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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

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

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach . . . . *Respondents*.

APPELLANT'S RETURN TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE

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APPELLANT'S RESPONSE TO RESPONDENTS' REQUEST FOR JUDICIAL NOTICE

The Appellant, William H. Bailey, Jr. (hereinafter "Appellant" or "Bailey"), by and through his counsel, objects to the Request of Respondents for Judicial Notice as follows:

RELEVANCE

Respondents cite to *Wise v. Wise,* 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) as authority for the proposition that "*An appellate court can take judicial notice of something that was not before the trial court if it is indisputable.*" That citation is misplaced. What this Court actually noted in *Wise* was that notice may be taken of judicially cognizable facts in administrative cases, and referenced S.C. Code Ann. § 1-23-330(4) (2005) for that dictum. The matters under appeal in the present case are not administrative matters and the provisions of Title 1 Chapter 23 of the Code, which concerns proceedings in the South Carolina Administrative Law Court, do not apply here.

What the Court actually relied upon when deciding *Wise* was the principle that appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record.

The Court went on in *Wise* to note that appellate courts are limited to the record on appeal, and are not able to be as sensitive to the appropriateness of judicial

notice as the trial judge. *Wise*, 394 S.C. 591, 599, 716 S.E.2d 117, 122. *Masters v. Rodgers Dev.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984).

Wise concerned a workers' compensation claim, not a matter arising under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* (Supp. 2013). The Court of Appeals upheld the circuit court's dismissal of a workers' compensation claim that arose from the same facts as a civil action settled by the appellant against a third party and a default judgment he obtained against his employer. The appellant maintained that the circuit court could not take judicial notice of the existence of his civil action when evidence of that claim did not appear in the appellate record. The Court of Appeals noted that the appellant had filed suit and entered a settlement against a third party without providing any notice to the South Carolina Uninsured Employers' Fund or the Workers' Compensation Commission as required by statute, thus barring his workers' compensation action. The South Carolina Code of Regulations applicable to workers' compensation claims also specifically provides for the admission of additional evidence. *Wise*, 394 S.C. at 691, 716 S.E.2d at 123. The principles of law derived from *Wise* have no relevance to the present matter under appeal.

However, even if this Honorable Court were to consider taking notice of the Complaint and Trial Court Order in *Bellamy v. Hatley et al.*, C/A/ No. 2013-CP-26-07765, the Appellant here would argue that the facts and procedural history in that case are different. Bellamy sued (and is still suing) for unpaid wages in addition to

causes of action arising under the South Carolina Freedom of Information Act, violations of city ordinances, and violations of his Constitutional rights. He sought to prove that as to his claims, municipal employees and officers may bear personal responsibility. His litigation is unfinished.

The trial court held that the only proper party as to all claims made by Bellamy was the City of North Myrtle Beach. Bellamy moved for reconsideration, which the trial court denied with a Form 4 Order. Bellamy decided not to appeal, as he has continuing litigation for his unpaid wages and also the FOIA, city ordinances and Constitutional rights. The Appellant Bailey in the present case is contesting only matters related to FOIA over a different span of time. Following the commencement of the lawsuits by Bellamy and Bailey, the City changed its practices concerning the composition and publication of agendas and the holding of executive sessions of the city council.

The Respondents in the present case cite to no other asserted authority in South Carolina or the Fourth Circuit for their proposition that judicial notice may be taken of the Bellamy pleadings, but refer to Rule 201, SCRE. That Rule applies only to adjudicative facts, which are defined as *"facts about the particular event which gave rise to the lawsuit and ... [help] explain who did what, when, where, how and with what motive and intent."*

The events that gave rise to Bellamy's claims are not the same <u>particular</u> events of which the Appellant Bailey has complained, though there is some overlap in the

facts. In the court below, the Respondents in the present case sought at one time to consolidate the two cases, even though Bailey has no wages or Constitutional claims against the city defendant in his present lawsuit. The two lawsuits may still be consolidated for trial on the FOIA issues pursuant to Rule 42, SCRCP provided that each is ready for trial at the same time. However, that consolidation would not be a finding that the claims are the same in each lawsuit, but a determination without prejudice by the trial court that the two actions involved either a common question of law or a common question of fact. Neither case has completed discovery at the present time.

The Respondents next refer to *Kramer v. Time Warner Inc.*, 937 F.2d 767 (2nd Cir. 1991) as authority for the proposition that federal courts "*...routinely take judicial notice of documents filed in other courts to establish the fact of such litigation and related filings...*" *Kramer* involved an action relating to an alleged non-disclosure of information relating to the issuance of securities. The Second Circuit Court of Appeals in that case held that where documents are required by law to be filed with the Securities & Exchange Commission as public documents, and those documents were the very documents alleged to contain misrepresentations or omissions upon which the lawsuit was based, judicial notice of the documents was proper.

In noting that under the Federal Rules of Evidence, "... courts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and

related filings. *See, e.g., United States v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975)*(on review of denial of habeas corpus, judicial notice of briefs and petitions filed in state courts to determine whether petitioner had exhausted his state remedies)...." the Second Circuit Court of Appeals was not claiming that precedential value attached to a lower court order. 937 F.2d 767, 774. What the Respondents in the present case are attempting to persuade this Court is that a lower trial court Order involving a different litigant that has not been appealed has precedential or persuasive value. *Kramer* does not support that argument.

The second case referred to by the Respondents in their Request for Judicial Notice was *Hensley et al. v. United States District Court Eastern District of California et al.*, No. CIV S-07-1546 (E.D. Cal. Fe. 15, 2008). In that case, the plaintiffs had filed a *pro-se* complaint, the latest in a succession of complaints filed in and against Federal and State courts, and had been declared vexatious litigants in 2007 in the United States District Court for the Central District of California. In dismissing the latest complaint by Hensley, the District Court took judicial notice of the other litigation in which the plaintiffs had engaged (all unsuccessful), and found the prior pleadings and related Orders relevant. The District Court also found that on a Motion to Dismiss, a court may take judicial notice of matters of public record outside the pleadings, and that a court may take judicial notice of its own files and of documents filed in other courts. The judge in *Hensley* was justified, as a trial court

judge, in being less sensitive than an appellate court has to be to matters being part of the Record on Appeal.

The Respondents have failed to show precedent arising in South Carolina or the Fourth Circuit. The authorities cited by the *Hensley* court were all cases decided in the State or Federal Courts within the Ninth Circuit.

The Appellant Bailey would argue to this Honorable Court that, while the facts in the *Bellamy* case may have some relevance, it has no precedential value to assist this Court in its decision in the present case.

CONCLUSION

The Appellant would argue that taking judicial notice of the *Bellamy* case would not assist this Court in determining the issues under appeal. After all, the decision below may have been wrong, and may yet be found as such by the pending decision in the present case.

Respectfully submitted,

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North Myrtle Beach, South Carolina
October 6, 2014

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APPEAL FROM HORRY COUNTY
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Appellate Case No. 2014-000756

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

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach . . . . *Respondents*.

PROOF OF SERVICE

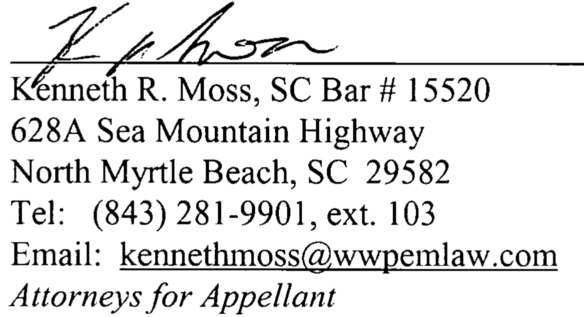
I certify that I have served a copy of the Appellant's Return to Respondents' Request for Judicial Notice, along with the Proof of Service of same in the above-captioned appeal, on counsel for the Respondents by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Michael W. Battle, Esq.
Battle Law Firm, LLC
1200 Main Street
Post Office Box 530
Conway, South Carolina 29528

*** *signature page follows* ***

Respectfully submitted,

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC



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D.F. McGOUGAN, JR.
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*DRC-Certified Family Financial Mediator
*Of Counsel

October 6, 2014

VIA CERTIFIED MAIL #7014 0510 0000 2675 5087;
RETURN RECEIPT REQUESTED
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: William H. Bailey, Jr., *Appellant* vs. Marilyn Hatley, *et al.*, *Respondents*
Civil Action No. 2013-CP-26-08446
Appellate Case No. 2014-000756
Our file no. SC-3922-012A

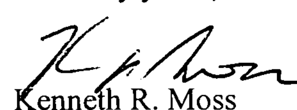
Dear Ms. Kitchings:

Enclosed for filing is one (1) unbound original and six (6) copies of the Appellant's Return to Respondent's Request for Judicial Notice in the above-referenced case, and Proof of Service of same.

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

With best regards, I am

Sincerely yours,



Kenneth R. Moss

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KRM/cd
Enclosures as stated
cc: Michael W. Battle, Esq. (*via U.S. Mail*)
Client (*via hand delivery*)