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.*

FINAL REPLY BRIEF OF APPELLANT

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FINAL REPLY BRIEF OF APPELLANT

The Appellant, William H. Bailey, Jr. (hereinafter "Appellant" or "Bailey"), responds to the Initial Brief of Respondent (hereinafter "Respondent" or "City") as follows:

A. The Respondent's Code of Ordinances was pled by Bailey to the lower court in his Verified Complaint dated July 5, 2010 at ¶¶ 21 and 25, and in his Prayer for Relief for Declaratory Judgment at § A(a).

At the time of the filing of the Appellant's Verified Complaint, and at the present date, the Respondent's Code of Ordinances 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. . . .

(CITY OF NORTH MYRTLE BEACH, S.C., CODE OF ORDINANCES ch. 1, § 1-4) (R. p. 331).

Bailey sought to amend his Complaint on December 14, 2011, after the Respondent amended its Ordinances to abolish its employee grievance procedure, but the lower court denied his Motion by Form 4 Order dated July 23, 2012 and filed July 31, 2012. (R. pp. 6–7.) No appeal was available as the July 23, 2012 Order was interlocutory in nature.

The lower court also ruled in the same July 23, 2012 Form 4 Order (R. pp. 6–7) that Bailey's cause of action for Declaratory Relief, which was still pending, should be scheduled for trial. (R. pp. 6–7.) Bailey had pled in his Complaint at ¶¶ 21 and 25, and in his Prayer for Relief for Declaratory Judgment at § A(a), that the Respondent's

City Manager had no authority to vary the Respondent's Code of Ordinances and deny Bailey a grievance hearing, and renewed that assertion again in the October 11, 2012 hearing from which this Appeal stems. (R. pp. 26–27; R. p. 187, lines 1–3; R. p. 187, lines 15–24; R. pp. 331–332.)

Bailey, therefore, had raised the issue of the effectiveness of Respondent's Code of Ordinances to the lower court as a core issue. (R. p. 186, line 20 – p. 187, line 3; R. pp. 331–332.) The lower court erred by ruling that the issue became moot (R. pp. 4–5; R. pp. 8–13) when the Respondent abolished the employee grievance procedure (R. p. 141, lines 16–22; R. p. 186, lines 20–23) because the Respondent did not also rescind, repeal, or amend the provisions of Chapter 1, § 1-4 of the Respondent's Code of Ordinances. (R. p. 331.) A copy of the Respondent's new City Ordinance abolishing the employee grievance committee was admitted into evidence without objection. (R. pp. 308–314; R. p. 140, lines 16–22.) It contains no reference to Chapter 1, § 1-4 of the Respondent's Code of Ordinances (R. p. 331), and does not seek to affect any rights already vested thereunder. The Respondent's amendment of its Ordinance did not contain a "conflicts" clause stating that any prior Ordinance in conflict with the current Ordinance would be overridden. (R. pp. 308–314.)

The Respondent misconstrues and misstates the rule in South Carolina concerning the use by the courts of local ordinances. The Respondent cites directly to two cases, namely Hill v. City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), and Robinson v. Brown, 260 S.C. 104, 194 S.E.2d 249 (1973), but admits that

both of those cases were decided before the *South Carolina Rules of Evidence* were adopted effective September 3, 1995. (Respondent's Initial Brief, p. 24.) Bailey cited Rule 201, SCRE in his Initial Brief as the basis for the taking of judicial notice of the Respondent's Code of Ordinances as published at the time of the filing of Bailey's Complaint, and the trial of the Declaratory Judgment cause of action. (Appellant's Initial Brief, p. 14; R. p. 331.)

The reference to Harkins v. Greenville Co., 340 S.C. 609, 533 S.E.2d 886 (2000), is similarly misplaced. (Respondent's Initial Brief, p. 25 n.8.) The Supreme Court in Harkins was considering whether, absent the record containing specific references to procedures for appealing against a zoning administrator's administrative decision, whether the trial court erred in deciding whether a zoning administrator's decision was immediately appealable to the circuit court, or whether the zoning administrator's decision was first to be heard by a board of zoning appeals in order to exhaust all administrative remedies. The Supreme Court was not laying down an inflexible rule that all local ordinances are not subject to judicial notice – the phrase used in the decision was to "***such***" ordinances. Harkins at 616, 533 S.E.2d at 891 (emphasis added).

Moreover, Bailey's counsel affirmatively argued to the lower court that Bailey remained entitled to an employee grievance hearing under the Respondent's Code of Ordinances, and the Respondent's City Manager had no right to deny Bailey an employee grievance hearing. (R. p. 331; R. p. 108, lines 5–9; R. p. 112, lines 11–15.)

The Respondent in its Initial Brief continues to argue two alleged barriers to that employee grievance committee hearing. First, they argue that Bailey had retired before he was terminated, which is contrary to witness testimony and a gross distortion of the facts and the record before this Honorable Court. Second, they argue that the amendment to the Respondent's Code of Ordinances (R. pp. 308–314) during the pendency of the current litigation was effective to deny Bailey's demand for an employee grievance hearing pursuant to the Respondent's Code of Ordinances. This second argument is incorrect because the amendment to the Respondent's Code of Ordinances (R. pp. 308–314), admitted into evidence without objection (R. p. 140, lines 16–22), did not seek to amend Chapter 1, § 1-4 of its Code of Ordinances, or provide that any of Respondent's prior Ordinances in conflict with its new provisions would be rescinded. (R. pp. 308–314; R. p. 140, lines 16–22; R. p. 331.)

B. The record shows that Bailey did not retire in advance of being terminated.

In Respondent's Initial Brief, Respondent's counsel continues to assert that Bailey retired in lieu of being terminated from employment. However, the Respondent itself, as illustrated in the Appellant's Initial Brief at p. 21, testified through its City Manager that Bailey was terminated. (R. p. 130, lines 17–19.) Bailey testified he was terminated. (R. p. 171, line 19 – p. 172, line 3.) The Respondent's Assistant City Manager testified in confirmation that the Respondent took the position as late as July 29, 2010 that Bailey had been terminated for cause. (R. p. 139,

lines 4–17.) The Respondent's Assistant City Manager also testified that the Respondent's personnel records revealed that the date of Bailey's termination was April 30, 2010, and that Bailey's official retirement date was May 1, 2010. (R. p. 136, lines 9–14.) Counsel representing the Respondent also testified that Bailey was terminated on April 30, 2010, and further that he wrote on May 2, 2010 to Bailey's counsel so confirming Bailey's termination. (R. pp. 34–35; R. pp. 220–221; R. p. 154, lines 10–12.)

The assertion of counsel for the Respondent that Bailey retired rests on two material misrepresentations, and the Respondent's Initial Brief points to no fact of record that supports the assertion.

The first misrepresentation is that Bailey somehow retired on April 30, 2010 from the City. Bailey did not do so: he submitted an application on April 30, 2010 to the South Carolina Police Officers Retirement System to start drawing accrued pension benefits at some future date. As the retirement system allows, and as his application stated, his application was "*on hold.*" (R. p. 246; R. p. 183, lines 5–20.) Bailey could not retire until he provided some required information to the South Carolina Police Officers Retirement System, and then only after the Respondent confirmed Bailey's termination date of employment. The Respondent confirmed Bailey's termination date weeks later on May 19, 2010. (R. p. 237; R. p. 184, lines 6–19.) The Respondent's retirement system is a different system from the South Carolina Police Officers Retirement System, as Respondent's City Manager

confirmed when testifying. (R. p. 129, lines 14–15.) The Respondent's personnel records, testified to by the Respondent's Assistant City Manager, also indicated that Bailey was terminated from employment on April 30, 2010, and became a retiree on May 1, 2010. (R. p. 237; R. p. 136, lines 9–14.)

Sometime after April 30, 2010, Bailey's date of retirement became effective but was backdated to May 1, 2010. (R. p. 237; R. p. 136, lines 9–14.) Bailey's retirement became effective after the date of Bailey's termination, as was confirmed by the sworn testimony of Respondent's City Manager, counsel for the Respondent, and as evidenced by the Respondent's personnel records. (R. pp. 34–35; R. pp. 220–221; R. p. 124, line 19 – p. 125, line 2; R. p. 154, lines 10–12; R. p. 163, lines 2–6.) Bailey did not therefore retire on or before April 30, 2010, as counsel for the Respondent continues to assert – without any reference to the record in this case or explanation of why the assertions conflict with the testimony of Respondent's City Manager, Appellant Bailey, the Respondent's Assistant City Manager, and counsel for the Respondent who was dealing with the matter in May 2010. The fact that in Respondent's Initial Brief counsel for the Respondent takes a position directly contrary to that of their client, without explanation or justification, is a material misrepresentation of the relevant facts.

The second material misrepresentation is that Bailey has pled in another case not currently before the court that he was "*constructively dismissed.*"[1] (R. p. 190, lines 20–23; R. pp. 48–96; Respondent's Initial Brief, p. 29.) That assertion by Respondent's counsel is a major distortion of the complex pleadings in that other case, which involves significantly more parties and contains pleadings related to seventeen (17) separate causes of action, some of which are framed in the alternative. It is also a distortion of the verification attached to that complaint, in which Bailey verified as to fact and events, but not as to legal theories of recovery. In that other complaint, Bailey pleads that he was discharged from employment unlawfully by the Respondent's City Manager in retaliation for seeking and participating in an employee grievance hearing. (R. p. 83, Eighth Cause of Action.) Bailey also alleges in the alternative (R. p. 82, Seventh Cause of Action) that he was constructively dismissed by the Respondent's City Council which refused to take action under the Respondent's Code of Ordinances to review allegations by Bailey of malfeasance by the Respondent's City Manager, or to require employee grievance hearings to be fair and impartial.

Separate causes of action do not bind the plaintiff to a single legal theory or to only one application of law to the facts alleged. Rule 8(e)(2), SCRCP provides

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[1] Civil Action No. 2010-CP-26-5145: Bailey v. City of North Myrtle Beach, John Smithson, Steven Thomas, and Nicole Aiello; Horry County Court of Common Pleas, referenced in the Respondent's Initial Brief at p. 29 as Bailey's "Verified Compl." (R. pp. 48–96.)

expressly "A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Rules 11(c) and 56(e), SCRCP, address factual averments by a non-expert witness and not any opinion on alternative legal theories of recovery. The Respondent's references to Bailey's verification in 2010-CP-26-5145 do not support the arguments then made by the Respondent. In any event, Bailey was not qualified as an expert witness under Rule 702, SCRE, and his opinions could not assist the lower court in determining an issue of fact. In addition, as a layperson Bailey could not be bound by his verification to only one of the many alternative theories of recovery because his attorney utilized a term of art in one of cause of action.

Counsel for the Respondent claims that knowledge of Bailey's retirement status came as a surprise to the Respondent. The record is clear that the Respondent knew all relevant facts when notifying the South Carolina Police Officers Retirement System that the date of the Bailey's termination was April 30, 2010. (R. p. 237.) The assertion by counsel for the Respondent on July 2, 2010 that Bailey had retired on April 30, 2010, and therefore Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987) applied, a claim repeated in the Respondent's Initial Brief, is incredible. The assertion was directly contradicted by the statements of the Respondent and its officers after the date of July 2, 2010, and is unsupported by any evidence. (R. pp. 40–41; R. pp. 226–227; R. p. 139, lines 4–21.)

C. There is material collateral litigation that would be affected by the issues in this case.

The Respondent has drawn attention to other litigation between the parties, which has been mentioned above. One core issue in that on-going case (C/A No. 2010-CP-26-5145; Horry County Court of Common Pleas (R. pp. 48–96)) is that Bailey was terminated from employment in violation of the law.[2] If this Honorable Court were to uphold the lower court's finding in the present case that Bailey retired from employment, it would have a material impact on that other case, which has yet to come to trial, and in which the scope of the issues between the parties extend well beyond the issue of a employee grievance hearing. The issue of retirement versus termination was not before the lower court in the present case, and its Order against which this Appeal has been made contains an unnecessary and prejudicial ruling. (R. pp. 8–19.)

D. Eubanks v. Smith is a case that confirms Bailey's case on appeal.

The Respondent continues to misrepresent the facts and applicability of the court's decision in Eubanks, supra. In Eubanks there was, in addition to complaints made and actions taken by the appellants' employer (the City of Myrtle Beach), there

[2] The allegations in the present case could not be consolidated into Civil Action 2010-CP-26-5145 at the time the Complaint was filed because the Defendants had removed Civil Action 2010-CP-26-5145 to the U.S. District Court. (R. p. 110, line 20 – p. 111, line 6.)

had been complaints laid against the appellants at the State Ethics Commission. The "name-clearing" hearing that took place in Eubanks was not one offered by the city manager, but was an obligatory proceeding before the State Ethics Commission, which involved sworn testimony and witnesses. Eubanks at 62, 354 S.E.2d at 901. Eubanks, supra, supports Bailey's position in the present case.

Additionally, the Respondent admits at page 28 of its Initial Brief that the Respondent's City Manager presented Bailey with a choice of being terminated or resigning (R. p. 119, lines 21–25), and both the Respondent's City Manager and Bailey testified that Bailey did not agree to resign. (R. p. 121, lines 18–19; R. p. 181, lines 22–23.) Even counsel for the Respondent does not assert there was a third alternative – taking early retirement – offered by the Respondent's City Manager.

The Respondent in its Initial Brief then leaps to the fabricated assertion that somehow Bailey chose to "resign by retiring." (Respondent's Initial Brief, p. 29.) By asserting that the issue of voluntary resignation by Bailey was "not the question before the lower court" (Respondent's Initial Brief, p. 28), but then asserting that the lower court decided on some evidence before it that Bailey resigned by retiring (a voluntary act), the Respondent makes an illogical leap in its argument that is unsupported in the record.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR. The undersigned further certifies that this Final Reply Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.

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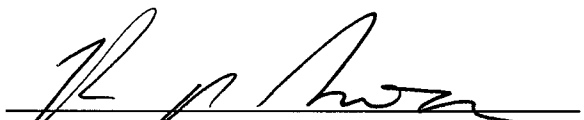

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PROOF OF SERVICE

I certify that I have served a copy of the **Final Reply Brief of Appellant** 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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