

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

69640

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-26-5964

William H. Bailey, Jr.,

Appellant,

v.

City of North Myrtle Beach,
a South Carolina Municipal
Corporation,

Respondent.

MOTION TO CORRECT RECORD ON APPEAL AND
STAY DEADLINE TO SUBMIT FINAL BRIEF
UNTIL RECORD IS CORRECTED

Christopher W. Johnson
Derwood L. Aydlette, III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Avenue, Suite 100
Columbia, South Carolina 29201
(803) 799-9311
Attorneys for Respondent

RECEIVED

SEP 04 2013

SC Court of Appeals

MOTION

Respondent City of North Myrtle Beach (“City”) respectfully requests an Order of the Court requiring Appellant to correct the Record on Appeal to include matter designated by the City. In the alternative, the City requests permission of the Court to supplement the record with the correct material by way of an appendix. Further, because the City cannot complete its final brief without the designated material, the City requests the Court stay the due date for the final briefs, currently set at August 9, 2013, pending correction or supplementation of the record.

MEMORANDUM IN SUPPORT OF MOTION

An affidavit of counsel setting forth the facts asserted below is being submitted with this motion. The City filed and served its Initial Brief and Designation of Matter on or about May 7, 2013. In the Designation, the City designated at item 8., “Complaint in 2010-CP-26-5145 with verification.” The designated complaint was filed by Plaintiff in another matter, offered to the trial court, and referred to by counsel for the City in cross examination of Appellant at trial. The complaint was also cited in the trial court’s order and in the City’s Initial Brief.

On or about August 19, 2013, Appellant filed the Record on Appeal. Upon review of the Record, counsel for the City determined that Appellant had mistakenly included the Amended Complaint and verification in 2010-CP-26-5145 instead of the Complaint as designated by the City. Counsel for the City notified Appellant’s counsel by email of the error on August 23, 2013. On August 26, 2013, Appellant’s counsel responded by letter, refusing to correct the record absent agreement of the City to bear the cost of

reprinting and rebinding the Record and Appellant's Final Brief, despite the error clearly lying with Appellant.

On August 28, 2013, counsel for the City proposed that the City would supplement the Record on Appeal by way of an appendix to include the Complaint and verification. Appellant's counsel responded that, "I cannot imagine that I will express any objection to your doing so." However, despite being asked by email on August 29 and twice again on September 3, Appellant's counsel has not given his express consent or indicated whether he will sign a consent to supplement the record by way of Appendix. Because the Final Briefs are due just three business days from the date of this filing, and because the City cannot complete its Final Brief without the record corrected, it has been forced to file this motion.

Rule 210, SCACR, requires in relevant part that "the *appellant* shall serve a copy of the Record on Appeal on each party who has served a brief" and further that "[t]he *appellant* must file with the clerk of the appellate court fifteen (15) copies of the Record on Appeal . . ." SCACR 210 (a) and (b) (emphasis added). Regarding the content, Rule 210 requires that "[t]he Record on Appeal shall include all matter designated to be included by any party under Rule 209 . . ." SCACR 210 (c). The rule further requires that the Record on Appeal "shall not, however, include matter which was not presented to the lower court or tribunal." *Id.* Accordingly, the burden to correctly prepare, serve and file the Record on Appeal is on the Appellant, a burden he has failed to satisfy.

Appellant's various excuses for refusing to correct the record are of no avail. In his letter of August 26, 2013, he claims that he was confused because the designation did not include the date of filing of the complaint. However, if he was unsure, Appellant's

counsel should have asked the City's counsel to determine which complaint was meant. Further, the designation clearly stated "*Complaint* in 2010-CP-26-5145 with verification." Conspicuously absent from the designation was the word "Amended." Appellant also claims that the City could have sent him a copy of the complaint. However, Appellant never asked for a copy, despite seeking and receiving copies of other items, and he managed to correctly include other matters designated by the City for which no copies were provided. Moreover, while Appellant's claim that the amended complaint contains nearly identical language, albeit at different places, may be true, it does not change the fact that the complaint, not the amended complaint, from 2010-CP-26-5145, was what was before the trial court and the document from which Appellant was cross examined. Further, it was the complaint, not the amended complaint, which formed part of the basis for the City's decision at issue in the trial. Accordingly, inclusion of the amended complaint is improper and must be corrected.

RELIEF SOUGHT

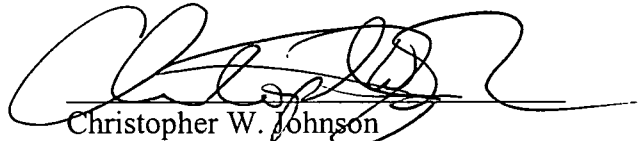
The City requests that the Court:

1. Order Appellant to correct the Record on Appeal at his cost, either by filing an appendix with the Complaint and verification in 2010-CP-26-5145 or by preparing the Record on Appeal anew; or, in the alternative,
2. Allow the City¹ to supplement the record by way of an appendix to include the Complaint and verification in 2010-CP-26-5145, taxing the cost for printing and binding to Appellant, or reserving the issue of costs until after the appeal is disposed of on the merits; and,

¹ Counsel for the City expects that the City could prepare, file and serve a supplement within 10 days of an Order of the Court allowing it.

3. Stay the deadline to file Final Briefs until five days after the record has been corrected and served.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Christopher W. Johnson', written over a horizontal line.

Christopher W. Johnson
Derwood L. Aydlette, III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Ave., Suite 100
Columbia, S.C. 29201
Tel.: (803) 799-9311

Columbia, South Carolina

September 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-26-5964

William H. Bailey, Jr.,

Appellant,

v.

City of North Myrtle Beach,
a South Carolina Municipal
Corporation,

Respondent.

AFFIDAVIT OF COUNSEL IN SUPPORT OF
MOTION TO CORRECT RECORD AND STAY
DEADLINE TO FILE FINAL BRIEFS

Christopher W. Johnson
Derwood L. Aydlette, III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Avenue, Suite 100
Columbia, South Carolina 29201
(803) 799-9311
Attorneys for Respondent

AFFIDAVIT

Christopher W. Johnson, having been duly sworn, states and deposes as follows:

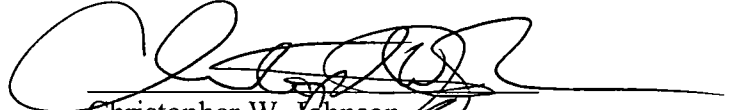
1. I am over 18 years of age and have personal knowledge of the facts herein.
2. I was trial counsel for Respondent City of North Myrtle Beach (“City”) in this matter and am counsel of record in this appeal.
3. On or about May 7, 2013, I prepared and filed the City’s Designation of Matter to be Included in the Record on Appeal, in which was designated the “Complaint in 2010-CP-26-5145 with verification.”
4. The complaint in that other matter was presented to the trial court and used by the undersigned counsel at trial to cross examine Appellant. The complaint was also part of the basis for the City’s determination that Appellant was not entitled to a grievance hearing, which determination was the subject matter of the trial below.
5. On or about August 19, 2013, Appellant filed and served the Record on Appeal.
6. After reviewing the Record, undersigned counsel discovered that Appellant had mistakenly included the *Amended* Complaint in 2010-CP-26-5145 instead of the Complaint. Counsel notified Appellant’s counsel of the error by email on August 23, 2013, inquiring how he would like to resolve the issue. Appellant’s counsel replied that he would consider it over the weekend. A copy of that email chain is attached as Exhibit 1.
7. On August 26, 2013, Appellant’s counsel emailed the undersigned counsel a letter in which he blamed confusion over which complaint was to be included on the lack of a filing date in the City’s designation, asserted that the Amended Complaint contained identical language to that in the Complaint, albeit at

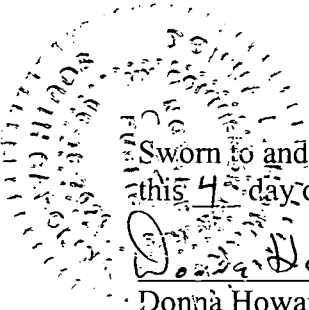
different places, asserted that he had already spent a lot of money preparing the record and final briefs, and refusing to correct the record unless the City agreed to pay the cost of reproducing the Record on Appeal and Appellant's Final Brief. A copy of Appellant's counsel's letter is attached as Exhibit 2.

8. Appellant's counsel never contacted the undersigned to express any confusion over whether the complaint or amended complaint was intended. Appellant's counsel did ask the City to provide copies of the three exhibits it submitted to the trial court, which it did. Appellant's counsel never asked the City to provide any other documents, including a copy of the complaint.
9. In an effort to resolve the issue in time to meet the looming deadline to file the Final Briefs, counsel for the City proposed that the City would supplement the record by way of appendix to include the Complaint with verification in 2010-CP-26-5145. Appellant's counsel responded that, "I cannot imagine that I will express any objection to your doing so." Undersigned counsel asked Appellant's counsel to confirm his express consent by way of email on August 29 and two emails on September 3; however, counsel for Appellant has not responded. A copy of the email chain through the first email of September 3 is included as Exhibit 3. A copy of the second September 3 email is included as Exhibit 4.

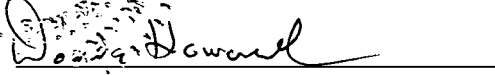
[Signature page follows.]

I swear or affirm that the foregoing is true and correct to the best of my knowledge and ability.


Christopher W. Johnson



Sworn to and subscribed before me
this 4th day of September, 2013.



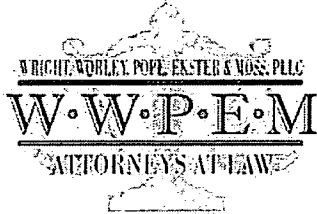
Donna Howard
Notary Public for South Carolina
My Commission Expires: 6/16/2020

From: [Kenneth Moss](#)
To: [Chris Johnson](#)
Cc: whbaileynmb@gmail.com
Subject: RE: Bailey v. NMB - Appeal of DJ Action
Date: Friday, August 23, 2013 3:51:18 PM

Chris,

I am not sure what I think about it. I will try to give it some thought over the weekend and get back to you.

Kenneth R. Moss
Wright, Worley, Pope, Ekster & Moss, PLLC



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Please consider the environment before printing this email.

From: Chris Johnson [<mailto:CJohnson@gsblaw.net>]
Sent: Friday, August 23, 2013 2:19 PM
To: Kenneth Moss
Subject: Bailey v. NMB - Appeal of DJ Action

Ken,

The Record on Appeal includes the Amended Complaint and Verification in 2010-CP-26-5145, but what we included in our designation was the original Complaint and Verification in that case. Let me know how you'd like to straighten this out.

Thanks,
Chris

Christopher W. Johnson
900 Elmwood Avenue, Suite 100

Columbia SC 29201

☎ 803.799.9311 • 📠 803.254.6951

✉ cjohnson@gsblaw.net



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WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC

ATTORNEYS AT LAW
628A SEA MOUNTAIN HIGHWAY
NORTH MYRTLE BEACH, SOUTH CAROLINA 29582
Telephone (843) 281-9901 - Fax (843) 281-9903

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DENNIS T. WORLEY*
HAROLD G. "Butch" POPE*
PAUL J. EKSTER**
KENNETH R. MOSS
MICHAEL T. SMITH++
RICK W. SCOTT*
MARTHA HENLEY SLEDGE*
MELANIE C. NICHOLSON ***
KELLY SANSONE-GALLEY***
NAPOLEON B. BAREFOOT, JR. *
D.F. McGOUGAN, JR.
(1921 - 1994)

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**DRC-Certified Family Financial Mediator

**licensed in SC & DC and Admitted to the U.S. Supreme Court

***licensed only in SC, Certified Family Court Mediator, Guardian *ad Litem*

August 26, 2013

VIA EMAIL and U.S. MAIL

Christopher W. Johnson, Esq.
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Avenue, Suite 100
Columbia, SC 29201

Re: William H. Bailey, Jr., *Appellant* vs. City of North Myrtle Beach,
a South Carolina Municipal Corporation, *Respondent*
Appellate Case No. 2013-000195

Dear Chris:

Thank you for your email of August 23, 2013, a copy of which is attached hereto. You advised me that the Record on Appeal produced on August 19, 2013 included the Amended Complaint and Verification in Civil Action 2010-CP-26-5145 (R. pp. 48-96), but what you included and intended in your designation was for the original Complaint and Verification in that case to be included in the Record. I have looked into this matter and spoken with the paralegal who assembled the Record, who stated that your designation of "8. Complaint in 2010-CP-26-5145 with verification" did not have a date associated with it. Inasmuch as she is aware that an amended pleading replaces the original, she included the Amended Complaint and Verification.

I have reviewed the Initial Brief of Respondent and found specific mention of this other case, accompanied with citation to the complaint, as follows:

- pages 5–6: “Shortly afterward, Appellant filed a verified complaint with the Court in his other lawsuit, asserting several causes of action relating to his separation from employment.³ [n.3] See *Bailey v. City of North Myrtle Beach, et al.*, C.A. No. 2010-CP-26-5145.”
- p. 29: “Appellant has also sworn under oath in a verified complaint filed in another action that he was “constructively dismissed” and “constructive[ly] discharge[d]. (Verified Compl, p. 13, ¶ 101, pp. 21-22, ¶147)⁹. [n. 9] Citation is to the verified complaint filed by Appellant against the City and others in his other lawsuit, 2010-CP-26-5145.” This citation to the verified complaint can be found on p. 24, ¶ 206 of the Amended Complaint. The language included in paragraph 206 is *verbatim*, excepting the reference to “Exhibit 20,” which is “Exhibit 24” in the Amended Complaint.
- p. 29: As cited above, the reference to the Verified Complaint, pp. 21-22, ¶ 147, is included *verbatim* in the Amended Complaint at p. 36, ¶ 283.

I invite you to contact me should you find any specific citations to the Verified Complaint that I may have missed.

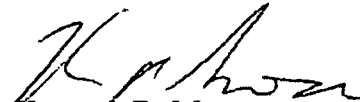
My client and I have already incurred substantial costs in the record produced. The costs associated with copying and mailing the Record on Appeal amounted to \$421.24, not including paralegal time. Further, I have had the Appellant’s Final Brief and Final Reply Brief copied and bound, which cost \$218.27. The inadvertent inclusion of the Amended Complaint instead of the original Complaint for that other case has not prejudiced the Respondent in any manner that I can see. Frankly, this could have been avoided had you been more specific in your designation. However, should you wish to have the original Complaint for C/A No. 2010-CP-26-5145 included in the Record on Appeal in place of the Amended Complaint, then I must ask your client and you to stipulate to assuming the cost of reproducing the Record and Appellants’ final briefs.

Assuming that your client and you are willing to incur those costs, I will certainly work with you to seek the appropriate extension and order from the Court by consent.

Christopher W. Johnson, Esq.
August 26, 2013
Page 3

With best regards, I am

Sincerely yours,



Kenneth R. Moss

KRM/rb
Enclosure as stated
cc: The Honorable Jenny Abbott Kitchings
Derwood L. Aydlette, III, Esq. (via email only)
Client (via email only)

Kenneth Moss

From: Chris Johnson <CJohnson@gsblaw.net>
Sent: Friday, August 23, 2013 2:19 PM
To: Kenneth Moss
Subject: Bailey v. NMB - Appeal of DJ Action
Attachments: image001.jpg

Ken,

The Record on Appeal includes the Amended Complaint and Verification in 2010-CP-26-5145, but what we included in our designation was the original Complaint and Verification in that case. Let me know how you'd like to straighten this out.

Thanks,
Chris

Christopher W. Johnson
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From: Chris Johnson
To: "Kenneth Moss"
Cc: Dirk Aydlette (DAydlette@gsblaw.net)
Subject: RE: Bailey v. City of NMB, Appellate Case 2013-000195
Date: Tuesday, September 03, 2013 8:47:00 AM

Ken,

Please advise today whether you will consent to our supplementing the record with the original complaint in 5145. I need to get this taken care of ASAP.

Thank you,
 Chris

Christopher W. Johnson

900 Elmwood Avenue, Suite 100

Columbia SC 29201

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✉ cjohnson@gsblaw.net



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From: Chris Johnson
Sent: Thursday, August 29, 2013 8:52 AM
To: 'Kenneth Moss'
Cc: Dirk Aydlette (DAydlette@gsblaw.net)
Subject: RE: Bailey v. City of NMB, Appellate Case 2013-000195

Ken,

We will take care of preparing and filing the appendix. The issue of the cost of preparation is premature at this point. If we win the appeal, I expect to seek all allowable costs and attorney's fees in accordance with the appellate court rules. At this point, I simply need your consent to supplement the record with the verified complaint, which is all I plan to include in the appendix. You can let me know by reply that you consent and I'll inform the court of the same when I get it prepared and filed.

Best regards,
 Chris

Christopher W. Johnson

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Columbia SC 29201

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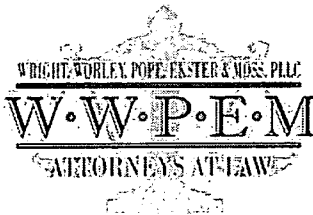
From: Kenneth Moss [<mailto:KennethMoss@wwpemlaw.com>]
Sent: Wednesday, August 28, 2013 5:44 PM
To: Chris Johnson
Cc: Dirk Aydlette; whbaileynmb@gmail.com
Subject: RE: Bailey v. City of NMB, Appellate Case 2013-000195

Chris,

As usual, I have to take great issue with your mischaracterization of what I have written. First, I simply do not believe that I have made any "mistake" and disagree strongly with your assertion that your designation "could have not been more clear". You clearly could have sent copies to me of what you wanted to include in the record. Second, and more important, I have not refused to correct anything. I have simply asked for a stipulation that your client and /or you agree to pay the costs of rebinding the record and the Appellant's brief, all of which have been finally prepared and bound. With that stipulation, I have agreed to include that which you have asked.

If you had rather supplement the record by way of an appendix, and you are seeking only to include the original Complaint and original Verification in the appendix I cannot imagine that I will express any objection to your doing so. Frankly I have never supplemented the record by way of an appendix and am not clear as to what the rules for doing so require. But if that is the direction that you want to go, I do not mind working with you. If your client and / or you are willing to stipulate to paying the costs for rebinding the record and Appellant's brief, I can work with you in that direction as well.

Kenneth R. Moss
Wright, Worley, Pope, Ekster & Moss, PLLC



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Please consider the environment before printing this email.

From: Chris Johnson [mailto:CJohnson@gsblaw.net]
Sent: Wednesday, August 28, 2013 4:50 PM
To: Kenneth Moss
Cc: DAydlette@gsblaw.net
Subject: Bailey v. City of NMB, Appellate Case 2013-000195

Ken,

I am writing in response to your letter of August 26, 2013, in which you refuse to correct your mistaken inclusion in the record on appeal of the Amended Complaint in Mr. Bailey's other lawsuit. My designation of the record on appeal, in which I designated the "Complaint in 2010-CP-26-5145 with verification" and not the "Amended Complaint...", could not have been more clear. While I appreciate that mistakes can happen, I cannot fathom how it is somehow my fault, as you assert in your letter, that you messed that up.

In any event, it is important that the Court of Appeals have the same document that the trial court had before it, because that is what the rules require. Accordingly, since you refuse to correct your mistake, I intend to supplement the record by way of an appendix. Please advise by Friday whether you will consent to the supplement, so that I may advise the Court of Appeals accordingly.

Best regards,
Chris

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Columbia SC 29201
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✉ cjohnson@gsblaw.net



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From: Chris Johnson
To: [Kenneth Moss \(KennethMoss@wwpemlaw.com\)](mailto:KennethMoss@wwpemlaw.com)
Cc: [Dirk Aydlette \(DAydlette@gsblaw.net\)](mailto:DirkAydlette@gsblaw.net)
Bcc: [Felicia Wines](mailto:FeliciaWines)
Subject: Bailey v. NMB - Appeal
Date: Tuesday, September 03, 2013 3:24:00 PM
Attachments: [Consent-Appx.pdf](#)

Ken,

The court of appeals requires written consent of the parties with original signatures to file the appendix. Attached is a proposed consent. If all is in order, please sign and date the consent and return to me.

Since our final briefs are due Monday, and I need to get the appendix prepared prior to then to finish my final brief, I need to know today if you will or will not consent to supplementing the record. I would appreciate your letting me know by email and, if you plan to consent, returning the executed document to me by overnight or priority mail service so I can file it with the appendix.

Thanks,
Chris

Christopher W. Johnson

900 Elmwood Avenue, Suite 100

Columbia SC 29201

☎ 803.799.9311 • 📠 803.254.6951

✉ cjohnson@gsblaw.net



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-26-5964

William H. Bailey, Jr.,

Appellant,

v.

City of North Myrtle Beach,
a South Carolina Municipal
Corporation,

Respondent.

RECEIVED

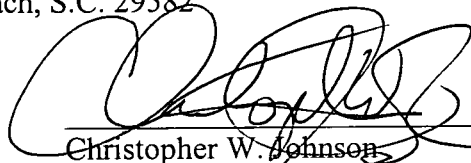
SEP 04 2013

SC Court of Appeals

PROOF OF SERVICE

I hereby certify that I have this day caused to be served a copy of the Respondent's Motion to Correct Record on Appeal and Stay Deadline to Submit Final Brief until Record Is Corrected and accompanying affidavit of counsel and exhibits on counsel of record by deposit in the United States mail, first-class postage prepaid, addressed to:

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