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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

Deborah B. Durden, Administrative Law Judge

Opinion No.: 6154

Case No.: 2023-ALJ-17-0362-CC

Appellate Case No.: 2024-000962

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

Petition for Writ of Certiorari to the Court of Appeals

November 18, 2026

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 22, 2026.

QUESTIONS PRESENTED

1. Did the Court of Appeals improperly prevent Petitioner's case from being decided on the merits by creating a novel jurisdictional bar not authorized by the General Assembly and in direct violation of Article I, § 22 of the South Carolina Constitution that guarantees a taxpayer's right to judicial review?

2. Did the Court of Appeals fail to adhere to the rules of statutory construction in creating a novel, retroactively applied jurisdictional bar to tax appeals from Administrative Law Court?

3. Did the Court of Appeals confuse appellate jurisdiction with alleged procedural deficiencies easily corrected?

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STATEMENT OF THE CASE

On July 29, 2026, the Court of Appeals issued Opinion No. 6154, dismissing Petitioner's appeal without addressing the merits. The Court of Appeals found "Appellant failed to perfect its appeal as required by section 12-60-3370 when it failed to either pay the taxes owed or procure an **appropriate** bond." (emphasis on "appropriate" added) The Court of Appeals determined that the appeal bond was not "appropriate" because it failed to provide the Department of Revenue with future interest. This conclusion is controlled by an error of law because the Court of Appeals overlooked and failed to apply settled South Carolina law that Petitioner's cash bond and the irrevocable assignment of it to the Department of Revenue stops future interest from accruing. The Court of Appeals also ignored that the cash deposit of disputed taxes and all accrued interest, as determined by the Administrative Law Court on remand from the Court of Appeals, also included an irrevocable assignment of the cash deposit to the Department of Revenue, *i.e.,* a "bond."

Tidalwave Watersports began in 1996, renting jet skis and conducting sightseeing water tours, some of which provided an option to parasail from a boat while underway. The General Assembly exempts boats from collecting an "admissions" (or is it frequently labeled in Department of Revenue publications, an "amusement") tax that is the subject of this dispute. § 12-21-2420, S. C. Code, ann. imposes a five per cent tax "upon paid admissions to places of amusement." That "amusement" tax section contains 15 specific exemptions including number 13, which exempts boats as follows: "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.") It is undisputed that all of Tidalwave's activities take place "on boats." See Stipulations of Fact numbers 1-3 in the Record on Appeal at page 79:

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.[1]

The current principals of Tidalwave purchased the business as a going concern in 2005. From 1996 until 2021, the Department of Revenue enforced the amusement tax statute as written and agreed with Tidalwave that it owed no admissions or amusement taxes because its activities take place on boats. The Department of Revenue audited Tidalwave in 2014 and found no deficiency with the admissions/amusement tax or anything else. (R.O.A. page 145 [affidavit of Michael Fiem])

On September 16, 2021, the Department of Revenue notified appellant it would conduct a sales tax audit on October 20, 2021. On February 17, 2022, the Department of Revenue notified the Petitioner for the first time that the Department of Revenue contended Tidalwave was allegedly in arrears for failing to collect and remit the amusement tax in the principal sum of $34,511.15. The Department also alleged Tidalwave owed $1,527.66 in interest and $11,576.00 in penalties (33% of the alleged deficiency).

Tidalwave challenged the decision administratively on March 17, 2022, pointing out that the General Assembly exempted "sight-seeing, excursion and private charter" conducted on boats. (R.O.A. page 40 [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

[1] There are other parasailing rides in South Carolina operating from a fixed location, a "place of amusement." See R.O.A. pg. 146. Tidalwave's activities are exclusively on boats, which are exempt from the amusement tax.

Revenue notified Petitioner by mail on August 29, 2022, that the Department would not adjust his alleged tax deficiency, interest, or penalty. (Because the Administrative Law Court granted summary judgment against the taxpayer without a hearing, the Record is undeveloped and silent as to the Department of Revenue's motivation or explanation for its change of position from its prior 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 $33,998.40, plus interest of $4,808.41, and penalties of $14,356.74 (42%). See the August 18, 2023 Departmental Determination at page 51 of the Record on Appeal.

On September 15, 2023, the taxpayer filed an appeal with the Administrative Law Court, and after pre-hearing briefing, Tidalwave 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 82 and 89. [motions for summary judgment]) Both parties filed pre-hearing briefs, a joint stipulation of 8 facts, and supplemental briefing. (R.O.A. pages 58, 71, 96, 101, & 109 [Pre-hearing briefs, Memoranda of Law, Stipulation of Facts])

The Administrative Law Judge never held a hearing on the motions for summary judgment either in person, via WebX, or by telephone, leaving the Record undeveloped on many points, for example why the sudden change in policy. On April 18, 2024, the Administrative Law Court granted summary judgment for the Department of Revenue holding courts are required to defer to the Department of Revenue's interpretation of its own regulations. (R.O.A. pg. 1) On April 24, 2024, the taxpayer timely moved for reconsideration, citing cases such as *Dorchester County Assessor v. Middleton Place Equestrian Center, L.L.C.*, 414 S.C. 453, 778 S.E.2d 919 (Ct. App. 2015) and others to demonstrate an Agency's interpretation is not entitled to deference when a tax

statute is plain and unambiguous.[2] The Administrative Law Court summarily denied reconsideration on May 14, 2024, again without holding a hearing. (R.O.A. pg. 8) On June 7, 2024, the taxpayer filed a Notice of Appeal, and in conformity with the General Assembly's appeal bond statute, §12-60-3370, S. C. Code, ann., the taxpayer deposited the disputed taxes ($33,296.00) in a federally insured bank (I.O.L.T.A. account) accompanied by a properly executed irrevocable assignment of the cash deposit in favor of the Department of Revenue. (R.O.A. pages 147 and 149 [Notice of Appeal and appeal bond with irrevocable assignment]) §12-60-3370, 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."

After Tidalwave deposited the disputed amount into counsel's I.O.L.T.A. account and executed an irrevocable assignment of the proceeds to the Department of Revenue, on June 19, 2024, the Department of Revenue filed a motion asking the Court of Appeals to dismiss the appeal with prejudice because the taxpayer miscalculated the amount, leaving it $702.00 short, failed to file it "before" appealing, and because it asserted the cash deposit/irrevocable assignment bond did not conform to the appeal bond statute. Petitioner immediately conceded the $702.00 error and corrected it, explaining confusion caused by relocating an office and being temporarily disconnected from files caused counsel to miscalculate the bond amount. After Petitioner corrected the shortfall on June 26, 2024, by depositing an additional $702.00 and filing an amended irrevocable assignment to reflect the correct amount (R.O.A. page 152), the Department of Revenue interposed a further objection that the tender and accompanying irrevocable assignment

[2] By coincidence, while this case was pending, on June 28, 2024, the U.S. Supreme Court handed down *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244 (June 28, 2024) abrogating the *Chevron* deference standard.

did not include the disputed interest. The Department of Revenue requested that the Court of Appeals dismiss the appeal with prejudice, and the Court of Appeals entered an Order on July 18, 2024, remanding the appeal back to the Administrative Law Court to determine the sufficiency of Petitioner's appeal bond. On remand, the Administrative Law Court scheduled a hearing for the first time and after a hearing, entered an Order on Remand on September 4, 2024, requiring the Petitioner to deposit an additional extra $7,842.52 in accrued interest in order to perfect the appeal bond. The Administrative Law Court was silent on future interest or the manner in which Petitioner deposited the disputed funds or the irrevocable assignment of the proceeds to the Department of Revenue. On September 26, 2024, Petitioner deposited an extra $7,842.52 in counsel's I.O.L.T.A. account and executed a Supplemental Appeal Bond, and filed an Amended Notice of Appeal, challenging the Administrative Law Court's decision that Petitioner had to pay interest as a condition of appeal. (R.O.A. pages 182 and 186 [Amended Notice of Appeal and Supplemental Appeal Bond]) The Court of Appeals never addressed any of these issues because it determined Petitioner forfeited appellate jurisdiction for failing to file an "appropriate" appeal bond. See Opinion No. 6154 at 5.

On July 29, 2026, the Court of Appeals dismissed Petitioner's appeal concluding a cash deposit in an I.O.L.T.A. account accompanied by an irrevocable assignment does not meet the terms of the appeal bond statute, §12-60-3370, S. C. Code, ann., which 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." (Emphasis on the disjunctive "or" added.) The Department of Revenue's motion to dismiss with prejudice alleged—and the Court of Appeals agreed—Tidalwave forfeited appellate jurisdiction because it failed to pay the disputed taxes directly to the Department of Revenue or

post a cash bond with a commercial surety company instead of in an I.O.L.T.A. account on the ground that future interest on an I.O.L.T.A. account goes to the South Carolina Bar Foundation and not the Department of Revenue. Both the Department of Revenue and the Court of Appeals assert the fatal defect is that a deposit into an I.O.L.T.A. account deprives the Department of Revenue of future interest.

In sum, the Department of Revenue complains that Petitioner did not post the bond "before" appealing, that it was initially $702.00 short, that it did not include past **and** future interest. The Department of Revenue contends Tidalwave "neither paid these taxes nor posted a bond for such taxes" (Respondent's June 19, 2024 motion to dismiss), which is incorrect.

On July 29, 2026, the Court of Appeals issued published Opinion 6154. On August 10, 2026, Petitioner asked for rehearing and rehearing *en banc*, and on October 22, 2026, the Court denied Petitioner's request for rehearing. (Petitioner requested the case be heard *en banc* since it involved a Constitutional issue, established a novel limiting condition on appeals being retroactively applied, and departed from established precedent.)

Arguments

1. The Court of Appeals improperly deprived Tidalwave of its Article I, § 22 Constitutionally protected right to judicial review by rewriting § 12-60-3370, S. C. Code, ann. to create and impose a novel limitation on appeal bonds not authorized by the General Assembly, which it retroactively applied to dismiss the appeal.

The Court of Appeals dismissed Petitioner's appeal despite Petitioner tendering the disputed tax with an irrevocable assignment to the Department of Revenue. The Court of Appeals found the cash bond and irrevocable assignment was not an "appropriate" because it did not provide for future interest. The error is that the cash deposit stops the accrual of future interest. The Court of Appeals created a new, novel limitation in the appeal bond statute and then retroactively imposed

it to dismiss a meritorious appeal. The new condition is neither found nor implied in the General Assembly's appeal bond statute, and it was error to invent a new conditions and apply it retroactively to deny access to the Court. Even if there were a deficiency, the remedy is to direct the Petitioner to correct a putative deficiency. (This is discussed in more detail below.) The Court of Appeals never considered the Constitutional protection for judicial review guaranteed by Article I, § 22 or how its dismissal violated the Constitutional prohibition against *ex post facto* laws. Article I, § 4 prohibits *ex post facto* laws, which prevents retroactive application of criminal or penal statutes. The imposition of substantial penalties and interest is penal. The Court of Appeals never mentioned the irrevocable assignment or how it is indistinguishable from a commercial bond and misapplied the universal rule that a deposit of the disputed amounts shuts off future interest. The Department of Revenue's motion alleged Tidalwave never "posted a bond for such taxes," but even it hedged its bet by softening its assertion in footnote 1 of its motion to dismiss, saying, **in its opinion**, the appeal bond did not "constitute" a bond for reasons it never specifically identified. "Bond" means "guarantee" or "pledge," and the taxpayer's transfer of the funds into escrow came with an irrevocable assignment to the Department of Revenue—something the Court of Appeals never mentions. Such a cash deposit and assignment is without contradiction a pledge, a bond, a guarantee. Instead, the Court of Appeals took a new tack, holding that because the **future interest** on an I.O.L.T.A. account goes to the South Carolina Bar Foundation and not the Department of Revenue that Petitioner's bond is not "appropriate." As discussed in detail below, this is an error of law because the deposit and assignment cut off future accruing interest. South Carolina law is settled that Petitioner's pledge and cash deposit terminates future interest. See *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 460, 483 S.E.2d 796, certiorari granted, reversed 394 S.C. 324, 513

S.E.2d 617 (1997)[3] *See Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995); Duval v. Heritage Life Ins. Co*., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000) ("A judgment debtor's deposit of funds into court pending the debtor's own appeal stops the accrual of interest on the judgment.") See also *Great Games, Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000), reminding the Administrative Law Court that the purpose of the appeal bond is set forth in § 12-60-20:

> It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine any disputed revenue liability. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent.

The Department of Revenue mischaracterized the facts of this case, saying on page 2 of its motion to dismiss, "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." Petitioner deposited the accrued interest the Administrative Law Court required and filed a supplemental appeal bond, while appealing that requirement. (R.O.A. pg. 182 and 186 [Amended Notice of Appeal and Supplemental Appeal Bond]) The disjunction "or" in § 12-60-3370 is controlling, for while it is true Petitioner did not initially post interest until the Administrative Law Court required it after remand from the Court of Appeals, there is no doubt Petitioner deposited the disputed tax with an irrevocable assignment to the Department of Revenue at the beginning of the appeal and deposited all accrued interest once the Administrative Law Court fixed the amount. (See page 189 R.O.A. [irrevocable assignment of funds]) The Department of Revenue may argue the deposit does not conform to its interpretation of § 12-60-3370, S. C. Code, but it cannot argue Tidalwave did not deposit the

[3] *Renaissance Enterprises* is an interesting case. The Court of Appeals held that the deposit cut off interest. This Court reversed on the ground that parties entered into a voluntary contract for the future interest to continue to accrue. Without the voluntary agreement to the contrary, interest would have terminated with the bond.

disputed taxes and issue its irrevocable assignment to the Department of Revenue. Moreover, as discussed in more detail below, if there were a deficiency in the deposit into an I.O.L.T.A. account and/or the assignment of proceeds, the remedy is to require the Petitioner to put the funds in what the Court finds is the appropriate spot—not refuse to address the merits of a proper appeal. See *Great Games*, 339 S.C. 79, 529 S.E.2d 6, quoted above. Whether a cash deposit is legally deficient (and incurable) or whether disputed interest is required are appellate procedural questions properly raised to (and improperly ignored by) the Court of Appeals, but as the Opinion under review demonstrates, the Court of Appeals never reached any of the merits of the case, holding the "inappropriate" appeal bond deprived it of appellate jurisdiction: "We find Appellant **failed to perfect** its appeal as required by section 12-60-3370 when it failed to either pay the taxes owed or procure an **appropriate** bond." (Op. at page 5, emphasis on "failed to perfect" and "appropriate" added.) What the Court of Appeals found was "not appropriate" was that future interest on the deposit did not go the Department of Revenue: "The interest generated from the IOLTA account is paid to the Bar Foundation and is therefore not available to satisfy the accrued interest on the tax debt should Respondent prevail." (Opinion under review at page 4) This is the legal error that justifies discretionary review because the transfer of the cash deposit to an irrevocable account assigned to the Department of Revenue stops future interest. The Court of Appeals also held that § 12-60-3370 contains a temporal restriction ("before") that limits appellate jurisdiction, but (1) Petitioner never missed a temporal deadline by filing the bond and the appeal simultaneously, and (2) the statute only says an appeal bond must be in place before appealing, which Petitioner did. The Record on Appeal, pages 144 and 147, shows that Petitioner filed both on June 10, 2024. Without explaining how "simultaneously" falls short of "before" or prejudiced anyone, the Court of Appeals invented a new bar to review. This Court refused to allow a "temporal" defect in filing

an appeal bond to defeat appellate jurisdiction in *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), but the Court of Appeals refused to follow that precedent on the ground it said the appeal bond statute has "before" in the statute and Petitioner filed the Notice of Appeal and the appeal bond **simultaneously** on June 10, 2024! As this Court said in *Roberts*, a failure to comply with a procedural requirement only affects appellate jurisdiction, not subject matter jurisdiction and is not grounds for dismissal when an alleged procedural defect can be corrected. See also *Great Games*, 339 S.C. 79, 529 S.E.2d 6 (2000); *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004). Here, the Court of Appeals initially denied the Department's motion to dismiss and remanded the case back to the Administrative Law Court for it to fix the bond, and Petitioner posted and assigned every dollar the Administrative Law Court required while appealing the requirement for interest. See Supplemental Appeal Bond, page 186 R.O.A. Even cases filed in the wrong court are not dismissed even though the time for appeal has passed. See Rule 204, "Improperly Filed Cases" *Appellate Court Rules*. Fairness—the bedrock of justice—requires that litigants be allowed to correct putative deficiencies to prevent cases escaping judicial review. Since Petitioner's tender terminated future interest, since a simultaneous filing is "temporally" sufficient for "before," since the Department of Revenue suffered no prejudice, it should not be permitted to thwart a taxpayer's constitutionally and statutorily protected access to the Court and prevent meaningful analysis of its conduct in violation of the Revenue Procedures Act on such pretense complaints.

Therefore, the taxpayer seeks certiorari review on several grounds, but the sole legal issue before the Court—the **only** issue addressed by the Court of Appeals—is to correct its erroneous dismissal based entirely on its newly created and newly applied novel limitation to § 12-60-3370 retroactively applied to Petitioner. "In a case raising a novel question of law, the appellate court

is free to decide the question with no particular deference to the lower court." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). The Court of Appeals based its decision on a demonstrably erroneous conclusion that the Department of Revenue is entitled to future interest after a tender of the disputed amount. Petitioner's cash deposit and irrevocable assignment meet any definition of "bond," "pledge," or "guarantee." Bond means "pledge" or "guarantee," and neither the Department of Revenue nor the Court of Appeals explains how an irrevocable assignment of a cash deposit is not a bond. There is no limiting condition as to the form of a bond in the appeal bond statute. The Opinion under review creates and grafts a novel restriction on § 12-60-3370, which is absent in the statute, not supported by case law, and contrary to the statutory requirements and public policy of the Revenue Procedures Act identified by this Court in *Great Games*. In creating a novel limiting condition—and applying it retroactively without notice—the Court of Appeals failed to adhere to the rules of statutory construction and fashioned a new and artificially narrow restriction that is at variance with the universal legal principle that Courts prefer to decide cases on their merits. See also the Revenue Procedures Act, § 12-60-20, S. C. Code, ann:

> It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning property taxes. The South Carolina Revenue Procedure Act must be interpreted and construed in accordance with, and in furtherance of, that intent.

The Department of Revenue's mission statement declares its policy is to provide "effectiveness and fairness to all taxpayers." See also § 12-58-20, S. C. Code, ann. Taxpayer's Bill of Rights. The Opinion under review is grounded upon a demonstrable error of law that interest continues to accrue after posting a bond. The Opinion under review misapplies South Carolina law that a tender or "bond" of the disputed amount shuts off future interest and yet this is the sole ground upon which the Opinion under review dismisses the appeal, erroneously denying

judicial review. In 2004, this Court reversed the Court of Appeals' dismissal of an appeal because the Court of Appeals concluded appellant made successive Rule 59 motions for reconsideration (one oral and a second one written) and therefore missed her appeal deadline. In allowing the appeal to go forward on the merits, this Court declared that procedural rules should be liberally construed so as not to deprive parties of the right to review:

> Fifth, civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*. *Cf. Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").
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> *Elam v. S. C. Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004)

The taxpayer properly preserved these issues in its September 26, 2024, Amended Notice of Appeal and in its August 10, 2026 Petition for Rehearing. (R.O.A. page 185 [amended Notice of Appeal]) The Record demonstrates Petitioner filed its initial appeal bond on June 10th **simultaneously** with the Notice of Appeal. (R.O.A. pgs. 147, 150 [Notice of Appeal, Appeal Bond]) The Department filed a motion to dismiss on June 19, 2024, arguing the appeal bond was deficient because (1) it was not filed "before" appeal, (2) did not include interest, and (3) Petitioner deposited the disputed funds in escrow in an I.O.L.T.A. account with an irrevocable assignment rather than a surety company or paid them over to the Department of Revenue. After the Department of Revenue asked the Court of Appeals to dismiss the appeal, on July 18, 2024, the Court of Appeals remanded the case back to the Administrative Law Court with instructions to set the appeal bond. The Court of Appeals remanded the case as follows:

> This matter is hereby remanded to the Administrative Law Court for an order specifying the amount of taxes Watertoys must pay and/or the amount of the Watertoys must **post** pursuant to 12-60-3370. (R.O.A. pages 11-12) (emphasis on "post" added)

The Court of Appeals and the Administrative Law Court on remand were both silent about the cash deposit allegedly being in a wrong place until the Court delivered its dismissal on July 29, 2026. On remand, the Administrative Law Court issued its Order on September 4, 2024, requiring Petitioner to increase the bond amount by $7,842.52 to include interest but said nothing about the Petitioner being responsible for future interest or the deposit being in a wrong bank. (R.O.A. pages 16-20 [Order]) Both the Administrative Law Court and the Court of Appeals were silent on the deposit into the I.O.L.T.A. account until the Court dismissed the appeal. As set forth above, on September 26, 2024, after the Administrative Law Court, again erroneously relying on "deference" accepted Respondent's interpretation even though it acknowledge the General Assembly amended the statute in 2000 to delete the interest requirement! See R.O.A. pg. 17, footnote 1. Tidalwave paid the required accrued interest amended the assignment (R.O.A. pg. 185-191) and filed an amended Notice of Appeal challenging the Administrative Law Court's decision that interest must be included in an appeal bond. As mentioned above and discussed in detail throughout, 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 Department of Revenue sought a preemptive dismissal with prejudice on the ground that the Court of Appeals lacked appellate jurisdiction. It acknowledged on page 3 of its June 19, 2024, Motion to Dismiss that questions about the sufficiency of an appeal bond are appellate questions, not jurisdictional ones, and conceded that the question was properly before the Court.

Because the Court of Appeals never reached the merits, the questions presented concern only the dismissal; if the writ is granted and the dismissal reversed, the merits either should be

remanded to the Court of Appeals for decision or this Court should exercise its prerogative to address the merits because the case raises a constitutional question under Article I, § 22.

Petitioner treats the Court of Appeals' misapplication of the rules of statutory construction separately in the next argument. Here, Petitioner points out that the right to judicial review is a constitutionally protected right that the Court of Appeals ignored. The Administrative Law Court gave due process short shrift even imposing the "drastic remedy" of summary judgment against Petitioner without a hearing, denying reconsideration without a hearing, and thereafter the Court of Appeals decided Tidalwave's appeal bond is fatally deficient (not "appropriate") without explaining why a cash deposit in an I.O.L.T.A. account accompanied by an irrevocable assignment to the Department of Revenue is qualitatively different from a written pledge from a surety company or a tender to the Department of Revenue itself. Either one terminates the accrual of future interest, the sole basis for the Court of Appeals' dismissal: "The interest generated from the IOLTA account is paid to the Bar Foundation and is therefore not available to satisfy the accrued interest on the tax debt should Respondent prevail. More importantly, deposit the funds into an IOLTA account is not a method sanctioned by the statute." (Opinion under review, page 4) This novel limitation on the appeal bond statute, adopted for the first time, and yet the Court applied it retroactively to bar a meritorious appeal. The decision is controlled by an error of law because § 12-60-3370 contains no such limitation and because an appeal bond terminates the accrual of future interest and yet these are the erroneous reasons the Court of Appeals dismissed the appeal.

The Court of Appeals also stated that depositing funds into an I.O.L.T.A. account "is not a method sanctioned by the statute." But Petitioner did not merely deposit funds. It filed a written "Appeal Bond & Personal Surety," given in accordance with § 12-60-3370, in which Petitioner's

principals, Michael Fiem and Mark Fiem, bound themselves to the Department of Revenue for the disputed tax, interest, and costs, and secured that undertaking with the escrowed funds and an irrevocable assignment of those funds to the Department. (R.O.A. 147, 149, 186 [appeal bond, amended appeal bond, supplemental appeal bond]) Section 12-60-3370 requires a taxpayer to "post a bond." It does not require a corporate surety, prescribe the form of the bond, or forbid a personal surety secured by cash. Opinion 6154 never acknowledges the personal-surety undertaking at all. Whether a bond of this kind satisfies § 12-60-3370 is a novel question of law that this Court has not decided and cannot serve as a bar to jurisdiction. Rule 242(b)(1), SCACR.

South Carolina law is settled that a judgment debtor's deposit of the disputed funds pending its own appeal stops the accrual of interest. *Russo v. Sutton*, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000). As this Court has explained:

> In *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), we held a judgment debtor's deposit of funds into court pursuant to Rule 67 pending his own appeal stops the accrual of interest on the judgment. See also *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct.App.1998). The rationale was that "such a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available." 317 S.C. at 442, 454 S.E.2d at 896.
> *Renaissance Enters., Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 326, 513 S.E.2d 617, (1999)* (holding the rule does not apply to interest agreed to by contract).

Because the interest at issue here is statutory and not contractual, *Russo* and the contract exception recognized in *Renaissance*, governs. The purpose of the rule is to "assure[] the judgment creditor the funds will be available." *Russo*, 317 S.C. at 444, 454 S.E.2d at 896. Tidalwave's deposit and irrevocable assignment: (1) guarantees a fund to pay a judgment without going through collection efforts, and (2) shuts off the accrual of interest by operation of law**.** The Opinion under review conflates two legally different forms of interest: (1) the interest accrued on the underlying tax liability computed to the date of appeal, which Petitioner paid in full (and also

appealed), and (2) interest earned on the deposited cash bond, which ends with the posting of the bond by operation of law. The Appellant's deposit of all principal and all accrued interest and the irrevocable assignment (which the Court of Appeals never mentions except to imply in oral argument Petitioner's counsel might not obey it) provides the first, and the application of law prevents the second. The only reason deposits into court exist is to preserve recovery for a prevailing party and freeze the debt to the amount paid into a court or a bond. See *Duval*, 339 S.C. 616, 529 S.E.2d 566 ("A judgment debtor's deposit of funds into court pending the debtor's own appeal stops the accrual of interest on the judgment."). In Common Pleas cases, the *Rules of Civil Procedure* include Rule 67, which allows parties to deposit the funds in any federally insured bank. The General Assembly's appeal bond statute provides the same ability for appellants without requiring leave of court, and Appellant's disputed principal amount and all accrued interest are deposited in a federally insured bank no different than if the Clerk of Court handled the deposit under a Rule 67 tender. Unlike a Clerk of Court's account, lawyers' I.O.L.T.A. accounts are highly regulated by the South Carolina Supreme Court and its rules governing the conduct of lawyers. These rules also regulate I.O.L.T.A. accounts and are far more protective than rules regulating the conduct of Clerks of Court. Lawyers' escrow accounts are insured, including protecting "third parties," by the Lawyers' Fund for Client Protection, Rule 411 *Appellate Court Rules*.

It is, therefore, palpable error for the Court of Appeals to create and impose a novel limiting condition not contained in § 12-60-3370. In providing for a taxpayer's right to contest a tax, the General Assembly did not adopt or imply the judicially created—and undefined—limiting condition of "appropriateness." This judicial statutory revision violates both the Article I, § 22's guarantee of judicial review, the State Revenue Act's purpose, and the rules of statutory construction. Appellate courts require litigants to adhere to statutory constraints and failure to do

so can result in an appeal being dismissed. Such failures include failing to appeal in time, failing to pay a filing fee, failing to address an issue on appeal, or failing to file proper pleadings, but South Carolina jurisprudence has never denied jurisdiction to a Constitutionally mandated judicial review based solely on a newly created restraint, especially one based entirely on a demonstrably erroneous ground that it is protecting the Department of Revenue's right to future interest it is not entitled to receive: "The interest generated from the IOLTA account is paid to the Bar Foundation and is therefore not available to satisfy the **accrued interest** on the tax debt should Respondent prevail." (Opinion under review at page 4, emphasis on "accrued interest" added) This conclusion is based on demonstrable errors of fact and law. First, Petitioner tendered **all the accrued interest** while properly appealing that issue, a fact the Court of Appeals never addressed. Second, the Court of Appeals misapplied settled law that Petitioner's irrevocable assignment and cash deposit appeal bond principal and accrued interest **stops future interest.** The Court of Appeals also deploys a power it does not possess either Constitutionally—to deny the guarantee of judicial review—or by ignoring the rules of statutory construction (discussed in the next section). When a party appealing a case pays disputed funds into Court by posting a bond, such deposit stops further accrual of interest. *Russo*, 317 S.C. at 444, 454 S.E.2d at 896. The deposit into an I.O.L.T.A. account accompanied by an irrevocable assignment meets every definition of "appeal bond" and fulfills the purpose of an appeal bond because it "assures the judgment creditor the funds will be available." *Russo,* 317 S.C. at 444, 454 S.E.2d at 896*, Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S. C. 460, 483 S.E.2d 796, certiorari granted, reversed 394 S.C. 324, 513 S.E.2d 617 (1997 Even if an appeal bond were misfiled, as in the case of filing an appeal in the wrong court, the remedy is not to abrogate a Constitutionally protected right of review, but rather to direct an appellant to correct the deficiency, something neither the Administrative Law

Court on remand nor the Court of Appeals did while the case was pending, violating the State's public policy of deciding cases on their merits. "This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities." *Mictronics, Inc. v. S. C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (Court allowed motion to reopen case.)

The Court of Appeals rested its entire conclusion upon a fundamental error of law: that depositing the cash in an I.O.L.T.A. account deprived the Department of Revenue of future interest on the disputed amount. This is an error of law because tendering the disputed amount terminates the accrual of future interest. The purpose of the Court of Appeals' July 18, 2024 Order of Remand was to require the Administrative Law Court to determine the amount of the appeal bond. On September 4, 2024, after remand, the Administrative Law Court entered its Order finding only a single deficiency: that Petitioner must deposit an additional $7,842.52 in accrued interest to perfect the appeal. The Petitioner complied, and filed an amended assignment, "supplemental bond," (R.O.A. page 189) and an amended notice of appeal on September 26, 2024. The Court's sole reasoning for dismissing the appeal is its erroneous conclusion that the deposit deprives the Department of Revenue of future interest, a conclusion **in direct conflict with established law**, which is a ground for review under Rule 242(b)(3), SCACR because tendering the disputed amount irrevocably assigned shuts off future interest. Thus, the Opinion under review is controlled by a clear error of law. The Opinion under review does not cite a single case, statute, policy, or tradition that supports a finding that a deposit into escrow accompanied by an irrevocable pledge falls short of the requirements of § 12-60-3370 for an appeal bond or that a simultaneous filing of bond and appeal is qualitatively different from one file one second before the other. How the Clerk of Court chooses to clock them in up to the Clerk, and Respondent can identify no prejudice drawing a

distinction between "before" and "simultaneous." Likewise, no one can reasonably question that an insurance company's "bond" is qualitatively different from (or better than) a "cash deposit bond." In Common Pleas, Rule 67 "Deposit in Court" of the *South Carolina Rules of Civil Procedure* requires only the funds be deposited in a federally insured bank identical to an I.O.L.T.A. account. Because the General Assembly did not place limiting conditions on appeal bonds in its clear and unambiguous appeal bond statute, the appellate "court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court of Appeals misapplied the rules of statutory construction.

2. In grafting a novel limiting condition on the appeal bond statute, § 12-60-3370 S. C. Code, ann. to impose a condition not authorized by the General Assembly, the Court of Appeals rewrote the General Assembly's statute governing tax appeals and misapplied the rules of statutory construction.

Section 12-60-3370 is not ambiguous. It contains no limitation, no prescription, and no proscription on appeal bonds; the Court of Appeals created a novel limiting condition out of whole cloth, ignoring and failing to obey or apply the rules of statutory construction. The rules governing the Court's interpretations of statutes prohibit courts from inventing or implementing novel limitations especially when circumscribing a constitutional right. In *Hodges*, this Court defined the rule of statutory construction to which lawyers and courts faithfully adhere. In determining for the first time that a cash bond is not "appropriate," the Opinion under review failed to adhere to its responsibilities to enforce the plain and ordinary meaning of the appeal bond statute:

> 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).

. . .

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).

Even the Administrative Law Court recognized this controlling principle on page 2 of its September 4, 2024 Order on Remand. See footnote 2 on page 2, where the Administrative Law Judge notes that an 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 by deleting that requirement, turning the rule of statutory construction on its head concluding the General assembly intended the opposite of deleting the requirement! See *Great Games Inc. v. S. C. Dept. of Revenue* 339 S.C. 79, 529 S.E.2d 6 (2000): "The appeal bond statute gives a taxpayer who wishes to challenge an administrative decision the right to elect either to pay the disputed amount over to the Department of Revenue or 'post a bond'." The General Assembly places no limitations or conditions on the form of the bond, and the use of a cash bond in both criminal and civil cases is common and undisputable. In criminal cases, a defendant either can deposit cash with the Clerk of Court or a percentage with a licensed bonding company. Likewise, in civil cases, defendants can deposit cash with the Clerk of Court and Rule 67 of the *South Carolina Rules of Civil Procedure* specifically authorizes cash deposits to Clerks of Court and requires only that the cash be deposited "in any bank or institution authorized to receive public funds." Rule 67.

Neither the Department of Revenue nor the Court of Appeals identified, let alone explained, the difference between a pledge from a surety company to pay the disputed amount versus an actual cash deposit secured by an irrevocable assignment to the Department of Revenue. The Court of Appeals skipped over this analysis and concluded without authority that it "finds" the Petitioner's cash bond is not "appropriate." Nothing in the record suggests that a commercial bond is more reliable than a cash deposit secured by an irrevocable assignment. This record portrays a wide array of technical objections interposed to prevent judicial review of the taxpayer's meritorious question, and the Court of Appeals erred in allowing one to prevent review of the substantive question the taxpayer raised. See § 12-60-20, S. C. Code—the Revenue Procedures Act—quoted on page 8 above.

The Opinion under review never engages, let alone analyzes the novel question the Court raised: Does the appeal bond statute, § 12-60-3370 prohibit a cash bond deposited in a trust account with an irrevocable assignment because it deprives Respondent of future interest? Without citation to a single authority, and without even a mention of the rules of statutory construction, the Opinion under review rewrites the General Assembly's statute to insert a novel limitation the General Assembly did not include. The Court does so on a demonstrably erroneous application of law regarding future interest to restrict Constitutionally protected judicial review. The Opinion under review never explains or justifies how cash deposits in a federally insured bank for the full amount in dispute—including accrued interest—accompanied by an irrevocable, written pledge is not a "bond" under the statute other than to rely on the erroneous proposition that the Department of Revenue is entitled to future interest after an appealing taxpayer posts a bond. Under *Russo*, a debtor's deposit of the disputed funds stops future interest. Lawyers' trust accounts are highly regulated. See *South Carolina Appellate Court Rules*, Rule 417, Rule 1, "Recordkeeping

Generally," Rule 2, "Client Trust Account Safeguards," and especially Rule 407, *Rules of Professional Conduct*, Rule 1.15 Safekeeping Property. See, particularly, subsection (d) of Rule 1.15:

Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client **or third person** is entitled to receive, and, upon request by the client or third person, shall promptly render a full accounting regarding such property. (emphasis added)

Thus, the Court of Appeals' Opinion is controlled by errors of law and it erred in dismissing the appeal to avoid addressing the Petitioner's appeal on the merits. The Court should grant a discretionary review to review these errors and prevent future taxpayer appeals from being improperly dismissed.

3. Even if the Court of Appeals, assuming *arguendo*, were correct in finding the Petitioner's bond to be deficient because it failed to meet a condition never previously defined, the remedy was to allow the taxpayer to correct it, not apply a new condition retroactively to dismiss a properly filed appeal.

The State Revenue Procedures Act (quoted above on page 8) and South Carolina jurisprudence favors deciding cases on their merits. See *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (1990), *Mictronics,* 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001 (quoted above on page 17) As this Court said in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018):

The court of appeals erred in concluding this issue was not preserved for appellate review; further, it was an abuse of discretion for the court of appeals to raise this issue sua sponte then to deny Petitioners' request to supplement the record with materials in response to the court of appeals' questions at oral argument, particularly where counsel for Pertuis conceded the Hammonds' challenge was preserved. "Judicial economy is not served when a case, ripe for decision, is decided on a procedural technicality of this nature. **In the interests of justice and fair play, cases should be decided on the merits when deficiencies of this nature can be easily corrected.**" *Silk v. Terrill*, 898 S.W.2d 764, 766 (Tex. 1995) (citation omitted) (finding an intermediate appellate court abused its discretion in denying a party's motion to supplement the record then concluding the resulting insufficiencies in the record procedurally barred the substantive consideration of the legal issues where the omitted documents had not previously been at issue and the appellate court was not in any way misled or its decision hindered or delayed); see also *Atl. Coast Builders &*

Contractors, LLC v. Lewis , 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "long-standing error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW* , 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review . . . . Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." (quotation marks and citations omitted)); *Wilder Corp. v. Wilke* , 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.").
423 S.C. 640, 817 S.E.2d 273 (2018) at footnote 3 (emphasis added)

The Court of Appeals failed to apply this settled jurisprudence to the present case. When the parties were before the Administrative Law Court after remand to consider the amount of the appeal bond, neither the Department of Revenue nor the Administrative Law Court mentioned the tender and assignment being improperly posted in an I.O.L.T.A. account. The Court of Appeals had denied the Department's motion to dismiss and remanded for the bond to be fixed, and Petitioner then posted every dollar the Administrative Law Court required. Dismissing the appeal two years later for a defect of form, without an opportunity to cure, cannot be reconciled with the Revenue Procedures Act, *Great Games*, *Pertuis*, or *Atlantic Coast Builders v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012): "However, this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." As discussed above, doubtful appellate procedural errors when correctable are not grounds for dismissal, and the Court of Appeals erred in dismissing this appeal.

CONCLUSION

This petition presents three of the considerations identified in Rule 242(b), SCACR: a novel question of law (Rule 242(b)(1)), a decision in conflict with decisions of this Court (Rule 242(b)(3)), and a substantial constitutional issue (Rule 242(b)(4)).

First, the Court of Appeals ignored the Constitutionally guaranteed right to judicial review of

administrative decisions preserved in Article I, § 22 of the State Constitution. Instead of giving any consideration to the right of judicial review, the Court of Appeals created a novel limiting condition found nowhere in South Carolina jurisprudence.

Second, the Court of Appeals generated a novel limiting condition on appellate review found nowhere in the applicable appeal bond statutes. Thus this case raises an issue of first impression (including the Court of Appeals conflating subject matter jurisdiction with appellate jurisdiction because appellate jurisdictional defects are subject to correction).

Third, the Court of Appeals disregarded the controlling precedent of this Court, including *Great Games* and *Pertuis*, by conflating subject matter jurisdiction with appellate jurisdiction. The lack of subject matter jurisdiction prevents an appellate court from taking up a case, while a procedural defect is never ground to deny a litigant appellate review when an alleged procedural error is easily remedied. To deny an appeal on the merits in this case, the Court of Appeals decided the Department of Revenue was prejudiced by being deprived of future interest on the tender when it is undisputable that the tender terminates future interest. Thus the Opinion under review is controlled by an error of law.

Fourth, on remand to determine the appeal bond, the Administrative Law Court said nothing about the amount being tendered improperly. The Department of Revenue raised the issue for the first time on appeal, and even if the Department of Revenue were correct, the remedy is not to dismiss an appeal, but to direct an appellant to correct the putative deficiency.

Fifth, the Court of Appeals ignored the well-established rules of statutory construction to create a novel limitation on the right to appeal found nowhere in the statutes governing appeals.

Finally, the Court of Appeals elevated a technicality over a substantive issue, ripe for judicial review and ignored the directive of the South Carolina Revenue Procedures Act, § 12-60-20, requiring

its provisions to be "interpreted and construed" in a manner to "provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue." The South Carolina Constitution guarantees access to judicial review, which the Court of Appeals denied based on an alleged technicality, that even if incorrect, can be easily corrected. The Court of Appeals improperly deprived this taxpayer of due process and fairness all the way around—from the Administrative Law Court deciding summary judgment without a hearing to the Court of Appeals denying a taxpayer Constitutionally protected judicial review based upon a demonstrable error of law that Petitioner's bond prevented the Department of Revenue from receiving future interest it is not entitled to collect. It is not only unjust but unlawful to deny fundamental access to judicial review upon invented conditions grafted upon appellate procedure.

For these reasons, the Court should grant Petitioner's prayer for certiorari review, reverse the dismissal, and either remand to the Court of Appeals for a decision on the merits (or decide the case on the merits because it involves a Constitutional question under Article I, § 22 as allowed by SCACR., Rule 203(d)(1)(A) or, alternatively, for leave to post a bond in whatever form the Court directs.

Respectfully submitted,

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