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

Todd Olds..... Appellant,

vs.

City of Goose Creek ..... Respondent,

APPELLANT'S REPLY TO RESPONDENT'S RETURN ON PETITION FOR REHEARING

December 22, 2016

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITIES:

As allowed by Rule 240(f) *South Carolina Appellate Court Rules*, appellant replies to Respondent's arguments (combining the reply to City's arguments I and II into one reply) as follows:

1.

The Parties agree the rules of statutory construction are an important consideration in evaluating the legal issue before the Court

The parties agree that the rules of statutory construction control the analysis. The parties agree that municipalities possess only those powers the General Assembly grants them. The parties agree that § 5-7-30, S. C. Code grants municipalities leave to collect a tax on "gross income." However, both the lower court and this Court overlook the **fact** (and this case is an appeal from the grant of summary judgment) that Goose Creek defines "income" and defines "receipts" and defines them differently. This is a **fact** ignored by the lower court and by this Court even though the appellant demonstrated the existence of this **fact**: ". . . the term 'gross receipts' is defined in Chapter 110 of the Goose Creek Code. See Goose Creek code § 110.001. However, it is unclear the reason 'gross receipts' is defined, as the term 'gross receipts' is never again used in the Goose Creek Code. . . . Two things are important about this definition: (1) it does not link to any other section in Chapter 110 of the Goose Creek Code in regards to the business license fee or the definition of gross income and (2) assuming a link can be established, it is inapplicable as it pertain to Mr. Olds, as he is selling real property not personal property." (R.O.A. page 187, affidavit of Professor Gutting).

It is also a **fact** that Goose Creek agrees—or at least did—with this statement.

See Brief submitted by the City to the City on appellant's administrative appeal:

> Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income.
> R.O.A. page 224-225, City's Reply Brief to City Council

Note how the City's position evolves: "In specific response to Old's suggestion . . . the ordinance defines Gross Income to mean the same as the IRS definition, this is also plainly incorrect." According to the City's brief to City Council, the appellant is correct, and the City cannot be permitted to change its position to justify maximizing its collections. Even the *Municipal Association Handbook*, on which the City places great weight, makes this clear: S. C. Code Sec. 5-7-30 authorizes each municipality to levy a business license tax measure by gross income. **No other basis is authorized**, except for certain businesses." R.O.A. page 147 (emphasis added)

Since the City defines "gross income" and "gross receipts" differently, and since the City agrees its definition of gross income "is in accord with the Internal Revenue Code," there is only one possible conclusion under the rules of statutory construction.

2. Appellant's alleged concession at oral argument

Appellant's "concession" at oral argument was—and is—that the core function of government is to acquire power and deploy it against its citizens. Likewise it is the core function of the Court to act as a check on governmental power. The Supreme Court of South Carolina recognized this tension in another tax case and stated plainly that "Simply put, the statutes do not allow these revenues to be treated as a slush fund."

Azar v. City of Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015)[1]

Thus, appellant's "concession" at oral argument is merely a repetition of the universally accepted premises that the three branches of government act as checks and balances against the excesses of the other.

3. Municipalities have no inherent power to tax

It is an undisputed principle of law that municipalities only have those powers granted to them by the legislature. The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law." Article VIII, § 9, S. C. Constitution. ". . . a municipality, being a creature of the legislature, may exercise only such authority as is granted to it." *Dunbar v. City of Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976)

4. This Court overlooked appellant's pleadings and evidence.

This Court never considered appellant's allegations of governmental misconduct, and the City builds on that theme by saying that appellant has failed to make a meaningful response. The parties are merely talking over each other and not to each other. Plaintiff's amended complaint sets out nine causes of action, including two tort claims, abuse of process and civil conspiracy. The evidence in this record is shocking, but this Court is unconcerned with the fact that the Director of Finance and the Business

[1] This case involved the City's used of water and sewer "user fees" to pump up its general fund. "Finally we reject the City's contention that interpreting section 6-1-330 to apply and limit the City's' expenditure of service and user fees would effectively preclude any water and sewer revenues from every being spent on anything other than the utility's direct costs."

License Clerk got in an automobile together, drove to the appellant's property, impersonated law enforcement officers, detained a friend of the appellant against his will, and wandered through appellant's property unsupervised and without a warrant. ". . . while I was there [at appellant's house] putting trash in plastic bags, two City of Goose Creek employees showed up at the residence and confronted me. I had no idea who they were. One of them showed me a badge, and I assumed that he was a police officer. Later on, I found out that the two people who showed up were Ron Faretra and Jennifer Althoff. Mr. Faretra and Ms. Althoff detained me for somewhere between on and half and two hours. They continued to ask me questions over and over, and were aggressive and mocked my answers. They made it clear that I was in a lot of trouble, and up until the very end of the meeting, I thought that one or both of them were Goose Creek Police Officers. I now know that they are not police officers, but while we were there, they led me to believe that they were law enforcement authorities and I was not free to leave." R.O.A. page 166, affidavit of Robert Eckhardt.

This testimony is shocking. And true. Because the appellant is the party resisting a motion for summary judgment, the lower court is required to accept his evidence. However neither the lower court nor this court gave the appellant's pleadings or evidence any consideration and simply ignored the testimony of Mr. Eckhardt. If this Court is unconcerned with this evidence, then there is nothing standing between the citizens of South Carolina and power of local governments to do with them as they will. The issue before the Court is whether the appellant created a genuine issue of material fact, an analysis ignored by the lower court and overlooked by this Court. Both the City of Goose Creek and this Court's reliance on *Kurschner v. City of Camden*, 376 S.C.

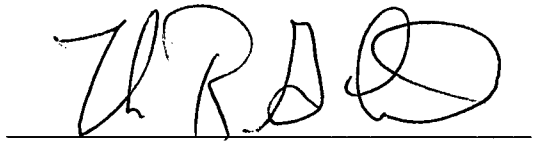
165, 656 S.E.2d 346 (2008) is misplaced because not only did *Kurschner* provide the appellant an opportunity to participate in the Planning Commission decision, but also the decision in Kurschner involved a discretionary standard related to property subdivision. Unlawful taxation is not a discretionary function of government. See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015).

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, and this Court overlooked the existence of undisputed facts and ignored the appellant's pleadings. Neither the lower court nor the Court of Appeals considered the Constitutional/statutory limitation on a municipality's ability to tax income nor did either court 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 that the City of Goose Creek specifically defines "gross income" and "gross receipts" differently but uses them interchangeably. This Court further overlooks 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,



December 22, 2016

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 Appellant's Reply to Respondent's Return on Petition for Rehearing on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on December 22, 2016, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

December 22, 2016

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.

Harry C. Belk (1919-2003)

Dale T. Cobb, Jr.
dtcobblaw@hotmail.com

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

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

December 22, 2016

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

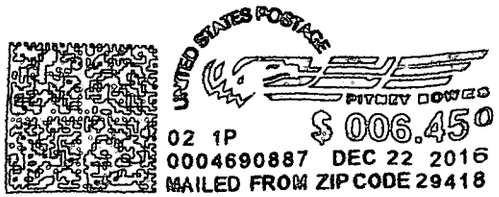
Dear Ms. Kitchings,

I enclose an original and seven extra copies of the Appellant's Reply to the City's Return to Petition for Rehearing in the above case. 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: Reply to City's Return to Petition for Rehearing
TRG/ral
cc: Tim Domin, Esq.
Todd Olds
Mary D. LaFave, Esq.



First Class Mail

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

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