THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Opinion No. 5454
Trial Court Case No. 2011-CP-08-2814

Todd Olds, ... Petitioner,

v

City of Goose Creek, ... Respondent.

Petition for Writ of Certiorari

February 15, 2017

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the he filed a Petition for Rehearing on November 16, 2016, and the Court of Appeals finally ruled on the Petition for Rehearing by Order dated January 20, 2017.

QUESTIONS PRESENTED

Did the Court of Appeals err in failing to adhere to the holding of the Supreme Court in *Azar v. City of Columbia,* 414 S.C. 307, 778 S.E.2d 315 (2015)?

Did the Court of Appeals fail to recognize that the City of Goose Creek Defines "Gross Income" and "Gross Receipts" separately—and correctly—but uses the terms interchangeably?

Did the Court of Appeals fail to apply § 5-7-30, S. C. Code, ann.?

Did the Court of Appeals err in failing to apply the rules of statutory construction?

Did the Court of Appeals err in finding no evidence of prejudice to the Petitioner when the record shows numerous instances of discrimination?

Did the Court of Appeals apply the correct standard of review?

STATEMENT OF THE CASE

In December, 2010, Petitioner, Olds, became involved in a job permit dispute with the City of Goose Creek unrelated to the issues raised in this case. (Vol. II, Appendix, R.O.A. page 177). After the City acknowledged its mistake in the permit dispute, about four months later, the City sent him, on May 23, 2011, a letter informing Petitioner that it audited his business license returns (Vol. II, Appendix, R.O.A. page 213), and as a result, he owed the City additional taxes: "It has come to our attention that you sold 123 Evergreen Magnolia Avenue... The **sale price** of 123 Evergreen Magnolia Avenue must be claimed as **revenue** on your 2011 City of Goose Creek Business License." (emphasis added) The City informed petitioner that he failed to report his "gross income" because he reported "income" and not "sale price." (By way of illustration, Goose Creek contends that if a taxpayer buys a house for $100,000.00 and sells it for $90,000.00, he or she has $100,000 "gross income" because that is the "sales price" even though the taxpayer had no income but a loss.)

Petitioner disagreed with the City's calculations, pointing out that "gross income" is a well-defined and commonly understood accounting term. Petitioner appealed the City's recalculation, following the procedure outlined in the City's ordinances. As required by the City's ordinance, the first appeal was to the City Administrator, Dennis Harmon. (Appendix, Vol. II, R.O.A. page 214) After Mr. Harmon denied the appeal, petitioner appealed that decision to the City Council. (Appendix, Vol. II, R.O.A. page 229) On September 27, 2011, the City Council took up petitioner's appeal (App., Vol. II, R.O.A. page 20); however, the City Council did not allow petitioner to participate. (The circuit court found petitioner's exclusion to be a constitutional violation, but ordered no relief for petitioner. See trial court Order at App.

Vol. II, page 8.) The trial court found that the City "invited Mr. Olds or his counsel to appear prior to the meeting, but Mr. Olds' counsel declined. . ." This statement is not correct as may be seen by petitioner's September 15, 2011, letter: "Thank you also for reminding me that neither Mr. Olds nor I are permitted to participate in the process." (App. Vol. II, R.O.A. page 232) The City Council affirmed the City Administrator's decision that sales price is gross income. App. Vol. II, R.O.A. pages 235-239.

The Petitioner appealed to the circuit court on October 12, 2011 (App., Vol. II, R.O.A. page 41), and after amending the complaint, alleged 8 causes of action in addition to the appeal. See Amended Complaint at App. Vol. II, page 64.

On January 16, 2013, the Petitioner moved for summary judgment. The Petitioner also sought leave of court to amend his complaint. (App., Vol. II, R.O.A. page 109) On July 2, 2014, the Respondent moved for Summary Judgment (App., Vol. II, R.O.A. page 198)

On June 16, 2014, the trial court deferred any action on the parties' cross motions for summary judgment, but granted Petitioner's request to amend the complaint adding two parties and two causes of action (conspiracy and breach of contract). App. Vol. II, R.O.A. page 16.

The circuit court granted summary judgment for Respondent on September 5, 2014, (App. Vol. II, R.O.A. page 1), and after the circuit court denied Petitioner's motion for reconsideration on October 8, 2014 (App. Vol. II, R.O.A. page 14), the Petitioner timely appealed to the Court of Appeals. The Court of Appeals issued Opinion Number 5454 on November 16, 2016 (App. Vol. I, page 1) and thereafter denied Petitioner's Petition for Rehearing on January 20, 2017. (App. Vol I, page 12)

The Petitioner now seeks review of Opinion Number 5454 for the reasons set forth below.

1.
THE COURT OF APPEALS ERRED BY NOT FOLLOWING THE PRECEDENT OF THE SUPREME COURT IN *AZAR v. CITY OF COLUMBIA,* 414 S.C. 307, 778 S.E.2d 315 (2015)

It is a testament to the ingenuity of lawyers that such a simple issue generates so much debate. No accountant or tax preparer reports the "sales price" of a house as the "gross income" resulting from the sale. As discussed fully below, the term "gross income" is defined by the Internal Revenue Code, the South Carolina Legislature, and by the City of Goose Creek itself. Each and every definition is consistent: "income" = "gain." Neither the Internal Revenue Code, (I.R.C.), the State of South Carolina nor Goose Creek defines "income" as "receipts" or "sales price," and, in fact, Goose Creek's ordinance distinguishes between the two. (Ordinance is quoted by the Court of Appeals on page 7 of the Appendix and pages 11 and 17 below.) Before turning to a discussion of the rules of statutory construction, the discussion should start with the controlling precedent of this Court, which the Court of Appeals ignored.

In *Azar*, the City of Columbia deployed a similar rate collection ingenuity to circumvent the statutory limitations on the uses for the money collected. The City of Columbia "generates approximately $110 million in revenue from user fees each year by providing water and sewer services." Notwithstanding the General Assembly's statutory limitation placed on the disbursement of this money, the City of Columbia tortured the plain and ordinary meaning of the controlling statutes in order to create what this Court called a "slush fund." By redefining the revenues as "voluntary payments," the City justified redistributing the

water and sewer money to its "General Fund" even though the General Assembly requires the money to be set aside to protect and maintain the infrastructure that generates the payments. Columbia's misuse of language to benefit itself is similar to Goose Creek's desire to escape the limitation the General Assembly places on municipalities to collect a business license tax. The General Assembly makes clear that municipalities may collect a business license tax on "gross income," and no one mistakes "gross income" for "sales price." See I.R.C. § 61: "Gross Income defined (a) General Definition.--. . . gross income means all income from whatever source derived, including (but not limited to) the following items: (3) Gains derived from dealings in property."

In order to get around the restrictions imposed by the General Assembly on water and sewer collections, the City of Columbia argued that the money was not "imposed" but rather proceeds from "voluntary contracts" with the City's water customers. As a result, Columbia stretched the definition so that "surplus revenues" became "profits": "Through an incorrect interpretation of the word 'imposed,' the trial court accepted the City's' argument and found that section 6-1-330(B) does not apply to the water and sewer fees paid by the users." *Azar* at page 317. As a result, the City asserted it could do as it liked with the money. In order to justify annual contributions into the City's General Fund, the City of Columbia employed a similar strategy of pliable construction as involved here, convincing the Court of Common Pleas that the statute did not mean what it said. This Court restated the well-known rules of statutory construction, reaching the only logical result possible, 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.
>
> Simply put, the statutes do not allow these revenues to be treated as a slush

fund.

Azar at pages 317 and 320.

Here, the record demonstrates that the City of Goose Creek went to much effort to pay petitioner back for besting the City on an unrelated issue. Not only did it torture the plain meaning of its own ordinance (discussed in Argument 2), but also it repeatedly threatened him—and his wife—with garnishment and with incarceration (App., Vol. II, R.O.A. page 213), refused to allow him to speak at his own administrative appeal (Vol. II, R.O.A. page 231: "City Council shall review the records and without further oral argument or presentation of evidence will affirm, modify, or deny the appeal."), shut off his water (Vol. II, R.O.A. page 168), invaded his property without a warrant, and impersonated police officers to intimidate a friend, Robert Eckhardt, who was on Petitioner's property picking up trash:

> . . . while I was there [Petitioner's property at 834 North Aylesbury] 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 assume 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 one and a half and two hours. . . . they led me to believe that they were law enforcement authorities and I was not free to leave. . . . I have no idea how the City of Goose Creek knew I was in the house, but when they finally told me I could go after approximately an hour and a half or two hours, I left them inside the house on their own. The whole ordeal was intimidating and it was clear from the manner in which they treated me and the questions that they were asking me that they have it out for Todd Olds. Since they were still in the house when they ultimately let me leave, I have no idea what they did inside the house while they were unaccompanied by anyone or what purpose they had for remaining in the house after being inside for nearly two hours with me.
>
> App. Vol. II, R.O.A. pages 166-167

Thus the holding of *Azar* is doubly important, not only for its analysis of the rules of statutory construction as applied to a tax (user fee) case, but also for the statement that courts will not tolerate government misconduct. Here, neither the trial court nor the Court of Appeals made an effort to address Goose Creek's misconduct. Instead of addressing it head-on as this

Court did in *Azar*, the Court of Appeals avoided the issue by sleight of hand: "Olds also raised an issue to the City Council regarding the city's decision to withhold water service. Olds was able to raise this issue again in circuit court through various claims; therefore, the City Council's procedure did not prejudice Olds as to this issue." (Opinion 5454 at page 9 of Appendix, Vol. I) Had the City of Columbia shut off Mr. Azar's water or falsely imprisoned an acquaintance or wandered through his property without a warrant because he challenged the City's distribution of utility "surplus funds," no one has any doubt that this Court would have addressed such unlawful acts. The Petitioner raised genuine issues of material fact regarding Goose Creek's unlawful conduct, and the Court should allow him an opportunity to present his case before a jury. Therefore, this Court should grant certiorari to review the Court of Appels' refusal to analyze all of Petitioner's important claims.

2.
THE COURT OF APPEALS FAILS TO RECOGNIZE THAT THE CITY OF GOOSE CREEK DEFINES "GROSS INCOME" AND "GROSS RECEIPTS" SEPARATELY—AND CORRECTLY—BUT USES THE TERMS INTERCHANGEABLY

Opinion No. 5454 contains a succinct statement of the material facts. However, it also contains a material error of fact, which prevented the Court of Appeals from reaching a correct analysis of the legal issue before the Court. The third paragraph of Opinion 5454 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. (See also Footnote 2 of Opinion 5454 for a palpable error of fact and law. In Footnote 2, the Court of Appeals places great

weight on its conclusion that "We note the standard income tax forms from the South Carolina Department of Revenue do not include a space for gross income to be reported." This is not correct. Line 1 of the South Carolina Income Tax Return instructs the taxpayer to enter "federal taxable income from your federal form." The ordinance, which is quoted below at page 17, confirms that Goose Creek requires that the figures on its renewal form must match what the taxpayer reports to the Department of Revenue **and** the Internal Revenue Service. (On the South Carolina Income Tax reporting form, the taxpayer inserts the numbers taken from the federal tax return.) Thus gross income is taken from the federal form, and the federal form is found at App. Vol. II, page 397. Line 7 requires that the taxpayer report "gross income," which is the figure placed on Line 1 of the South Carolina Tax Return. The boldfaced statement quoted above is the case compressed down to a single sentence because it is undisputed that—as required by the City of Goose Creek's business license ordinance—Olds is required to report to the City his "gross income, "which **must match** what he reports to the I.R.S. as "gross income." The Court of Appeals overlooked the controlling fact that Goose Creek's ordinance defines gross income; it just refuses to apply it to Petitioner:

> The *GROSS INCOME* for business license purposes **shall conform to the gross income reported to the State Tax Commission**. . ." § 110.001 City of Goose Creek Ordinances, page ____ of R.O.A. (emphasis added)

Thus, to use the words of the Court of Appeals, an inquiry "focusing" on whether the City is properly applying its own ordinance, demonstrates that in Olds' case, the City is not.

As discussed more fully in the next section, discussing the application of the rules of statutory construction, the City's business license tax ordinance requires that the "gross

income" reported to the City must match the "gross income" reported to the I.R.S. and provides further **that the City may communicate with the I.R.S. to verify these figures**! As the above explanation demonstrates, the figure reported to Goose Creek is the figure taken from line 7 of schedule C, the line for "gross income." Those figures must match by the express terms of Goose Creek's ordinance. There is no doubt, based on the evidence here, the City is eager to provide Petitioner's figures to the I.R.S. that do not match. Obviously, "sales price" as "gross income" will never match, and therefore, once the City substitutes Olds' "sales price" for "gross income" reported to the I.R.S., Petitioner will find himself in perpetual audit because the City creates a false impression that Olds is understating his income to the I.R.S. The fact that the Court reduces this undisputed, material, and controlling fact to a footnote demonstrates Opinion No. 5454 overlooked the most fundamental point in the case; to wit, that the City defines "gross income" correctly, and that its definition of "gross income" requires the figures reported to Goose Creek to match the "gross income" figures reported to the I.R.S. and the State Department of Revenue. (See App., Vol. II, pages 182 – 188 of the R.O.A., for a detailed explanation how gross income is reported to the I.R.S. and the State Department of Revenue.)

At the hearing on summary judgment, Petitioner presented the affidavit of Professor Gutting, a tax expert, (App., Vol. II, R.O.A. 189 for resume) whose affidavit explains that not only does Goose Creek correctly define "gross income," but that its definition conforms to the General Assembly's definition of "gross income." **Even the City of Goose Creek concedes this point!** See the City's statement on this issue at App. Vol. II, R.O.A. 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." Even though the trial court decided this case on summary judgment, both the trial court and the Court of Appeals swept aside both Professor Gutting's affidavit and the City's admission as "irrelevant" because it is "legal argument": "As to Professor Gutting's affidavit, the circuit court properly disregarded the affidavit because it was nothing more than a legal argument." (Opinion No. 5454, Appendix Vol. I, page 8) The Court of Appeals committed this error by misapplying *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003), where the Supreme Court affirmed the rule that a law professor cannot submit an affidavit on the issue of whether the Court should or should not grant summary judgment. (It is odd that the Court of Appeals relied on *Dawkins*, when it simultaneously relies on *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App.1989) a few paragraphs later for the proposition that gross income has a flexible meaning. In *Bogan*, discussed below, the Court of Appeals noted how common it is to have expert witnesses in tax cases: "As might have been expected, both parties produced tax experts who interpreted the term in a manner beneficial to the interest of their respective client.") For the trial court and the Court of Appeals to confuse an accounting opinion with an opinion on law is an impermissible leap without support. Most taxpayers routinely use experts when filing tax returns. Trial courts always admit expert testimony when the subject matter is beyond the ordinary knowledge of a jury, the expert has the requisite experience, and the substance of the testimony must is reliable. *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 735 S.E.2d 650 (2012) Here, neither the trial court nor the Court of Appeals applied **any** analysis under Rule 702 of the *South Carolina Rules of Evidence*. Under Rule 702, the

trial court is required to evaluate five factors in determining whether an expert's evidence is admissible: (1) whether the accounting technique has been tested, (2) whether the accounting technique has been subject to peer review, (3) the known or potential rate of error, (4) the degree to which the method or conclusion has been accepted within the accounting community, and (5) whether the accounting theory existed before the litigation began or is it a theory created in response to the litigation. See *Daubert v. Merrrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Professor Gutting's affidavit is not a legal opinion, as was Professor Freeman's in *Fields*, on whether the court should or should not grant summary judgment. Instead, she carefully explained the accounting process in reporting "gross income" as required by tax regulations. Since most taxpayers routinely rely on tax experts to prepare a return, the Court of Appeals erred in refusing to consider Professor Gutting's expert tax opinion, especially at the summary judgment stage. Because both the trial court and the Court of Appeals refused to consider it, this is an error of law for which the Supreme Court should grant certiorari.

3.
THE CITY ORDINANCE DEFINES GROSS INCOME AS REQUIRED BY THE GENERAL ASSEMBLY IN § 5-7-30, S. C. CODE, ANN.

In Opinion 5454, the Court of Appeals correctly notes that the City of Goose Creek possesses only the powers granted to it by the State of South Carolina: "Section 5-7-30 of the South Carolina Code (Supp. 2015) grants municipalities the power to 'enact regulations regulations, and ordinances, not inconsistent with the [c]onstitution and general law of this

[s]tate.'" App. Vol I, page 5. The Court of Appeals then goes on to note that because "gross income" is not defined in Title 5, the City can adopt any definition it wants: Citing *Bogan v. Bogan*, the Court of Appeals holds that "The term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used." App. Vol. I, page 7. The next sentence reads like it is drawn straight out of Lewis Carroll: "[Gross income's] meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished." Compare this statement with Lewis Carroll: "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." The Court of Appeals statement is an error for two reasons:

Bogan v. Bogan, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989)

Bogan v. Bogan does not support the Court of Appeals' flexible approach to statutory construction. *Bogan* is a contract case, not a tax case. Second, *Bogan* involved a physician trying to hold down his alimony obligation by diverting his income, a tax issue known as "constructive receipt." In *Bogan*, the physician husband tried to convince a Family Court that he should pay less alimony under an Alabama consent Order because the money his medical practice sent to a car dealership to pay for his car and deposited into his retirement account should not count as "income" in calculating his alimony obligation. Neither his ex-wife nor the Family Court accepted his spurious argument: "The trial court found 'gross income' included all income received from the husband's practice of

medicine including his automobile allowance and retirement contributions made by the P.A. on his behalf." *Bogan* at page 608. Thus the Court of Appeals erred in relying on this case. On the other hand, if the issue in *Bogan* had been whether the physician's medical practice's receipts were "gross income" to the doctor, then it might be relevant.

§ 5-7-30

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)

The parties agree that the City of Goose Creek has no power to tax its citizens except as provided by the State. Here, the parties agree—and the Court of Appeals said—that the rules of statutory construction require "a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Opinion 5454, App. Vol. I, page 6. If applying a "practical, reasonable, and fair interpretation" to "Gross income," then "gross income" cannot be translated into "sales price" without a lot of torture. Using Goose Creek's interpretation, a lawyer who settles a case for $3,000.00 and pays $1,000.00 to medical providers, $1,000.00 to the client, and $1,000.00 to herself as a fee has $3,000.00 of "income," which is an absurd conclusion. More importantly—and this

is the error permeating Opinion No. 5454—the City of Goose Creek ordinances adopt the Internal Revenue Code and the State of South Carolina Department of Revenue rules in defining gross income. Not to put too fine a point on it, but Goose Creek defines "gross income" for us, and not surprisingly, it's definition tracks the universally accepted definition as set out in § 61 of the *Internal Revenue Code*. The Court of Appeals overlooked this dispositive fact, which cannot be questioned. Goose Creek's 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 Opinion No. 5454, Vol. I, page 7, emphasis added here, except that emphasis on "GROSS INCOME" is in the original ordinance.

In Opinion 5454, the Court of Appeals erred because gross income has a precise meaning. If there is any doubt, the *Internal Revenue Code*, Treasury regulations, state law, generally accepted accounting procedures, *Webster's Dictionary*, or any other outside source are readily available for consultation, and none of them equate "sales price" with "income." Even if there were no precise definition readily available, the ordinance **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 (L.L.M. in taxation) 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." (App. Vol. II, R.O.A. page 184, affidavit of Prof.

Gutting.)

Goose Creek's ordinances, § 110.003 and § 110.008, require the taxpayer to turn over his state and federal returns for inspection to make sure the figures match. These ordinances authorize 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, or as Ms. Althoff says, "sales price"—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 App. Vol. II, 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.

4.

IF RULES OF STATUTORY CONSTRUCTION ARE NECESSARY, THE RULES OF STATUTORY CONSTRUCTION REQUIRE THAT THE TERM, "GROSS INCOME," BE INTERPRETED IN "A PRACTICAL, REASONABLE, AND FAIR INTERPRETATION CONSONANT WITH THE PURPOSE, DESIGN, AND POLICY OF THE LAWMAKERS"

Opinion 5454 states the correct rule, but 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 fails to apply the standard enunciated in those cases by torturing the word "receipts" to inflate it to mean "gain" or "income." Opinion No. 5454 not only ignores appellant's evidence, but also that even without appellant's evidence, no one confuses the words, "receipts" with "income" when these words are used in in their "plain and ordinary meaning." "Sales price" and "income" have never meant the same thing, and no one thinks they do. Even the City of Goose Creek code of ordinances distinguishes the two terms: "The term **GROSS RECEIPTS** means the value preceding or accruing from the sale of tangible personal property, . . ." (App. Vol. II, R.O.A. page 129 § 110.001 DEFINITIONS.) The Court of Appeals' reliance on cases like *Historic Charleston* and *I'On* only confuses the simple issue raised by this case. *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. If the Court is searching for a case offering guidance on how to interpret an unambiguous tax statute, 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." This Court said something similar regarding the "voluntary" user fee in *Azar v. City of*

Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015). Likewise, the utility case, *Municipal Association of South Carolina v. AT&T Communications*, 361 S.C. 576, 606 S.E.2d 468 (2004) is a closer case, where, in construing the limits of § 5-7-30, this 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.)

In order to justify torturing the plain and ordinary meaning of gross income to turn it into "sales price," or "receipts," or "revenue," not only did the Court of Appeals have to ignore the plain meaning of § 5-7-30 and the City's own ordinances, and ignore Professor Gutting's **accounting** evidence, the Court had to reach all the way back to 1922, citing *Columbia Ry. Gas & Elec. Co. v. Jones*, 119 S.C. 480, 494, 112 S.E.267, 272 (1922). The Court of Appeals' reliance on this case is misplaced for two reasons. First, § 5-7-30 did not exist in 1922, making its first appearance in the 1962 Code. Second, the issue in *Columbia Ry.* Was the company's deduction of income from other sources prior to computing its reported "gross income." Or, as the Supreme Court explained it:

> But the Columbia company during said period in making and filing its own reports deducted from or did not include in its gross income the amount so paid over or credited to the power company. It also failed to return as income of either the power company or the Columbia Company the sum of $123,074 received from the Winnsboro contracts of the power company and from miscellaneous earnings, upon which amount the appellant concedes that it is liable for the 3-mill tax.
>
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The Supreme Court determined that it was bound by the "metes and bounds" of the *Southern Express Co. v. Hood* case, cited as 15 Rich 66, 94 Am. Dec. 141, construing a business license statute that permitted a tax on "an income tax statute imposing a tax on

gross incomes, measured in the case of express companies, by the 'gross amounts of the receipts.'"

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Columbia Ry's reliance on *Southern Express Co. v. Hood*, 94 Am. Dec. 141 (S.C.) is a tantalizing bit of historical trivia. In that 1867 case, the court had to decide if "revenue" received as an "agent" counted as part of Southern' s "gross income." The court said: "The court construing the language 'upon all gross incomes derived from the following sources, there shall be paid a tax of the per cent herein specified on the aggregate amount received between the 1ast of January, 1866, and the 1st of January, 1867. . . " Just like the physician in *Bogan*, the railroad was trying to escape paying income tax for money it earned carrying freight on consignment. Naturally, the court concluded, like *Bogan*, that "revenues" from all sources must be included in gross income, a conclusion consistent with § 61 I.R.C. Thus, it turns out that *Columbia Ry.* Is a case supporting appellant's legal position and eviscerating the Court of Appeals' reasoning because § 5-7-30's authorization of taxing "gross income" is about as far from a statute authorizing taxing "gross receipts" as a case can be. If § 5-7-30 authorized a tax on "gross receipts," then perhaps Columbia Ry. might have some bearing on the case even though it would be in conflict with § 61 of the *Internal Revenue Code.* Here, the City's ordinance, the *Internal Revenue Code*, the Treasury Regulations, and § 5-7-30 are all in harmony, and the Court of Appeals erred in torturing a clear and concise municipal ordinance into something out of harmony with all the other authoritative statements on income. In fact, the holding of the Supreme Court in *Columbia Ry.* dovetails seamlessly with all of these authorities and with the testimony of

Professor Gutting, which both courts ignored, and the Court of Appeals erred in failing to adhere to traditional rules of statutory construction.

Thus, when the Court of Appeals said in paragraph 20, "The term 'gross income does not carry the same definite and inflexible meaning under all circumstances and wherever used." (App., Vol. I, page 7), its statement is in conflict with the well-developed body of law on statutory construction. In addition, the Court of Appeals' statement in paragraph 17, "We find the City's power to levy a business license tax is not limited by section 5-7-30," could not be more incorrect. 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 the Court of Appeals.

In saying that the words "receipts" and "income" do not "carry the same definite and inflexible meaning under all circumstances," Opinion 5454 jettisons the rules of statutory construction completely, and then compounds the error by re-writing the State's unambiguous legislative rule to comport with the Court of Appeals' view of what it should have said:

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, App. Vol. I, page 8)

This sentence in the Opinion leaps the separation between the legislative and judicial branches of government, and rewrites the City's ordinance to conform to the Court's view of what it thinks the City of Goose Creek ought to be allowed to tax. Opinion 5454 abandoned its judicial function to enforce the law as it is written.

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). Thus, the Court of Appeals failed to apply the well-settled rules of statutory construction, and this error requires that the Court grant certiorari to review the Court of Appeals' Opinion.

5.

THE COURT DOES NOT PERMIT A WRONG WITHOUT A REMEDY

Neither the trial court nor the Court of Appeals addressed the constitutional or tort issues raised by the pleadings, even though the Petitioner prevailed on the Constitutional issue—his exclusion from the appeal of his case to City Council. *Ubi jus ibi remedium.* (For every wrong, the law provides a remedy.) 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, yet the trial court offered no remedy.

As to the more prosaic misconduct, the record shows that Ron Faretra and Jennifer Althoff have gone to extraordinary lengths to oppress the Petitioner. On one occasion, summarized above, they 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 cross agency self-help in an effort to force 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. The Court of Appeals concludes that Petitioner was not "prejudiced" by it. If the conduct demonstrated in this case is unimportant—see affidavit of Robert Eckhart quoted above at page 9, then we live in a police state. In addition to Mr. Eckhart's affidavit, Petitioner filed four affidavits with the Court attesting to the Respondent's mistreatment of him. See Appendix, Vol. II, pages 168-179. When the circuit court ignored Petitioner's tort claims, the circuit court ignored them. See Petitioner's Motion for Reconsideration, App. Vol. II, page 95. The Court of Appeals likewise ignored them.

The only way a citizen can challenge government overreach peacefully is to petition the Court to evaluate the government's conduct. Since the City admits it unlawfully violated Olds' rights, admits it drove over to Olds' property, admits it shut off his water, admits it threatened him with incarceration, and since the appellant proved—at the summary judgment stage---that the City shut off his water improperly, invaded his property unlawfully, detained his friend under pretext, and excluded him from his appeal before City Council, then Olds is entitled to be heard since the right to be heard is the only means available to check unlawful government conduct. (Petitioner's allegations against t the City are summarized at pages 102-107 of Vol. II of the Appendix in his amended complaint). In holding that Petitioner is not "prejudiced", the Court of Appeals ignores the evidence and fails to construe the evidence in Petitioner's favor as required by the standard for evaluating summary judgment. Thus, the Court of Appeals' statement is incorrect 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.

6.

THE COURT DID NOT APPLY THE CORRECT STANDARD OF REVIEW

Neither the trial court nor the Court of Appeals considered this case as required by the correct standard of review. As the party resisting the City's motion for summary judgment, the Petitioner was entitled to have the facts and inferences drawn in his favor, and even though Opinion No. 5454 recites the correct standard, both for viewing the evidence and for constructing a state statute, the Court of Appeals did not apply them. For example, it brushed aside Petitioner's tort claims finding he suffered no "prejudice," which requires substituting its view of the evidence for that of a jury. Likewise, while the appellate courts are not required to construe the interpretation of a statute with any deference to the trial court, the Court of Appeals rewrote § 5-7-30 to make it say what it thinks it should have said. Thus, the Supreme Court should review Opinion 5454 for error for failing to apply the proper standard of review.

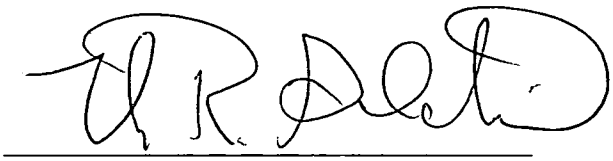
CONCLUSION

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. The Petitioner also provided compelling evidence of the City's conspiracy, abuse of process and unlawful harassment for

which he should be afforded the right to make his case to a jury. This Court should grant certiorari to review Opinion No. 5454 for these reasons.

Respectfully submitted,



February 16, 2017

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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
Opinion No. 5454

Todd Olds..... Petitioner,

vs.

City of Goose Creek ..... Respondent,

PROOF OF SERVICE

I certify that I have served the Petition for Certiorari on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on February 16, 2017, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

February 16, 2017

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