THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-08-2814

Todd Olds..... Appellant,

vs.

City of Goose Creek ..... Respondent,

APPELLANT'S INITIAL REPLY BRIEF

July 24, 2015

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

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REPLY TO GOOSE CREEK'S STATEMENT FACTS

The City's response contains a misrepresentation of a fact. On pages 2-3 of its brief, the City describes the procedureal path of the appellant's administrative appeal to the City Council as follows: "They [members of City Council] directed these [questions] to the City Administrator and the Finance Director who are normally present at all City Council meetings." (Respondent's brief at page 3) On page 18 of its brief, in discussing the appellant's due process claim (which the appellant won at circuit court, but the circuit court ordered no relief), the City informs the Court of Appeals that during the City Council Appeal, "Olds and his counsel were not present, although they had a right to be present and were invited." This is a misleading statement.1 The City did "invite" Olds to the City Council Appeal, but instructed him that the City Council did not permit either Olds or his legal representative to speak. See City's September 15, 2011 letter at R.O.A. page ___, quoted below at page 20. The appellant and his lawyer sat through the entire appeal, but in conformity with the City's instructions, the City forbid either from speaking. Since there were only two matters on the agenda of the Special Meeting, Mr. Olds and the undersigned were two-thirds of the audience members present, and it is impossible that the City Administrator, Dennis Harmon, or the Finance Director, Ron Faretra, failed to observe appellant sitting in the audience because Harmon and Faretra handled the previous administrative appeal that the City Council was reviewing. Thus, they were familiar with Olds and knew he had legal representation. Appellant's presence before the City Council sheds light on Council's token effort at fairness by purporting to advocate for Mr. Olds:

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1 The oversight is material because the City asserts *Carter v. Linder* as controlling authority on page 10 of its brief. That case holds that a taxpayer must be permitted to participate in his own case. This brief addresses *Carter* below.

"Mr. Mayor I read the packet that we receive on this appeal and it really stressed out what the state is saying and also what your ordinances say about uh what's involved in this and uh, so I really don't see any connection on the letter that we received from Mr. Olds concerning why he shouldn't be require to pay the amount that, the four hundred and some dollars that is still owed on, on this appeal.

Uh, well then let me try to be an advocate for Mr. Olds. Uh, well if I was an advocate for Mr. Olds I would ask you some question regardless whether they were misleading or not. . . .

Transcript of Special Meeting, September 27, 2011, R.O.A. pages ___-____, quoted in appellant's brief at page ____

Even though the City's Minutes do not reflect who was present in the audience, it is an indisputable fact that both the appellant and counsel were present.2

REPLY TO GOOSE CREEK'S ARGUMENT I

A. The appeal from the City of Goose Creek City Council and the challenge to the City's ordinance on constitutional grounds involves the same parties, the same facts, and the same legal principles.

The City is correct. The appellant could have filed two separate actions and then moved to consolidate them. Short of generating an extra $150.00 for Berkeley County, the appellant discerns no procedural or substantive reason why a litigant would do so, and the *Rules of Civil Procedure* do not require it. Rule 18 of the *South Carolina Rules of Civil Procedure* provides a mechanism for **joinder** of claims and remedies, and subsection (c) of that rule provides for separate trials for almost any reason. Thus the City could have requested that the lower court try the appeal separately from the constitutional challenge but did not. The City cannot complain about the procedure now. The appellant cannot sue the

2 If this case is set for oral argument, appellant has no doubt Respondent will correct its statement.

City of Goose Creek in the City of Goose Creek's municipal court, and the appeal from City Council and the allegations brought under § 1983 involve the same parties, the same legal questions, and the same evidence. The purpose of the *Rules of Civil Procedure* is to cut through jargon and technicalities of pleading in order "to secure the just, speedy, and inexpensive determination of every action." Rule 1, *South Carolina Rules of Civil Procedure*

B. Goose Creek can only collect a business license tax in the manner authorized by state law, and state law defines gross income for the municipality.

In argument I, the City argues that it can adopt any definition of gross income it wants: "The City of Goose Creek's definition of 'gross income' is generally consistent with the ordinances of other South Carolina municipalities which equate 'gross income' to the total revenue of total income of a business." (Respondent's brief at page 8) The City's statement is wrong, and, as discussed more fully below, reliance on other municipalities who might be collecting unlawful taxes is no legal justification to disobey a state statute.

First, the City of Goose Creek has no authority to redefine legal terms that the General Assembly defines for the City. "Equally well settled is the rule that the word 'income' as used in a tax statute is to be taken in its ordinary sense of gain or profit." *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956). Even the United States Supreme Court has left no doubt about plain meaning of "gross income":

> . . . the general statutory definition of "gross income" requires subtracting the cost from the sales price. See 26 U.S.C. § § 61(a)(3), 1012. Under such a definition of "gross income" the calculation would take (1) total revenue from such sales . . . minus (2) the cost of such sales.
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> *U.S. v. Home Concrete & Supply*, U.S. , 132 S.Ct. 1836 (2012) (Taxpayer's error in understating basis did not extend government's recapture period from three years to six.)

Second, the City grounds its incorrect statement of law on the 1953 case of *Purdy v. Moise*.[fn3] There, the Supreme Court affirmed the circuit court's decision requiring the Sumter City Council to issue a permit to operate a "tourist court." When the City of Sumter refused to grant the permit on the ground that its zoning classification prohibited a "tourist court," the property owner appealed to circuit court, alleging, like the plaintiff here, that the City was using an incorrect definition of "tourist court." Using settled rules of statutory construction, the circuit court reversed and ordered the City to issue the permit: "The word hotel does have a well-recognized meaning in laws which under its terms are such as to encompass that of 'tourist court' or 'motor court.'" *Purdy* at page 608. Thus, the Supreme Court struck down Sumter's effort to redefine a commonly accepted term, and this entire controversy is brought about because the City of Goose Creek refuses to use the term "income" as the State defines that term. Goose Creek insists that "income" means "revenue" even though there is no support for this interpretation, making Goose Creek the municipal equivalent of Humpty Dumpty.

Third, (and perhaps more surprising about the City's reliance on *Purdy*) is that the Supreme Court held: "We have, however, as our guide the well founded principle of law that statutes or ordinance in derogation of natural rights of person over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases no clearly with their scope and purpose." There is no doubt that a business license tax is in derogation of

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3 223 S.C. 298, 75 S.E.2d 605 (1953)

the common law right to use private property because it is a tax on the "privilege" of working! The Constitution's most precious bequest is the right of every citizen to be left alone and pursue whatever lawful trade he or she desires. Likewise, as discussed fully in the initial brief and conceded by the City on page 7, the City's right to tax its citizens is a right that exists **only** as a grant of authority from the General Assembly. See § 5-7-30, S. C. Code. The City of Goose Creek refuses to accept this statutory limitation on its power to tax and refuses to acknowledge that the State of South Carolina adopts the federal Internal Revenue Code as its statutory code. Thus, when the City writes: "They are not limited or regulated in any sense by federal law," the City could not be more wrong. In short, this entire case is the result of Goose Creek's refusal to accept that its taxation powers are limited. State law only allows a business license tax on "gross income" not gross receipts.

The City doubles down on its incorrect statement of law on page 11 of its brief: "The modern Internal Revenue Code was first enacted in 1939. South Carolina has been operating under a different definition of 'gross income' for the purposes of business license or privilege taxes since before 1921." Like the statement on page 7 of its brief, the City's assertion could not be more wrong. As set forth in Professor Gutting's affidavit (R.O.A. page ___[affidavit page 3]) the State of South Carolina has adopted the Internal Revenue Code except for the sections specifically rejected by the General Assembly in §§ 12-6-1110 and 12-6-50, S. C. Code.[fn.4] As set forth in the initial brief, the lower court ignored Professor Gutting's detailed affidavit. Even without Professor Gutting's affidavit, the City has no authority to change the definition of "income" to "revenue" or "receipts" any more than it can

4 In her affidavit, Professor Gutting says "60," which is a typo for "50."

adopt a definition of a mile as 1000 yards in order to increase revenue from speeding tickets. This argument is fully developed in appellant's brief and does not need to be repeated here. If the Town of Goose Creek is allowed to define "income" as "receipts" or "revenue," then it ceases being a government of laws and becomes a government of men. The City can no more rely on other municipal governments allegedly utilizing an illegal definition as justification for its wrongful act than a person charged with a crime claim innocence because others are doing the same thing. More importantly, the City submitted, and the lower court relied upon, Goose Creek's claim that 40 other municipalities support Goose Creek's method of redefining "income" as "receipts." The record demonstrates that lower court did not examine the alleged 40 municipalities because if it had, it would have discovered that of the 40 Goose Creek submitted, 16 agree with the appellant, and one, Greenville cannot be determined by reference to its ordinance. (R.O.A. pages __-____ [ordinances] An examination of the 40 ordinances submitted by Goose Creek that allegedly utilize "gross income" in the business license ordinances demonstrates that 16 of them tax "gross income." In other words, these 16 support the appellant, not Goose Creek. They are: Aiken, Anderson, Camden, Cayce, Charleston, Chester, Gaffney, Greenwood, Summerville, Lancaster, Newberry, North Augusta, North Myrtle Beach, Rock Hill, Seneca, and West Columbia. (Greenville is unclear.)

The City seeks a safe harbor for its definition by relying on the Court of Appeals' analysis of "income" in a family court case, *Bogan v. Bogan*.[fn.5] *Bogan* involved the construction of a private settlement agreement that has no applicability to a municipal government's obligation to operate within the powers granted it by the state. Unlike a private

divorce agreement, the state defines "gross income" for the City of Goose Creek, and Goose Creek is not free to enlarge the definition because it possesses only those powers given to it by the State. In *Bogan*, a divorced physician tried to convince a family court judge that the income he allocated to his profit sharing, retirement, and automobile allowance was not "gross income" for purposes of calculating the wife's 10% share. The family court did not buy it, and neither did the Court of Appeals: "The language used in a [divorce] decree must be given its ordinary and commonly accepted meaning." *Bogan* at page 608. Neither the I.R.S., the Department of Revenue, nor a family court judge are going to overlook income because it does not touch the taxpayer's hands but goes into his retirement account or goes into an automobile allowance account that provides an automobile for him. The matter now before the Court does not involve the question of constructive receipt or the interpretation of a private divorce decree. *Bogan* does not support the City's unsustainable assertion that it is free to adopt a definition of gross income that allows it to collect more taxes than the General Assembly permits.

The next point argued by the City achieves a new level in reaching a common ground. For the first time since the appellant filed this case in November 2011, the City finally engages the appellant (and this Court) in a candid conversation about the real issue in this case. For once, the parties can agree on what is the central issue. On page 10 of Respondent's brief (highlighted for emphasis), the City writes:

> **Conversely, without clear and substantial justification, the Court should be reluctant to upend a system that generates substantial revenues for municipal and county government across the state.**

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5 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 189)

There it is. After four years, we have arrived finally at the City's motivation and explanation—generating revenue—for its interpretation of "income" as "receipts"—the ends justify the means. The City broadens the clear terms of the statute, § 5-7-30, to allow the unjust and unauthorized collection of revenue. The City says to this Court: Do not make us obey the law because we get more money collecting the business license tax our way. (Appellant believes that the City employs its special definition of gross income only to him and to no one else. Because business license tax returns are protected by statute, § 12-54-240, the appellant cannot prove his theory by direct evidence that he is being singled out from other returns. Legally, it makes no difference. Either the City treats everyone like the appellant or just the appellant. Either way is illegal, and if the City wants to defend the case on the ground that it treats every taxpayer illegally, appellant accepts the City's defense.) As set forth in the plaintiff's four page September 22, 2014, motion for reconsideration (R.O.A. pages ___-____), the outcome of this case is controlled by the plain meaning of § 5-7-30, S.C. Code, ann. that limits the authority of a municipality to collect a tax on "gross income." The well-settled rules of statutory construction require that courts enforce the General Assembly's statutes in their plain and ordinary meaning. Applying the rules of statutory construction to § 5-7-30 determines the outcome of this case. The City contorts the rules of statutory construction to justify it collecting more revenue than it is authorized to collect. As set forth by the Supreme Court in *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956):

> It is a well-established rule of construction that a tax statute is not to be extended beyond the clear import of its language, and that any substantial doubt as to its meaning should be resolved against the government and in favor of the taxpayer. [citations

omitted][fn.6]

The City's reliance on the money (ends justify the means) argument is shocking since courts exist to protect the rights of the citizen against government overreach and to do justice, not to facilitate a municipality's efforts to bend the rules in order to raise extra revenue. Courts do not sit to provide a cover for municipalities to collect illegal taxes. "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) An appeal to authority not only has no place in a legal argument because legal arguments are built on reason, but also is a circular argument and amounts to an argument to absolute power: "The act is just because I declare it so, and the ends justify the means."[fn.7] However, the City's argument provides common ground for the parties because the appellant has asserted from the beginning that the City's purpose in twisting the definition is to gain revenue it is not entitled to collect.

To support its position further, the City cites the case of *Carter v. Linder*.[fn.8] *Carter* involved a taxpayer's challenge to Richland County's "classification" of businesses. In other words, Richland County classified a barber shop differently from a used car lot, and the taxpayer asserted that such classifications were irrational because the classifications generated different **rates** of taxation. The Supreme Court adopted the circuit court's Order as its Opinion holding the tax constitutional: "Such a tax is based upon classification and

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6 This is the same conclusion reached by our Attorney General in its opinion to Beaufort County on April 2, 2012, regarding "the proper interoperation of the term 'gross income' in the context of a county business license tax ordinance."

7 In his textbook on logic, Professor Kahane describes the fallacy: "The fallacy of appeal to authority (Latin name: *argumentum ad verecundiam*) is committed when we accept a statement because an authority, expert or famous person accepts it or says he accepts it. Howard Kahane, *Logic and Philosophy*, (Wadsworth Publ., 1973) page 236

gross income, not upon the level of governmental services provided." (emphasis added) More interesting is the fact that the *Carter* case is especially meaningful in regard to the City's lack of due process, discussed more fully below in Argument II (D), because the Supreme Court held further that the Richland County ordinance scheme passed muster because it provided a mechanism for the taxpayer to pay the tax under protest "with an opportunity to be heard." As the lower court found, the City of Goose Creek does not provide a taxpayer an opportunity to be heard before City Council.

The balance of the City's argument is to assert reliance on its expert's opinion and on the City's assertion that Old's interpretation of § 61, I.R.C. leads to an absurd result. As to the City's reliance on Baldwin's affidavit, the City misses the point. It was Olds who was resisting the City's motion for summary judgment, and Olds is relying on Professor Gutting's affidavit, not Robert Baldwin's. However, as the Order under review reveals, the lower court did not acknowledge, let alone analyze, Professor Gutting's affidavit, and this error of law requires a remand. The lower court cannot ignore the plaintiff's evidence, and because a review of a lower court's grant of summary judgment is *de novo*, it is a straightforward matter to review Professor Gutting's affidavit in the Record on Appeal at pages ____-____ and see that she grounds her analysis on irrefutable and correct statements of law. Even the City concedes this: "It is true that under federal Internal Revenue Code § 61, a real estate business only used the gains on the real estate for 'gross income' whereas every other type of sale 'gross income' is the total amount received without deduction for costs of goods." (Respondent's brief at page 11) What Respondent's brief glosses over is the irreducible fact

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8 303 S.C. 119, 399 S.E.2d 423 (1990)

that Goose Creek ignores the State's limitation on it. The City also ignores that the state defines "gross income" for the City, and that definition is the definition provided by § 61. Section 61 could not be more lucid and it is, to borrow the City's word, absurd to stand before this Court and argue that "income" is the same thing as "receipts." Likewise, there is nothing absurd about a taxpayer paying what is due and challenging the City's collection of an illegal tax.

REPLY TO GOOSE CREEK'S ARGUMENT II

A. The City ignores that this case is an appeal from a grant of summary judgment and that Olds, as the party resisting the motion for summary judgment, is entitled to have the evidence construed in his favor.
B. Equal Protection
C. Abuse of Process
D. Due Process requires that every litigant be afforded the right to be heard in a meaningful manner.
E. F.O.I.A. violation
F. 42 1983
G. Civil Conspiracy
H. Damages and Attorney's fees
I. Breach of Contract
J. S. C Constitution Article I, § 22

A. This is an appeal from summary judgment; the lower court failed to construe the facts and inferences in the light most favorable to the appellant as the party resisting the motion for summary judgment

In the introductory portion to the City's argument II (pages 13-16), the City's argument again ignores that this is an appeal from the grant of a summary judgment. The City characterizes Olds' allegations as "imagination": "Mr. Olds imagines that he is being singled out for unequal and unfair treatment." (Respondent's brief at page 13) Mr. Olds

does not "imagine" it; he asserts it through his pleadings, through his affidavits, and through the documents submitted in support of his legal position. By criticizing the plaintiff for "imagining" that the City singled him out for disparate treatment, the City is really saying to this Court: You three appellate judges cannot believe Mr. Olds. He is not credible. Credibility determinations are not decided on motions for summary judgment, and the appellant's pleadings and four affidavits (R.O.A. pages ___-____) detail numerous instances of specific government misconduct.

> . . . since '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict,' the evidence presented by [Olds] 'is to be believed, and all justifiable inferences are to be drawn in his favor.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); see *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence."
> *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003), affirmed 365 S.C. 589, 619 S.E.2d 428 (2005)

Appellant's first affidavit, August 31, 2012 (R.O.A. page ___) details the City's efforts to make him capitulate by withholding water service. Appellants' supplemental affidavit, November 7, 2012 (R.O.A. page ___) details how the appellant obtained water service only to have it turned off and padlocked at the direction of Ron Faretra because of the tax dispute. Appellant's supplemental affidavit dated January 14, 2013, explains how the City's "audit" of the appellant's business license tax followed "shortly after" he resolved a dispute with the City over his business. (R.O.A. page ___ [affidavit January 14, 2013]) Appellant's third affidavit, April 1, 2013 (R.O.A. page ___ "second supplemental affidavit")

details how the City refused him an administrative appeal on the 2012 taxes. The clearest example of the City's overreach is the July ___, 2012 affidavit of Robert Eckhardt (R.O.A. page ___), who testifies to being detained against his will for over an hour by Goose Creek's Finance Director, Ron Faretra, and Business License Clerk, Jennifer Althoff, who led him to believe they were police officers. As Mr. Eckhardt says, it was clear that they were out to get Todd Olds. Moreover, he testifies that when they finally let him go, they remained inside Mr. Olds' house. The City can do its best to pretend that such acts are insignificant: "However, even if the event happened exactly as Olds' friends describe, it would be entirely irrelevant to Olds' case." (Respondent's brief at page 14). Whether the acts are or are not "irrelevant" is a credibility question that is specifically reserved for a jury. The facts are relevant because they demonstrate that the City's motivation in auditing appellant and imposing a tax definition of "gross income" not supported by law proves the City's motivation is not tied to an even handed application of its limited taxing authority but rather by a desire to get Todd Olds. No one is above the law, and when government officials commit misconduct, they are answerable for it as violations under color of law. Whether Faretra and Althoff were acting in their official capacity when they entered the appellant's property without a warrant and detained someone acting on his behalf, and whether their acts were or were not related to the City's efforts to collect additional taxes from the appellant are all questions of fact, and these questions of fact cannot be resolved against the appellant at a motion for summary judgment. Even private citizens can be held accountable for violations of a citizens XIVth Amendment rights if they are acting in concert with government officials:

> In this respect, our holding in *Adickes v. S. H. Kress & Co.* was as follows: "The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were official or unlawful; [citations omitted] Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents.' *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966)" 398 U.S. at 152, 90 S.Ct. at 1605 (Footnote omitted)"
> *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L.Ed.2d 185 (1980)

The City attempts to blunt the bad acts of the City by asserting that Faretra and Althoff's bad acts were directed at Eckhardt and not Olds, and therefore Olds is precluded from asserting a claim. This argument ignores the purpose of the Olds affidavits, which portray a City government that singled Olds out. The City shut off his water supply, harassed his agent, forbid him from participating in his own tax appeal, entered his property without a warrant, and threatened him with incarceration over a dispute whether "income" means "receipts." The appellant's affidavits portray a shocking pattern of government overreach, and while the City's conduct in this case is not as deadly or disabling as police officers shooting unarmed motorists, the government conduct differs in degree only. It is for a jury to say whether the City's treatment of Eckhardt was directed at the appellant or whether it was two diligent City employees discharging their duties in an efficient manner and providing "high quality essential service and . . . fairly enforce[ing] the applicable laws."[fn.9] All these factual questions are factual questions reserved for a jury,

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9 In the most famous trial in the history of mankind, Hannah Arendt wrote a book about the defendants' employment of the defense of just following orders. She called her book: *The Banality of Evil.* We have a lot of law books, and yet very few, if any, contain cases in which a government bureaucracy **admitted** misusing his or her authority.

and the lower court erred in not giving them any weight.

B. Equal Protection

The City sets forth the correct legal standard for equal protection claims, except that the City is wrong to suggest the **unanimous** 2000 Supreme Court case of *Village of Willowbrook v. Olech*[fn.*10*] has been overruled. As of the date of this brief, 2,681 courts have cited the unanimous *Olech* opinion as authoritative. The appellant's argument here is the same as the argument above in II A. The appellant's affidavits make out a clear case of discrimination on numerous fronts. At the trial of this case, if the City wishes to persuade a jury to acquit it of XIV Amendment violations by telling the jury it treats everyone the way it has treated Olds, the jury may well reject plaintiff's equal protection claim, but appellant believes that the size of the verdict on other causes of action will go up. It is a strange defense that can only be asserted in legal briefs because no trial lawyer in the history of trial by jury has urged a jury to acquit a defendant because the defendant mistreats everyone uniformly. As argued in the preceding section, there is abundant evidence in this record that the City singled appellant out for individual treatment designed to punish him for challenging the City on an unrelated matter. (See appellant's affidavits in record on appeal at pages ____, ___, ____, and ____. See ¶¶ 8, 9, 10 amended complaint at page ___.

There is overwhelming evidence in this record of a Fourteenth Amendment violation, and it is for the jury, not the court, to weigh the evidence and determine credibility.

C. Abuse of Process

Likewise, for the same reasons as stated above, there is overwhelming evidence in the record below of the City's misuse of its governmental powers to harass the appellant and force him to capitulate in a tax dispute. The elements of an abuse of process are: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. *Huggins v. Winn-Dixie Greenville*, 249 S.C. 206, 153 S.E. 2d 693 (1967) The lower court found there is no genuine issue of material fact on the abuse of process because "a denial of water service is not an abuse of process." (R.O.A. page __ [order page 7]) The lower court erroneously concludes that a "process" must be a lawsuit. This is an incorrect statement of law. What is required is: "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of process is required." *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984) The lower court erred by deciding that the City's conduct in invading the appellant's property without a warrant, detaining his associate using a badge of authority, and cutting off his water supply are not authorized by the "processes." Rather, the City aims to punish a citizen who challenges the City's tax calculation. The City committed all of these acts under indicia of authority, and it is for a jury, as the fact finders, to say whether they were "legitimate" or not.

D. Due Process requires that every litigant be afforded the right to be heard in a meaningful manner.

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10 528 U.S. 562, 120 S.Ct. 1073 (2000)

As set forth in the appellant's brief, the appellant prevailed on this action. The lower court found that the City's procedure in excluding the appellant from his appeal to City Council is a violation of his due process rights. As set forth on page 4 above, the City is not correct in stating that the appellant was not present. The appellant and the undersigned were present in the audience. Whether appellant was invited or not is irrelevant as neither appellant nor his lawyer were permitted to speak. The City wrote a letter to appellant on September 15, 2011 (R.O.A. page __), telling him that neither he nor his legal representative could speak:

> Please be advised that Section 110.016 (c) of the Goose Creek City Code states, in part, "City Council shall review the records and without further oral argument or presentation of evidence will affirm, modify or deny the appeal."

As the minutes of this meeting (R.O.A. page ___) show, this is another false statement by the City. The Respondent argued the case fully to the City Council through Ron Farertra and Dennis Harmon and responded to their questions, even (presumably as a nod to the appellant and his lawyer who **were** present) attempted to argue for the appellant. The City attempts to minimize this sorry state of affairs by citing two state cases for the proposition that an appellant cannot complain about an administrative hearing unless he is prejudiced. As set forth in the appellant's brief, excluding a party from participation in his own case is always prejudice of the highest order. This point does not require much discussion because the lower court agreed with the plaintiff and found the procedure "not fair":

> City Council called on the City Administrator [Harmon] and City Finance Director [Faretra] to explain the appeal and the City's position to Council. The City employees obliged. I find that this system is not fair. Either City Council should

hear from no one or form both sides, but not just one side.
Order at page 8, R.O.A. page ___

The lower court sidesteps the issue by concluding that because appellant concedes (and appellant does concede; in fact, appellant asserts) that the rule of statutory construction governs the interpretation and application of § 5-7-30, that appellant suffered no prejudice. The lower court's conclusion is not logical. As set forth in the appellant's brief, whenever a procedure excludes a litigant from an opportunity to be heard, prejudice is presumed, and prejudice does not evaporate because the excluded party agrees the rules of statutory construction govern the interpretation of a statute. The fundamental right to be heard belongs to the appellant, and the City of Goose Creek has no power to take it away, and when it does, it prejudices the rights of the appellant.

Since *Teague* was decided, this Court has never found a rule so essential to the fairness of a proceeding that it would fall under this exception. In my view, the right in *Simmons*—the right to respond to an inaccurate or misleading argument—is surely a bedrock procedural element of a full and fair hearing. As Justice O'Connor recognized in her opinion in *Simmons*, this right to rebut the prosecutor's arguments is a "hallmark[k] of due process," 512 U.S. at 175 (concurring opinion). See also *id.*, at 174 (Ginsburg, J., concurring) ("This case is most readily resolved under a core requirement of due process, the right to be heard"). When a defendant is denied the ability to respond to the state's case against him, he is deprived of "his fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986)
O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969 (1997) Stevens, Souter, Ginsburg, Breyer dissenting.

The lower court erred, and the City tacitly acknowledges it. The City literally employs the passive voice on page 19 of its brief: "The suggestion by the Circuit Court to consider allowing all to speak or none to speak is a good idea. It has been heard and will likely be followed in the future as a good idea." The choice of passive voice is not

accidental because it hides who is "hearing." One thing is certain, and it is this: without the appellant's calling the procedural defect to the City's attention, the City would have continued on its path of depriving its citizens of fundamental rights. As discussed below, appellant's success on this procedural challenge is sufficient to sustain an award of attorney's fees, and the lower court erred in finding a violation but denying a remedy, especially in failing to consider whether the appellant is entitled to attorney's fees and costs for pursuing a cause of action that cures a serious defect in Goose Creek's ordinances.

E. F.O.I.A. violation

The lower court found no F.O.I.A. violations based on a notation on the agenda that the City posted it 24 hours before its special meeting. Neither the appellant nor his lawyer could find the agenda. The posting of the agenda in conformity with South Carolina law cannot be determined either way from this record. The record does show that the City handled the appeal at a special meeting (R.O.A. page ___ [September 27, 2011 agenda]), and the record contains an e-mail from Clerk Kelly Lovette dated September 19, 2011, purporting to send the notice to two local newspapers (R.O.A. page ___). However, the minutes of the meeting contain no reference to the posting of the agenda, and thus the only evidence in the record are self-serving documents not referenced by City Council. Since the Council made no mention of notice, it is a question of fact. Moreover, the meeting was closed to the appellant and his counsel, which foreclosed any opportunity to explore the issue, and thus the record contains sufficient evidence, a *scienter*, to create a question of fact as to whether the City did or did not comply with F.O.I.A.

F. 42 § 1983

There is an almost universal misunderstanding about the method and effect of 1983 claims. 42 U.S.C § 1983 does not create a substantive right; it creates a procedural path for citizens to challenge unlawful government action. Perhaps the best metaphor for the purpose of § 1983 is Judge Roger Young's description of the section as a wagon. Judge Young sometimes describes § 1983 as wagon that plaintiffs use to carry their causes of action to court. This is a pretty effective description. The U. S. Supreme Court emphasizes that the provision can be used to bring any claim to court including claims against municipalities for acts that impair a citizen's constitutional rights:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-168 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a `custom or usage' with the force of law."
>
> *Monell v. Dept. of Social Services*, 436 U.S. 658 98 S.Ct. 2018 (1978)

Therefore, §1983 can be utilized to assert any claim against Goose Creek that interferes in the appellant's constitutional rights. The City is wrong if it thinks it can retaliate against the appellant by withholding water service, invading his property without a warrant,

detaining his associate, denying him the right to participate in his own case, and especially in employing an unlawful and punitive interpretation of a tax collection statute to retaliate against him because the City singles him out. H. L. Mencken said every citizen lives in fear that he will be noticed by the government. The most precious right any citizen possesses is the right to be left alone and not persecuted by his government. Moreover, if the City chooses to sail into what it thinks is a safe harbor by asserting that it discriminates against all its citizens in the same fashion, the appellant embraces the City's confession of unlawful conduct. Either way, the appellant is authorized to under §1983 to bring an action for both damages and for injunctive relief.

G. Civil Conspiracy

The lower court gave civil conspiracy short shrift. The lower court found—and the respondent argues—that the plaintiff cannot make out a claim for civil conspiracy because the acts taken by Faretra and Althoff were in their "official capacity." (Order at page 10, R.O.A. page ___) If Faretra and Althoff were acting in their official capacity, then the Tort Claims Act may provide immunity for them if, and only if, they were performing some official government function in which they have discretion. However, if they were acting outside of the course and scope of their authority, or if they were misusing their authority to punish the appellant, then they become liable officially and personally. Whether they were acting in or out of their authority is a critical factual question that can only be resolved by a jury based on its view of the evidence and its view of the credibility of the witnesses. The lower court cannot make such credibility calls on a motion for summary judgment.

H. Damages and Attorney's fees

The issue of attorney's fees will not be fully ripe until the appeal is resolved. However, the appellant is unquestionably the prevailing party on educating the City that it should allow appellant's to speak during the appeal of their cases. The City concedes the issue on page 19 of its brief, and calls the plaintiff's claim a "good idea." Thus, the appellant persuaded the City to amend its procedures to allow citizens to be afforded their constitutional right to be heard. As such, on this issue alone, the plaintiff is a prevailing party and the lower court erred in not considering whether the plaintiff, as the prevailing party, should be awarded attorney's fees.

> . . . Federal courts characterize a plaintiff as the prevailing party when she succeeds on any significant issue that achieves some of the benefit sought in bringing the action; he or she does not have to win it all to be regarded as prevailing . . . Similarly . . . this Court held that plaintiffs may be considered the prevailing parties if a significant issue is resolved so as to achieve some of the benefit through litigation. 662-663
> *Stevenson v. Branch Banking and Trust Corporation,* 159 Md. App. 620, 662, 861 A.2d 735 (2004)

Thus, the lower court erred in not considering attorney's fees, and this Court should remand the case to allow the lower court to consider whether appellant is a prevailing party and if so, to what extent is he entitled to fees.

I. Breach of Contract

The appellant has not abandoned this claim. As the City correctly points out, the breach of contract claim relates to the City's termination of water service. As the plaintiff's complaint sets out in ¶¶ 51, 52, and 53, the City provided water service to appellant, and then Ron Faretra and Jennifer Althoff instructed the water department to terminate the service and lock the meter. These facts are extensively covered in appellant's four

affidavits. It is not a separate claim, but rather part of the same transaction that forms the plaintiff's tort claim for abuse of process, civil conspiracy. Thus, it does not require separate briefing because it is the same cause of action. The only difference is that one is in tort and one is in contract, and the issue of contract vs. tort does not ripen until a jury decides the case. Only then is a litigant required to elect his remedy. "Election of remedies" involves a choice between different forms of redress afforded by law for the same injury. . . . It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Taylor v.Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). *Keeter v. Alpine Towers Intern., Inc.,* 399 S.C. 179, 730 S.E.2d 890 (Ct.App. 2012)

J. Article I § 22, S. C. Constitution

Article I, § 22 is nothing more than the state version of the Fifth and Fourteenth Amendments to the Federal Constitution. The legal principles, the facts, the parties, and the theories of recovery are identical to those asserted under the federal constitution, and therefore do not need to be briefed separately. The only role of Article I, § 22 in this case is to provide additional state authority for the same violations already extensively briefed.

Reply to Goose Creek's Argument III

The Tort Claims Act does not shield municipalities from constitutional violations.

The remainder of the City's brief is a repetition of the lower court's finding that the tort claims act shields the City from any and all discriminatory acts against appellant. The

City relies upon *Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry* [fn.11] to support its assertion. The City's reading of *Health Promotion*, and the lower court's error in the same manner, is that they both construe far too broadly what the Supreme Court specifically rejected in *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992) as an universal shield. The City argues the Tort Claims Act provides a shield for all acts. The purpose of the Tort Claims Act is to abrogate sovereign immunity and provide a shield to government employees who exercise **discretion** in their duties, but there is no such thing as discretion to commit an unlawful act. In other words, there is no Tort Claims Act shield for constitutional violations. As the Court said in *Gardner*:

> Clearly, to accept Department's contention and view § 15-78-60 (25) in an "unrestricted sense" would absolve schools, state hospitals, and prisons from liability for virtually *all* acts relating to students, patients, prisoners, *etc.*, absent gross negligence. Such an interpretation of the statute is contrary to the purpose and policy of the Tort Claims Act, which abrogates sovereign immunity.

It is a question of fact as to whether Ron Faretra and Jennifer Althoff's acts were taken in and during the course and scope of their authority, just as it is a question of law as to whether the City of Goose Creek can overrule the General Assembly's limitations of § 5-7-30. The plaintiff is entitled to bring an action for declaratory relief, injunctive relief, and damages. The Tort Claims Act cannot be read by the lower court as providing care blanche to a municipality to ignore the limitations on its municipal powers and to misuse those powers to deprive a citizen of constitutionally protected rights.

CONCLUSION

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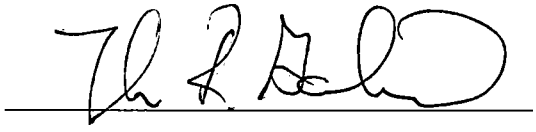
11 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013)

Thus, as set forth in the appellant's brief, the lower court failed to consider the appellant's evidence in the light most favorable to him as the party resisting summary judgment. The lower court never considered the Constitutional/statutory limitation on a municipality's ability to tax income nor did it apply the rules of statutory construction that require it to apply the words in the statute in their plain and ordinary meaning. As the Supreme Court said in Beard, the Court is required to not read the tax statute to extend the City's powers beyond the clear import of it language, and any substantial doubt must be resolved in the appellant's favor. The lower court did the opposite. The lower court substituted its interpretation of the applicable state statutes instead of applying the clear and unambiguous meaning. The lower court never gave any consideration to the appellant's evidence of animus—which sheds light on the City's motivation—and even though the lower court found the Town's administrative appeal procedure to be flawed, it granted the appellant no relief. By successfully challenging the City's procedural appeal process, the appellant already achieved one of the benefits he sought on a significant issue and is a prevailing party as to the procedural due process challenge, and the lower court failed to consider the appellant's entitlement to attorney's fees as the prevailing party. The appellant respectfully requests that this Court reverse the entry of summary judgment and remand the case to the lower court with instructions to consider the appellant's motion for summary judgment on the Constitutional/statutory construction claim and to place the case on the jury roster for disposition on the appellant's constitutional and conspiracy claims. The lower court should also consider the appellant's request for attorney's fees as the prevailing party on procedural due process.

Respectfully submitted,



July 27, 2015

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-08-2814
Appellate Case No. 2014-002393

Todd Olds..... Appellant,

vs.

City of Goose Creek ..... Respondent,

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Designation of Contents of Record on Appeal on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2015, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

July 27, 2015

Thomas R. Goldstein, #2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291; (843) 554-5566 fax
tgoldstein@cobblaw.net
Attorneys for the Appellant

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.

ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2003)

Dale T. Cobb, Jr.
dtcobblaw@hotmail.com
Peggy M. Infinger
pinfinger@cobblaw.net
Thomas R. Goldstein
tgoldstein@cobblaw.net

Mailing Address:
P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

July 27, 2015

Hon. Jenny Abbott Kitchings
Clerk of Court,
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Todd Olds vs. City of Goose Creek, Appellate Case No.: 2014-002393

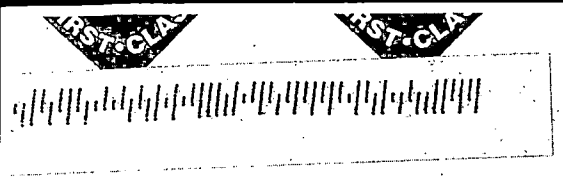
Dear Ms. Kitchings,

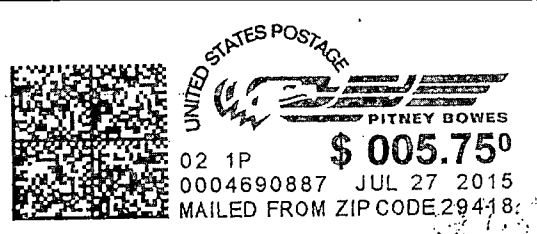
I enclose an original and extra copy of the Appellant's Initial Reply Brief and Designation of Matters to be Included in the Record on Appeal along with a Certificate of Service and Certificate of Compliance. I ask that you please file the original with the court and return a filed copy to me in the envelope provided. By copy of this letter to Tim Domin, I am serving a copy to him of the Initial Reply Brief and Designation of Matters to be Included in the Record on Appeal. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

Thomas R. Goldstein

TRG/ral
enclosure: Initial Reply Brief, Certificate of Service and Compliance, return envelope
cc: Tim Domin, Esq.
Todd Olds





First Class Mail

Belk Cobb Infinger & Goldstein, P.A.
P.O. Box 71121
N. Charleston, SC 29415-1121

Hon. Jenny Abbott Kitchings
Clerk of Court,
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211