing in the Code, so parasailing cannot be excluded from "sightseeing" or "excursion" or "private charter" as a matter of law. The Administrative Law Court erred in allowing the Department of Revenue to usurp judicial review by defining parasailing to mean anything it wants to increase collections, and the Court abdicated its judicial responsibility by improperly relying on "deference." Thus, this case is lightyears away from "the parties agree that there is no genuine issue of material fact relevant to the transactions at issue." (Order under review at page ___) In fact, the parties could not be more opposite about the "application of the law" to Tidalwave's operation, and many cases instruct trial courts that an agreement on facts does not mean the absence of a genuine issue of material fact, and the Administrative Law Court erred in inverting the summary judgment standard. See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co*., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co*., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

Nowhere is the Administrative Law Court's error more obvious than in its ignoring appellant's affidavit or the fact that for over 20 years, the Department of Revenue's interpretation of the statute aligned with the appellant's interpretation, either of which creates a genuine issue of material fact requiring further inquiry "as to the conclusions or inferences to be drawn from [the

[3] It remains to be seen if algorithms and artificial intelligence replace trial lawyers and make courtrooms obsolete.

facts]." The Administrative Law Court never allowed the appellant an opportunity to address the Court to make any of these points. Thus, the case should be reversed and remanded, assigned to a new judge who will take a fresh look at the **evidence** and the inferences properly drawn from it and allow appellant to participate.

The legal prejudice flowing from the lack of opportunity to address the Court on summary judgment follows through to the Administrative Law Court's surprisingly aggressive May 14, 2024 rejection of appellant's motion for reconsideration. (R.O.A. page ___) There, the Administrative Law Court decided appellant raised the statutory interpretation issue "for the first time" in seeking reconsideration! The Administrative Law Court held:

> In its motion to Reconsider, Petitioner raises for the first time an assertion that a genuine issue of material fact exists as to whether parasail rides fall under the exemption to the admissions tax for admission to boats which charge a fee for pleasure fishing, excursions, sight-seeing, and private charter."
> R.O.A. page ___[Order at page 1]

This shockingly erroneous conclusion demonstrates why it is a bad idea to decide cases without the litigants' participation, because this record bursts at the seams with appellant's raising this issue frequently, starting from the earliest opportunity. Here is appellant's May 2, 2022, framing of the issue for the Department of Revenue's administrative review, which appellant specifically incorporated into its September 5, 2023 appeal to Administrative Law Court (R.O.A. page ___) :

> Thank you for allowing us an opportunity to present our position at an informal. Conference. I understand this will be on Tuesday, May 11, 2022, but I do not know the time. (I am scheduled to be in court that day at 1:00 p.m.)
>
> In order to avoid ambushing you on May 11th, I hope you will allow this letter to serve as our memorandum so that you will know in advance of May 11th our legal position and the reasons for it. That way, you can run it by general counsel if you are so inclined and be prepared in advance of the date and time of the informal conference.
>
> Our legal position is simple and based on the straight-forward, well-established rules of statutory construction. As you are aware, the General Assembly passed § 12-21-2420 in 1929, and the legislature as amended it frequently since that time, the most recent

amendments occurring in July 2021. This section authorizes the Department of Revenue to collect taxes on "admissions to places of amusement" in the amount of 5% of the ticket price. The section then lists 16 exemptions, and Exemption No. 13 is our topic of conversation.

. . .

The Legislature included exemptions, one of which, number 13, reads as follows:

However, no tax may be charged or collected:
(13) On admissions to boats which charge a fee for pleasure fishing, excursion, sightseeing and private charter.

Tidalwave's activities fall under this exemption as it provides "excursion," "sightseeing," and "private charter."

In order to justify imposing an accommodations tax on Tidalwave, the Department would have to amend the Legislature's exemption by carving out a definition of "parasailing" that takes it out of "excursion" or "sightseeing" or "private charter." This is something the Department cannot do. "Parasailing" is an activity that occurs only on board my client's vessel and does not involve "entertainment, dancing, or drinking in a social environment." It is sightseeing and specifically exempt from the accommodations tax. In fact, any of the terms, "excursion" or "sightseeing" or "private charter" capture my client's activities. For example, if I hire Tidalwave to take me to view Fort Sumter, it matters not whether I take in the sight from the deck of the boat or from a parasail tethered to the boat. (I think we can agree that being aloft provides a better view.) However you examine the activity, the entire process takes place on the vessel and involves all three of the exempted activities. We turn now to the rules of statutory construction and apply them to these facts. . . .
(R.O.A. page ___[Memo to Jessica Frazier, Field Audit, May 2, 2022])

Appellant cannot explain how the Administrative Law Court overlooks this central issue in the case or why appellant raised it for the first time on reconsideration when appellant raised it repeatedly at every level of the litigation. The Court's error demonstrates again why litigants should not be excluded from courtrooms. Almost any page of the record refutes the Administrative Law Court's demonstrably erroneous statement. It is impossible to review this record and overlook the appellant raising this central issue **at every level**! Appellant raised it before the administrative appeal (R.O.A. page ___[May 22, 2022, corresp. to Jessica Frazier quoted above]. Appellant raised it in pre-hearing briefing to the Administrative Law Court: "Tidalwave's activities fall under this exemption

as it provides 'excursion,' 'sightseeing,' and 'private charter.'" (R.O.A. page ___[pre-hearing brief] Appellant filed an affidavit—ignored by the Administrative Law Court—setting out the precise issue (R.O.A. page ___[Feim affidavit]: "We provided sightseeing charters, excursion/tours as set forth in the Stipulation of Facts." Likewise, the joint stipulation of facts (R.O.A. page ___) identified the issues as follows:

> Pursuant to S.C. Code Ann. § 12-6-3320 (2014), the parties stipulate to the following:
>
> 1. During the September 1, 2018 – December 31, 2021 (Periods at Issue), Petitioner operated a water sports business based out of Isle of Palms, South Carolina.
>
> 2. Petitioner offered various water activities including ecotours, jet ski rentals, and parasailing rides.
>
> 3. When a passenger engages in parasailing, the Petitioner launches the passenger from the motor vessel while it is underway, and the passenger returns to the vessel at the completion of the parasailing ride.
>
> . . .
>
> 10. The Tax Code (Title 12) does not contain a definition of "parasailing."

Finally, appellant extensively briefed the issues for the Administrative Law Court. Appellant's April 24, 2024, motion for reconsideration (R.O.A. page ___) reviewed both the facts and the law for the Administrative Law Court, including this passage:

> **4. Ambiguous vs. Precise**
>
> Finally, the Order under review is on both sides of the debate of whether § 12-21-2420 is ambiguous or precise. If it is precise (and it is), then the Department cannot impose an admissions/amusement tax on Petitioner because the statute is clear and because Petitioner's entire business is connected to sightseeing/excursion/private charter on a boat, and as set forth above, the Department does not possess veto power over the General Assembly. The parties can debate whether an eco-tour or dolphin watching is an "excursion" or "sight-seeing" or "private charter" until the end of time, another distinction without a difference because the General Assembly exempts sight-seeing activities on **boats**. On the other hand, if the Court believes the question being asked is ambiguous, then the Court must resort to the ordinary rules of statutory construction to answer the question whether "para sailing" is a species of the genus "sight-seeing," "excursion," or "private charter," which is not something that can be determined at summary judgment. When the Court writes on page 4 of the Order under review that "[t]he parties do not dispute any of the

material facts of this case," that statement begs the question[4] before the Court because the question is not how expansive can the Department stretch ordinary language but whether the General Assembly spoke clearly or not. The parties do agree that all of Tidalwave's activities take place on the water and involve sight-seeing, excursion, and private charter. The dispute is whether parasailing is a distinct activity excluded by the definitions of "sight-seeing" or "excursion" or "private charter," and on this question, the parties could not be further apart. As a result, the "conclusions or inferences to be drawn from them" is widely divergent, which makes summary judgment for the Department of Revenue improper. See *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co*., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co*., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

The parties agree what the statute clearly and unambiguously says and what Petitioner's operation is, but they are miles apart on the Department of Revenue's assumption that "sight-seeing," "excursion," and/or "private charter" excludes parasailing, an assertion based on nothing more than the circular reasoning of "Because I say so." Tidalwave's operation is the dictionary definition of "private charter" because its patrons "charter" the vessels for private tours. "Charter, a mercantile lease of a ship or some principal part of it." *Webster's Seventh New Collegiate Dictionary* The *Oxford Languages* definition is: "the reservation of an aircraft, boat, or bus for private use," which is precisely Tidalwave's activities. The synonyms are: "hire, lease, retain, pay for the use of, book, reserve, engage." Once again, these precisely describe Tidalwave's business. The Petitioner asks nothing more than to apply the words of the statute in their plain and ordinary meaning, while the Administrative Law Court bestowed unbridled definitional discretion

[4] The Administrative Law Court committed the fallacy of begging the question or circular reasoning. "The fallacy of begging the question is generally said to be committed when we assume the very thing to be proved (whether in the same or different words), or a more general form of the thing to be proved. For example, we are said to commit this fallacy when we argue that God exists because it says so in the Bible, where our acceptance of what is said in the Bible rests on our belief that its writing was inspired by God." Howard Kahane, *Logic and Philosophy*, (Wadsworth Publishing, 1973) p. 237 Here the Administrative Law Court grounds its fallacious conclusion on (1) its erroneous inference that a stipulation of selected facts leads to one, and only one, conclusion, thus inverting the summary judgment standard, and (2) the Department of Revenue's statutory interpretation is binding to which courts must "defer.". The first error is a violation of the summary judgment standard as well as logically invalid; the second error—unbridled "deference"—is a misapplication of law, discussed in the next section.

on the Department of Revenue under the rubric of "deference." The Department of Revenue asserts it can expand the definition of "sightseeing," of "excursion," and "private charter" beyond plain and ordinary meanings because taxpayers must defer to them, a principle of language parodied by the logician Charles Dodgson.

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."

In 2015, our Supreme Court addressed the identical issue of applying the summary judgment standard to disputes over statutory construction in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E2d. 315 (2015) There the City of Columbia wanted to interpret a statute so that "related costs" became "surplus revenues" to free up the City to do what it liked with the money. Just like the Department of Revenue here, the City knew that if they defined the money collected from water bills as "surplus revenues," then the City could put the money in its general account and do what it liked rather than maintain the money for maintenance and expansion of its water services. Just like this case, the parties stipulated what the competing statutes said. The trial court granted summary judgment for the City, concluding, as the Administrative Law Court did here, that there was no genuine issue of material fact because the parties agreed on the wording of the statute. Just like this case, the parties disputed what the statute allowed. The Supreme Court reversed summary judgment saying: "Turning to the facts of this case, there is a genuine issue of material fact as to whether the transfers into the City's General Fund are properly considered either "related" costs under section 6-1-330 or characterized as "surplus revenues" under section 6-21-440." (The Supreme Court also condemned the City's effort to create a "slush fund": "Simply put, the statutes do not allow these revenues to be treated as a slush fund.") As the Supreme Court made clear in *Azar*, the Administrative Law Court erred in surrendering statutory interpretation to a government entity which desires to increase collections.

Therefore, the Order under review is controlled by multiple errors of law, and the confusion with which the Administrative Law Court evaluated the case and the prejudice appellant suffered as a result could have been avoided if the Court allowed appellant an opportunity to address the Court.

Argument 2. The Administrative Law Court applied the wrong summary judgment standard in general because Tidalwave's operation takes place entirely on the water, an undisputed fact that creates at least a genuine issue of material fact .

As set forth above, the Administrative Law Court inverted the summary judgment standard because it made no effort either to construe the facts in conformity with the summary judgment standard—by ignoring the fact that the appellant's parasail operation only occurs on boats while underway and involves only "sightseeing," "excursion," or "private charter." All Tidalwave's activities take place entirely on boats underway—sightseeing—and therefore significantly differ from other land-based parasailing operations on which the Department of Revenue might plausibly assert are "places of amusement." § 12-21-2420, S. C. Code, ann. Moreover, from 1996 until 2021, the Department of Revenue agreed Tidalwave is exempt. To this day, the Department of Revenue has not identified on what it relied in changing its position. See the affidavit of Michael Fiem at R.O.A. page ___ an appellant's October 12, 2023, pre-hearing statement to the Administrative Law Court:

Tidalwave provides a wide spectrum of water touring. These include: Geneal Touring, Eco-Touring, General sightseeing, Bachelorette parties, parasailing." R.O.A. page ___ Disputes over the interpretation of statutes present genuine issues of material fact that cannot be decided on summary judgment against a background of the constitutional requirement that no citizen be "bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard. Article I, § 22, S. C. Const. See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015) discussed above: "In light of the proper

construction of section 6-1-330, there is a genuine issue of material fact as to whether the City's transfers and expenditures were lawful." As demonstrated below, the Department of Revenue manufactures its tax legerdemain through a solipsistic expedient of creating, Humpty Dumpty style, a parasail definition that excludes parasailing from "sight-seeing," "excursion," or "private charter" with no justification other than the circular reasoning of "I say so."[5] By redefining "sight-seeing," "excursion," and "private charter," the Department of Revenue increases collections based entirely on assertions found nowhere but in the inventive minds of tax collectors. Not only did the Administrative Law Court invert the summary judgment standard by construing the facts and inferences in favor of the Department of Revenue, a legal error requiring reversal, but also it improperly imbued the Department of Revenue with legislative veto by accepting without question the Department's self-serving assertion of what "parasail" means: "The Department's longstanding interpretation, published in a policy statement, is entitled to deference." (R.O.A. page ___[Order at page 5]) This is error for several reasons.

The first is this: "deference" is not unbridled. The function of the General Assembly is to legislate, and local governments or agencies have no power to overrule or amend properly enacted legislation. See Article XII, South Carolina Constitution: "The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies." A state agency cannot adopt regulations at variance with the South Carolina Code. See § 1-23-120(A), S. C. Code: "All regulations except those specifically exempted under this section must be submitted to the General Assembly for review in accordance with this article." Therefore, the Department of Revenue has no authority to rewrite or ignore the exemption to the admissions/amusement tax like the City of Goose Creek attempted

[5] In Professor Kahane's Bible example cited above, the Department's regulations play the part of the Bible and the definition of parasailing is the equivalent of an assertion that God exists.

for the business license tax. When the City of Goose Creek decided to increase its business license tax collections, it redefined the Legislature's grant of power to levy a business license tax from "gross income" to "gross receipts." In the same manner the Department of Revenue manufactured a definition to increase its collection, Goose Creek declared "gross income" means "gross receipts" because that interpretation made applicants pay more than authorized by the Legislature.[6] However, the Supreme Court struck down the City's re-definition in *Olds v. City of Goose Creek*, 424 S.C. 240, 818 S.E.2d 5 (2018) because the City has no power to rewrite § 5-7-30, S. C. Code, ann. That is exactly what the Department of Revenue has done here, carving parasailing out of "sight-seeing" or "excursion" or "private charter." In short, while courts might have allowed some "deference" in the pre-*Loper Bright* past to agencies applying their own regulations, no court has ever allowed a state agency to rewrite a statute passed by the General Assembly.

Second, even if accepting *arguendo* the Department of Revenue's doubtful premise that it possesses an unbridled power to ignore the Legislature's terms—to which courts must defer—was correct on April 18, 2024, the U. S. Supreme Court ended that type of deference on June 28, 2024, when it handed down *Loper Bright Enterprises v. Raimondo*, __ U.S. __, 144 S. Ct. 2244 (June 28, 2024). There, the U. S. Supreme Court forcefully stated that it is the sole province of courts, not agencies, to interpret statutes passed by the legislature or regulations adopted by agencies. Thus, the Department is not intitled to any special "deference," especially where its decision is based entirely on its self-serving semantic fiat to increase collections. Of course, the S. C. Supreme Court beat them to the punch by 75 years in *Stone Mfg. Co. v. S. C. Employment Comm*., in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), and in *Olds v, City of Goose Creek*, 424

[6] § 5-7-30, S. C. Code, ann. says: Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, . . .levy a business license tax on gross income.

S.C. 240, 818 S.E.2d 5 (2018).[7] *Olds* is instructive. The General Assembly grants municipalities the power to impose a business license tax on "gross income." § 5-7-30, S. C. Code, ann. The City of Goose Creek decided to redefine "gross income" into "gross receipts" to increase its collections, exactly as the Department of Revenue does here by defining "parasail" in such a way as to redefine § 12-21-2420, Exemption 13, to increase collections.

In 2014, in a 3-2 decision, the South Carolina Supreme Court defined judicial review of agency interpretations of agency regulations as a "two-step process":

> In reaching this conclusion, the ALC erred by failing to give deference to DHEC's interpretation of its regulation. Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. *See Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also *Brown v. Bi–Lo*, 354 S.C. at 440, 581 S.E.2d at 838.
>
> *Kiawah Dev. Partners II v. S. C. Dept. of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014)

Kiawah Dev. Partners has lost some punch because of its heavy reliance on *Chevron*, but it is still instructive for driving home the point that the Department of Revenue cannot rewrite §

[7] The holding of *Loper Bright* has been the law in South Carolina for 75 years: "While the construction of a statute by the officials charged with its administration, which has been acquiesced in by the Legislature for a long period of time, should be given great weight, *Etiwan Fertilizer Co. v. S.C. Tax Commission*, 217 S.C. 354, 60 S.E. (2d) 682, the final responsibility for the interpretation of the law rests with the courts. "At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. . . . While we are of course bound to weigh seriously such rulings, they are never conclusive." *F.W. Woolworth Co. v. United States*, 2 Cir., 91 F. (2d) 973, 976. Also, see *Whitcomb Hotel, Inc., v. California Employment Commission*, 24 Cal. (2d) 753, 151 P. (2d) 233, 155 A.L.R. 405. *Stone Mfg. Co. v. S. C. Employment Sec. Comm.*, 219 S.C. 239, 64 S.E.2d 644 (1951) (Wife who voluntarily left work to accompany husband to N.C. was not for "good cause" entitling her to benefits.

12-21-2420 by the simple expedient of declaring an unambiguous statute ambiguous and then supplying an interpretation at variance with the clear meaning of the statute. The dispute is at least a genuine issue of material fact, and the Administrative Law Court erred concluding otherwise.

A good place to see the Department's sleight-of-hand is to examine the appellant's prehearing statement to the Administrative Law Court, quoted above on page 18. (R.O.A. page ___). There, the appellant defined its operation for the Court, which the Department of Revenue accepted and the Administrative Law Court ignored:

> Tidalwave provides a wide spectrum of water touring. These include:
> General Touring
> General Sightseeing
> Eco Touring (*i.e.*, dolphin watching, visiting remote waterways, *etc.*),
> Bachelorette parties
> Parasailing

It is undisputed that all these activities take place on a boat while it is underway, and if a passenger elects to parasail as an ancillary part of the tour, he or she is launched from the boat while it is underway and descends to the boat, again, while it is underway, thus bringing all the taxpayer's activities squarely within Exemption 13. All Tidalwave's activities take place on the water and all involve touring—sightseeing, excursion, or private charter—in the waters around Charleston. (R.O.A. page ___affidavit of Michael Fiem])

As fully discussed in detail in the next section, the General Assembly enacted 16 exemptions to admissions/amusement tax, and Exemption No. 13 states:

> However, no tax may be charged or collected:
> (13) On admissions to **boats** which charge a fee for pleasure fishing, excursion, sightseeing and private charter. (§ 12-21-2420, S. C. Code, ann.) (emphasis on boats added)

The following discussion, also addressed separately in Argument 3—the heart of this appeal—demonstrates how the Administrative Law Court erred by misapplying the rules of statutory

construction to the construction of this statute—not a regulation—by allowing the Department of Revenue to declare by bureaucratic fiat[8] that "parasailing" is neither "sightseeing" nor "excursion" nor "private charter." The South Carolina Supreme Court previously condemned this self-serving, semantic manipulation in many cases, not the least of which are *Azar, ibid*. and *Olds, ibid* discussed above and *Alltel Communications, Inc. v. S. C. Dept. of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) discussed below. To arrive at an erroneous conclusion that the Department of Revenue's decision cannot be questioned, the Administrative Law Court made no effort either to ascertain the facts of Tidalwave's operation, or address how parasailing is qualitatively or factually different from "sightseeing" or "excursion" or "private charter," when the exemption applies to activities on boats. In this factual/legal vacuum, the Court construed the inferences in the light most favorable to the Department of Revenue based on nothing other than the Department's self-serving opinions. The Court's improper surrender under the flag of deference is the sole reason for the Court's imposing the "drastic remedy" of summary judgment. See Order under review at R.O.A. page ____[Order pages 4-5] This is a palpable error of law requiring reversal for more than one reason. First, as the affidavit of Michael Fiem, R.O.A. pages ___-___ demonstrates, Tidalwave offers nothing but waterborne services, hence on "boats," and the General Assembly exempted waterborne activities from the amusement tax. This is both an undisputed fact and an unambiguous statute, which the Administrative Law Court never addresses. The record is undisputed that Tidalwave rents jet skis, conducts waterborne sightseeing, some of which include parasailing. Parasailing is an option, but the passengers who elect to go aloft are raised from the vessel while it is underway and land in the vessel while it is underway, and the General Assembly excluded these activities from the admissions/amusement tax. Even the Department of Revenue's own

[8] As set forth above, on June 28, 2024, the United States Supreme Court ended agency legislation by striking down the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, U.S. , 144 S.Ct. 2244 (2024).

instructions to taxpayers, also ignored by the Administrative Law Court, declares that sightseeing in the air is not a "location" or "amusement" that requires collecting the tax:

> It has been the longstanding policy of the Department of Revenue not to impose the admissions tax on fees paid solely for sightseeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes.
> *Department of Revenue SC Technical Advice Memorandum* #95-2 (tax) R.O.A. page ____

All Tidalwave's activities are conducted on the water, and the only difference between a helicopter or airplane ride and a parasail ride is that one of them is at a lower altitude. The Administrative Law Court simply ignored both the facts and the law in granting summary judgment to the Department of Revenue. Without an adequate basis on which to reach factual conclusions, the Orders under review are controlled by errors of law because they not only inverted the summary judgment standard, but also they lack an evidentiary or legal foundation to justify summary judgment.

In grounding its decision solely on deference to the Department of Revenue, the Administrative Law Court could not have anticipated that a month later, the United States Supreme Court drove a stake through the heart of "deference" when it struck down the *Chevron* doctrine, the federal version of the state "deference" standard relied on by the Administrative Law Court. In *Loper Bright Enterprises v. Raimondo*, ___ U.S. ____, 144 S.Ct. 2244 (June 28, 2024) (Opinion No.: 22-), the U. S. Supreme Court made the same point appellant makes here; to wit, that granting deference to agencies interpreting their own rules for their benefit are the precise circumstances in which such deference is least warranted:

> Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. *Chevron* gravely erred in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction is

> to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate. (emphasis in original)

Here, the error is compounded because the Department of Revenue is not construing one of its regulations. Instead, like the City of Goose Creek in *Olds*, it is rewriting a state statute without authority. The Administrative Law Court handed down its Order in May and the Supreme Court handed down *Loper* in June, so the lower court did not have the benefit of the decision. It did, however, have a well-developed body of South Carolina law that agencies cannot legislate. Any neutral reading of the Order under review reveals the legal error in the Administrative Law Court denying appellant's tax challenge on summary judgement solely because it found the Department of Revenue's self-serving definition of "parasailing" imperially dispositive. In short, the Administrative Law Court erred by abdicating its judicial responsibility. Even the Department of Revenue's course of conduct illuminates the error because as set forth in Michael Fiem's affidavit, the Department never applied the amusement tax to Tidalwave until 2021 even after auditing the business in 2014 without raising the issue. (See R.O.A. page ___) The sudden change demonstrates that even the Department of Revenue's opinion on the matter is subjective, yet the Administrative Law Court granted summary judgment entirely on the Department's revised opinion, giving no weight to the fact that the Department properly applied the exemption for 25 years until it suddenly reversed course without explanation and in contravention of its own prior statements. Thus, summary judgment was inappropriate, and the case should be remanded to allow the Court to make a proper evidentiary finding and reach an **independent** judgment on a clear and unambiguous statute instead of deferring to the Department of Revenue's solipsistic conclusion.

Argument 3. The Administrative Law Court erred in not applying the plain and ordinary meaning of the governing statute to the appellant's operation and misapplied the rules of statutory construction, especially because the *Alltel* standard requires tax statutes to

be strictly construed against the Department of Revenue. ***Alltel Communications v. S. C. Dept. of Revenue*****, 399 S.C. 313, 731 S.E.2d 869 (2012)**

The Rules of Statutory Construction

Section 12-21-2420, S. C. Code, ann. authorizes the Department of Revenue to collect taxes on "admissions to places of amusement" in the amount of 5% of the ticket price. The same statute provides 16 exemptions to the amusement tax, and Exemption No. 13 exempts "admissions to boats that provide pleasure fishing, excursion, sight-seeing, and private charter." (quoted above on page 3)

The plain and ordinary reading of the exemption relieves Tidalwave from collecting and remitting an "amusement" tax because the straight-forward, unambiguous language of Exception 13 exempts Tidalwave because—and this is undisputed—100% of its activities take place on "boats." The Department of Revenue improperly exercises a legislative veto it does not possess in the same unlawful way the City of Goose Creek unlawfully inflated its power to impose a tax based on "gross income" by reinterpreting "income" as "receipts" to increase its collections. Even though the Department of Revenue exempted Tidalwave for almost 25 years, yet in 2021, for unknown reasons, the Department abruptly changed position on the issue and administratively abrogated Exemption 13 because it decided parasailing is qualitatively different from "sight-seeing" or "excursion" or "private charter" in the same way Goose Creek reinterpreted "income" to mean "receipts." Instead of deciding the issue on the merits as constitutionally required by Article I, § 22, S. C. Const., the Administrative Law Court abdicated its judicial function to deference to the agency's putative prerogative to control the decision. In this case, judicial "deference" to agency interpretation of statutes guarantees an erroneous outcome. As discussed above, in June, the U. S. Supreme Court drove a stake through the unbridled discretion of agency legislative power and restored courts to their proper function of construing statutes. The

Department's 2021 reversal of its legal position is based on nothing more than its *sua sponte* declaration that "parasailing" is not "excursion," is not "sight-seeing" and/or is not "private charter," and the only reason the Administrative Law Court approved this reversal was because it erroneously believed the Department is entitled to unbridled "deference" even though the subject is a state statute, not an agency regulation. To arrive at this conclusion, the Administrative Law Court ignored the undisputed fact that all Tidalwave's activities take place on "on boats that charge a fee . . ." The Administrative Law Court accepted the Department of Revenue's pronouncement on nothing more than its erroneous "deference" without giving any weight to Tidalwave's evidence or even allowing it to address the Court. This is an error of law because not only do the rules of statutory construction compel a straight-forward conclusion—or at least create a genuine issue of material fact—that Tidalwave's activities fall under a non-ambiguous exemption under a non-ambiguous statute. Even, *arguendo*, if the exemption were ambiguous—the Administrative Law Court compounded its error by failing to construe ambiguities in favor of the taxpayer before imposing the "drastic remedy" of summary judgment. The South Carolina Supreme Court makes clear that Courts called upon to construe an ambiguous tax statute must construe ambiguities in the light most favorable to the taxpayer:

> Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. [citation omitted] However, "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." [citations omitted] "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." [citations omitted] (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government.) The existence of an ambiguity in section 12-20-100 raises substantial doubt regarding the section's application to Petitioner's. This doubt must be resolved in favor of Petitioners. *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012)

Here there is no ambiguity in § 12-21-2420. The Administrative Law Court erred in allowing the Department of Revenue to rewrite the statute and improperly accepts the Department of Revenue's interpretation, to which the Administrative Law Court blindly deferred: (R.O.A. page ___[Order Granting Summary Judgment, page ___] This is material error requiring reversal. Even though the *Loper* decision did not come down until June, the well-established case law of South Carolina restrains the Administrative Law Court from delegating its judicial obligation to apply the statute independently. The Court cannot grant to the Department of Revenue the power to rewrite the General Assembly's laws. Thus, the Order under review is controlled by an error of law. The legislative history of § 12-21-2420 further demonstrates the error.

The General Assembly passed § 12-21-2420 in 1929, and frequently amended it. The most recent amendments occurred in July 2021. The statute provides 16 exemptions to collections of "amusement" taxes, and Exemption No. 13 governs this case. An interesting historical footnote sheds light on Exemption 13 and how activities on boats are exempt. The General Assembly adopted Exemption 13 in 1981 during the extensive Fort Sumter Tours litigation. Those cases were filed in 1977, 1995, and 2000, and they made their way from the United States District Court to the Fourth Circuit Court of Appeals to the Supreme Court and back again. See: *Fort Sumter Tours v. Andrus*, 564 F.2d 1119 (4th Cir. 1977); *Fort Sumter Tours v. Babbitt*, 66 F.3d 1324 (4th Cir. 1995); and *Fort Sumter Tours v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000). As set forth above, the Department of Revenue's Ruling 95-2 illuminates this timeline in its *S. C. Technical Advice Memorandum #95-2 (Tax)* and drives home the point that Tidalwave is exempt. This memorandum states in applicable part: "Later in 1981, the Legislature amended Section 12-21-2420 to exempt from the admission tax "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing, and private charter." Unfortunately, the legislative debate of

Exemption No. 13 has not been preserved. As a result, the full impact of the legislative conversation in the run-up to the legislative amendment remains undeveloped, but the missing legislative history is not dispositive because there is nothing ambiguous about the statute. As set forth above, Exemption number 13, reads as follows:

> However, no tax may be charged or collected:
> (13) On admissions to boats which charge a fee for pleasure fishing, excursion, sightseeing and private charter.

All Tidalwave's activities involve "admissions to boats which charge a fee" and clearly fall under this exemption as a plain reading of the statute demonstrates Tidalwave provides boats for "excursion," "sightseeing," and "private charter."

To justify its 2021 reversal and decision to impose an accommodations/amusement tax on Tidalwave, the Department tortures the Legislative exemption unilaterally by carving out a subcategory exception to the exemption by excluding "parasailing" from "sightseeing," *etc*. The Department claims it possesses the power to rewrite the Legislature's statute and impose unilaterally a carveout to take "parasailing" out of "excursion" or "sightseeing" or "private charter" which is the same type of agency rewrite of statutes struck down by the Supreme Court in *Azar, ibid.* and *Olds, ibid*. The Department's rewriting legislation is something the Department never had the power to do as *Loper, ibid*. and South Carolina case law make clear. See *Azar v. City of Columbia, ibid., Olds v. City of Goose Creek, ibid., Altel Communications v. S. C. Dept. of Revenue, ibid.*, and *Hodges v. Rainey* quoted on the next page. The *Loper* decision is consistent with the case history of this Court. For example, on April 26, 2023, this Court affirmed the Administrative Law Court reaching the opposite conclusion on this same issue when the Department tried to redefine "motor vehicle": ". . . while this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain

language of the statute is contrary to the agency's interpretation." *Jack's Custom Cycles, Inc. v. S. C. Department of Revenue*, 439 S.C. 35, 885 S.E.2d 433 (Ct. App. 2023, citing *Brown v. Bi-Lo Inc*., 354 S.C. 436, 581 S.E.2d 836 (2003). (Court rejected the Department's definition of "motor vehicle.")

As *Technical Advice Memorandum 95-2* makes clear, the Department of Revenue's definition of "Parasailing" is irrelevant—at least it is for Tidalwave—because it is an activity that occurs **only** on board Tidalwave's vessel and does not involve any of the indicia of conduct the Department of Revenue identifies as activities that trigger the "amusement" tax: "entertainment, dancing, or drinking in a social environment." The Administrative Law Court ignored all previous Department of Revenue interpretations at variance with its newly revised assertion by abandoning its Constitutional obligation to provide the independent review required by Article I, § 22. Judicial review means more than blanket deference, especially where the topic is a state statute and not an agency regulation. Because the Department itself has competing and conflicting definitions, the Administrative Law Court cannot decide the issue for the Department on summary judgment. Parasailing is waterborne sightseeing and specifically exempt from the "amusement" tax by the plain and ordinary reading of § 12-21-2140. In fact, three of the Exemption's categories capture Tidalwave's activities: "excursion" or "sightseeing" or "private charter." For example, if a passenger hires Tidalwave to take a tour of Fort Sumter from the water, it matters not whether a passenger takes in the sights aloft or seated. In other words, if two things are not unequal, then they are, by definition, equal. The activities are identical.

The Administrative Law Court abandoned its judicial duty, and instead improperly "deferred" to the Department of Revenue's torturing Exemption 13 to decide the appellant failed to create a genuine issue of material fact. In excluding "parasailing" from "excursion," "sight-

seeing," or "private charter," the Department errs in failing to apply the ordinary rules of statutory construction. The Administrative Law Cout mentioned the most frequently cited Supreme Court opinion on the rules of statutory construction, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000), but made no effort to apply it. In defining 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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> . . .
>
> 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 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 Department itself frequently cites the *Hodges* standard in numerous Revenue Rulings, informing taxpayers that words used in statutes must be read in their plain and ordinary meaning. However, when the Department of Revenue vetoes Exemption #13 by carving out an exclusionary definition of "parasailing," it offers no justification for its definition other than its own self-serving

circular reasoning, and yet, this circular reasoning is the sole basis for the Administrative Law Court's "deference." The Administrative Law Court erred in accepting—without question—the Department's definition, which is both legal error under the summary judgment standard and a demonstration of why excluding the appellant from the process is so prejudicial. When the Department of Revenue defines places of amusement as places for entertainment, dancing, or drinking in a social environment, **and not solely for sightseeing** (R.O.A. page ___[*S.C. Technical Advice Memorandum 95-2*], it demonstrates just how subjective its definitions are. The Department of Revenue offers nothing, other than its own circular reasoning, in support of its assertion that parasailing is different from "sightseeing" or "excursion," or "private charter," or as the logician, speaking through Humpty Dumpty, says about the meaning of words: "The question is, which is to be master—that's all."

In short, the Department of Revenue's Humpty Dumpty strategy employs the same definitional sleight of hand rejected by *Hodges v. Rainey* and arrives at the same erroneous conclusion using the method of construction the Supreme Court prohibited in *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012)[9] The Department violates the rules governing statutory interpretation in pushing Tidalwave out of an exemption by legislatively rewriting (or torturing) the definitions of "excursion" or "sightseeing" or "private charter" to exclude "parasailing" justified only by its desire to increase collections. This unnatural reading of the exemption not only violates the principle of statutory construction set forth in the well-developed case law of South Carolina, but also is at variance with the

[9] Appellant never obtained the records from the Department of Revenue's 2014 Sales Tax Audit of appellant. Even without them, it is undisputed, at least for summary judgment analysis, the Department of Revenue found no error or omission in Tidalwave's collection and disbursement of sales tax. R.O.A. page ____[affidavit of Michael Fiem]. This fact collaterally estopps the Department from changing its legal position in 2021, or at least presents compelling evidence that its 25-year course of conduct creates a genuine issue of material fact.

Department's own stated policies on this subject. In Revenue Ruling 05-14, "Places of Amusement," the Department stated that:

> It should be noted that it has been the longstanding position of the Department that . . . (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax. (See Technical Advice Memorandum #95-2)

The 05-14 Revenue Ruling cites back to the October 18, 1995, Technical Memorandum, which contains, among other things, this footnote: "It should be noted that the admissions tax applies to a carriage, bus, trolley, *etc*. when admission to the vehicle is for entertainment, dancing, or drinking in a social environment, **and not solely for sightseeing**." (emphasis added) Therefore, because Tidalwave's activities take place on the water and involve solely sightseeing (there is no "entertainment, dancing, or drinking"), there is at least a genuine issue of material fact that Exemption 13 exempts Tidalwave from the admissions tax. For this reason, the decision below should be reversed and remanded with instructions to evaluate whether the appellant is entitled to summary judgment because the application of the plain meaning of § 12-21-2450, and the application of Exemption 13 demonstrates Tidalwave's activities are exempt from the amusement tax, a decision which is also consistent with the Department of Revenue's previously issued rulings on this issue.

For these reasons, the Administrative Law Court erred in granting summary judgment that is plainly inconsistent with the plain and ordinary meaning of Exemption #13 in § 12-21-2450.

Argument 4. The Administrative Law Court erred in requiring the appellant to post interest as a prerequisite to filing an appeal because the appeal bond statute excludes "fines and penalties," and the rules of statutory construction require the statute to be applied as written, and interest is a "fine" or "penalty."

The Department of Revenue also misstates the requirements § 12-60-3370, S. C. Code, ann. by disregarding the disjunctive "or." The disjunctive "or" is an important grammatical

component of the statute. By ignoring the disjunctive, the Department of Revenue seeks to impose another extra-legislative requirement that denies an appellant the right to post an appeal bond in lieu of paying the disputed taxes to the Department. (Before the Administrative Law Court on August 28, 2024, the parties narrowed the appellate question of the bond to the single question of whether an appeal bond must include interest. Simultaneously with appealing the decision requiring appellant to tender interest, appellant paid the disputed interest into the *I.O.L.T.A.* account and signed a supplemental appeal bond without waiving the right to challenge the decision. Therefore, appellant believes the original $702.00 shortfall is resolved.)

The appeal bond statute is clear and unambiguous that an appeal bond includes only the taxes the Department claims are due. The governing statute, §12-60-3370, quoted **in full** above on page 5 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 right to judicial review 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) quoted on page 30 and discussed throughout. In explicating the rules of statutory construction, the Supreme Court said: "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). The Order under review acknowledges this principle in footnote 2 on page 2 of its September 4, 2023, Order. There, the Administrative Law Court notes that the earlier version of the appeal bond statute included a requirement that interest be tendered as a condition of appeal and notes further the General Assembly amended the statute in 2000, deleting that requirement. See *Great Games Inc. v. S. C. Dept. of Revenue* 339 S.C. 79, 529 S.E.2d 6 (2000).

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 raising the bar to make the process more difficult and expensive. To avoid the clear holding of §12-60-3370, the Department shifts direction away from the appeal statute 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, obviously, a collection statute—it says nothing about appellate jurisdiction or appellate practice.

Second, as *Olds v. Goose Creek, ibid*. explains, a specific statute addressing a specific subject controls over a general statute on broader topics: "[W]here two provisions deal with the same issue, one in general and the other in a more specific and definite manner, the more specific prevails."

Third, the statute says: "interest is due on the unpaid portion **from the time the tax was due** until paid in its entirety." (emphasis added) 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 walks into a bank and says: "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, amortized rate of return, which courts will enforce. With credit card debt, interest rates often increase as punishment/penalty for overdue 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 appeal bond interest in this case is the second form of interest: statutory interest, which if not "punitive," is 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. The Department of Revenue calls interest "a neutralizing factor so that someone does not get the benefit of having someone else's funds." (R.O.A. page ___[tr. Page 20]) That means if the taxpayer prevails, then the Department of Revenue is freed from having to pay interest to Tidalwave, or, as the Administrative Law Judge said, prevents the Department form having a "free loan" of the taxpayer's money. 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 of the disputed taxes 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 initial and immaterial computational error in the amount tendered in the timely filed appeal bond, 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. The Department demonstrated no legal prejudice flowing from the minor error, which is why it agreed the subsequent deposit cured the deficiency. It would be unconscionable—and inconsistent with its mission statement—if the Department of Revenue sought to prevent a taxpayer from judicial review for a small error in a timely filed appeal bond. This aggressive strategy is emblematic of the Department of Revenue's aggressive pursuit of an alleged sales tax deficiency, a reversal of the Department's policy for the previous 25 years. From 1996 until 2021, 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 ignored: "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, R.O.A. page ___--the notice of audit was in September 2021, claiming an audit review for the years 2018, 2019, and 2020) 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 this highly disputed matter. However, it is indisputable that the taxpayer timely filed an appeal bond in accordance with the governing statute, and the minor deficiency in the original filing was immediately corrected 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. The Administrative Law Court erred in determining there is no genuine issue of material fact, grounding its conclusion entirely on "deference" to the Department of Revenue's self-serving declaration that "parasailing" is excluded from "sightseeing," "private charter," or "excursion." This is legal error because there is nothing in this record to support the Department's interpretation other than its self-referential circular reasoning, and the Department of Revenue has no power to rewrite or expand the General Assembly's statutes. The words in the statute, "sightseeing," "excursion," "private charter" all encompass parasailing that occurs entirely on a water vessel underway. The Administrative Law Court's astonishing lack of appreciation for the central issue, as evidenced by excluding appellant from full participation in the process, caused it to sacrifice its constitutional duty of review to "deference." As demonstrated in its Order denying reconsideration, appellant received something less than the full attention of the Court. This record demonstrates there is overwhelming evidence

of a genuine issue of material fact, and the Administrative Law Court compounded its error by demanding that the appellant pay an interest penalty as a condition to access to the Court. The decision below should be reversed and remanded to address the appellant's motion for summary judgment and if that does not resolve the case, then to set the matter for a plenary hearing on the merits.

Respectfully submitted.

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