

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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Case No. 2011-CP-08-2814

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**RECEIVED**

MAY 26 2016

**SC Court of Appeals**

Todd Olds..... Plaintiff,

vs.

City of Goose Creek ..... Respondent,

of whom

Todd Olds is the..... Appellant.

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RETURN TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

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The appellant objects to the application of the Municipal Association to file an Amicus Brief on the grounds of irrelevance, sharp practice, misrepresentation and timeliness.

**PROCEDURAL BACKGROUND**

On November 4, 2014, appellant filed his notice of appeal with this Court. Appellant filed final briefs and the Record on Appeal on September 9, 2015. The case is set for oral argument on June 6, 2016. The Municipal Association hand delivered a conditional final brief to this Court on May 17, 2016, and mailed a copy to appellant, which he received on May 19, 2016, 18 days before this case is set for oral argument. At no time during the preparation of initial briefs, final briefs or

any time since appellant filed this case on October 12, 2011 (R.O.A. page 41) has the Municipal Association expressed any interest in the case, other than to support appellant repeatedly in writing. As quoted below, the Municipal Association verified that appellant's legal position is correct and in conformity with the Municipal Association's Handbook to municipalities.

### **IRRELEVANCE**

The Court should deny the Municipal Association's request for amicus status because the Municipal Association not only misstates the legal issue raised in this case, but also, as demonstrated below, the Municipal Association previously stated that appellant's legal position is correct. The Association should be estopped from now alleging a contrary position.

Most importantly, the issue in this case is not one of "statewide importance" as the Municipal Association asserts. The issue in this case is the City of Goose Creek's misapplication of its Business License Tax Ordinance as it is written to the appellant. Appellant does not challenge the validity of a municipality to collect a business license tax based on § 5-7-30, S. C. Code, which allows a municipality to levy a business license tax based on "gross income." The issue in this case is not the validity of the definition of "gross income" as stated by Goose Creek in its ordinance. As Professor Gutting points out (R.O.A. page 187), Goose Creek defines both "gross income" and "gross receipts" in its business license ordinance, and the City distinguishes the two. Goose Creek erred when it selected appellant's returns for an audit in order to apply "gross receipts" formula to calculate appellant's business license tax and refused to apply "gross income" as required by its own ordinance. The issue here is the prejudice to the appellant because Goose Creek refuses to adhere to its own ordinance. When Goose Creek selected appellant's returns for audit, Goose Creek demanded

an unlawful tax by substituting “gross receipts” for “gross income” to calculate appellant’s business license tax even though both state law and its own ordinance require the use of “gross income.” Goose Creek’s ordinance as written adheres to the Municipal Association’s published guidelines that the “gross income” used to calculate the Business License Tax must match the “gross income” reported to the I.R.S. and the State Department of Revenue:

The gross income for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other government agency.” § 110-001 “Definitions” Goose Creek City Ordinances. (R.O.A. page 129)

The complete definition, which is cited on page 14 of Appellant’s Final Brief, is as follows:

**GROSS INCOME.** The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city,

...

The **GROSS INCOME** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission.

§1101.001 DEFINITIONS

(Page 129, R.O.A., cited page 14 Appellant’s Final Brief)

Further, § 110.003(c) says: “The Business License Inspector . . . may disclose gross income of licenses to the Internal Revenue Service, South Carolina Department of Revenue, and other municipal or county offices for the purpose of assisting tax assessments, tax collections, and enforcement.” § 110.008 “Registration Required; License Application.” § (b): “Applicants may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures.” Regardless of how other municipalities in the state define “gross income,” the City of Goose Creek incorporates in its ordinances the income tax definition of “gross income” and requires that the figures reported to the City match the figures reported to the I.R.S. and the State Department

of Revenue. It is undisputed that the figures on the state and federal income tax returns are figures for “gross income” and not “gross receipts.” § 110.009 “License Fee According to Classification; Due Date; Separate License; Computation of Fee” (c) says: “A license fee based on gross income shall be computed on the gross income for the preceding calendar or fiscal year. . .”

Thus, there is no “statewide importance” in Goose Creek’s failure to confirm to its ordinance. The fundamental rule of statutory construction requires that words should be used in their plain and ordinary meaning. More importantly to the application of the Municipal Association, using gross income is in conformity with the Municipal Association’s published guidelines and written responses to the appellant in the prosecution of this case. See *the South Carolina Municipal Association Handbook*’s discussion of “gross income” at page 14 of its *Handbook*. (R.O.A. page 159) Throughout this case the appellant has been in contact with the Municipal Association, and at every point of contact, the Municipal Association confirmed in writing that appellant’s legal position is correct. None of this evidence is in the record because the Municipal Association, even though it has known about this case for over three years, laid in wait until the eleventh hour when it sprung its proposed amicus brief, apparently in an effort to influence pending legislation. On November 7, 2012, after appellant laid out his concerns to the Municipal Association, Mellissa M. Carter, the Association’s Research & Legislative Liaison, wrote appellant: “Thank you for following up on our conversation. You have stated my understanding correctly. If you have any further questions please give either Warren [Harley, Governmental Affairs Liaison] or me a call.” The subject of this November 7, 2012, correspondence is “Business License Calculation,” in which the appellant laid out the following example for Ms. Carter: “The example you [Mellissa Carter] shared was if you pay \$200,000. And sell for \$300,000 the license fee should be calculated on \$100,000 gain, not the

sale price \$300,000.” (November 1, 2012, e-mail Olds to Mellissa McCullough Carter,) On October 31, 2012, Municipal Association’s Governmental Affairs Liaison, Warren Harley wrote to appellant: “For the purpose of determining gross income our business license guide references Section 61(a) of the IRS code. Your business license is calculated on the amount you show as your gross income on your tax return.”

The Municipal Association now attempts to justify the City’s incorrect calculation by noting that the statute is “completely silent” on the specifics of levying business license taxes and that the legislature does not “constrain” municipalities in exercising authority to levy business license tax. In addition to being an incorrect statement of law—Section § 5-7-30 is clear—the Municipal Association ignores the fact that goose Creek employs a definition of “gross income” for license tax that is consistent with the definition of gross income used by the State and the I.R.S. Moreover, by ordinance, the figures on the Business License return must match the figures on the federal and state returns. Obviously, using “gross receipts” instead of “gross income” will cause a mismatch, thus guaranteeing discord between the taxpayer and the I.R.S. and Department of Revenue. The City of Goose Creek errs when it departs from the clear language of § 5-7-30 and its own ordinance to use “gross receipts” as its formula as to the appellant.

Finally, the Municipal Association is actively involved in the creation of House Bill 5109, introduced March 15, 2016, by 8 members of the House of Representatives to change the definition of “gross income” in order to allow municipalities to collect a business license tax based on “gross receipts.” (See Municipal Association February 18, 2016, Press Release: “the task force of business license and finance officials from 15 towns met on Wednesday to continue work on the details of the proposed Business License Tax Standardization Act.”) Since the Municipal Association is actively

involved in trying to change the law to allow calculation of a business license tax on “gross receipts,” it should not be allowed to assert a contrary position to the Court of Appeals by way of an amicus brief.

Goose Creek’s ordinance consistently identifies the “gross income” used for calculating business license fees as the reported gross income on federal and state tax returns. The City may verify gross income by inspecting returns filed with the Internal Revenue Service and may require appellant to submit “federal income tax returns reflecting gross income figures.” The ordinance also provides that the City may disclose gross income of licensed **to** the Internal Revenue Service. Regardless of how other municipalities in the state define “gross income,” the City of Goose Creek incorporates the income tax definition of “gross income,” and its Code of Ordinances serves as authority for this position. However the City misapplies its ordinance when the City calculates appellant’s business license fee based on “gross receipts.” Goose Creek’s ordinance is drawn on the Municipal Association’s “model ordinance,” which carefully defines “gross income,” and “gross receipts.” Goose Creek’s ordinance requires that its definitions “shall apply unless the context indicates or requires a different meaning.” § 110.001 “Definitions”

It is, therefore, irrelevant what other municipalities do because the issue here is that the City of Goose Creek does not apply its Business License Ordinance to the appellant in conformity with state law and its own ordinance. The Municipal Association’s argument that “the lasting statewide impact” and “wide reaching effect” of this case are irrelevant, especially where, as here, the Municipal Association has repeatedly published a Handbook supporting appellant’s legal position and repeatedly informed appellant that his legal position is correct. The issue here is about whether or not the City of Goose Creek correctly applies its business license ordinance to this appellant, and

whether the appellant has presented a genuine issue of material fact that it does not.

### **SHARP PRACTICE**

The Court should deny Municipal Association's request to enter the case at the eleventh hour. To allow the Municipal Association to attempt to influence the decision in this case at such a late date with no opportunity to the appellant to conduct discovery is to condone sharp practice. This is especially true where, as demonstrated above, the Municipal Association has reversed course at such a late date and where the Municipal Association has adopted the opposite of the position it advocates here with the General Assembly. On Tuesday, May 17, 2016, the Municipal Association filed a bound, conditional final brief with the Court of Appeals and mailed a copy to appellant. Despite knowing about this case since 2012, the Municipal Association made no effort to enter the case until it was too late for the appellant to respond. The Municipal Association never inquired of appellant if he objected or consented to its request or furnished an initial brief to appellant to allow him to consider the application. (Trial courts require consultation prior to filing a motion. Rule 11(a), *S. C. Rules of Civil Procedure*.) Instead, appellant received notice by U. S. Mail on Thursday, May 19, 2016, that the Municipal Association is requesting leave of court to file a brief, 18 days before oral argument. If the Court grants the motion, the appellant will have an inadequate time to compose a response and no time to examine Municipal Association's designee to expose contradictions in its position. ("If leave to file amicus curiae brief is granted, the appellate court will specify the period in which a response to the brief may be filed." Rule 213, *South Carolina Rule of Appellate Court Rules*) The Municipal Association's proposed brief cites 18 cases, 13 of which are not cited by either appellant or respondent, thus preventing the appellant from having an adequate period of time

to reply.

As set forth above, the Municipal Association has been aware of this case since 2012, and furnished appellant with written confirmation that his legal position is correct. The Municipal Association is now involved in a public effort to persuade the legislature to amend the law to change the method of collection, and thus the Municipal Association should be estopped from asserting here a position contrary to its written responses to appellant's inquires and its representations to the General Assembly. The Municipal Associations strategic timing is calculated to prejudice appellant's opportunity to respond. This Court should not reward the Municipal Association for asserting mutually exclusive positions and for lying in wait and becoming involved in a case at such a late hour to the prejudice of the appellant.

Throughout its proposed brief, the Municipal Association criticizes appellant for making legal statements with no authority and misrepresenting the law even though the appellant relied, in part, upon the Municipal Association's published guidelines and made inquiries of the Association during the litigation below. Appellant's brief cites considerable authority for his legal position—starting with the City of Goose Creek's Business License Ordinance and the rules of statutory construction—and the Record on Appeal contains an affidavit from a law professor, which the lower court did not consider or even acknowledge. (R.O.A. pps. 182-191) The issue before the Court of Appeals is whether the appellant did or did not present a "scintilla" of evidence creating a genuine issue of material fact. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.,2d 801 (2009): ". . . non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Because of the Municipal Association's late entry into the case, the appellant has no opportunity to conduct discovery to ask an Association designee why

the Association changed its position and now believes the appellant's legal position is wrong. If discovery demonstrated that the Association is simultaneously advocating mutually exclusive positions to the Court and to the General Assembly, the Association's credibility would be eroded.

On page 3 of its proposed brief, the Municipal Association writes:

Appellant provides no state or federal law requiring that the use of the income tax definition of "gross income" and such an argument misapprehends the very nature of the business license tax. Appellant provides no authority for his position because none exists. (Proposed Brief at page 3)

In light of the Association's published Handbook, quoted above, and its written explanations to the appellant, quoted above, and the rules of statutory construction, this statement is shocking. The Association's statement lacks support in the record for several reasons. First it ignores that this appeal is from a grant of summary judgment. More importantly, it exposes the Municipal Association's lack of familiarity with the Record on Appeal. On page 94-95 of the Record on Appeal, the appellant lists 8 undisputed statements of law and fact. The Municipal Association's unsupported assertion that the legislature uses one definition for "gross income" to compute income and a completely different definition for "gross income" to compute a business license tax is not only refuted by the record and the ordinance itself, but also a *reductio ad absurdum*. In South Carolina, courts construe statutes in accordance with the plain and ordinary meaning of the words used. The Supreme Court recently had an opportunity to address a similar issue involving the City of Columbia and the definition of "surplus revenues." In *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), a group of citizens challenged the City of Columbia's using water and sewer fees to prop up its general fund. Just like here, some citizens brought suit alleging that the governing statutes do not allow the creation of a "slush fund" by manipulating the definitions of words. Just as here, the

circuit court granted summary judgment for the City. The Supreme Court reversed the grant of summary judgement holding: “The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” The Municipal Association tortures “gross income” into dual meanings. When collecting an income tax, “gross income” means “gross income,” but when Goose Creek collects a business license tax, the words “gross income” shift without authority to mean “gross receipts.” The Municipal Association fails to consider the definitions and context of requirements in the Goose Creek ordinance when defending the City’s practice. Of course, the statute under review, § 5-7-30, limits the collection of a business license tax to “gross income.” The Legislature knows the difference between “income” and “receipts.” As set forth above, on March 15, 2016, 8 house members introduced a bill, HR 5109, to change the state statute from “gross income” to “gross receipts.” Clearly, the Legislature knows the difference. The Municipal Association is involved in the effort to change the law, and because the Association’s position here and before the General Assembly is so contradictory, it should withdraw its application for amicus status. The Supreme Court dealt with shifting definitions in *Azar* as well: “Simply put, the statutes do not allow these revenues to be treated as a slush fund.”

Here, the Municipal Association wants to create a slush fund for its 270 clients and presumably itself, and the appellant is being denied any opportunity to challenge the Municipal Association’s eleventh hour change of heart, its motive for change, its bias and financial interest in the outcome, or the basis for its opinion, which is premised on its unsupported assertion that “gross income” can have different meanings. The Municipal Association ignores the issue before the Court in this appeal, which is whether the appellant did or did not create a genuine issue of material fact

that Goose Creek is misapplying its ordinance as written to the appellant. If the Court allows the Association to file a brief at this late date, it is equivalent to allowing a duel with one pistol. When a party stands before the Court, ignores the issue before the Court, and asserts a departure from ordinary rules of statutory construction, it is a violation of fundamental fairness to allow such an assertion without affording the appellant an opportunity to test and refute the basis for such an assertion.

### **MISREPRESENTATIONS OF FACT AND STANDARD OF REVIEW**

At no time in its proposed amicus brief does the Municipal Association address the fact that this appeal is an appeal from a grant of summary judgment. The Municipal Association does not acknowledge or address that the lower court ended the case on summary judgment or discuss the standard for review from an entry of summary judgment. The Municipal Association ignores the Court's obligation to construe the facts and the reasonable inferences drawn from them in the appellant's favor. The Municipal Association misrepresents the fact that its published Handbook for Municipalities and its multiple written correspondence to the appellant on the legal issue in this case is the opposite of what it now states to this Court. It ignores the fact that the Legislature now has a bill pending to change the statute under review to allow for a business license tax on "gross receipts." Such conduct shocks the conscience and should not be tolerated by this Court.

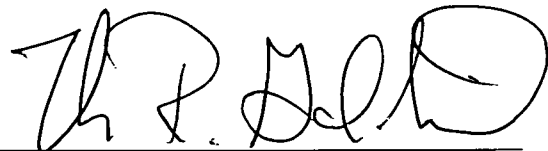
### **CONCLUSION**

The Municipal Association's late attempted entry into this case ignores the facts of the Record on Appeal and attempts to shift the focus from the facts of the case before the Court to a

consideration of a statewide policy. The Association's involvement arguably has more to do with the Association itself—and its efforts to influence pending legislation—than the City of Goose Creek and the case before the Court. (See Municipal Association February 18, 2016, Press Release quoted above at page 5:

The Municipal Association of South Carolina has been working since last year to . . . draft a bill to make the license process more streamlined across all cities and towns . . . business license taxes in all cities will be calculated using the same definition of gross income.

The Association's interest ignores appellant's reliance on Goose Creek's Code of Ordinance. The Association attempts to broaden the issue before this Court rather than limit the discussion to the issue before the Court. The issue before the Court is whether appellant did or did not present a genuine issue of material fact that Goose Creek is misapplying its ordinance to the appellant. The Municipal Association's effort to enter the case ignores this issue and prejudices the appellant. The Court should deny the Municipal Association's request.



May 23, 2016

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