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.

RESPONDENT'S RETURN TO SECOND MOTION TO SUPPLEMENT RECORD

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

RETURN TO SECOND MOTION TO SUPPLEMENT RECORD

Appellant once again has drummed up sound bites from other litigation in a desperate attempt to support his contention that, despite his own admissions and the mountain of evidence to the contrary, he was fired and did not retire. This matter is set for oral argument the week of December 8, just over a month from now. For the reasons set out below, Appellant's eleventh-hour motion to add to an already ample record should be denied.

Appellant contends that the City has taken a position in the unrelated litigation that is inconsistent with the position it took in this litigation. Specifically, Appellant asserts that counsels' statements in motions hearing that Appellant "was terminated for life [sic]" and "was fired for lying" are inconsistent with its position in this case that Appellant retired.[1] (Appl. 2nd Mot. Supp. Rec. p. 2) The City's consistent position throughout this litigation, however, has been that its City Manager thought he had fired Appellant for lying, but that Appellant, unbeknownst to the City Manager, retired in lieu of being fired. More importantly, the City's position is entirely consistent with Appellant's own admissions and actions.

Appellant's Admissions and Conduct

Appellant was given the choice between resigning or being fired on April 28, 2010, leading to two days of discussions between his and the City's lawyers, which ended late the evening of April 30, 2010. (R. pp. 34-35) Appellant testified at trial that, on April 30, 2910, he purchased five years of service in the Police Officers Retirement System *and*

[1] Complete copies of the transcripts cited by Appellant, which would provide context to the quoted statements, were not provided with the motion and are not in possession of Respondent's counsel.

elected to retire that same day. (R p. 164, *l.* 11 – p. 165, *l.* 25; p. 201, *l.* 19 – p. 203, *l.* 2; pp. 243, 318) According to PORS records, Appellant's last day of service was April 30, 2010, and his first day of retirement was May 1, 2010. (R. pp. 235, 243).

Appellant and his counsel stated numerous times following his separation from employment on April 30, 2010, that he retired. Appellant wrote in his grievance request that he was "forced into taking early retirement." (R p. 224, ¶ 1) Appellant's counsel, who was intimately involved in the discussions that preceded Appellant's separation from employment, gave an interview in the *Sun News* in which he claimed that Appellant retired before the City could take any threatened disciplinary action.

> Bailey filed his retirement paperwork when the state office opened at 8:30 a.m. on April 30, [Appellant's Counsel] Moss said – *before City Manager John Smithson could take any threatened disciplinary action.*
>
> "We were still negotiating with the city at the time William drove to Columbia," Moss said. "*The city didn't even know he had retired.*"

(R. p. 192, *l.* 14 – p. 194, *l.* 18; pp. 319-320 (emphasis added)). Appellant's counsel also wrote to the City's outside counsel, informing him on May 24, 2010, by email that "[i]f you were not aware, on the morning of April 30, 2010, . . . , [Appellant] elected to retire . . ." (R. p. 165, *ll.* 2-11; p. 318).

Appellant also swore under oath in a verified complaint filed in another action against the City that he was "constructively dismissed" and "constructive[ly] discharge[d]." (Supp. R p. 14, ¶ 101, pp. 22-23, ¶ 147) A constructive discharge is a well-settled term of art meaning that an employee is compelled to resign, or in this case retire, rather than actually being fired by the employer. *See Graves v. Horry-Georgetown Technical College*, 391 S.C. 1, 9-10, 704 S.E.2d 350, 355 (Ct. App. 2010) (constructive

discharge where "employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit"); *Cole v. Lexington-Richland School Dist. 5*, 2011 WL 441974, *2 (D.S.C. Feb. 8, 2011) (unpublished) (allegations employee given "option to resign from her position or be terminated [and who] tendered her letter of resignation under duress . . . to prevent a termination from appearing on her employment record . . . are sufficient to raise a valid claim for constructive discharge in the form of forced resignation"); *accord, Tracey v. Sconnix Broadcasting of South Carolina, Inc.*, 284 S.C. 379, 381, 325 S.E.2d 542, 544 (1985) (noting when employee contracts to fill a position, material change in duties or reduction in rank constitutes "constructive discharge"); *Barr v. Board of Trustees of Clarendon County School Dist. No. 2*, 319 S.C. 522, 528, 462 S.E.2d 316, 319 (S.C. Ct. App. 1995) (analyzing allegation that an involuntary transfer was a constructive discharge). Quite simply, there is no conflict in the evidence in the record that Appellant retired in lieu of being fired.

The City's Position

The City's position throughout this and the other litigation with Appellant has been – and remains – that City Manager John Smithson believed he had terminated Appellant's employment when discussions between the City's lawyer and Appellant's lawyer ended on April 30, 2010 with no agreement to keep Appellant on the payroll so he could buy his additional years of service in the retirement system. (R. pp. 124-125, 153-154) Mr. Smithson testified pointedly to this:

> Just at the time that I filled out the paperwork on the date of his separation *it was my understanding that he had been terminated*, because everything had broken down on the evening of the 30th, *however as it turned out he had retired* and therefore any request for a grievance hearing after that point would not have been honored by me.

(R. p. 135 (emphasis added))

As previously discussed in response to Appellant's last motion to supplement the record, "a forced resignation or constructive discharge is legally equivalent to a termination . . ." *Hess v. Multnomah County*, 216 F.Supp.2d 1140, 1155 (D. Or. 2001). *See also, Mathew v. N. Shore - Long Island Jewish Health Sys., Inc.*, 2013 WL 5799883, *8 (E.D.N.Y. Oct. 23, 2013) (unpublished) (discussing "termination through forced resignation" where employee given choice to resign or be terminated); *Bay v. Fairfield Resorts, Inc.*, 2006 WL 3484236, *1 (E.D. Tenn. Nov. 30, 2006) (unpublished) (plaintiff told to move to Florida or lose job was "constructively discharged and forced to resign"); *Mouser v. Hocking County Board of Mental Ret. & Dev. Disabilities*, 2009 WL 768561, *1 (Ohio Ct. App. March 23, 2009) (unpublished) ("Appellants each claim they were wrongfully terminated from their positions at HCMRDD in that they were forced to resign."); *accord, Schillinger v. Wells Fargo Bank, N.A.*, 268 Cal. Rptr. 368 (Cal. Ct. App. 1990), ("Appellant first claims the statute does not apply because the Bank did not 'dismiss' him, but rather laid him off and then involuntarily retired him. This is a distinction without a difference. As a result of the Bank's actions, appellant was no longer employed at the Bank, an outcome which was involuntary on appellant's part and which he challenged as a wrongful 'discharge' and wrongful 'termination.' Thus, the Bank did 'dismiss' appellant . . ."), *depublished*, 1990 WL 10554223. Therefore, counsels' use of the word "fired" to describe the ultimatum given by Smithson to resign or be fired is not inconsistent. Moreover, nothing in counsels' statements changes the fact that Appellant did, in fact, retire in lieu of being fired and admitted repeatedly that he did so.

Whether Appellant Retired or Was Fired Does Not Matter if The Case is Moot

Appellant's repeated attempts to scour the records of his serial litigation with the City for support for his contention he was fired despite his multiple admissions and the mountain of evidence that he retired does not matter if the Court holds that the case is moot. As discussed in the City's briefs, the trial judge's primary holding was that there was no justiciable case or controversy because the matter is moot. (R. pp. 13-16) Following Appellant's separation from employment, Smithson retired and a new City Manager recommended to City Council that the grievance procedure be abolished. (R. p. 146) As the trial judge explained:

> Here, Plaintiff seeks a determination that he was entitled to a grievance hearing due to his separation from employment. Granting the requested relief, however, will not settle the legal rights of the parties or have any effect whatsoever on the parties' legal status with respect to each other. The Court cannot grant injunctive relief and require the City to give Plaintiff a grievance hearing. . . . Accordingly, even if the Court were inclined to grant Plaintiff a declaratory judgment, it would not serve any purpose. Plaintiff would not get a grievance, and the parties' rights as to each other would not change.

(R. p. 15) The determination that, even if the matter were not moot, Appellant was not entitled to relief because he retired, was secondary and "for the sake of completeness." (R. p. 16) Accordingly, the additional evidence offered, which was not before the trial court, is unlikely to be needed even if it were relevant in the least.

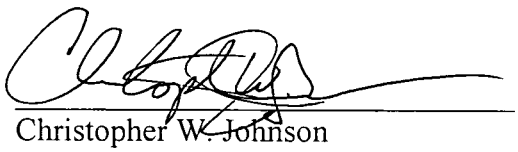
In sum, there is no conflict between the isolated statements of counsel and the City's position – supported by the overwhelming and undisputed record evidence – that Appellant retired when given the choice between being fired or resigning. The City's

position throughout has been that it thought it terminated Appellant when discussions ended the evening of April 30, 2010, and that it found out later that Appellant, in fact, retired.

CONCLUSION

For the foregoing reasons, Appellant's second motion to supplement the record should be denied.

Respectfully submitted,



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

October 29, 2014

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

PROOF OF SERVICE

I hereby certify that I have this day caused to be served a copy of the Respondent's Motion to Accept Late Respondent's Return to Appellant's Second Motion to Supplement the Record and Respondent's Return to Second Motion to Supplement Record on counsel of record by deposit in the United States mail, first-class postage prepaid, addressed to:

Kenneth R. Moss, Esq.
Wright, Worley, Pope, Ekster & Moss, PLLC
628A Sea Mount Highway
North Myrtle Beach, S.C. 29582

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

October 29, 2014

GIGNILLIAT SAVITZ & BETTIS LLP

STEPHEN T. SAVITZ*+
VANCE J. BETTIS *
LINDA PEARCE EDWARDS *
KATHRYN THOMAS *
DERWOOD L. AYDLETTE III*+
CHRISTOPHER W. JOHNSON *
FRED A. WILLIAMS *
T. FOSTER HASELDEN
MICHAEL C. GREENE

R. HAYNE HODGES III
SPECIAL COUNSEL

JULIAN H. GIGNILLIAT
(1939-2002)

*CERTIFIED SPECIALIST
LABOR & EMPLOYMENT LAW
+CERTIFIED MEDIATOR

Sender's email address:
cjohnson@gsblaw.net

October 29, 2014

VIA HAND-DELIVERY
The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

Re: *Bailey v. City of North Myrtle Beach*
Appellate Case No. 2013-000195
C/A No. 2010-CP-26-05964

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Respondent's Motion to Accept Late Respondent's Return to Appellant's Second Motion to Supplement the Record, filing fee for the same, and Respondent's Return to Second Motion to Supplement Record and Proof of Service of the foregoing. Please file the original and return the clocked copy to me by our courier.

Should you have any questions, please do not hesitate to contact us.

With highest regards,

Sincerely,

Christopher W. Johnson

Christopher W. Johnson

CWJ/fre
Enclosure
Fltr COA- RetMotSuppRec.439.AJ

cc: Kenneth R. Moss, Esq., Counsel for Appellant (w/ encl.)(via U.S. Mail)