

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

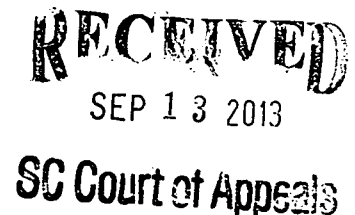
William H. Bailey, Jr. *Appellant,*

v.

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

**APPELLANT'S RETURN TO RESPONDENT'S MOTION
TO CORRECT RECORD ON APPEAL AND STAY DEADLINE
TO SUBMIT FINAL BRIEF UNTIL RECORD IS CORRECTED**

Appellant William H. Bailey, Jr. ("Bailey"), pursuant to Rule 240(e), SCACR, respectfully submits this Return to Respondent's Motion to Correct Record on Appeal and Stay Deadline to Submit Final Brief Until Record is Corrected, requesting that this Honorable Court deny that Motion for the reasons set forth below.



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. On June 11, 2010, Bailey filed a Verified Complaint with the Court of Common Pleas in Horry County, which was assigned Civil Action Number 2010-CP-26-05145. The issues raised in the present case 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 matter, the larger case had been removed on June 25, 2010 by the City to the United States District Court in Florence, South Carolina. Thereafter, Bailey filed a Verified Amended Complaint on August 9, 2010 with the United States District Court. (R. pp. 48–96) That larger case was subsequently remanded back to the Court of Common Pleas in Horry County on October 25, 2010, and remains to be tried.

At the trial of the present matter on October 11, 2012, counsel for the City cross-examined Bailey on several items included in Bailey's Verified Complaint in Civil Action No. 2010-CP-26-05145, even though Bailey's Verified Amended Complaint (R. pp. 48–96) had been filed more than two years prior. The City, in its Motion to Correct Record on Appeal, asserts that:

[W]hile Appellant's claim that the 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.

(Emphasis added; City's Mot. to Correct Record on Appeal, p. 4.) As set forth in the August 26, 2013 letter from Appellant's counsel to counsel for the City, attached hereto as Exhibit A, substantial costs have already been incurred by Bailey and his counsel in producing the Record on Appeal, Final Brief, and Final Reply Brief. Even if an Appendix to the Record were filed, Bailey would still be required to revise his Final Brief and Final Reply Brief, which were served on September 4, 2013 and mailed to the Clerk of Court for filing.

Bailey and his counsel do not dispute that Bailey was cross-examined by the City on his Verified Complaint, or that a copy of the Verified Complaint was handed up to the trial judge for his reference. A copy of the Respondent's cross-examination of Bailey regarding the Verified Complaint in Civil Action Number 2010-CP-26-05145 is contained in pages 174–178 of the trial transcript (**R. pp. 188–192**), a copy of which is attached hereto as Exhibit B. In its Motion the Respondent has represented that “[t]he complaint was also cited in the trial court's order. . . .” but fails to note that the inclusion in the trial court's Order was nothing more than a mere acknowledgement of other pending litigation between the parties. Footnote 1 of the trial court's Order dated November 13, 2012 and filed November 27, 2012 (**R. p. 8**) states:

The parties apparently dispute the details of the incident involving Plaintiff's weapon and his representations following the incident. Those matters, however, were not before this Court for decision, and are not relevant to the instant action. The Court notes that the parties are engaged in other litigation surrounding Plaintiff's separation from employment. *See Bailey v. City of North Myrtle Beach, et al.*, C.A. No. 2010-CP-26-5145.

Bailey and his counsel do, however, dispute that the City is entitled to file an Appendix to the Record on Appeal.

At the trial of the underlying action that is the subject of this Appeal, the Verified Complaint in Civil Action Number 2010-CP-26-05145 was never marked, proffered, or admitted into evidence as an exhibit by the trial court, and as such has not been properly preserved for inclusion in the Record of this matter. To allow the City to supplement the Record with matter not properly preserved for review would be in violation of Rules 209(b) and 210(c), SCACR.

REQUEST FOR RELIEF

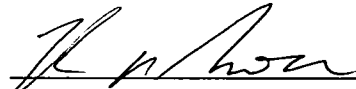
Therefore and accordingly, the Appellant respectfully requests this Honorable Court grant the Appellant relief as follows:

- (1) deny the Respondent's Motion to Correct Record on Appeal and Stay Deadline to Submit Final Brief until Record is Corrected; and
- (2) assess the Respondent with reasonable attorney's fees and costs incurred by the Appellant in responding to this Motion.

In the alternative, should the Court grant Respondent's Motion to supplement the Record by way of an Appendix, the Appellant respectfully requests that the Court:

- (1) require the Respondent to prepare, file and serve the Appendix, and tax the Respondent with the cost of printing and binding the Appendix; and
- (2) tax the Respondent with the costs incurred by the Appellant for the amendment, printing, and binding of Appellant's Briefs.

Respectfully submitted,



**WRIGHT, WORLEY, POPE, EKSTER
& MOSS, PLLC**

Kenneth R. Moss, SC Bar # 15520

628A Sea Mountain Highway

North Myrtle Beach, SC 29582

Tel: (843) 281-9901

Attorneys for Appellant

North Myrtle Beach, South Carolina
September 11, 2013

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

O. RICHARD WRIGHT, JR.*
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)

OTHER OFFICES
TABOR CITY, NC
WHITEVILLE, NC
SHALLOTTE, NC

*licensed only in NC

**licensed in NC, DC & SC

**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

900 Elmwood Avenue, Suite 100

Columbia SC 29201

☎ 803.799.9311 • 📠 803.254.6951

✉ cjohnson@gsblaw.net



This email is intended solely for the addressee. It may contain confidential and/or privileged information. If you have received this message in error, please notify us by return email, and delete it from your system. Reading, copying, or disseminating this message is strictly prohibited. Thank you.

Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

1 it.

2 MR. MOSS: Thank you, Mr. Bailey. I'm not
3 going to ask any further questions at this time.
4 Please answer any Mr. Johnson has or the Court has.

5 THE COURT: Mr. Johnson.

6 MR. JOHNSON: Thank you, Your Honor.

7 CROSS EXAMINATION BY MR. JOHNSON:

8 Q Good afternoon, Mr. Bailey.

9 A Good afternoon.

10 Q Bear with me just a second. You testified
11 earlier that on April 28th when you had the meeting
12 with Mr. Smithson and he gave you the ultimatum to
13 resign or be fired, that you told him you were not
14 going to resign, and what I wanted to ask you was
15 did you understand at the time that if you did not,
16 that if you did resign instead of being fired you
17 would not be able to grieve your separation from
18 employment?

19 A That has always been a rule, that is why I
20 absolutely refused it.

21 Q I hand you, and I haven't marked it, I can if
22 we need to, Your Honor.

23 MR. JOHNSON: This is the verified complaint
24 that was filed in the other matter, which a
25 verified complaint is basically an affidavit.

1 THE COURT: Yes.

2 MR. JOHNSON: I was going to ask him some
3 questions about that. If we need to mark it I will
4 be happy to mark it.

5 THE COURT: I don't have a copy.

6 MR. JOHNSON: Would you like me to hand you a
7 copy?

8 THE COURT: Please.

9 BY MR. JOHNSON:

10 Q Mr. Bailey, do you recognize that document as
11 the verified complaint that you filed in your other
12 lawsuit?

13 A Yes, sir.

14 Q Okay. And if you will look with me on the
15 last few pages of the document, at the very end, do
16 you see where it says verification of complaint?

17 A What page would that be?

18 MR. JOHNSON: May I approach, Your Honor?

19 THE COURT: You may.

20 A Yes.

21 Q Do you see that?

22 A Yes, sir.

23 Q And on the next page, the very last page of
24 the document, is that your signature?

25 A Yes, it is.

1 Q Okay. And that's been notarized, correct?

2 A Yes.

3 Q Okay. And look with me, if you would, at
4 item three on that last page where it says, "The
5 allegations contained in the complaint are true and
6 correct and based on my personal knowledge."

7 A Correct.

8 Q You swore to that when you signed this?

9 A Yes, I did.

10 Q Okay. Now would you turn to page 13 of the
11 complaint for me, please?

12 A Okay.

13 Q And if you look at paragraph 101, toward the
14 bottom of that document, or about the last page.

15 Do you see that?

16 A Yes, sir.

17 Q And just take a minute and read that
18 paragraph for me, please.

19 A Okay.

20 Q Okay. Do you see where it says that they
21 caused you to be constructively dismissed? Do you
22 see that?

23 A I do.

24 Q What does that mean?

25 A To me it means I was forced to do something I

1 didn't want to have to do.

2 Q Okay. You were forced to retire, is that the
3 position you're taking?

4 A I was forced to apply for my retirement, yes,
5 sir.

6 Q Okay. And do you understand that
7 constructive dismissal is a term of art?

8 A I understand it is a lawyer term, I do
9 understand that.

10 Q And your lawyer drafted this for you?

11 A Yes, he did.

12 Q And then you read it and swore it was true?

13 A Yes, sir.

14 Q Okay. Look with me again, if you would, on
15 page 21 and if you would look at paragraph 147 at
16 the bottom of page 21 and it carries over to page
17 22. Let me know when you have had a chance to read
18 that paragraph.

19 A Okay.

20 Q All right. You see in paragraph 147 on page
21 22 it talks about wrongful constructive discharge.
22 Do you see that?

23 A Yes.

24 Q Again what does that mean to you?

25 A To me?

1 Q Yes, sir.

2 A To me that means that I was put in a
3 situation where I had to accept something that I
4 did not want to accept.

5 Q You had to retire?

6 A I had to take advantage of my retirement,
7 yes, sir.

8 Q Your other option was to be fired?

9 A Was to not get any retirement. I needed that
10 as an income.

11 Q And once again constructive discharge is a
12 term of art, you're aware of that?

13 A Yes.

14 Q Okay. Mr. Bailey, I have handed you what was
15 marked Defendant's Exhibit 2. Please take a minute
16 to look at it and let me know when you have
17 reviewed that.

18 A I have.

19 Q Did you read it when it came out?

20 A I did.

21 Q Okay. Tell us what it is, please.

22 A It's basically, it is basically an article
23 that was written by a reporter who is just
24 absolutely hounding the city and my estimate of how
25 many articles this reporter, investigative reporter

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 the **Appellant's Return to Respondent's Motion to Correct Record on Appeal and Stay Deadline to Submit Final Brief until Record is Corrected** in the above-captioned appeal on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Derwood L. Aydlette, III, Esq.
Christopher W. Johnson, Esq.
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Avenue, Suite 100
Columbia, SC 29201
Attorneys for Respondent

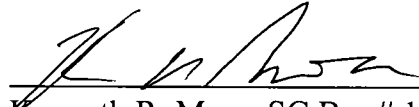
RECEIVED
SEP 13 2013

SC Court of Appeals

*** signature page follows ***

Respectfully submitted,

**WRIGHT, WORLEY, POPE, EKSTER
& MOSS, PLLC**



Kenneth R. Moss, SC Bar # 15520

628A Sea Mountain Highway

North Myrtle Beach, SC 29582

Tel: (843) 281-9901

Attorneys for Appellant

North Myrtle Beach, South Carolina
September 11, 2013