THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

RECEIVED
FEB 18 2014
SC Court of Appeals

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

APPELLANTS' REPLY TO RESPONDENT'S RETURN

Pursuant to Rule 240(f), Appellants ("the Rays") respectfully Reply to the Return of Respondent ("DOR"). The Return is dated Thursday, February 6, 2014. However it was placed into an envelope bearing an inaccurate address (cf. DOR Proof of Service to the Rays' address of record), the envelope was eventually corrected, the Return mailed some time thereafter, and it was received by the undersigned on Monday, February 10, 2014 at 3:04 p.m.

First, the Rays reiterate by this reference, the text and arguments of its Motion of January 27, 2014. In addition, reference is made to the Exhibits attached thereto.

Relevant Procedural Admissions

The DOR Return contains relevant and revealing admissions. In it, to outline only two (2) concessions, DOR confirms the tribunal's non-compliant abbreviation of the matter below by the ALC. Moreover, in its submission to the Supreme Court, also dated February 6, 2014, DOR makes an astounding reversal of its position as to what "determination" is required under S. C. Code § 12-60-3370. Either, but certainly both issues, in addition to those of the Rays' Motion, further militate in favor of reinstatement here.

For Good Cause, the Court should grant Reinstatement

Artificially shortened timeframe made Summary Judgment premature

DOR now concedes/confirms that a scant 76 days (May 11, 2012 to July 27, 2012) elapsed from the initial filing of the Contested Case in the Administrative Law Court ("ALC") until the award of Summary Judgment. That is a period of time far less than the 90-day minimum afforded for discovery, alone. Rule 21A, ALC.

It is already established in the Record and the Briefs that the Rays prepared and served discovery under the rules at the earliest possible time. It is admitted by DOR that it never filed a Motion for Protective Order addressed thereto. It is also conceded that DOR never prepared or served any objection or any response at all to Rule 33 standard Interrogatories or the Requests for Production allowed by the ALC. Yet, Summary Judgment was awarded to DOR by the ALC.

By its current Relevant Procedural History admission that the minimum period expressly devoted to discovery was curtailed, without DOR Motion or *sua sponte* ruling, DOR establishes that even consideration of Summary Judgment below was error. Its award, and tribunal approval of complete refusal of discovery by DOR, only served to compound the prejudice to the Rays.

In summary, the South Carolina appellate courts reviewed and considered lower court awards of Summary Judgment nearly 100 times in 2013. Many of those cases were reversed or affirmed solely on the issue of the affording or disallowance of a reasonable opportunity to complete discovery. Because the tribunal failed to accord the Rays that opportunity, good cause for reinstatement and review is demonstrated.

DOR's new. and novel. interpretation of S. C. Code § 12-60-3370

To briefly summarize the currently pertinent aspect of proceedings here, the DOR Motion (8 months into the appeal) and the Order of The Honorable Jasper M. Cureton dated July 12, 2013 (11 months into the appeal) relied exclusively upon S. C. Code § 12-60-3370. That statute applies only when an amount is determined "by the administrative law judge".

To reiterate, DOR still did not cite any figure in its earlier Motion. DOR did not, and still does not, cite to any section of the Order under appeal for an amount. DOR did not before and, in its Return here, does not attaché a single page from any tribunal Order to support its self-serving conclusion. The absence of a figure by DOR is purely because DOR cannot cite a figure: the tribunal did not determine or announce a sum due in the ruling/directive sections of its Orders

In an amazing reversal, DOR now concedes that point in its Return to the Supreme Court. However, still seeking to avoid appellate review, on February 6, 2014, DOR effectively re-wrote the statute to assign determination responsibility to the undersigned: "The **Rays should** have easily been able to **determine the amount due** under § 12-60-3370." DOR Supreme Court Return, p. 5, all emphasis added. By its new interpretation of the statute upon which it relied, the onus was on the Rays to determine the amount due, thereby making the DOR Motion to Dismiss improperly brought in this Court and improperly applied by Judge Cureton.

By DOR's newly announced construction of late last week, DOR concedes that the sole authority upon which its dismissal is based requires elucidation. That enlightenment can only come via appellate review and, respectfully, mandates reinstatement.

In summary, DOR protestations notwithstanding and with its self-impeachment in support, this case is proper for Supreme Court Certification due to the multiple constructions of S. C. Code § 12-60-3370 by DOR and the Court of Appeals in this single case, alone.

The Return now admits that DOR improperly sought dismissal of this matter. DOR's Return does not deny and, in fact, again confirms its total reliance upon a single statute for its view that Certification should be denied.

DOR waived objection to juridiction, if any it truly had

If DOR's argument, beginning at page 3 of its Return, were made in a trial court it would be subject to any objection for assuming facts not in evidence. As before, DOR claims that remittance

of a sum "determined to be due" is required and, still again, fails to attach or cite to a single instance of any such determination. DOR has produced no ruling to demonstrate any such determination.

More notably, DOR's Return raises more questions than it attempts to answer. If such a "determination existed", why did DOR fail to mention it in its Motion for dismissal? Why has DOR neglected, to date, to furnish evidence of such a figure? If proper at all, why did DOR not immediately file a Motion with the ALC? If a procedural defect existed here, why did DOR fail to timely raise its current claim upon service of the August 22, 2012 Notice of Appeal? If jurisdiction was not proper here, why did DOR proceed to demand affirmative relief of this Court (December 20, 2012 and February 11, 2013) without notice? If as cut-and-dried as DOR only now asserts, why did DOR move forward with the filing/service of its Designation of Matter (January 28, 2013) and final Brief (June 25, 2013)? If this Court had no authority over this appeal, why did DOR delay for eight (8) months and engage in multiple "merits" actions in this Court?

In summary, DOR made numerous voluntary appearances in this matter. DOR actively engaged this Court and sought grants of relief from it on more than one occasion. DOR submitted documents and briefs and engaged in affirmative conduct directly related to the merits of this appeal. By such overt acts and record entries, DOR fully submitted itself to jurisdiction here. *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 339, 644 S.E.2d 793, 796 (Ct.App. 2007).

DOR misconstrues the Rules of this Court

DOR cites Rule 260(a), SCACR, as a reason for denying Reinstatement. Again, desperate to avoid scrutiny here, DOR attempts to misuse a standard to justify its improper conclusion. As noted, DOR waited eight (8) months to assert what it deems an obvious defect. Now, nearly sixteen (16) months into this appeal, DOR contradictorily raises an unstated Rule violation.

This matter has not been the subject of so much as an intimation that the Rays have "failed to comply with the requirements of these Rules". Rule 260(a), SCACR. To the contrary, as appears to be its standard tactic, DOR only now attempts to bring new claims to the Court. As conceded in

the DOR Return, unlike here, a Rules violation is pursued by the Clerk. In THAT event, the violating party has fifteen (15) days to comply with the Rule before remittitur.

In stark contrast to DOR's flawed analysis, there has been no allegation of Rule non-compliance or Clerk intervention. Instead, DOR brought a Motion with no assertion of a Rule violation expressed or implied.

To summarize, the ruling(s) in question were timely subjected to requests for rehearing, as conceded by the DOR Return. The dismissal did not become final until the Order of January 23, 2014. On January 27, 2014, the Rays served the pending Motion for Reinstatement. It was received in the Court of Appeals no later than January 29, 2014, the sixth (6^{th}) day after Order issuance.

Other Good Cause and Important Issues

A line-by-line reiteration of the various "good cause" aspect of the Rays' Motion for Reinstatement would be superfluous. However, aside from the foregoing synopsis of DOR's continually changing views and "authority", DOR's claim that their are no issues of significance or public interest is easily refuted by a sample listing of "first impression" questions herein.

- As seen on the foregoing pages, neither DOR nor the tribunal understood or properly applied § 12-60-3370. That statute has never been reviewed by this Court in this context.
- In 2013 alone, the Supreme Court and the Court of Appeals issued nearly 100 opinions involving Summary Judgment. Many lower court rulings were reversed. None of them dealt with the first impression ALC Summary Judgment issues present here.
- The unsettled nature of ALC evisceration of a Rule promulgated by the Supreme Court militates in favor of scrutiny of the consistency standard of S.C. Code §1-23-650(B)(1).
- State Constitution Article V, §4A and S.C. Code §14-3-90 have never been reviewed here to determine whether an ALC may pick-and-choose Rule text mandated by this Court.
- The Administrative Law Courts are an agency of the executive branch. It has never been determined by this Court whether the conduct described in the Briefs, the Motions, the

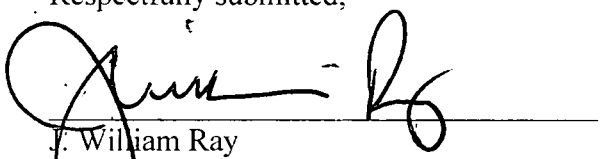
foregoing paragraphs, and as evident in the Record on Appeal constitutes a usurpation of the authority of this Court and an ensuing violation of the separation of powers.

Conclusion

DOR demands that it be given wide statutory leeway, while demanding that the consumer Appellants be held to its strict and unsupported interpretations. As DOR concedes, the principle is a century old in this state that statutes and rules of court should be construed liberally in **favor of the right of appeal**. *Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); *Haughton v. Order of United Commercial Travelers*, 108 S.C. 73, 74-75, 93 S.E. 393, 394 (1917); *O'Rourke v. A. Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) (emphasis added). That precept applies even where DOR seeks to exploit a technicality. *Mictronics, Inc. v. S.C. Department of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct.App:2001). Finally, it is has been established and confirmed that the enforcement of all tax statutes should provide the taxpayer with the benefit of doubt. *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989); *Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, __ S.C. __, 731 S.E.2d 869, 873 (2012).

Here, DOR fails to negate (it barely mentions) the first impression issues cited in the Motion for Reinstatement. The procedure used and the order issued below cannot be squared with the state Constitution, the Rules of Civil Procedure, ALC limiting statutes, and the opinions of this Court and the Supreme Court. Respectfully, the important legal principles and significant "first impression" issues present in this matter render it wholly proper for Reinstatement.

Respectfully submitted,



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February 11, 2014

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PROOF OF SERVICE

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

Aaron M. Scheuer, Esquire
Attorney for Respondent S.C. Department of Revenue
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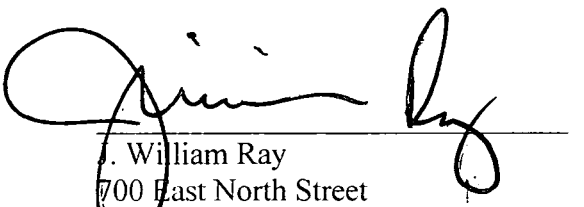

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February 12, 2014

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