THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable William Jeffrey Young, Presiding Judge

Case No. 2010-CP-26- 05964

Appellate Case No. 2013-000195

William H. Bailey, Jr. ..... *Appellant,*

v.

City of North Myrtle Beach,
a South Carolina Municipal Corporation ..... *Respondent.*

RETURN TO MOTION TO STRIKE PORTION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL, AND IN THE ALTERNATIVE, APPELLANT'S MOTION TO ARGUE AGAINST PRECEDENT

Pursuant to Rule 240(e), SCACR, Appellant William H. Bailey, Jr. ("Bailey") respectfully submits this Return to Respondent's Motion to Strike Portion of Matter from Appellant's Supplemental Designation of Matter to be Included in the Record on Appeal ("Supplemental Designation"), requesting that the Court deny that Motion.

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In the alternative, Bailey respectfully requests an Order of the Court granting Bailey permission pursuant to Rule 217,SCACR, to argue against precedent concerning judicial notice of published local ordinances.

MEMORANDUM OPPOSING RESPONDENT'S MOTION

The City of North Myrtle Beach ("City") is the Respondent in this appeal from Orders of the Court of Common Pleas in Horry County. Bailey filed a Verified Complaint on July 6, 2010, and in ¶¶ 21 and 25 of that Complaint Bailey pled the Respondent's Code of Ordinances.

In his Prayer for Relief for Declaratory Judgment at § A(a) Bailey sought a declaration by the court that the Respondent's City Manager had no authority to deny Bailey a grievance hearing. The second cause of action was for Injunctive Relief, specifically requesting the court to order that Bailey be afforded a grievance hearing in accordance with the provisions of the City's Personnel Manual that had been made part of the City's Code of Ordinances.

At the time of the filing of Bailey's Complaint, and at the present date, the Respondent's Code of Ordinances, chapter 1, contains the following provision:

> *Sec. 1-4. The repeal of an ordinance, or its expiration by virtue of any provision contained therein, shall not affect any right accrued. . . .*

(Emphasis added.) CITY OF NORTH MYRTLE BEACH, S.C., CODE OF ORDINANCES ch. 1, § 1-4.)

In May 2011, Respondent's City Council gave first reading to an Ordinance Amendment that removed the Grievance Committee procedures from its Code of Ordinances. (Tr. p. 73, lines 1–22.) That amending Ordinance was admitted into evidence without objection, but did not amend chapter 1, § 1-4 of the Respondent's Code of Ordinances, or provide that any of Respondent's prior City Ordinances in conflict with its new provisions would be rescinded. (Pl.'s Trial Ex. 8; Tr. p. 72, lines 16–22.)

Bailey sought to amend his Complaint on December 14, 2011, but the lower court denied that Motion to Amend by Form 4 Order dated July 23, 2012 and filed July 31, 2012. (July 23, 2012 Form 4 Order). Bailey, therefore, was unable to amend his Complaint to allege a specific continuing right based on the foregoing Ordinance provision.

The lower court, however, also ruled in the same July 23, 2012 Form 4 Order that Bailey's cause of action for Declaratory Relief was still pending. The lower court at that time found that Bailey's demand for a grievance hearing was moot, a position that counsel for the Respondent repeated to the lower court at oral argument when the remaining issues were litigated. (Tr. p. 4, lines 16–24.) Despite that, Bailey argued to the lower court that the City's Code of Ordinances did not allow the City Manager to deny a grievance hearing. (Tr. p. 19, lines 10–15.)

In his Assignment of Error in this present appeal, Bailey argues that the lower court erred in finding no justiciable controversy remaining between the parties – *i.e.*,

that the issues were not moot, and also that the lower court strayed into matters that were not before that court but could affect collateral litigation that is still ongoing between the parties.

The issues raised in this present lawsuit were not able to be consolidated into the larger lawsuit, Civil Action Number 2010-CP-26-05145 because at the time of the filing of the present lawsuit, the larger case had been removed on June 25, 2010 by the City to the United States District Court in Florence, South Carolina. That case was subsequently remanded back to the Court of Common Pleas in Horry County on October 25, 2010. That case remains to be tried.

Because of the procedurally bifurcated nature of the disputes between the parties and the different timetables on which the two cases have proceeded, two things have occurred. First, Bailey has been denied the opportunity to amend his Complaint in the present case to specifically allege that the City continues to be bound by the provision of chapter 1, section 1-4 of its Code of Ordinances and therefore cannot deny him a grievance hearing. Being unable to plead the matter because of the procedural posture of the two cases is an affront to justice. Second, the findings of the lower court in the present matter impact the issues in the other case, which has yet to come to trial, when Honorable Judge Young in the lower court strayed in his Order into matters not before him but that may impact the larger case.

IN THE ALTERNATIVE
MOTION TO ARGUE AGAINST PRECEDENT

In McLeod v. Starnes, 396 S.C. 647, 723 S.E.2d 198 (2012), the Supreme Court said:

> . . . stare decisis is not an inexorable command: "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. . . . There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." Smith v. Daniel Const. Co., 253 S.C. 248, 255-56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting) (quoting Sidney Spitzer & Co. v. Comm'rs of Franklin County, 188 N.C. 30, 123 S.E. 636, 638 (N.C. 1924)). Furthermore,
>
> > [w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. . . . An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis.
>
> State v. Williams, 13 S.C. 546, 554-55 (1880). In that vein, stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone. See Langley v. Boyter, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("The doctrine of stare decisis says that where a principle of law has become settled by a *series of court decisions*, it should be followed in similar cases." (emphasis added)). This is not to say that a single case garners no protection from stare decisis, for even in those circumstances we should hesitate to revisit and reverse our decisions without good cause to do so.

> Our precedents simply make clear, however, that such a case is not rendered immutable by stare decisis.

McLeod, supra at 654-655, 723 S.E.2d at 203 (2012).

Bailey believes that the case of Harkins v. Greenville, 340 S.C. 606, 533 S.E.2d 886 (2000) is best viewed as a limited decision applicable at the time to "**such**" local Ordinances as were at issue in that case, namely procedures for appealing against a zoning administrator's administrative decision. Harkins at 616, 533 S.E.2d at 891. The Supreme Court found that the relevant Code of Ordinances had not been included in the Record on Appeal even though they had been argued before the lower court.

> . . . the lower court failed to discuss the procedure for appealing a decision by the County zoning administrator. . . . The record does not contain the Greenville Ordinances controlling appeals from zoning administrator decisions. . . . The Adult Businesses failed to include these ordinances in the record on appeal. The Adult Businesses, as the appellant in this issue, have the burden of presenting this Court with an adequate record.

Harkins at 616, 533 S.E.2d at 891.

In addition, since the date of the decision in Harkins, there has been a significant evolution in the manner in which pubic laws including local Ordinances may be accessed and made public. The Internet and the Municipal Code Corporation ("Municode") have revolutionized and expanded the ways in which public information is made available. Municode only started offering online access to its database in 1995, the same date as the underlying events in Harkins.

To the extent, therefore, that the Court believes Harkins is relevant to the procedural matters in this appeal and is adverse to Bailey's compilation of the Record on Appeal, Bailey respectfully moves the Court to grant him permission to argue against precedent.

Respectfully submitted,

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Attorneys for Appellant

Little River, South Carolina
June 24, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable William Jeffrey Young, Presiding Judge

Case No. 2010-CP-26-05964

Appellate Case No. 2013-000195

William H. Bailey, Jr. . . . . *Appellant,*

v.

City of North Myrtle Beach,
a South Carolina Municipal Corporation . . . . . *Respondent.*

PROOF OF SERVICE

I certify that I have served a copy of Appellant's *Return to Motion to Strike Portion of Matter to Be Included in Record on Appeal, and in the Alternative, Appellant's Motion to Argue Against Precedent* in the above-captioned appeal on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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900 Elmwood Avenue, Suite 100
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Attorneys for Respondent

**** signature page follows ****

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Respectfully submitted,

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VIA CERTIFIED MAIL #7013 0600 0000 0368 1043;
RETURN RECEIPT REQUESTED
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

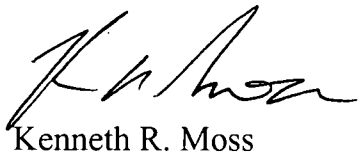
Re: William H. Bailey, Jr., *Appellant* vs. City of North Myrtle Beach, a South Carolina Municipal Corporation, *Respondent*
Civil Action No. 2010-CP-26-05964
Appellate Case No. 2013-000195
Our file no. SC-3922.007

Dear Ms. Kitchings:

Please find enclosed for filing one (1) unbound original and six (6) copies of the *Appellant's Return to Motion to Strike Portion of Matter to be Included in Record on Appeal, and in the Alternative, Appellant's Motion to Argue Against Precedent*, and Proof of Service of same.

I have included one (1) additional copy of the Proof of Service and would appreciate you returning a clocked copy in the enclosed self-addressed, stamped envelope I have provided for your convenience.

Sincerely,



Kenneth R. Moss

KRM/rb
Enclosures as stated
cc: Derwood L. Aydlette, III, Esq.
Christopher W. Johnson, Esq.
Client