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S.C. SUPREME COURT

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

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SC Court of Appeals

Case No.: 2011-CP-08-2814
Appellate Case No. 2017-000297

Todd Olds ..... Petitioner ~~Appellant~~,

v.

City of Goose Creek ..... Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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March 3, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Law Review Article

QUESTIONS PRESENTED

Petitioner attempts present six questions. His petition for rehearing stated only four. His initial brief to the Court of Appeals stated only three. Not a single issue appears to have stayed the same from start to finish. The City of Goose Creek would ask this Court to limit consideration, if any, to those issues raised in the briefs and in the Petition for Rehearing, and then in the petition for writ of certiorari.

STATEMENT OF THE CASE

Mr. Olds is a real estate developer who buys distressed properties and attempts to sell them for a profit. He often performs repairs and renovations to the properties prior to sale. He sometimes buys and sells the homes through his alter-ego Prime Properties of Charleston, LLC.[1] Mr. Olds claimed on his 2011 business license application next to the line "Actual Gross Receipts (total receipts generated by the business regardless of source, without deduction) for January 2010 to December 2010" a sum of $58,432.46. (Appx. Vol. II p. 212). The City of Goose Creek Business License Department matched Olds/Prime Properties to the sale of a home in Goose Creek during the prior year at 123 Evergreen and noted the total sales price was $134,000. Based on this, the City sent notice of recalculation of the business license fee from $460.40 to $928.40. The City provided notice of the increased amount to Olds on May 23, 2011 and demanded the difference without assessing any penalties. (Appx. Vol. II p. 213). Olds paid the difference under protest and timely appealed on June 7, 2011, contending that the City was not applying "the plain and ordinary meaning . . . [of] Gross

[1] The City has allowed Mr. Olds to have only one permit for his company and himself. Because business license fees are calculated on a sliding scale and contain a minimum base fee, allowing consolidation for this purpose saves the taxpayer a small amount of money.

Income. (Appx. Vol. II p. 214). Per the City's business license ordinance, the appeal went to the City Administrator who set a hearing for July 26, 2011. Olds was present, represented by counsel and submitted a memo. The City Administrator also asked for a memo from the City Attorney on behalf of the Business License Official's position. The City Attorney copied Mr. Olds' counsel on his response. The City Administrator decided on September 1, 2011 to deny the appeal of Mr. Olds and reaffirm the City Staff's interpretation of the business license ordinance. (Appx. Vol. II p. 226). Mr. Olds was advised of his right to timely appeal that decision to City Council. Olds first requested that he be allowed to bypass the appeal to City Council as futile. (Appx. Vol. II pp. 227-228). Olds then initiated a timely appeal to City Council. (Appx. Vol. II p. 229). Olds was advised in writing that City Council would hear the appeal on September 27, 2011 at a Special Meeting of City Council and that the matter was to be heard on the record without additional argument. (Appx. Vol. II p. 231). Olds' counsel advised that he would not attend as the Ordinance calls for the matter to be decided on the record below. (Appx. Vol. II p. 232). The meeting of City Council was duly noticed and a proper agenda listing the items of business including the appeal of Olds as one of the items of business. The agenda was posted in City Hall and sent to the three local newspapers in the area. (Appx. Vol. II p. 233). City Council heard the appeal and did have questions. They directed these to the City Administrator and the Finance Director who are normally present at all City Council meetings. (Appx. Vol. II pp. 235-236). City Council voted to affirm the decision of the City Administrator. Olds filed a summons and complaint with the Circuit Court demanding a jury trial and claimed for a first cause of action appeal and additional causes of action for 1) Equal Protection 2) Abuse of

Process 3) Substantive Due Process 4) Procedural Due Process 5) Violation of FOIA 6) Abuse of Process and Attorney's Fees.

Counsel exchanged discovery with respect to the causes of action. Discovery revealed yet another property sold in the City that Mr. Olds entirely failed to disclose. The City provided notice of recalculation of the business license for 2011. (Appx. Vol. II p. 314).

Olds refused to pay this sum under protest or otherwise. In fact, he initially claimed that he did not need a business license in 2012 because he was conducting no business and owned no property. (Appx. Vol. II p. 347).[2] The City responded that Olds did own property at Aylesbury Road in the City (Appx. Vol. II pp. 372-373). Olds sent in in a payment under protest, but not the full amount based on the City's calculation. The City wrote to Olds on April 23, 2012 explaining it would not issue a license without payment in full and would add penalties if payment in full was not made by April 30, 2012. (Appx. Vol. II p. 346). Olds did not make payment in full and the City did not issue his 2012 business license.

In July 2012, Olds sought to get water service to a new address at a property on North Aylesbury in the city limits which he had purchased and was trying to sell. The prior owner called for water to be turned off in their name. (Appx. Vol. II p. 384). The City has a lock placed on the water meter when someone has water turned off. (Appx. Vol. II p. 380). The City refused to turn on water to Olds on a new account as he had not paid in full to get his business license. (Appx. Vol. II pp. 380-385). It is the policy of the City not to turn on new water service to a business unless the business has a business

[2] The letter from Attorney Goldstein is incorrectly dated 2010 due to a typographical error. It was sent in 2012 as is evident from the response. (Appx. Vol II p. 347).

license and is not delinquent on any payments for its business license. (Appx. Vol. II p. 310).

During that same time that Olds was demanding water be turned on without paying the remaining balance under protest and without having been issued a business license, business license officials saw work going on at the location. The business license officials as part of their regular duties go by job sites to confirm that persons have appropriate permits and business licenses. (Appx. Vol. II p. 312). Olds was not on the property. There was never any contact between the business license officials and Olds at that time. Two other men were on the property without any business licenses themselves. (Appx. Vol. II pp. 312-313). No tickets were issued. The men were told about information on how to get business licenses from City Hall. (Appx. Vol. II p. 312). (The men dispute this version of events, claiming they were treated rudely, questioned for a long period of time, and claimed the officials flashed a badge and said they were police.[3] That discrepancy is irrelevant as Olds cannot assert as a cause of action any alleged violation of the constitutional rights of other persons and the conduct complained about by the men does not rise to the level of a constitutional violation.)

Olds continued to refuse the City's suggestion to pay under protest. Olds filed a motion for an injunction requiring the City to turn on water service to the new account. That request for an injunction was filed August 28, 2012 and was heard by the Honorable Kristi Harrington. The injunction request was denied in a written order on October 8, 2012 which concluded that there was no right to have new water service

[3] Business license officials in the City do have metal wallet badges on a shield similar to a police badge, but the badge states "Code Enforcement" and business license officials have the authority to issue business license citations.

turned on at the location. (Appx. Vol. II pp. 18-19). That Order was not appealed at any time.

The respondent-defendant filed a "Motion for Hearing on the Appeal and for Dismissal or Summary Judgment of Any Remaining Causes of Action." The matter was heard by the Honorable R. Markley Dennis, Jr. on July 29, 2014. The Court elected to decide the appeal first and then proceeded to determine whether there were any remaining viable causes of action. The court affirmed the appeal on the issue of "gross income" and granted summary judgment as to the remaining causes of action. The Plaintiff timely moved for reconsideration which was denied. The decision of the Circuit Court was affirmed by the Court of Appeals and the petition for rehearing was denied by the Court of Appeals.

ARGUMENT

I. RESPONSE TO PETITIONER'S ARGUMENT 6: STANDARD OF REVIEW.

Petitioner attempts to use the standard of review applicable to a summary judgment motion for all the arguments he raises. However, this was first and foremost an appeal of a business license matter to which Olds attached "causes of action" when he filed his appeal to Circuit Court. The Circuit Court elected to first decide the appeal a non-jury matter and determined that the City of Goose Creek's interpretation of its own business license ordinance was correct and consistent with state law and precedent. Of course, an appeal is heard on the record below. In an appeal, the Court of Common Pleas sits as an appellate court. The matter is heard as a nonjury matter. The court must affirm if there is support in the record for the decision below.

The Rules of Civil Procedure do not apply to an appeal. Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 606 S.E. 2d 209 (Ct. App. 2004).

After determining the appeal, the Circuit Court examined Olds' causes of action and determined there was no merit to the causes of action and set forth reasons to each cause of action failed. The Court of Appeals addressed Mr. Olds' procedural due process cause of action, which was really part of his appeal because it directly relates to complaints as to how the appeal was conducted. The Court of Appeals also addressed Olds' general allegation of "disparate and unequal treatment." As the Court of Appeals noted in its decision, Olds did not even sufficiently explain in his brief to the Court of Appeals how this "disparate treatment" applied to his previously pled causes of action, providing another basis to reject this Petition. Even in this petition, Olds does not identify specific causes of action and explain his basis for specific causes of action. If the Court chooses to examine the specific "causes of action" plaintiff attached to his appeal, the Circuit Court order and the Respondent's initial brief address the fallacy of these claims. For various reasons, each is without merit. Further, as the circuit court found the claims should also be barred by the Tort Claims Act exemption for activities relating to collection of a tax. Olds has never appealed or disputed this finding of the lower court at any point. This should be the law of the case and sufficient reason not to examine any of Olds' claimed causes of action.

II. RESPONSE TO PETITIONER'S ARGUMENT 4: STATUTORY CONSTRUCTION.

The Court of Appeals and Circuit Court correctly applied rules of statutory construction. Petitioner concedes this when he specifically states: "The opinion recites the correct standard . ." But then Petitioner attempts to argue for a rule of strict

construction. Neither the Circuit Court nor the Court of Appeals took that route, nor should they. The cardinal principal of statutory interpretation is to ascertain and give effect to the intent of the legislative body. A hundred or more cases could be cited for this proposition. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E. 2d 543, 546 (2000).

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E. 2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E. 2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E. 2d 273, 274 (Ct. App. 1993).

Perhaps the best case to cite about the standard for interpretation of a business license matter would be the business license matter of Municipal Association of South Carolina v. AT&T Communications, 351 S.C. 576, 606 S.E. 2d 468 (2004) which calls for reasonable construction in light of the overall purpose and subject matter of the ordinance.

III. RESPONSE TO PETITIONER'S ARGUMENT 1: THIS MATTER IS IN NO WAY GOVERNED BY THE PRECEDENT OF AZAR V. CITY OF COLUMBIA, 414 S.C. 307, 778 S.E. 2D 315 (2015).

This is a new argument. The Azar case was not mentioned in the Appellant's brief. It was briefly cited in the Motion for Reconsideration. It has now become an argument number 1 in his Petition.

The argument is meritless because Azar is in no way precedent for the instant case. Azar involved a utility fee that was by law supposed to be used for a specific purpose. A lawsuit was filed contesting the use of the utility fees. The present case is a business license fee dispute. Business license fee money is used in a municipality's general fund. It does not have to be used for a specific purpose. More importantly, there has not been argument at any time in this case that the City improperly used business license revenue funds of Olds or anyone else. Olds contends he should not have to pay the license fees claimed to be due, he has never disputed the City's right to use the money. Azar is not precedent and is irrelevant to the present case.

IV. RESPONSE TO PETITIONER'S ARGUMENTS 2, 3 AND 4: INTERPRETATION OF "GROSS INCOME" AS TOTAL REVENUE OF A BUSINESS.

The Petitioner's arguments 2, 3, and 4 relate to his position that Goose Creek is using an improper definition of "gross income." This is the genesis of the dispute with Olds. Olds claims that because his business is buying and selling real estate, his business license should be based only on the difference between the purchase price of the homes he sells and the sales price. Olds claims that is how "gross income" is defined for by the Internal Revenue Code and that Goose Creek's definition of "gross income" should exactly the same as it is under the federal income tax code, I.R.C. § 61. The City of Goose Creek disputes this and submits that per the language of the City of

Goose Creek's ordinance and consistent with South Carolina law, a business license fee is based on the total sales price of the goods, services, or real estate, without deduction of any type including the cost of the goods or property sold.

State law allows municipalities to charge a business license fee on "gross income." S.C. Code § 5-7-30. Municipal business license fees are not limited or regulated in any sense by federal law. Thus, this is not a matter where the Supremacy Clause of Article 6 of the United States Constitution mandates the application of federal law. No federal law requires that "gross income" be interpreted the same in local or state laws.

A South Carolina Court of Appeals domestic relations case noted "[t]he term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished." Bogan v. Bogan, 298 S.C. 139, 378 S.E. 2d 606 (Ct. App. 1989). The Court of Appeals did not follow Bogan as precedent as Petitioner attempts to argue in his Petition. In all candor, the facts of Bogan are irrelevant to this appeal. But Bogan is a good citation for the proposition that "gross income" does not have an inflexible definition.

The City of Goose Creek has defined "gross income" as:

> 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, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term GROSS RECEIPTS means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any

> deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. The GROSS INCOME for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, GROSS INCOME shall mean gross commissions received or retained, unless otherwise specified. GROSS INCOME for insurance companies means gross premiums collected. GROSS INCOME for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in GROSS INCOME. 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.

City Business License Ordinance Section 110.001.

Clearly, the City of Goose Creek has defined gross income to include the "total revenue" of a business. The City of Goose Creek's definition of "gross income" is generally consistent with the ordinances of other South Carolina municipalities which equate "gross income" to the total revenue or total income of a business. The City submitted to the lower court the ordinances of over 25 South Carolina municipalities which have language where gross income is clearly defined as the total income and receipts of the business without deduction for costs. These cities include Abbeville, Aiken, Anderson, Beaufort, Camden, Cayce, Charleston, Chester, Columbia, Conway, Dillon, Florence, Georgetown, Greenville, Greer, Hartsville, Hilton Head, Isle of Palms, Mount Pleasant, Summerville, Myrtle Beach, North Charleston, Simpsonville, Spartanburg, Sumter, Union, and Walterboro. The City of Goose Creek could have submitted additional cities (and counties) in support of its position.

The City of Goose Creek's ordinance and interpretation thereof is consistent with the position taken by the South Carolina Municipal Association which provides in its

business license handbook[4]: "A business license fee is an excise tax levied on the privilege of doing business, and the value of the privilege extended is measured by the business's gross receipts." Municipal Association Business License Handbook, page 2. The Handbook goes on to state: "Gross income may be defined by the license ordinance and generally means all revenue received from the business operation without any deductions for such things as the cost of goods, overhead, salaries or cost of sales." Handbook, page 14. And specific to businesses which sell real estate, the Handbook provides: "The full sales price with no deductions for mortgages, commissions, closing costs or purchase cost to the owner is the amount used to compute the license tax." Handbook, p. 37.

Although the Municipal Association Handbook is not itself law, where a statute or series of similar statutes are interpreted and applied by local governments in a consistent manner, and the Legislature has taken no action to correct the practice, the inference should be that the matter is being interpreted consistent with the wishes of the Legislature. Conversely, without clear and substantial justification, the Court should be reluctant to upend a system that generates substantial revenues for municipal and county government across the state.

The City of Goose Creek's ordinance and interpretation of "gross income" is also consistent with South Carolina case law relating to business license fees. In Carter v. Linder, 303 S.C. 119, 399 S.E. 2d 423 (1990), the Supreme Court considered a county business license ordinance which derived its authority to collect business license fees on "gross income" from a substantially similar authorization at S.C. Code § 4-9-30. The court noted, "A license tax upon persons and businesses is an excise tax on the

[4] http://www.masc.sc/SiteCollectionDocuments/Finance/business_license_handbook.pdf

privilege of doing business. . . . The tax is not on the property itself, it is on the privilege of dealing with it. The value of such privilege is measured by the gross receipts therefrom and this is a familiar and valid method of ascertaining such value." Id. (quoting, Hay v. Leonard, 212 S.C. 81, 46 S.E. 2d 653 (1948)).

South Carolina has a long history of license taxes (also sometimes known as privilege taxes) based on the total revenue of a business. As stated by a 1921 case explaining application of "gross income" to a franchise tax:

> The tax imposed by Section 269, Vol. 1, Code 1912, therein called a "license fee," is manifestly an excise tax, laid under the benefit theory of taxation upon the public service corporation named for the privilege of exercising their corporate franchise and carrying on their business within the State. 26 R. C. L., p. 36, § 19; Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811. The measure of the tax is volume of business or "gross income for business done." Gross income means the total receipts from a business before deducting expenditures for any purpose. Black's Law Dictionary; German Alliance Ins. Co. v. Van. Cleave, 191 Ill. 410, 61 N.E. 94, 96.

Columbia Rwy Gas & Elect. Co. v. Jones, 119 S.C. 480, 112 S.E. 267 (S.C. 1921).

The modern Internal Revenue Code was first enacted in 1939. South Carolina has been operating under a different definition of "gross income" for the purposes of business license or privilege taxes since at least 1921.

Nor is South Carolina unique in this regard, as stated by a leading treatise on local and state taxation:

> Gross receipts taxes may be imposed on the "gross income of the business," "gross receipts," "gross proceeds of sales" or any other term that suggests total business revenues before deductions. Consequently, the term is used in a different context than as it relates to federal tax law which defines "gross income" as income net of "cost of goods sold" and similar expenses related to producing the income.

2-29 Bender's State Taxation: Principles and Practice § 29.03

And it is irrelevant that South Carolina has statutorily adopted IRS definitions for state income tax purposes. S.C. Code § 12-6-1110. There is no federal or state law which requires "gross income" to be the same for all purposes. There is no federal or state law which requires the use of IRS definitions for "gross income" for business license purposes. The IRS regulation is only applicable to federal taxes. South Carolina statute has only adopted the IRS definition for "South Carolina income tax purposes." S.C. Codes § 12-6-1110.

It is true that under Internal Revenue Code § 61, a real estate business only uses the gains on the real estate for "gross income" whereas for every other type of sale "gross income" is the total amount received without deduction for costs of goods sold. The affidavit of law professor Kristen Gutting describing federal and state income tax law is irrelevant for several reasons. First, interpretation of federal and state income law is not at issue in the present case. Second, the meaning of federal and state income tax law is not disputed. Third, even if the meaning of federal and state income tax law were disputed, legal questions are not for experts to decide.

In distinguishing the federal definition of "gross income" from the business license definition, it must be remembered that federal income tax and the South Carolina state income tax are based on net income or gain. A real estate seller may list the difference between the sales and purchase price when filling out a tax form line requesting "gross income." A seller of groceries, or diamonds or even intangibles will include the entire amount of the sale on that line----and then will deduct the costs of goods and other ordinary business expenses on a different line. But, the seller of real estate does not get to deduct the cost of the real estate a second time as an ordinary business expense. Therefore, for federal income tax purposes, both businesses reach

the same result. The real estate developer and grocery store ultimately pay federal income tax on the net income of the business because the federal system is a tax based on net income after deduction of expenses and costs of doing business.

The position take by Olds produces an absurd result. Although he has argued examples relating to scenarios other than property, the essence of his argument only applies to businesses "dealing in property." A business selling real estate would only owe a business license fee on the difference between the sales price and the purchase price. However, a business that sells an equivalent dollar amount of groceries or diamonds would owe on the entire gross sale. The Court should reject statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature. This rule of construction applies even in tax cases. Lexington County Health Servs. Dist. v. S.C. Dep't of Revenue, 384 S.C. 647, 682 S.E 2d 508 (Ct. App. 2009); So. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n, 297 S.C. 492, 496, 377 S.E. 2d 358, 361 (Ct. App. 1989).

In summary, the City of Goose Creek and other municipalities are correctly interpreting their business license ordinances and the state laws enabling them in a way that is proper as applied to businesses that sell real estate and those which do not sell real estate. Not only is the "total receipts" approach incorporated in the letter and spirit of the various ordinances including the City of Goose Creek's ordinance, such an interpretation is also consistent with state law and a long history of privilege taxes.

V. RESPONSE TO PETITIONER'S ARGUMENT 5: PLAINTIFF'S GENERIC CLAIMS OF INJUSTICE DO NOT AMOUNT TO A CIVIL RIGHTS VIOLATION OR OTHER CAUSE OF ACTION.

First, the Court of Appeals noted that Olds did not even adequately explain how his claims of unfair and unequal treatment amount to a cause of action or apply to a

cause of action. He has reduced his argument to the position that there should be "no wrong without a remedy." This equitable maxim does not create a course of action. Second, there is no evidence of unequal treatment. Third, the alleged inequitable treatment is not a cause of action. It is not a civil rights claim either. Fourth, even if there was a cause of action, the Circuit Court determined that such causes of action would be barred by retained immunities in the Tort Claims Act and Olds never contested that section of the opinion. It is and should be the law of the case. Fifth, in his Petition, Olds does not identify how his facts create a cause of action or error.

What Olds sees as harsh and unfair treatment is merely the City's effort to require a business to pay its business license fee on the same basis as every other taxpayer in the City, including companies that are in the business of buying and selling real estate. The City has only exercised reasonable efforts consistent with its normal policies and procedures. The City Business License Ordinance requires payment in full under protest to initiate any appeal and to get a license under protest. City of Goose Creek Ordinance § 110.016(a). No criminal charges have ever been issued in connection with the matter. Even if the face discovering Olds submitted information on business license application with was false, the City only assessed penalties after notice to Mr. Olds and refusal by him to pay the principal sum. Mr. Olds has always been given the ability to pay under protest, to contest the amount, and to seek a refund plus interest of any amounts wrongfully collected. Olds repeatedly cites the claims that his friends working at a property of his in the City were questioned for over an hour and treated rudely and sarcastically by City employees Faretra and Althoff. Faretra and Althoff strongly disagree with this characterization. Part of their job duties include visiting job sites to question contractors whether they have licenses (Appx. Vol. II p.

312). Faretra and Althoff claim they spent about 15 – 20 minutes total talking to two individuals who were doing work at a property Olds owned at a time when Olds had no business license because he refused to pay in full under protest. They deny being rude or unprofessional.

However, even if the event happened exactly as Olds friends describe--as the Court should for a motion for summary judgment--it would be entirely irrelevant to Olds' case and is not a civil rights § 1983 cause of action. Olds is not able to assert the rights of others. "A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Even if Olds could assert the rights of others, the men were not deprived of any constitutionally protected rights. The men were not deprived of a life, liberty or property interest. The men were not arrested. Their tools were not confiscated. There is no protected right of a person performing work on a house to be free from a business license inspector asking questions about whether a person has or needs a business license. Nor is there a protected property interest in being free of rudeness or sarcasm. There is no protected property interest someone being free from confusion as to whether the individual asking questions is a business license inspector with authority to issue a citation or a police officer with the power to issue a citation.

Nor has Olds been deprived of any life, liberty or property interest which is required for a section 1983 violation. He has never been arrested in connection with this matter. Olds complains that he got a letter threatening him with jail. In reality, the record shows that when Olds business license application was discovered to contain information that was inaccurate, the City sent a form letter which set forth the amount

due and some of the remedies that exist for failure to pay a business license including setoff against income tax refunds and/or a summons for which fines can be up to $1,092.50 or 30 days in jail. (Appx. Vol. II p. 365). Olds claims this was a threat to jail him. Olds apparently believes there is something wrong in advising people of possible consequences. In any event, there is no constitutionally protected property interest or liberty interest in not receiving warning letters from the government advising of possible consequences of action or inaction, including fines and jail. In his petition, Olds for the first time conflates this letter into a threat to jail his wife, presumably because the letter states that the City may offset amounts due against income tax refunds, including joint returns, if married. There is no mention of jailing his wife (Appx. Vol. II p 365) and this is typical of Olds' efforts to make an ordinary effort to collect business license fees into something nefarious.

Olds seemingly thinks the Constitution mandates that in dealing with the government, all persons will be happy, no one will be frustrated or confused, no difficult questions will ever be asked, and no form will be rejected as inaccurate. The City of Goose Creek strives to provide high quality essential service and to fairly enforce the applicable laws. However, local governments have to do things like collect fees, enforce traffic laws and other unpleasant tasks. These inevitably lead to some people who are unhappy with their interaction with the government. However, this does not amount to a violation of constitutional rights or create a tort.

It is with some hesitation that Goose Creek will individually discuss causes of action because Mr. Olds fails to separately do so. He simply offers a generic claim of violation of rights and causes of action and unequal treatment without much specificity as to how the facts create any particular causes of action.

A. Equal Protection

Olds claims a violation of Equal Protection. The deposition testimony in this case establishes the City of Goose Creek is applying its interpretation uniformly and there is no person known to be paying a business license fee in any manner different than Mr. Olds. (Appx. Vol. II pp. 354-355)

Mr. Olds claims he is a "class of one" citing Village of Willowbrook v. Olech, 528 U.S. 562 (2000). First, the Village of Willowbrook case held it was not necessary to identify that a particular group that was being treated differently by virtue of a classification such as race, sex, gender, etc. Willowbrook would later be eviscerated by a series of holdings starting in 2008 with Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008). See R. Farrell, "The Equal Protection Class of One Claim: Olech, Engquist and the Supreme Court's Misadventure" 61 S.C.Law Rev. 107 (2009).

However, even when Willowbrook was alive and well, the individual class of one had to be treated differently. Olds has not shown that anyone is paying tax based on a different rate or getting new water service to a business location without a license being paid in full. The *sine qua non* of an equal protection claim is showing that similarly situated persons received disparate treatment." Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E. 2d 161 (2013).

B. Abuse of Process

Olds complains that there has been abuse of process because the City terminated his water service as punishment for refusing to pay his business license according to the City's interpretation of its business license ordinance.

First, Olds has no basis to assert his water service was terminated. He only knows that he could not get the water service turned on. He has never testified that the water was flowing under his name and was shut off, only that his water meter was locked. The City has made clear through affidavit and through the deposition testimony of the Public Works director that the prior customer turned off water in their name. (Appx. Vol. II pp. 380, 384, 386) It was locked as a matter of standard procedure. Locking was also required by City Ordinance § 51.44. And, the City refused to turn on a new water account to a business in arrears on its business license fees. (Appx. Vol. II. pp. 310-311, 384-386). This was not a rule created to punish Mr. Olds. It is City policy. (Appx. Vol. II pp. 310-311).

It is reasonable for the City not to allow water service to a new business that is not in compliance with business license or zoning laws. In Ruggles v. Padgett, 240 S.C. 494, 126 S.E. 2d 553 (1964) the Court stated: "While in this state it is settled that the operation of water works by a municipality is so far governmental in character as to absolve the corporation from liability sounding in tort, there can be no doubt that in the fiscal aspect thereof the operation and maintenance of such utility partake largely of the nature of a commercial or business enterprise." If operation of the fiscal matters of a water utility are at all similar to the rights of a business enterprise, it is difficult to imagine any business enterprise being required to open a new water account for a customer who is delinquent with respect to their overall accounts. Mr. Olds specifically went to court to get an injunction to require the City to turn on water service. He was denied this injunction. (Appx. Vol. II p. 19). He did not appeal this order.

Of course, Mr. Olds has always had the ability to pay the sum under protest and to pursue an appeal of the same. The City has repeatedly given Olds opportunity to pay

outstanding fees under protest. It has even offered to allow the penalties to be left in his own attorney's trust account pending appeal. (Appx. Vol. II pp. 402-406). The City has made it clear that it will refund money with interest if it is determined to have been incorrectly calculated.

Finally, abuse of process has nothing to do with turning off water or refusing to turn on water. It involves abuse of the legal process not proper in the course of regular conduct of the proceeding for ulterior purpose. Scott v. McCain, 275 S.C. 599, 274 S.E. 2d 299 (S.C. 1981). It involves the perversion of a legal procedure for a purpose not intended by the procedure. Food Lion, Inc. v. United Food & Commer. Int'l Union, 351 S. C. 65, 567 S.E. 2d 251 Ct. App. 2002.

C. Due Process

Plaintiff's due process complaint seems to focus solely on the idea that the City Council asked the City Administrator and Finance Director about the matter during the hearing. Olds and his counsel were not present, although they had a right to be present and were invited. The Circuit Court concluded that this was not fair, but the lower court did not find a constitutional violation because, in part, the defendant did not lose any rights. Olds was not damaged in any way. Olds had his brief on file with the City raising all of his points for the City Council to consider. In fact, Olds' counsel had already requested in writing the appeal to City Council to be waived as a futile requirement. (Appx. Vol. II p. 228). The decision of the City Council is strictly a legal determination and not a factual one. As such, it does not matter what the City Council did or said. The question was and remains a legal question of the proper interpretation of "gross income" in the City's Ordinance. This Court will decide what "gross income"

means in this context regardless of what was decided by the City Council. Because it is simply a legal question, there is absolutely no prejudice or consequence to Olds. This Court has held that even when there is a violation of due process, including defective due process in an administrative hearing or hearing by other government body, this will not invalidate the decision absent prejudice. Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E. 2d 62 (1997) ("in an administrative proceeding, a demonstration of substantial prejudice is required to establish a due process claim.") quoting Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 233, 363 S.E. 2d 683, 687 (1987).

The suggestion by the Circuit Court to consider allowing all to speak or none to speak is a good idea. It has been heard and will likely be followed in the future as a good idea. However, there is no constitutional right to equal time or the right to speak at every level of a proceeding. There is no constitutional guarantee at a meeting that all persons get to speak or none get to speak. There is no right for a person who has a matter before a board or commission to speak at every stage of the proceeding. Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E. 2d 62 (1997) ("[The South Carolina Constitution]. . . does not require notice an opportunity to be heard at each level of the administrative process. . . . [but merely] opportunity to be heard at some point before the agency makes its final decision").

D. 42 U.S.C. § 1983

As it relates to 42 U.S.C. § 1983, Plaintiff can show no deprivation of a constitutionally protected right. As noted above, there no way Olds can claim the violation of constitutional rights of others. His friends' constitutional rights were not

violated. Even if they were, Olds does not have standing to assert a violation of their rights.

Nor does Olds have any constitutionally protected "life, liberty, or property interests" that was taken or violated. As noted, he was not arrested. He has not been placed in custody. He was requested to pay a tax under protest if he wished to operate a business in the City limits and has been provided an entirely constitutionally adequate post-deprivation process to be able to secure reimbursement plus interest of that money if he is correct in his interpretation.

Refusing Olds new water service at a time when he did not have a business license because he had not made payment in full on his business license fees is not a constitutionally protected property interest. To invoke a constitutionally protected property interest, "a person must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564 (1992). There is no known constitutional right to new water service at a business location which has no business license. There is no known right to require a City to provide water service to someone who is delinquent in their accounts to a City.

E. Civil Conspiracy

Plaintiff alleges in an amended complaint that Ron Faretra and Jennifer Althoff conspired to do certain things including miscalculating his business license fee and questioning his friends as to any possible business license violations. As noted in the affidavit of City Administrator, Dennis Harmon, these actions were taken in the official capacity of Faretra and Althoff. Therefore, this action against them individually is barred

by S.C. Code § 15-78-70. Further, there is no cause of action for conspiracy where employees of a company work together to undertake an act in furtherance of the company's business. McMillan v. Oconee Memorial Hospital, 367 S.C. 559, 626 S.E. 2d 884 (2009). Olds cannot assert that his friends were questioned as his damages.

F. Tort Claims Act Retained Immunities

Olds failed to address or contest that part of the Circuit Court order that notes Olds alleged claims are barred under the South Carolina Tort Claims Act, S.C. Code § 15-78-60 subsection 11. The lower Court expressly noted subsection 11 bars claims arising out of assessment or collection of taxes or enforcement of tax laws. In failing to contest this portion of the order in his brief, the appellant is bound by it. The City would renew its position that Olds' tort claims are barred by subsection 11.

The City also argued the application of several other subsections of the South Carolina Tort Claims Act including § 15-78-60 subsections 1, 2, 3, 4, 11, 12, and 13

"Provisions establishing limitations upon and exemptions from liability of government entities must be liberally construed in favor of limiting liability." Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E. 2d 808, 816 (2013).

Regardless of whether this Court agrees with this part of the Circuit Court's decision, Olds did not contest this point in any way in his briefs to the Court of Appeals. This should act as a bar to consideration of any cause of action.

CONCLUSION

For the reasons set forth, this Court should not grant the petition for writ of certiorari of Mr. Olds.

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March 3, 2017

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. 2017-000297

Todd Olds ..... Petitioner ~~Appellant~~,

v.

City of Goose Creek ..... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Response to Appellant's Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2017, addressed to its attorney of record, Thomas R. Goldstein, P. O. Box 71121, North Charleston, South Carolina, 29415-1121.

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