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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.

APPELLANT'S REPLY BRIEF

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REPLY TO RESPONDENT'S INTRODUCTION

The Respondent's introduction—and 3/4th's of its brief—urges this Court to not reach the merits of this appeal, glossing over important factual and procedural history. Not once does Respondent address the obvious legal errors governing the decision below: the erroneous reliance on administrative deference, the absence of a rationale to carve out waterborne parasailing from "boats which charge a fee for . . . excursion, sight-seeing and private charter." The court threw Appellant out of court on summary judgment without acknowledging—let alone analyzing—the Department of Revenue's unexplained change from its prior 22-year legal position agreeing with Tidalwave. Each one of these errors is sufficient to raise an inference that the case presents a genuine issue of material fact as to the application of § 12-21-2420. 75% of Respondent's brief is devoted to procedural fencing over technicalities to prevent review; only the last 5 pages address the legal issue of whether § 12-21-2420 is or is not ambiguous, and if it is, how the rules of statutory construction apply. (As discussed throughout Appellant's initial brief and below, the statute is not ambiguous.) The Department of Revenue ignores the undisputed fact that from 1996 until 2022, it agreed that the statute exempted Appellant's water tours from the admissions tax. It is also undisputed that the Department of Revenue audited Tidalwave in 2014 and found no deficiency in Tidalwave's exemption: "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." Record on Appeal page 144 [Affidavit of Michael Fiem] The Department of Revenue sent the first notice of an alleged deficiency on September 16, 2021. R.O.A. page 21 [Notice] The Record is silent about what changed from the Department of Revenue's previous 22-year policy, but the prior history is important, for it calls into additional doubt the lower court's selective deference. The 22-year prior history alone creates an inference compounding the error in granting the "drastic remedy" of summary judgment against Appellant without a hearing

precluding the parties from having a conversation about any of these issues. Therefore, Respondent's suggestion that Tidalwave improperly, fraudulently, or inequitably withheld admissions/amusement taxes is not supported by the record. A taxpayer can rely on long established government conduct: See *Ahrens v. State of South Carolina*, 392 S.C. 340, 709 S.E.2d 54 (S.C. 2011):

> B. The Elements of Estoppel
>
> Although the issue of estoppel may be disposed of under the State's first argument, for purposes of clarifying the necessary elements to prove estoppel against the government, we address this issue and find that Retirees failed to sufficiently prove these elements. "To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Grant*, 346 S.C. at 80–81, 551 S.E.2d at 232. In concluding that the State was estopped from requiring retirement contributions from Retirees, the circuit court judge applied a six element test derived from *Brading v. County of Georgetown*, 327 S.C. 107, 114, 490 S.E.2d 4, 7 (1997). Because the *Grant* elements have been specifically applied by this Court to claims against the government, we believe it is the appropriate test in this case.

Because the Administrative Law Court erroneously misapplied the obvious and unambiguous statutory exclusion for waterborne tours, and because the lower court never held a hearing, it neither considered nor applied the Department of Revenue's change in legal position. The undisputed fact is that from 1996 until 2021, the Department of Revenue believed waterborne tours were exempt, and this Record demonstrates that the Administrative Law Court ignored the plain and ordinary meaning of § 12-21-2420 S. C. Code, ann. and violated the summary judgment standard, discussed more fully in the next paragraph.

REPLY TO RESPONDENT'S STANDARD OF REVIEW—THE LACK OF ACKNOWLEDGEMENT OF THE SUMMARY JUDGEMENT STANDARD.

Respondent gives a cursory glance at the summary judgment standard. The Respondent lightly touches on it in a brief discussion on pages 14-15 and a single sentence in footnote 11 on page 15, none of which mentions either the Rule 56 hearing requirement or applies the obligation of the Administrative Law Court to construe evidence and inferences in favor of Tidalwave as the nonmoving party. As set forth in Appellant's Initial Brief at pages 9-10, the Administrative Law

Court misapplied the summary judgment standard across the board. As Respondent points out, the parties provided the Administrative Law Court with a joint stipulation of facts on March 20, 2024, and the parties agreed Appellant specifically reserved the right to call Tidalwave's principal to address the Court at a hearing: "We also agreed that I would have the right to call the taxpayer's principal, Michael Fiem, if your Honor has question(s) about any factual matter related to the operation of the business." (R.O.A. page 79 [March 20, 2024 corr. to Court]) Obviously, "questions" can only be addressed at the hearing required by Rule 56. Five days later, on March 25, 2024, Tidalwave filed its motion for Summary Judgment along with a supporting memorandum. (R.O.A. page 82) The Department of Revenue filed a cross motion for summary judgment on March 29, 2024. (R.O.A. page 90) Twenty days later, on April 18, 2024, without holding a hearing, the Court entered summary judgment. (R.O.A. page 1) The court denying participation to litigant before ending a case is the most profound prejudice imaginable.

To overcome this obvious prejudice, Respondent improperly cites a couple of in-house default judgements discussed below, inaccurately characterizing Appellant as staying "silent" about not being afforded a hearing when the record shows otherwise: "Appellant cannot stay silent throughout the ALC proceedings and then claim for the first time in its appeal that the ALC must hear an oral argument." Respondent's Brief at page 17. Both Rule 56 and 43 years of trial practice left counsel unprepared to contemplate that a court would consider imposing the "drastic remedy" of summary judgment against Appellant without a hearing, and the Department of Revenue's cross motion for summary judgment did not abrogate the Administrative Law Court's obligation to adhere to Rule the 56 procedure: "The motion shall be served **at least 10 days before the time fixed for the hearing**." (emphasis added), or to apply the correct summary judgment standard. While the trial court might deny summary judgment without a hearing, it cannot end Appellant's case without one, which is why Appellant specifically reserved the right to provide live testimony.

See correspondence to Court dated March 20, 2024 at R.O.A. page 79. The right to be heard is fundamental. *See State v. McSwain*, __ S.C. __, __ S.E.2d __ (Op. No. 28263 filed Feb. 26, 2025): "The [Vth and XIVth Amendments] provide both procedural and substantive due process protections. The procedural component requires adequate and fair procedures be employed when governmental action infringes upon a protected life, liberty, or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)" The Department of Revenue ignores this standard and misdirects the conversation to a discussion of the *Administrative Procedure Act*'s grounds for review. Appellant has no quarrel with Respondent's citation to the *Administrative Procedure Act's* § 1-23-610, listing the grounds for review of administrative decisions. The application of § 1-23-610 compels reversal for two reasons. First, the Administrative Law Court, erroneously relied upon *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984): "[C]ourts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" (R.O.A. page 4) This judicial deference is no longer permitted and thus the decision is controlled by an error of law. This error alone requires reversal under § 1-23-610 because, as set forth in Appellant's initial brief, the U. S. Supreme Court struck down judicial deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244 (June 28, 2024) To be fair to the Administrative Law Court, she issued her Order two months prior to *Loper Bright*. Moreover, the case arrives at the Court of Appeals on appeal from summary judgment—not from a decision on the merits—and thus the *de novo* standard of review is controlled by Rule 56, not § 1-23-610. Either way, the Order under review is controlled by an error of law.

REPLY TO RESPONDENT'S ARGUMENT 1
IT IS FRIVILIOUS TO ARGUE THAT THE COURT OF APPEALS LACKS APPELLATE JURISDICTION.

The Respondent's insistence that this Court lacks appellate jurisdiction is demonstrably frivolous. Every case Respondent relies on involves a dismissal either for failure to file the Notice of Appeal timely or a default judgement. Respondent's parsing of subject matter/appellate jurisdiction is a distinction without a difference. The most pertinent case, *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), not only rejects the Department of Revenue's spurious argument on jurisdiction, but also it demonstrates how the Administrative Law Court erred in failing to apply correctly the rules of statutory construction because in *The Town of Mt. Pleasant*, the Supreme Court supplied a missing deadline absent in the General Assembly's statute requiring Police Departments to install video cameras in their patrol cars within a reasonable time. Like Respondent here, Mt. Pleasant applied a self-serving interpretation to promote its interest. Its theory, like Respondent here, was that the omission of a term—a deadline—left the municipality free to ignore the statute as long as it liked. Even though the statute did not contain a time deadline, the Supreme Court recognized that leaving it open ended promoted governmental mischief. The Court imposed a deadline to prevent injustice, rejecting the equivalent of the Respondent's argument here; to wit, the absence of a definition of parasailing in the Code leaves the Department of Revenue free to apply its definition to increase its collections and ignore the law. For 22 years prior, the Respondent acknowledged that because 100% of Tidalwave's business occurs on "boats which charge a fee for . . . excursion, sight-seeing, and private charter," the admissions tax did not apply. The lower court gave erroneous deference to Respondent's interpretation, allowing it to create an interpretation to capture Tidalwave even though all of its activities took place entirely on a water vessel and involved "excursion, sight-seeing, and private charter." This self-serving hyper-technicality is precisely the same kind of governmental mischief addressed in *The Town of Mt. Pleasant*, especially when viewed against the Department of Revenue's previous 22-year course of conduct.

The Department of Revenue draws a pointless distinction between subject matter and appellate jurisdiction, arguing Appellant did not get his appeal bond properly filed, defeating the power of the Court to review the case. In *Town of Mt. Pleasant v. Roberts*, the municipality asserted the identical argument now being advanced by the Department of Revenue, an erroneous argument that appeal bonds are required **before** an appeal can be processed. (The Department of Revenue puts the emphasis on "before.") The South Carolina Supreme Court emphatically struck down an appeal bond precondition to invoke the Court's appellate jurisdiction in *Town of Mt. Pleasant*. There, the municipality demanded, as Respondent does here, the appellate court dismiss the appeal for the identical reasons now being advanced the Department of Revenue; to wit, Roberts forfeited her right to appeal because she did not post the requisite appeal bond before filing the notice of appeal. The Supreme Court recited those facts as follows:

> The Town moved to dismiss the appeal for lack of jurisdiction based on Roberts's failure to obtain a bond or pay the court-ordered fine prior to initiating the appeal. The Town contended the circuit court was without jurisdiction to rule on the appeal given Roberts did not comply with the procedural requirements of section 14–25–95 of the South Carolina Code, which governs appeals from municipal court to circuit court.
>
> *The Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011)

§ 14–25–95 says in part: "The party appealing shall enter into a bond, payable to the municipality, to appear and defend the appeal at the next term of the Court of Common Pleas or shall pay the fine assessed." That is the identical assertion the Department of Revenue now makes, but the Supreme Court swept aide that argument holding:

B. Appellate Jurisdiction

> As a threshold matter, we must address the Town's jurisdictional challenge as any defect in the circuit court's appellate jurisdiction would necessarily affect this Court's jurisdiction to rule on the Town's appeal.
>
> The Town asserts the circuit court judge erred in characterizing its jurisdictional challenge as one that implicated subject matter jurisdiction rather than appellate jurisdiction. The Town avers the circuit court judge did not have appellate jurisdiction to rule on Roberts's appeal given Roberts failed to either pay the court-ordered fine or obtain a bond prior to initiating her appeal to the circuit court. Under the Town's interpretation of section 14–25–95, the circuit court could only be vested with appellate jurisdiction if one of the above-listed prerequisites was satisfied.

Because our analysis of this issue and the Town's second issue is dependent upon our evaluation of the applicable statutes, we begin with an overview of this state's well-established rules of statutory construction.

1.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid– State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

2.

As an initial matter, we agree with the Town's argument that the circuit court judge erred in classifying the jurisdictional challenge as one of subject matter jurisdiction. See *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2000) ("The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction."); see also *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004) (recognizing that failure to timely appeal a conviction from magistrate court does not implicate subject matter jurisdiction).

Clearly, the circuit court had subject matter jurisdiction to hear and determine Roberts's appeal from her municipal court conviction as the Legislature has specifically authorized it to do so. See S. C. Code Ann. § 14–5–340 (1977) ("Circuit judges may hear appeals from magistrates' courts and municipal courts to the court of general sessions and the court of common pleas, upon notice as required by law being given for the hearing of such appeals."); *S.C. Const. art. V*, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

As for the circuit court's appellate jurisdiction, we find that Roberts properly met the prerequisites of section 14–25–95. Pursuant to this Code section, Roberts was required to file her notice of appeal with the municipal court "within ten days after sentence is passed or judgment rendered, or the appeal is considered waived." *Id*. § 14–25–95. There is no dispute that Roberts timely filed her appeal with the municipal court. Having met this procedural prerequisite, the circuit court was vested with appellate jurisdiction to determine Roberts's appeal. *Cf. Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 224, 634 S.E.2d 59, 61 (Ct. App. 2006) ("A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction.").

Unlike the Town, we do not believe the circuit court was divested of appellate jurisdiction because Roberts failed to obtain a bond or pay her court-ordered fine prior to filing her notice of appeal with the municipal court. These two provisions of section 14–25–95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute. Instead, these provisions serve the purpose of insuring that an appellant will appear for the hearing before the circuit court. If an appellant fails to comply with these provisions, the municipality may issue a bench warrant to address any delinquency on the part of the appellant.

Finally, we note that Roberts appeared at the hearing and paid her fine; therefore, any related issue is moot. See *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." (citations omitted)).

The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011)

In deciding *The Town of Mt. Pleasant*, the South Carolina Supreme Court cited the same case Appellant cites on page 35 of its Initial Brief, *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000). As discussed in Appellant's Initial Brief, *Great Games, Inc.* rejected the Department of Revenue's assertion that the appellate court lacked jurisdiction because the appellant failed to pay a fine before appealing:

Busters appealed to the circuit court, which held that because Busters failed to pay the $1,500 fine or post a bond before appealing as required by S. C. Code Ann. § 12-60-3370 (Supp.1998), it lacked "subject matter jurisdiction"5 over [339 S.C. 83] Busters' appeal. Alternatively, the circuit court held the ALJ's order was supported by substantial evidence. We agree with Busters that § 12-60-3370 does not apply to this type of case, but affirm the circuit court's substantial evidence holding.

Section 12-60-3370, a part of the "*Revenue Procedures Act*" (the *Act*), provides subject to certain exceptions not applicable here, "a taxpayer shall pay, or post a bond for, all taxes, including interest, penalties and other amounts determined to be due by the [ALJ] . . . before appealing the decision to the circuit court." The purpose of the *Act* 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 critical issue here is whether the fine imposed by the ALJ pursuant to S. C. Code Ann. § 12-21-2804(F) is a tax within the meaning of the *Act*. The circuit court held the language of § 12-60-3370 clearly and unambiguously applied to the fine, citing only this language from the statute: ". . . a taxpayer shall pay or post a bond for, all . . . amounts determined to be due by the [ALJ] . . . before appealing the decision to circuit court." The circuit court judge's editing of the statute selectively redacted the statute's relevant language, *i.e.*, the restriction of the bond/payment requirement to "all taxes, including interest, penalties and other amounts."

Turning to the *Act's* definitional section, it provides that "except when the context clearly indicates a different meaning," tax or taxes is defined as:

All taxes, licenses, permits, fees, or other amounts, including interest and penalties, imposed by this title, or subject to assessment or collection by the department, including property subject to collection pursuant to Chapter 18 of Title 27. § 12-60-30(27) (Supp.1998)

Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. *Mid-State Auto Auction of Lexington Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). Statutes which are part of the same legislative scheme should be read together. *Doe v. Brown*, 331 S.C. 491, 489 S.E.2d 917 (1997). The Legislature explained its intent in enacting the *Revenue Procedures Act*: "[T]o provide the people of this State with a straight forward procedure to determine any disputed revenue liability," § 12-60-20, and in promulgating this Act, it expressly repealed all provisions of Title 12 dealing with "tax appeals." See 1995 Act No. 60, § 41. That the Act concerns only tax appeals is clear from of reading of the Act as a whole, and it is also clear that the fine assessed against Busters for violation of video poker regulations is not a tax within the meaning of the *Act*, see § 12-60-30(27), *supra*, nor a tax within the ordinary definition of the term. See, *e.g., Powell v. Chapman*, 260 S.C. 516, 197 S.E.2d 287 (1973):

The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes. *84 C.J.S.* Taxation s 1, at page 32. The question of whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature and not on its designation.

We reverse the circuit court's holding that § 12-60-3370 applies to a fine imposed pursuant to § 12-21-2804(F).

Great Games v. S C Dept. of Revenue, 339 S.C. 79, 529 S.E.2d 6 (S.C. 2000)

These cases not only correct the Department of Revenue's misapprehension of jurisdiction, whether subject matter or appellate.[1] but also highlight the error below when the court failed to consider that it is at least a genuine issue of material fact the parasailing, which is not defined in the Code, is encompassed by the ordinary use of "excursion" or "charter" or "sight-seeing": "It is the intent of the General Assembly to provide the people of this State with a straightforward

[1] What's in a name? That which we call a rose By any other name would smell as sweet. William Shakespeare, *Romeo and Juliet*, Act II, sc. 2, lines 43-44

procedure to determine any disputed revenue liability. The *S. C. Revenue Procedures Act* must be interpreted and construed in accordance with, and in furtherance of, that intent." Little has been straightforward about this case, procedurally or factually.

To avoid the holding of the South Carolina Supreme Court, the Department of Revenue urges a bad faith, tortured parsing of the bond statute, § 12-60-3370, with an undue influence on the word "before" despite the controlling precedent such as *Great Games*, and a universal judicial commitment that litigants are not prevented from judicial review by technicalities. See *Mictronics, Inc. v. S. C. Dep't. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) where this Court reversed the administrative Law Court's refusal to allow a late answer: "This [setting aside default] is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. *Id*.; see also *Balloon Plantation, Inc. v. Head Balloons, Inc*., 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct. App. 1990) (finding sanction dismissing counterclaim too severe)."

Great Games, and every case dealing with tax appeals, instructs the Department of Revenue that: "The Legislature explained its intent in enacting the *Revenue Procedures Act*: "[T]o provide the people of this State with a straightforward procedure to determine any disputed revenue liability." The Department of Revenue's mission statement expresses the same principle: "Our mission is to administer the revenue and regulatory laws of the State with integrity, effectiveness and fairness to all taxpayers, while maintaining the highest security and the protection of taxpayer information." *S. C. Dept. of Revenue Mission Statement* However, whether misrepresenting the procedural timeline, ignoring controlling precedent, or improperly citing unpublished trial court default decisions (after being warned to discontinue that practice), the Department of Revenue repeatedly relies on sharp practices only engaging the substantive legal issue in the last five pages.

Reply to Argument 1.A

A deposit into an I.O.L.T.A. account accompanied by an irrevocable pledge is a sufficient cash bond.

The Department of Revenue jettisons integrity and fairness here. Rather than address the legal issue head on—did the General Assembly exempt waterborne tours from the admissions/amusement tax—the Department of Revenue employs ferocious sophistry to prevent the taxpayer's access to judicial review. The Department of Revenue asserts three alleged deficiencies it contends defeats the Court's jurisdiction:

(A) A cash surety bond is insufficient, (B) A bond for unpaid taxes, allegedly due, must include interest, and (C) Appellant's initial simultaneous filing of the Notice of Appeal and Appeal Bond do not fulfill the law's requirement that the bond is required "before" appealing.

Regarding access to judicial review, the only way the Department of Revenue can allege the Court lacks jurisdiction is by ignoring precedent and burdening the Court with demonstrably frivolous assertions. The State Constitution guarantees judicial review. Article I, § 22:

> No person shall be finally bound by a judicial or a quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; . . . nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all instances the right to judicial review.

With Article I, § 22 as the foundation, we will address the alleged deficiencies in order: The appeal statute, § 12-60-3370, 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 "or" added)

The Department of Revenue contends the Appellant's cash deposit into an *I.O.L.T.A.* accompanied with Appellant's irrevocable pledge does not fulfill the statute's terms, but it offers neither authority nor a rationale for its assertion. There is no more dependable surety than a cash deposit, and by posting a cash surety, Appellant relieves the Department of Revenue repaying interest to Appellant if Appellant prevails. Searching for any rationale as to why a cash deposit is not an adequate surety, the Department of Revenue takes the Court through a detour through the

Rules of Professional Conduct that govern lawyers' ethical duties to protect deposits in trust accounts. While Respondent's analysis of the *Rules of Professional Conduct* is an unnecessary and irrelevant detour from the issue before the Court, it does reinforce Appellant's point that the deposit is a guaranteed surety! In its Argument I(B) addressing interest, the Department of Revenue again relies on unpublished and administrative Law Court trial decisions, a violation of the *Rules* and the Department's own pledge of integrity and fairness. (For the literary minded on the subject of double standards, Dante Alighieri put the hypocrites in the eighth circle of *The Inferno*.)

Reply to Argument 1.B
§ 12-60-3370, S. C. Code does not require interest as a condition of appeal, and even if it did, Appellant supplemented its initial timely filed appeal bond by depositing the disputed interest and filing an amended notice of appeal.

The lower court applied mutually exclusive, illogical, and contradictory applications of statutory construction to the statutes it examined. When it comes to Exemption 13, the lower court concluded that the absence of a statutory definition of "parasailing" means it is excluded from "excursion" or "charter" or "sight-seeing," ignoring the obvious intent of the statute to exempt conduct conducted on water. Exemption 13 in § 12-60-2240 means the General Assembly **excludes** parasailing because it takes place on "boats which charge a fee for . . . sightseeing." Sight-seeing" is synonymous with "excursion" and "charter." By excluding "parasailing" from these terms, the court did not apply the terms in their plain and ordinary meaning. By contrast, the Department now urges the exact opposite statutory construction for § 12-60-3370; to wit, that the General Assembly's exclusion of "interest" in § 12-60-3370 means it **includes** it! The Department's elastic logic is so malleable that in contrast to its argument on the admissions tax, it urges the precise opposite application of statutory construction to the appeal bond statute because it contends "taxes" and "interest" are equivalent terms.

On July 18, 2024, this Court remanded the case to the Administrative Law Court to calculate an appeal bond (R.O.A. page 11) The Administrative Law Judge issued an Order on September 4, 2024, concluding that the previously posted surety bond should also include interest in the amount of $ 7,842.52. (R.O.A. page 152) On September 26, 2024, Appellant filed an Amended Notice of Appeal on the Administrative Law Court's decision on interest. (R.O.A. page 185) While specifically reserving the right to challenge this decision, Appellant deposited an additional $7,842.52 and filed a supplemental appeal bond on October 21, 2024. (R.O.A. page 189 [supp. appeal bond] The Department of Revenue again asserts that the Court has no jurisdiction to address the interest appeal even though *The Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011) quoted above resolves this assertion against the Department of Revenue: "A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction." What makes the Department of Revenue's constant jurisdictional attacks so wasteful is that the interest debate, while properly before the Court, is necessarily resolved by a decision on the one substantive legal issue before the Court—whether waterborne tours are required to collect an admissions/amusement tax. If Appellant prevails, then the issue of interest never arises.

When the parties were before the Administrative Law Court on August 28, 2024, Appellant pointed out that § 12-60-3370, S. C. Code specifically excludes "penalties or civil fines" from an appeal bond. The Department of Revenue countered that the definitional section of the *Revenue Procedure Act* defines "taxes" as including "interest." § 12-60-30 (27) simply defines when taxes are due, they may include interest. It says nothing about a requirement of interest as a condition of appeal, and the two statutes address completely different topics so they do not need to be harmonized. Respondent's definitional argument misses the point for several other reasons. The first reason is that the rules of statutory construction require that § 12-60-3370 be read in its plain

and ordinary meaning, and there is no dispute the General Assembly specifically excluded "penalties and fines." Likewise, there is no dispute that the word "interest" is not included in the statute. The Department of Revenue argues that when the General Assembly omitted the word "interest" in the statute, it really meant it was **including** "interest" in the statute, which is the precise opposite of the governing rule of statutory construction set forth above, citing *Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000).

> 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).

At the same time the Department of Revenue argues the precise opposite of its reasoning in applying § 12-60-2240 (discussed in Reply to Argument II). There, the Department of Revenue argues that when the General Assembly included "charter" and "excursion" and "sightseeing," it **excluded** parasailing! In other words, the Department of Revenue asserts that by excluding "penalties" and "civil fines," the General Assembly was including interest by implication, which is an obvious misapplication of the statute. George Orwell had a field day spoofing such sophistry.

The Department's reasoning is not only at variance with the rules of statutory construction, but also illogical.

Obviously "interest" is a "penalty." It is frivolous to assert otherwise. A similar issue arose in the Fifth Circuit Court of Appeals in 1992 in a case called *In Re: Matter of Garcia et. al.*, 955 F2d 16 (1992). There, the Fifth Circuit evaluated the question of whether interest on pre-petition unpaid tax was or was not a priority claim or a general unsecured claim. In defining interest on unpaid taxes, the Fifth Circuit (citing other cases) held:

> Although the priority of taxes is obvious, the provision does not mention the status of interest. Nevertheless, pre-petition interest on the tax liability seems to fit snugly within section 507(a)(7)(G). Interest on unpaid taxes accrues as a penalty, to repay the government and the public, for the loss of use of the money they suffer while the delinquent taxpayer refuses to pay. *Palmer*, 53 B.R. at 549 (distinguishing between interest, which is assessed as compensation to the IRS for the use of the money by the debtor subsequent to the filing dead-line, and a nonpecuniary loss penalty, assessed to punish the debtor for failure to file a tax return on time). In other words, the interest compensates the government for its actual pecuniary loss.

This is the same reasoning advanced by Appellant on page 36 of the initial brief, citing *22 Am.Jur.2d,* "Damages" § 426 Interest Generally. The federal courts cite the comparative section in *85 Corpus Juris Secundum*, Taxation § 1054: "As *C.J.S.* points out, interest, as a means to compel timely payment, constitutes a penalty in the broad sense of the word." *In re: Elmer Palmer*, 53 Bank. Rpts. 545 (N.D. Tex. 1985) In short, Respondent tortures the ordinary application of English words to suggest that interest added to a debt is not a "penalty." The Department of Revenue contradicts itself when it says interest is to compensate the State for the loss of use of the money and to prevent a taxpayer from receiving a "loan" from the State. See Respondent's Brief at page 10: "In other words, a taxpayer, might enjoy a loan from the state by deferring (perhaps indefinitely) payment of taxes." To compensate the State, it imposes "interest" as a penalty.

The Department of Revenue seeks to escape its logical cul-de-sac by resorting to a corollary rule of statutory construction that separate statutes should be harmonized when possible. Appellant concedes the principle that statutes should be harmonized whenever possible if they can

be harmonized without resorting to forced or tortured interpretation. However, the admissions tax statute and the appeal statute are not related to the same subject, so the Department's reliance on unrelated tax collection definitions to shoehorn "interest" into § 12-60-3370 ignores the more fundamental Constitutional protections and statutes guaranteeing a citizen's access to the Courts. In other words, a related tax statute that sets out definitions cannot be harmonized with the taxpayer's constitutionally guaranteed right to judicial review. In fact, the Department of Revenue makes Appellant's argument for him: "S. C. Code Ann. § 12-60-30 (2014), the definition section of Chapter 60 of the *Revenue Procedures Act* (RPA), provides: (27) "Tax" or "taxes" means taxes, licenses, permits, fees, or other amounts including interest, regulatory and other penalties, and civil fines, imposed by this title, or subject to assessment or collection by the department." (Respondent's Brief at page 9) Since the General Assembly made "interest" co-equal with "other penalties, and civil fines imposed by this title," Respondent demonstrates why interest is not required.

> The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998).
> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. Id. (citing *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 725, 501 S.E.2d 725 (1994)). *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)

To harmonize statutes, a citizen's constitutional and statutory rights to judicial review are fundamental requirements to which § 12-60-3370 must be harmonized. See Article I, § 22, *South Carolina Constitution* and Article XII, *South Carolina Constitution.* Both guarantee access to the Courts. Before the Administrative Law Court, Appellant was procedurally barred from challenging the constitutionality of § 12-60-3370—see *Great Games Inc. v. S. C. Dept. of Revenue* 339 S.C. 79, 529 S.E.2d 6 (2000)—which is a shame because like most taxpayers, Appellant lacks

the financial strength to assert a separate action in circuit court. There is an interesting and unresolved constitutional question as to whether the General Assembly can impose financial conditions—especially punitive ones—to curtail a citizen's right to judicial review, and § 12-60-3370 and Article I, § 22 are in an obvious conflict that needs to be resolved.

Finally, the issue of whether the Appellant must post interest as a pre-condition of appeal is premature because, as discussed above, the interest issue does not arise until the dispute of the admissions/amusement tax is resolved. Moreover, Tidalwave put an end to this misdirection by depositing the interest even though it was under no duty to do so. Even if interest were required, Appellant took "timely action necessary to correct an error" under the holding of *The Town of Mt. Pleasant v. Roberts, ibid*. This "correction" makes further discussion of Respondent's assertion merely academic: "Finally, we note that Roberts appeared at the hearing and paid her fine; therefore, any related issue is moot." Tidalwave timely appealed the September 5, 2024, Order requiring interest and later deposited the alleged interest well before this Court reaches the merits. Thus, there is a live issue before the Court should the Court choose to address it, but the fact that the lower court erroneously entered summary judgment renders the Department of Revenue's effort to prevent judicial review nothing more than dilatory and diversionary misdirection. The interest debate burdens the Court with a meaningless academic exercise to divert the Court from reaching the salient issue of the lower court improperly granting summary judgment. It is also inconsistent with the Department of Revenue's putative commitment to "fairness" and "integrity." There **is** an active question before the Court as to whether interest is or is not required in an appeal bond, and that is a fair debate, but since the Department of Revenue is still arguing the Court should not hear the appeal—and that is what Argument 1 contends—then because Appellant deposited the interest, or as the Supreme Court said in *Roberts*, "corrected," the filing, it is time for the Department of Revenue to focus on the real substantive issue before the Court: whether

Exemption 13 of § 12-21-2420 does or does not exclude Tidalwave. And, as set forth above, although it is worth repeating, no taxpayer can challenge the constitutionality of such appellate precondition in the Administrative Law Court. *Great Games Inc. v. S. C. Dept. of Revenue* 339 S.C. 79, 529 S.E.2d 6 (2000).

In addition, Rule 241 of the *Appellate Court Rules* imposes an automatic stay against enforcement of lower court orders. The exception to the general rule set forth in 241(b)(11) pertains to Orders requiring litigants to perform some act or refrain from performing some act, which is not involved here. The Rule 241(b)(11) exception does not pertain to a litigant's right to access to judicial review as a condition on tendering a penalty, and because the case was already on appeal and because Appellant previously posted an appeal bond, there was no requirement that he post interest as well. Nonetheless, Appellant deposited an additional $7,842.52 on October 21, 2024, and provided notice to the Clerk of the Court of Appeals. The fact that the Department of Revenue frames the dispute over interest as grounds to dismiss the appeal is a clear statement that it lacks confidence in its assertion that Tidalwave owes an admission/amusement tax.

Reply to Argument I(C)

The Appellant timely appealed and timely filed an appeal bond.

Respondent's argument here is both repetitive and spurious. For the Court's convenience, Appellant repeats, one more time, the appeal statute, this time with the emphasis where the Department of Revenue wants it:

> 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.
> § 12-60-3370 (emphasis on "before" added)

The Department of Revenue's argument is again frivolous. Appellant regrets burdening the Court by addressing it. For that reason, Appellant keeps the reply construing "before" succinct.

First, the Appellant filed the original notice of appeal to this Court and the appeal bond simultaneously on June 10, 2024. (R.O.A. pages 147 and 152) Any debate over which was

"before" and which was "after" is an exercise in meaningless sophistry. After the Department of Revenue filed a Motion to Dismiss on June 18, 2024 (R.O.A. page 154), Appellant realized, for the first time, his deposit was short by $702.00, an error attributed to counsel's mistake because counsel was in the process of relocating and temporarily disconnected from both the computer network and email. Upon learning of the error on June 18th, Appellant replied two days later on June 20th. (R.O.A. page 150) Tidalwave deposited an additional $702.00 and filed an amended surety pledge on June 25, 2024. (R.O.A. page 150) Thereafter on July 18, 2024, this Court remanded the case back to the Administrative Law Court to set the amount of the appeal bond. The Administrative Law Court issued its Order on September 4, 2024, setting the amount of the appeal bond at $33,998.40 in taxes, which was already deposited, and $7,842.52 in an interest penalty. (R.O.A. page 16) (For some reason, the Administrative Law Court also gratuitously computed a separate alleged "penalty," which it was not asked to do.) On September 26, 2024, Appellant filed an amended notice of appeal. (R.O.A. page 189) On October 22, 2024, Appellant made an additional deposit to the previously deposited bond in the amount of $7,842.52 and signed a supplemental surety bond, bringing the total deposit to $41,840.92. Notwithstanding the total amount of taxes posted on June 10 and 25, 2024, followed by alleged interest on deposited on October 22, 2024, pledged to the Department of Revenue, it still argues over jurisdiction.

There is not a single case in South Carolina jurisprudence that supports the Department's assertion that an amended or supplemental appeal bond must be filed "before" some set period of time prior to the Notice of Appeal or that an appeal bond must include interest. In *Town of Mt. Pleasant v. Roberts*, the Supreme Court made clear that timing of payment is not a consideration that impacts jurisdiction, not only giving the Appellant time to correct deficiencies but also declaring that corrections mooted the issue:

Finally, we note that Roberts appeared at the hearing and paid her fine; therefore, any related issue is moot. See *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499,

506 (2010) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." (citations omitted))...

The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011)

Here, Appellant corrected any alleged deficiency and a favorable decision on the application of § 12-21-2420 moots the debate.

Second, if the Department of Revenue is going to parse the statute so hyper-technically, it has no answer for the undisputed fact that Appellant filed the original appeal bond on June 10, 2024, four months before the Administrative Law Court calculated the amount due on September 4, 2024. (R.O.A. pages 147, 150, and 16 [Notice of Appeal, Appeal Bond, and Administrative Law Court Order] While the original bond amount was $702.00 short through counsel's excusable mistake, and while the original bond did not include "interest," it is indisputable that Appellant filed an appeal bond simultaneously with its Notice of Appeal properly invoking appellate jurisdiction. Under the facts of this case, it is frivolous to assert Appellant failed to file timely an appeal bond.

Reply to Argument II

§12-21-2420 is not ambiguous in the least, and the Department of Revenue tortures the meaning in order to increase collections improperly.

Argument II finally reaches the substantive legal issue before the Court: the unambiguous intent of the admissions/amusement tax statute, §12-21-2420. The parties also finally arrive at common ground. Respondent is correct—review of this case is *de novo*, which explains why it throws everything but the kitchen sink to persuade the Court not to review the case. Respondent is also correct that the Court must determine if §12-21-2420 is ambiguous. It is not. In fact, as discussed above, from 1996 until 2021, the Department of Revenue agreed Tidalwave's water tours are exempt, which shifts the burden to the Department of Revenue to explain its change of position. That single undisputed fact is sufficient to prevent summary judgment because it gives rise at least to an inference that water tours are exempt. Also correct is Respondent's

acknowledgement that the U. S. Supreme Court abrogated judicial deference to agency interpretations in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L.Ed.2d 832 (2024). That "least appropriate," erroneous reliance is also itself sufficient to require reversal because the Administrative Law Court relied almost exclusively on deference to reach its conclusion. Thus, the Order under review is controlled by an obvious error of law, and, as Respondent points out on page 5 of its brief citing § 1-23-610 of the *Administrative Procedures Act*, an error of law requires reversal.

The balance of the Respondent's Argument II(A) and (B) is that parasailing is not exempt from the admissions/amusement tax because the statute does not include the word "parasailing" in Exemption 13 and that Tidalwave bears the burden of proof showing Exemption 13 exempts its activities from the admissions/amusement tax, which is easy under the rules of statutory construction. Argument II(B) restates the same contention by saying there is no genuine issue of material fact, a hard sell when the record demonstrates the lower court (1) improperly applied deference, (2) asked no questions, (3) did not consider the change of position, and (4) never held a hearing.

As to Argument II(A), the parties submitted 13 stipulated facts (and an affidavit) to the Administrative Law Court including the following:

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.
4. For parasailing rides, Petitioner charged $85.00 for a passenger to parasail and $35.00 for a passenger to observe.

. . .

10. **The Tax Code (Title 12) does not contain a definition of "parasailing."** (R.O.A. page 81) (emphasis on #10 added)

The Department of Revenue asserts the omission of the word—or definition—means the Legislature excluded, or as it says: "Noticeably absent from that list are parasailing rides. Therefore, the analysis should end there." (Respondent's Brief at page 12) If that were so, then society would not require courts, lawyers, or rules of statutory construction, but the struggle over the meaning of language has been around since the ancients. The U. S. Supreme Court recently held that agencies' interpretations are afforded no weight, and yet, that is the substantial basis on which the lower court decided the case. All language is bounded, and human beings fill in context. That is why there are an abundance of cases turning on analysis of words like "shall," "and," "or," or even punctuation. Every science fiction book and every third movie depicts human beings struggling to overcome their elimination by machines. Even a one-word statement requires context; otherwise, abandoned cars would stack up behind stop signs. The Department of Revenues published its context in its October 9, 1995 Technical Memorandum, 95-2, (R.O.A. page 203) on the admissions/amusement tax, which says in applicable part:

> It should be noted that the admissions tax applies to charges for admission 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.

It is indisputable that the only function of "parasailing" is "solely for sightseeing," and all of its activities take place on "boats which charge a fee." As Respondent says, the inquiry should end there.

The words "entertainment, dancing, drinking in a social environment" do not appear in the statute, but the Department of Revenue construes these words in the context of the statute. The Department of Revenue makes an illogical leap that because "parasailing" is not defined, it is, by definition, excluded from the normal understanding of "charter" or "sightseeing" or "excursion," a negative inference without any basis for such an assertion other than the in-house declaration the Supreme Court declared cannot serve as validation. The lower court erred in applying the "drastic

remedy" based on a regulatory negative inference declared invalid by the U. S. Supreme Court. It is indisputable that Tidalwave's "parasailing," which is conducted entirely aboard a boat, is synonymous with any one of the exempted categories, and the dispute raises, at least, a genuine issue of material fact. The Administrative Law Court premised its entire conclusion upon improper deference to the Department of Revenue's interpretation. As Tidalwave's May 7, 2024, affidavit filed with the Administrative Law Court summarized its activities, it said in applicable part:

> Tidalwave began business in 2005, when I purchased it as a going concern. The original Tidalwave began in 1996.
>
> We provided sightseeing charters, excursion/tours as set forth in the Stipulation of Facts.
>
> Prior to closing down in 2023, we offered sightseeing, charter excursion tours, eco tours, and chartered parasailing. If a passenger wished to go aloft, we launched him or her from the boat while we were underway and we returned the passenger to the deck of the boat while underway. In other words, we did not offer parasailing rides like other companies in Myrtle Beach and other places operated. (There are even other companies that offer parasailing using a motor vehicle on land. See photo below discussed more fully below.)
>
> Participation in Tidalwave's parasailing is only a part of a minimum 2-hour excursion, charter, tour, but other passengers take in sights either seated or standing, and we take passengers on tours whether one or more elect to parasail. Each passenger pays the same fee whether he or she goes aloft or not (although we did offer a discount for parents who insisted that they be present to monitor their children). Even though we were in business since 2005, and audited by the Department of Revenue in 2014, it was not until late 2018[2] that the Department of Revenue made for the first time, a demand that we collect an admissions/amusement tax for parasailing passengers. The Department has never grasped that what our company specifically offered is different from other parasailing offerings. Tidalwave's activity is a minimum 2-hour private sightseeing, excursion charter, which may or may not include parasailing. That decision is left entirely to the paying customer, and a typical charter usually does not have 100% parasailing participation. Passengers pay the same amount whether they go aloft or remain seated during the entire charter. Every charter included a discussion of the sights, history, marine life, plant life, bird life, *etc*.
>
> Finally, as mentioned above, the Department of Revenue audited us in 2014 and found some deficiencies unrelated to admissions/amusement tax, but did not claim we were supposed to be collecting an admissions/amusement tax, and our operation did not change in any way from 2014 until we closed up in 2023. The Department of Revenue has never identified a definition of para-sailing other than its unsupported assertion. The Department of Revenue fails to acknowledge the undisputed fact that the activity of parasailing can be offered/conducted in significantly different manners. For example, parasailing is offered in the Midwest as a carnival ride behind a motor vehicle. Closer to home, companies in South Carolina have launched customers from the beach and landed them on the beach, all without ever being a passenger on a

[2] The date is incorrect. The Department notified Tidalwave of alleged deficiencies in 2022. See R.O.A. p. __[April 25, 2022, corr. to Jessica Frazier]

vessel or participating in a minimum 2-hour charter, excursion, sightseeing tour, which distinguished our operation from others. See sample photo: [photo on page __ R.O.A.]

Simply stated, we offered charter tours that included sightseeing and educational components. We offered charter tours, which is why Exemption 13 specifically applied to our operation.

Our operation has not materially changed since 2005, and all our activities took place on the water. R.O.A. page 141 and 144 [May 7, 2024 affidavit and Reply]

When applying these facts to the statute, the Administrative Law Court's error is obvious.

Reply to Argument II(C)

The Administrative Law Court denied Appellant fundamental due process in deciding summary judgment without participation, and the Department of Revenue misleads the Court by asserting non-binding and irrelevant trial cases.

The statutory interpretation error becomes even more obvious when the Court considers the Administrative Law Court entered summary judgment relying entirely on deference to the Department of Revenue's interpretation without even allowing Appellant to be heard. Despite being previously warned against citing improper authority, Respondent misleads the Court on the law by citing non-precedential and factually distinguishable Administrative Law Court default cases. The only reason Respondent is aware of these cases is because Respondent's counsel handled them. First, Rule 56 is clear: "The motion shall be served at least 10 days before the time fixed for the hearing." Second, the two cases cited by Respondent, *Clarence Hinnant* and *Alfonso and Evon Whitt*, 18-ALJ-17-0167 (2018) and 19-ALJ-17-008 (2019) as putative authority for a court to consider summary judgment without party participation both involved *pro se* parties who gave up and did not respond to the Department of Revenue's Motion for Summary Judgment so the Department of Revenue obtained default judgments! If such misrepresentation of these cases were not enough, the Respondent also contends the Appellant could have demanded a hearing **after judgment was entered**! For over 50 years *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) established that post-judgment hearings do not meet minimal due process standards. The rule is the same in South Carolina even in appearances before municipal boards: "The fundamental requirements of procedural due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 656 S.E.2d

346 (2008) The question here was raised in a court of law, and no one can say Rule 56 is ambiguous. No litigant's claim has been ended by the "drastic remedy" of summary judgment, for or against a party, without an opportunity to address the Court, and the prejudice to the Appellant is profound, which Respondent shrugs off as Appellant's mistaken reliance on the *Rules of Civil Procedure*.

On page 15 of its brief, the Respondent acknowledges in footnote 11 that the Court taking up summary judgment must construe the facts and inferences in the light most favorable to the non-moving party. How that happens without the non-moving party's participation is left unexplained.

Conclusion

The Administrative Law Court's Order is controlled by multiple errors of law. First it relied heavily on deference to the Respondent's interpretation of the statute, which we now know is an error of law. Second, it misapplied a tortured interpretation of § 12-21-2420 without ever explaining why parasailing conducted entirely on a chartered sightseeing vessel is not synonymous with "charter" or "sight-seeing," or "excursion." Third it compounded the error by freezing Appellant out of the summary judgment procedure established in Rule 56, which prevented any meaningful discussion of the prior 22-year course of conduct or even if the Court had questions about any aspect of the case. If judicial decisions are made in vacuums, then lawyers are unnecessary vestigial remnants of ancient times, and we are turning our legal disputes over to artificial intelligence. The General Assembly's exemption for boat charters, for boat excursions, and for waterborne sightseeing could not be clearer, and even if exemptions are strictly construed, the rules of statutory construction still apply. All of this could have been hashed out in a hearing and then at least the case would arrive to the appellate courts on a fully developed record. The case should be reversed and remanded because the Order under review is controlled by multiple errors of law and a denial of fundamental due process.

Respectfully submitted,

May 21, 2025

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CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief complies with Rule 211(b), S. *C. Appellate Court Rules*.

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