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 PETITION FOR REHEARING

November 19, 2016

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As allowed by Rule 221, appellant petitions for rehearing on the following points misapprehended or overlooked by the Court in Opinion 5454:

1.

THE COURT OF APPEALS MAKES AN ERROR IN ITS STATEMENT OF FACTS/PROCEDURAL HISTORY BECAUSE THE CITY OF GOOSE CREEK DEFINES "GROSS INCOME" AND "GROSS RECEIPTS" SEPARATELY BUT USES THE TERMS INTERCHANGEABLY

The Court of Appeals' November 16th Statement of Facts and Procedural History is a mostly succinct statement of the material facts. Even so, it contains a material error of fact, which prevents an accurate analysis of the legal issue before the Court. The third paragraph of the Court's well-written opinion contains this footnote: "The City's business license renewal form uses the term 'actual gross receipts,' rather than 'gross income.' **However, the form also includes a section where the applicant certified he or she has accurately reported the business's gross income."** (Footnote 1 of Opinion 5454, emphasis added). As discussed more fully in the next section, the boldfaced statement is the case compressed down to a single sentence because it is undisputed that what Olds reports to the City as his "gross income" **must match** what he reports to the I.R.S. as his "gross income." "The *GROSS INCOME* for business license purposes shall conform to the gross income reported to the State Tax Commission. . ." § 110.001 As discussed more fully in the next section, the City's tax ordinance provides that the City can and will communicate with the I.R.S., including turning over its figures to the I.R.S. Based on the record of animus in this case, it is certain that Faretra and or Althoff would turn over Old's

gross income figures to the I.R.S. precisely because they do not match. Once the City does so, then Olds' "gross income" reported to the I.R.S. will appear understated because it does not match the "gross income/receipts" reported to the Town, and Olds will find himself in perpetual audit because the City's torture of plain and ordinary language creates the false impression that Olds is understating his income to the I.R.S. The fact that the Court reduces this undisputed and material fact to a footnote demonstrates that appellant failed to present the case with sufficient clarity to allow the Court to appreciate this fundamental point; to wit, that the City's definition of "gross income" requires the reported figures to match the "gross income" reported to the I.R.S. and the State Department of Revenue. (See pages 182 – 188 of the R.O.A., which discusses in detail how gross income is reported to the I.R.S. and the State Department of Revenue.) Professor Gutting's affidavit explains that South Carolina law does specifically adopt the Internal Revenue Code's definition "gross income." Even the City of Goose Creek concedes this point. See pages 224-225 of the Record on Appeal: "Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income." Thus, it is not relevant that § 5-7-30 does not contain the definition of "gross income" because the statute uses words commonly understood by everyone in their plain and ordinary meaning.

2.

THE CITY ORDINANCE DEFINES GROSS INCOME.

The City of Goose Creek ordinances incorporate the State of South Carolina

Department of Revenue rules in determining gross income. The Court of Appeals overlooks this dispositive fact, which cannot be questioned. The ordinance says:

> **The *GROSS INCOME* for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. . . . 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 governmental agency.**
> Ordinance 110.001, quoted in its entirety in the 18th paragraph of the Court's Opinion, emphasis added here, except that emphasis on "GROSS INCOME" is in the original ordinance.

In Opinion 5454, the Court overlooks that without resort to state law, accounting procedures, *Webster's Dictionary*, or any other outside source, the ordinance by its own terms requires that Olds' "gross income" matches the "gross income" reported to the I.R.S. and the South Carolina Department of Revenue. As plaintiff's expert in accounting explained: ". . . Mr. Olds should calculate his business license for purposes of § 110.001 of the Goose Creek Code by including the portion of his gross income as reported to the South Carolina Department of Revenue on his South Carolina tax return for his business that is properly sourced to Goose Creek." (R.O.A. page 184, affidavit of Prof. Gutting.)

Moreover, § 110.003 and § 110.008 require a taxpayer to turn over his state and federal returns for inspection to make sure the figures match and allows the Finance Director to "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." Because it is undisputed that the figure reported to the I.R.S. and the state Department of Revenue is gross income—and **not** gross receipts—and must match the figures provided to the City, Olds calculated

his tax correctly and the City fails to do so by the very definition adopted by the City. See also page 187 of the Record on Appeal: ". . . for business license purposes [gross income] shall conform to the gross income reported to the State Tax Commission," citing § 110.001. In Opinion 5454, the Court overlooks that, by its very definition, § 110.001 requires that the definition of gross income match what the State of South Carolina and the Federal Internal Revenue Service require.

3.

THE COURT MISAPPLIES THE RULE OF STATUTORY CONSTRUCTION

The Court of Appeals in Opinion 5454 either overlooks or misapplies the settled rules of statutory construction. While the opinion recites the correct standard, citing *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000), the Court deviates from the standard enunciated in those cases by torturing the word "receipts" to inflate it to mean "gain" or "income." Receipts do not mean income. The Court also ignores both appellant's evidence and the indisputable fact that the words, "receipts" and "income," used in in their "plain and ordinary meaning" do not mean the same thing. Even the City of Goose Creek distinguishes the two terms: "The term **GROSS RECEIPTS** means the value preceding or accruing from the sale of tangible personal property, . . ." (R.O.A. page 129 § 110.001 DEFINITIONS.) Furthermore, reliance on these two cases is a little like a square peg in a round hole. *Historic Charleston* involved a dispute over what the City meant by "nonconforming" in a zoning case, and likewise, *I'On*

involved the question of whether citizens could rezone by referendum. Following the Court's lead in citing zoning cases for guidance on how to interpret unambiguous ordinances, a more appropriate authority is the case relied upon by Goose Creek: *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953), when, in deciding that the City of Sumter was being obtuse in arguing over the meaning of "tourist court" vs. "motor court," the Supreme Court said: "We have, however, as our guide the well-founded principle of law that statutes or ordinances in derogation of natural rights of a 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 not clearly with their scope and purpose." The Supreme Court said much the same thing in the tax cases in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015) and *Municipal Association of South Carolina v. AT&T Communications*, 361 S.C. 576, 606 S.E.2d 468 (2004) where, in construing § 5-7-30, the Court said: ". . . 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. [citation omitted] The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose." (Word, "fine," used in statute means criminal, not civil fine.)

Here the Court not only tortures the plain and ordinary meaning of gross income, which the City defines and requires to match the amount reported on State and Federal returns, but also the Court ignores Professor Gutting's **accounting** evidence, finding she is giving a legal opinion when all of her opinions are related to the science of accounting not law. To question the intent of the City's ordinance is to turn a blind eye to the plain

meaning of the unambiguous ordinance.

Perhaps he following example will crystallize the dispute because it is one to which every lawyer can relate: If Lawyer A settles a case for $9,000.00, pays $3,000.00 to medical providers to resolve liens, pays $3,000.00 to the client as the net settlement proceeds and keeps $3,000.00 as her fee, Lawyer A has $9,000.00 in receipts and $3,000.00 in gross income. There is no method of interpretation that can change the preceding statement without abandoning the plain and ordinary meaning of words. Calling the $9,000.00 in receipts income is nothing more than a Humpty Dumpty solipsistic approach to language for the sole purpose of grabbing money that the to which the City is not entitled as condemned by the Supreme Court in *Azar, op. cit.*

Thus, when this Court says in paragraph 20, "The term 'gross income does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Paragraph 20), its statement is in conflict with the Court's duty to interpret the words used in the ordinance in their "plain and ordinary" meaning. The requirement of the rules of statutory construction requires Courts to use words in their "plain and ordinary" meaning in order to avoid the logical cul-de-sac made famous by Lewis Carroll (who was a logician) through his character Humpty Dumpty. Of course words have "definite" meaning. When a police officer cites a motorist for "speeding," she does not mean "driving without a license." The only way language works is if the speaker and the listener reach an accord on meaning and no amount of torture will transform "receipt" into "income." (See lawyer hypothetical above.) Thus, when this Court says in paragraph 17, "We find the City's power to levy a business license tax is not limited by section 5-7-30," this is an incorrect

statement of law. If the City's power to levy a business tax is not limited by section 5-7-30, then it is infinite. Moreover, it is an indisputable correct statement of law that municipalities can tax only what the State allows them to tax, a well-settled legal point overlooked by this Court.

In saying that the words "receipts" and "income" do not "carry the same definite and inflexible meaning under all circumstances," this Court not only jettisons the rules of statutory construction completely, but also compounds the error by engaging in re-writing unambiguous legislative rules: **"Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, we find the city intended to define gross income for business license tax purposes as the total revenue of the business."** (Opinion at paragraph 21) This sentence leaps the separation between the legislative and judicial branches of government, and the Court is now re-writing the City's ordinance to conform to the Court's view of what it thinks the City of Goose Creek can tax. In doing so, not only does this Court abandon its judicial function to enforce the law as it is written, but also the Court re-writes both the City's ordinance and vetoes the General Assembly's limitation on the power of a municipality to tax. Appellant respectfully submits this Court does not have the authority to enact legislation.

The Court sidesteps this undisputable fact by pretending that "Olds has not set forth an argument explaining how the ordinance is inconsistent with our state constitution or other state law." (Opinion in paragraph 17) However, the Appellant did set forth an

explanation in Argument 1-A of the initial brief, where appellant raised this question and analyzed it from pages 16 to 18, citing the State Constitution, Article VIII and numerous cases on page 16. There, the appellant demonstrated that under South Carolina law, municipalities have no inherent right to levy taxes and possess only the powers granted to them by the State, which they cannot exceed. Appellant's brief stated:

A. The Constitutional Limitation on Municipal Government Authority

Local governments derive their police powers from the state. S.C. Const. Art. VIII, § § 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare, and convenience of such municipalities. S. C. Code § 5-7-30 (1976). This is a recognition that more stringent regulation often is needed in cities than in the state as a whole. *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943). However the grant of power is given to local governments with the proviso that the local law not conflict with state law. City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963). A city ordinance conflicts with state law when its conditions, [Page 157] express or implied, are inconsistent or irreconcilable with the state law. *Town of Hilton Head v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662, 664 (1990) (quoting *McAbee v. Southern Rwy. Co.*, 166 S.C. 166, 169-70, 164 S.E.444, 445 (1932)). Where there is a conflict between a state statute and a city ordinance, the Ordinance is void. *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965). *City of North Charleston v. Harper*, 306 S. C.153, 410 S.E.2d 569 (1991)

Whether analyzing the case now before the Court under the principle of Constitutional limits of municipal power (Argument I A) or under the principle of statutory construction (Argument I B), this Court must arrive at the same conclusion by either path of reasoning, and for that reason, appellant treats Arguments A and B in a combined argument, because they are the twin sides of the same argument. The appellant treats the Town's procedural deficiencies in Argument II.

(Appellant's brief at page 16)

It is, therefore, clear that Opinion 5454 overlooks and misapprehends the City's clear expression that gross income in the City of Goose Creek means the same as gross income in the rest of the world, and even if it did not, the City is not free to torture

langue to enhance its collections. See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015):

> 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.
>
> Simply put, the statutes do not allow these revenues to be treated as a slush fund.

4.

THE COURT DOES NOT PERMIT A WRONG WITHOUT A REMEDY

Perhaps the most fundamental precept in American jurisprudence is that the law provides a remedy for every legal wrong. *Ubi jus ibi remedium.* (For every wrong, the law provides a remedy.) After the United States declared independence from England, Chief Justice John Marshall made the principle the bulwark of judicial review: The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed.2d 60 (1803) Here, not only did the City Council of Goose Creek take up Old's appeal while barring him for participation, but the trial court found, and the City admits, it violated the appellant's constitutional rights by doing so! This finding is not challenged by the City. In addition, the record shows that Ron Farertra and Jennifer Althoff left their offices together, drove over to Olds' property, detained his friend under false pretenses and trespassed through Olds' property without permission and without a warrant. They also resorted to self-help in forcing Olds to capitulate by interfering in his right to receive water service. Notwithstanding this shocking conduct, the Court regards this

admitted lack of due process and unlawful conduct as unimportant. If the conduct demonstrated in this case is unimportant, then we live in a police state. This is especially true because the only way a citizen can challenge government overreach peacefully is to ask the Court to evaluate the government's conduct. Since the City admits it unlawfully violated Olds' rights, and since the appellant proved—at the summary judgment stage---that the City shut off his water, invaded his property, detained his friend and excluded him from his appeal before City Council, then Olds is entitled to be heard, at least on the issue of attorney's fees because the award of attorney's fees to citizens who challenge unlawful government conduct is the only means a citizen possesses to address and check unlawful government conduct. See page 12 of the Record on Appeal, paragraphs 60-62 of plaintiff's complaint. The Court's rationalization to avoid evaluating the City's conduct or allowing Olds to be heard on the merits is that Olds was not "prejudiced." This is an incorrect statement of law for two reasons. First, the standard is whether Olds created a genuine issue of fact, and there can be no dispute that Olds met that standard. Second, and more importantly, the most fundamental aspect of American jurisprudence is that a violation of a citizen's basic rights is always a "prejudice" and gives rise to a claim for damages. See 42 U.S.C.A. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom , or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

This Court overlooked that the lower court granted summary judgment, and that

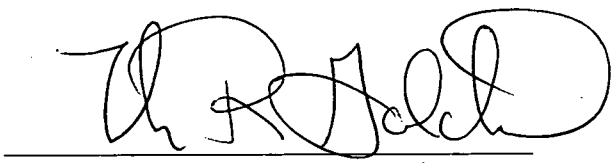
there is no debate that appellant created a genuine issue of material fact on these claims.

CONCLUSION

Thus, as set forth in the appellant's briefs, 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 proper rules of statutory construction that require it to apply the words in the statute in their plain and ordinary meaning. In affirming the lower court, this Court overlooked the numerous instances in which the City of Goose Creek links its definition of "gross income" to the universally accepted definition as must be reported in State and Federal tax returns. As the Supreme Court said in *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956): "Equally well settled is the rule that the word 'income' as use in a tax statute is to be taken in its ordinary sense of gain or profit." In searching the record for the existence of a genuine issue of material fact, the Court is required to read the words of the tax statute in their "plain and ordinary meaning." The Court is not entitled to re-write the definitions to expand the City's powers beyond the clear import of the enabling statute, and any 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. This Court does not have the authority to rewrite the State's enabling statute to comport with its view of how citizens should be taxed. Finally, creating a genuine issue of material fact about the violation of his rights, and 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. He is entitled to be heard, therefore, on his claim for damages and attorney's fees.

Respectfully submitted,



November 23, 2016

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

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 Petition for Rehearing on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on November 23, 2016, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

November 23, 2016

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November 22, 2016

Hon. Jenny Abbott Kitchings
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NOV 28 2016
SC Court of Appeals

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

Dear Ms. Kitchings,

I enclose an original and seven extra copies of the Appellant's Petition for Rehearing in the above case. I also enclose our firm's check in the amount of $25.00 for the filing fee. Would you be so kind as to file the original with the Court and return a clocked in copy to me? I have enclosed a self-addressed, stamped envelope for your convenience. With kind regards, I am

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

Thomas R. Goldstein

enclosure: Petition for rehearing
TRG/ral
cc: Tim Domin, Esq.
Todd Olds
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