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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

Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

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,

v.

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

RESPONDENT'S FINAL BRIEF

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**STATEMENT OF ISSUES ON APPEAL**

- A. The Trial Court Did Not Err in Dismissing The Causes of Action Under the South Carolina Freedom of Information Act Against the Individual Named Defendants.**
- B. The Trial Court Did Not Err in Finding That Causes of Action Against the Individual Named Defendants Under the South Carolina Freedom of Information Act Were One and the Same as Causes of Action Against the Public Body.**
- C. The Trial Court Did Not Err in Dismissing Appellant’s Causes of Action Against the Individual Defendants for Violation of the City’s Ordinances.**

**ADDITIONAL SUSTAINING GROUNDS**

- D. The Individual Defendants Are Immune From Appellant’s Claims For Attorneys’ Fees Under The S.C. Tort Claims Act.**
- E. Appellant Does Not Have Standing To Bring A Claim Against The Individual Defendants For Alleged Violations of City Ordinances.**

**STATEMENT OF THE CASE**

Appellant William H. Bailey (Bailey) commenced an action in the Court of Common Pleas for Horry County on December 23, 2013, against Marilyn Hatley, individually, and as the Mayor of the City of North Myrtle Beach, Michael G. Mahaney, Christopher Noury and the City of North Myrtle Beach (Respondents) alleging

Respondents conducted of scheduled meetings of the City Council in violation the South Carolina Freedom of Information Act ("FOIA"), *S.C. Code Ann. § 30-4-10 et seq. (Supp. 2013, as amended)*, and the City's Code of Ordinances ("City Ord."). Part of the relief Bailey requested was an order from the court enjoining Hatley, Mahaney, and Noury, in their individual capacities, from violating FOIA statutes and City ordinances in connection with public meetings. In addition, Bailey requested an order from the court requiring Hatley, Mahaney and Noury, in their individual capacities, to pay such costs and attorneys' fees as deemed appropriate by the Court.

Defendant Marilyn Hatley ("Hatley") is Mayor of the City and as mayor presided over each of the meetings of City Council of which the Complaint was made. Defendant Michael G. Mahaney ("Mahaney") is the City Manager, and as city manager prepared agendas for the regularly and specially scheduled meetings of the City Council. Defendant Christopher Noury ("Noury") is the City Attorney and as City Attorney he is the designated parliamentarian to the City Council.

Respondents filed a Motion pursuant to *Rule 12(b)(6), SCRCF* to dismiss Marilyn Hatley, individually, Michael G. Mahaney, and Christopher Noury as individual defendants on the grounds that they were not proper parties to the action. By Order filed March 28, 2014, Judge Larry Hyman granted the Respondents' Motion as to Marilyn Hatley, individually, Michael G. Mahaney, and Christopher Noury as individual defendants [R. pp 2-4].

Bailey duly filed this appeal and the Respondents' response follows.

### **STANDARD OF REVIEW**

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. *Rule 12(b)(6), SCRPC*. The trial court's ruling on a *Rule 12(b)(6)* motion must be bottomed and premised solely upon the allegations set forth by the plaintiff. *Holy Loch Distribs. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998), rev'd on other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).

Dismissal of an action pursuant to *Rule 12(b)(6)* is appealable. *S.C. Code Ann. §§ 14-3-330(1) & (2)(c) (Supp.2000)*. Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court. See *O'Laughlin v. Windham*, 330 S.C. 379, 382, 498 S.E.2d 689, 691 (Ct.App.1998) ("The grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law.") (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)).

## ARGUMENT

- A. The Trial Court Did Not Err in Dismissing The Causes of Action Under the South Carolina Freedom of Information Act Against the Individual Named Defendants.**
  
- B. The Trial Court Did Not Err in Finding That Causes of Action Against the Individual Named Defendants Under the South Carolina Freedom of Information Act Were One and the Same as Causes of Action Against the Public Body.**

Respondents have combined the two above stated issues into the one argument for purposes of brevity and clarity in stating their positions.

***1. FOIA's civil remedies do not apply to persons in their individual capacities.***

FOIA was enacted to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings. *SC Code Ann. §30-4-15*. The essential purpose of the FOIA is to protect the public from secret government activity. *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 166 (S.C. Ct. App. 2003). FOIA does not designate expressly who may be sued to enforce its provisions. This is not surprising because FOIA, unlike 42 USC § 1983, does not provide for civil damages as an enforcement tool against individuals. FOIA's civil enforcement tool is injunctive relief and attorneys' fees and it authorizes private citizens to seek injunctions for illegal government acts at a minimum cost. *SC Code Ann. §30-4-100*. FOIA's enforcement tool for the illegal acts of an individual person or group of persons is a criminal penalty of a fine or imprisonment. *S.C. Code Ann. § 30-4-110*.

In the trial court's order dismissing Bailey's claims against the individual

defendants in their personal capacities, the trial court found FOIA was created to allow citizens to be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. *S.C. Code Ann. § 30-4-15*. The trial court further found FOIA's equitable relief provisions are directed at those improper actions taken by the public body and only the public body can perform such acts that are subject to FOIA's equitable provisions. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010).

Public bodies are defined in part as any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities. *S.C. Code Ann. § 30-4-20(a)*. Individuals on the other hand are defined in FOIA as persons and are placed in a separate class from public bodies. *S.C. Code Ann. § 30-4-20(b)*.

The meetings part of FOIA which Bailey claims was violated addresses only the actions of public bodies, it does not mention individuals or persons nor does it require a person acting in an individual capacity to perform any duties. *S.C. Code Ann. § 30-4-70*. In other words, FOIA's public meeting duties are required to be performed by public bodies or public agencies not private citizens. *Id.* Respondents contend that while Bailey may seek to enforce the civil remedies in FOIA against Hatley, Mahaney, and Noury, in their official capacities, the FOIA statutes do not authorize injunctions or monetary judgments against officers or employees of the City or North Myrtle Beach in their personal capacity. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39,47-48 (Ct. App. 2010).; Also see, *S.C. Code Ann. § 15-78-70(a) and (b)* (*Supp.1989*).

Although FOIA is not the equivalent of the Federal Civil Rights Act, 42 USC §1983, which imposes liability on individuals who act under color of state law, there are similarities between FOIA claims and 42 USC §1983 claims which illustrate the distinctions Respondents would make between personal capacity suits and official capacity suits. Under 42 USC §1983 personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 237–238, 94 S.Ct. 1683, 1686–1687, 40 L.Ed.2d 90 (1974). While 42 USC §1983 expressly provides for personal civil liability, FOIA does not. See *S.C. Code §30-4-100*. Official-capacity suits, in contrast, “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. See *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985).

South Carolina cases dealing with FOIA claims support Respondents' distinction between personal capacity suits and official capacity suits. In one case, a group of Plaintiffs were suing for an injunction to prevent a school board candidate from being seated due to FOIA violations. *Fowler v. Beasley*, 322 S.C. 463, 467, 472 S.E.2d 630,

632 (1996). The court made a specific point that the individual parties did not need to be named. The Supreme Court stated, "Although representatives of commissions, delegations and boards are often named individually, there is no requirement in the rules they be so named and there are numerous cases in which individual members have not been named." *Id.* See *Cameron and Barkley v. S.C. Procurement Review Panel*, 317 S.C. 437, 454 S.E.2d 892 (1995); *Willis Constr. Co. v. Sumter Airport Comm'n*, 308 S.C. 505, 419 S.E.2d 240 (Ct.App.1992); *Charleston County School District v. Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993); *Davis v. Budget and Control Board*, 301 S.C. 373, 392 S.E.2d 183 (1990).

The trial court found that the appellate courts treat suits against individuals as being one and the same as suits against the government entity. In so finding the trial court tacitly acknowledged that appellate courts treat individuals named in FOIA suits as being named in their official capacity. As stated above, official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978).

**2. FOIA did not create a private cause of action against individuals.**

Bailey appears to claim FOIA provides all the authority he needs to seek injunctive relief together with a monetary judgment for costs and attorneys' fees against Hatley, Mahaney, and Noury, in their individual capacities. Bailey appears to be seeking a private cause of action to bring on behalf of the public against private individuals who were also government officers and employees. [R. pp. 5-22] Although FOIA may give Bailey standing to bring a lawsuit on behalf of the public, Respondents contend that

FOIA does not create a private cause of action against the individual defendants. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991); Also see *Adkins v. S. Carolina Dep't of Corr.*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004).

The SC Supreme Court has held public officials are immune from private causes of action under the public duty rule, which holds that “public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than [to] anyone individually.” *Bellamy v. Brown*, 305 S.C. 291, 294, 408 S.E.2d 219, 220-21 (1991); *Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940). Since the FOIA obviously creates a public duty, Bailey must show that the individual Respondents owed to him a special duty in connection with conducting public meetings.

In determining whether a statute creates a private cause of action, the main factor is legislative intent. The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute. In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a private civil liability. *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (quoting *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. *Citizens of Lee County v. Lee County*, 308 S.C. 23,

416 S.E.2d 641 (1992); *Doe v. Marion*, 373 S.C. 390, 396-97, 645 S.E.2d 245, 248 (2007).

Respondents contend the General Assembly did not create FOIA for the special benefit of a private party such as Bailey. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 328, 701 S.E.2d 39, 48 (S.C. Ct. App. 2010). As stated in the legislative findings and purpose, FOIA was created to allow citizens to be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. *S.C. Code Ann. § 30-4-15*. FOIA does provide for criminal sanctions against individuals for willful misconduct. *S.C. Code Ann. § 30-4-110*. However, for the same reasons stated hereinabove for civil statutes, FOIA's criminal penalty does not create an additional private civil cause of action for relief against government officers or employees in their individual capacities. See *Adkins v. S. Carolina Dep't of Corr.*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Like the other provisions of FOIA, the criminal penalty was not created for the special benefit of a private party such as Bailey. *S.C. Code Ann. § 30-4-110*.

Respondents' interpretation of FOIA is supported by the policies underlying the common law public duty rule. The 'public duty' rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. *Summers v. Harrison Constr.*, 298 S.C. 451, 455-56, 381 S.E.2d 493, 496 (Ct.App.1989). The public duty rule is rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to

create a private cause of action for its breach. *Arthurs ex rel. Estate of Munn v. Aiken Cnty.*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001).

The public duty rule insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff. *Arthurs ex rel. Estate of Munn v. Aiken Cnty.*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). Bailey's claim that violations of FOIA give rise to individual liability for claims of attorneys' fees and costs is in derogation of the common law public duty rule. Statutes in derogation of the common law are to be strictly construed. See *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013)

Although attorneys' fees are not damages under the American Rule for damages, they are an award of compensation to an individual Plaintiff and more importantly an exposure to liability for individual officers and employees. If the General Assembly had intended to cause such an important shift in the underlying policies of common law for public servants, the General Assembly would have expressly provided for it in FOIA. If the legislature intended the individual liability result Bailey seeks, it could have expressly stated that individual persons are civilly liable for violations of FOIA. See *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 65, 744 S.E.2d 547, 551 (2013).

**3. *The S.C. cases cited by Bailey do not address the issue of individual liability.***

Government employees' individual liability for attorneys' fees and costs for alleged violations of FOIA was not addressed in the Bailey's cited cases. Bailey's claim appears to be that the failure of FOIA and appellate courts to expressly prohibit individual liability for public activities is authority to support his claims against the

individual respondents in the present case. Bailey's claim fails to recognize issue preservation as a fundamental component of appellate practice. See *Washington v Whitaker*, 317 S.C. 9, 409 SE 2d 811 (1994); cf *State v Austin*, 306 S.C. 9, 409 SE 2d 811 (Ct. App. 1991) ("Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.")

Until now, the question of individual liability for alleged FOIA violations has not been directly addressed. Respondents contend that in other areas of the law where individual liability in connection with the discharge of public duties has been addressed the appellate courts have declined to extend liability for damages to the individual person. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991). Respondents contend that for the same reasons liability for costs and attorneys' fees, which can be substantial in FOIA claims, should not be extended to individual persons performing public duties.

Bailey may claim that he is primarily interested in seeking injunctive relief against the individual defendants and individual liability for costs and attorneys' fees should not prevent the Court from granting injunctive relief against the individual respondents. Respondents contend that the significance of injunctive relief lay in the power of the court to punish for contempt of court. A person does not have to be a party to a lawsuit or named in the order to be punished for knowingly violating a court's order. See *Ex parte Walker* (1965) 279 Ala 53, 181 So 2d 493, aff'd on other grounds 388 US 307, 18 L Ed 2d 1210, 87 S Ct 1824, reh den 389 US 894, 19 L Ed 2d 202, 88 S Ct 12, in which the court held that persons who, with knowledge of a court order enjoining mass demonstrations without a permit, participated in such demonstrations with the persons who were named in the injunction were guilty of contempt of court. *Id.* Also See *Power*

*Authority of New York v Moeller* (1977, 3d Dept) 57 App Div 2d 380, 395 NYS2d 497, (Stating that it was well settled that persons not named as defendants to an action for a permanent injunction may be bound by the terms of a preliminary injunction in that action if they have knowledge of the terms of the injunction and if they are acting in collusion or combination with the named defendants.)

**C. The Trial Court Did Not Err in Dismissing Appellant's Causes of Action Against the Individual Defendants for Violation of the City's Ordinances.**

***1. The issue of the improper dismissal of Bailey's City ordinance claim was not properly preserved.***

On appeal Bailey raises for the first time statements made by Respondents' counsel during oral argument and he claims those statements should have prevented the trial court from dismissing his claims against the individual defendants for violation of the City's ordinances in connection public meetings. Bailey did not move under *Rule 59, SCRPC* for the trial court to reconsider its order on grounds that its order should have been limited by Respondents' counsel's oral argument. The trial court was not given an opportunity to rule on the question of the effect of Respondents' counsel's oral argument. Bailey's argument is improper and should be dismissed. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. See generally *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). *Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006).

***2. Respondents' Motion to Dismiss properly requested dismissal of the entire Complaint which included dismissal of the claim based on the City's ordinances.***

The request to dismiss all of Bailey's claims against the individual defendants was raised in Respondents' motion to dismiss. [R. p. 58] Bailey's complaint was not separated into causes of action. The trial court's order contained the following order: "Defendants' Motion to Dismiss Marilyn Hatley, Michael G. Mahaney, and Christopher Noury from the above captioned lawsuit is hereby granted. Plaintiff's claims against those individuals are hereby dismissed with prejudice." [R. pp. 2-4] As stated above, Bailey did not move under *Rule 59, SCRPC* for the trial court to reconsider its order on any grounds. The issue of the City ordinances was raised by Respondents' motion and by Bailey's attorney. The trial court had the authority to grant Respondents' motion to dismiss all of Bailey's claims against the individual defendants including the claims of violation of the City's ordinances.

#### **ADDITIONAL SUSTAINING GROUNDS**

**D. The individual defendants are immune from Bailey's claims under the S.C. Tort Claims Act.**

If the Court were to find that FOIA creates a private cause of action in favor of Bailey, such a cause of action would create a tort for violation of a statute. See *Pierson v. Ray*, 386 U.S. 547, 556, 87 S. Ct. 1213, 1219, 18 L. Ed. 2d 288 (1967) (statutory violations should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions). As an additional sustaining ground for dismissing Bailey's FOIA claims, Respondents contend that government officers and employees in their personal capacities are immune from Bailey's claims for monetary judgments for attorneys' fees under the South Carolina Tort Claims Act. The

General Assembly in the tort claims act granted the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. *S.C. Code Ann. § 15-78-20*. Plaintiff has not alleged that the individual government officers and employees conduct was not within the scope of their official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Therefore, under the procedure established by the South Carolina Tort Claims Act, the individual Respondents should be dismissed from suits for monetary claims stemming from alleged breaches of FOIA to individuals acting on behalf of the public. *S.C. Code Ann. § 15-78-20 & § 15-78-70*.

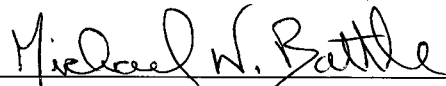
**E. Bailey does not have standing to bring a claim for failure to follow City ordinances against individual defendants.**

For Bailey to have individual standing to bring a claim for violation of City ordinances three elements must be satisfied. First, Bailey must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (group that was not a nonadjacent property owner lacked standing to enforce city's zoning ordinances). Bailey may have alleged a generalized harm to the public under FOIA, but Bailey has not alleged a private, concrete, particularized harm to his own individual legally protected interest. Therefore, Bailey lacks standing to bring a claim for violation of the City

ordinances. *Id.* See *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 85, 644 S.E.2d 58, 60 (2007) (tenant lacked standing under land management ordinance to bring enforcement action).

#### CONCLUSION

For the forgoing reasons, the trial court's order dismissing Marilyn Hatley, individually, Michael G. Mahaney, and Christopher Noury should be affirmed and Appellant's appeal should be dismissed.



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Attorneys for Respondents

October 16, 2014

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM Horry COUNTY

Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

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Case No. 2013-CP-26-08446

(Court of Appeals Case No. 2014-000756)

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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,

v.

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

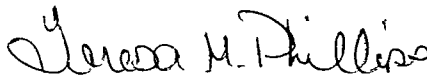
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Teresa M. Phillips certifies that she is a Paralegal with Battle Law Firm, LLC, attorneys for Respondent and that she has mailed a copy of Respondents' Final Brief to the address shown this 17th day of October, 2014, with proper postage attached thereto.

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