THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No.: 2016-000455

DomainsNewMedia.com, LLC, Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce, Appellant.

RETURN TO MOTION TO STRIKE

Robert E. Stepp (SC Bar No. 5335)
Tina M. Cundari (SC Bar No. 71951)
Bess J. DuRant (SC Bar No. 77920)
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
803-929-1400
803-929-0300
rstepp@sowellgray.com
tcundari@sowellgray.com
bdurant@sowellgray.com

Attorneys for Appellant

INTRODUCTION

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Appellant Hilton Head Island-Bluffton Chamber of Commerce ("Appellant" or "Chamber") files this Return to the Motion to Strike of Respondent DomainsNewMedia.com, LLC ("Respondent"). The motion to strike should be denied because the letter Appellant seeks to include in the record on appeal is relevant to the issue on appeal and contains undisputed facts of which this Court may take judicial notice. Moreover, the letter reflects a change in position by Respondent that this Court should be aware of and which casts doubt on the positions taken by Respondent in this case.

For these reasons, the letter should be made a part of the record on appeal, or at least subject to judicial notice by this Court.

ARGUMENT

I. The letter is relevant and subject to judicial notice.

Respondent's letter should be made part of the record on appeal because it is relevant to the issue of whether the Chamber is a public body subject to the Freedom of Information Act ("FOIA") and contains undisputed facts of which this Court may take judicial notice.

According to the South Carolina Rules of Evidence, "a court shall take judicial notice if requested by a party and supplied with the necessary information." Rule 201(d), SCRE. "A judicially noticed fact must be one not subject to reasonable dispute that is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE. Further, "[j]udicial notice may be taken at any stage of the proceeding," including on appeal. Rule 201(f), SCRE; *see also Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (explaining that although appellate courts are reluctant to notice adjudicative facts, they may do so in limited circumstances). At the

appellate level, "original judicial notice of adjudicative facts . . . should be limited to matters which are indisputable." *Masters*, 283 S.C. at 256, 321 S.E.2d at 197.

Here, the letter Respondent seeks to exclude shows Respondent publicly acknowledging (for the first time) that the relationship between the Chamber and the Town of Hilton Head Island ("Town") is contractual in nature and for the provision of services. This is significant because it is contrary to positions taken by Respondent in the litigation—that the relationship between the Chamber and the Town is not for the provision of services and is not arm's length—and therefore directly undermines Respondent's argument that the Chamber is a public body subject to FOIA.

As this Court explained in *Weston v. Carolina Research & Dev. Found.*, FOIA would *not* apply "to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis." 303 S.C. 398, 404, 401 S.E.2d 161 (1991). The statements in Respondent's letter put the Chamber squarely within this exception. According to the letter, the relationship between the Chamber and the Town is contractual and for the provision of services. Because the letter contains admissions that go directly to the question of whether the Chamber is a public body, the letter is relevant to the issue on appeal, and was properly made a part of the Designation of Matter. *See* Rule 209(c), SCACR (requiring counsel to certify that "the Designation contains no matter which is irrelevant to the appeal").

The letter is also relevant because it represents an about-face by Respondent on the question of whether the Chamber is a public body. Up until the date of the letter, Respondent has vigorously argued that the Chamber is a public body subject to the FOIA, and that the relationship between the Chamber and the local government entities it serves is not arm's-length. In the letter, however, Respondent takes the position that the relationship is contractual in nature

and relates to the provision of services and therefore is subject to the procurement code. This blatant and very public change in position is relevant to the issue on appeal because it casts doubt on the positions Respondent has taken in this case, and shows that although Respondent knows the relationship is contractual and for the provision of services, Respondent is taking a completely different position in this case because that is what serves it in this forum. Respondent should not be permitted to use the timing of the letter—the fact that it was sent nearly three months after the trial court ruled—to hide the letter from consideration by this Court.

In addition to being relevant, the letter is subject to judicial notice. It is undisputed that the letter was sent on behalf of Respondent and that the positions contained in the letter are those of Respondent. Respondent does not dispute the contents of the letter or try to distance itself from the letter in any way. It is also undisputed that the letter is a matter of public record because it was sent to the Town Manager of Hilton Head Island, with copies to the mayor, members of Town Council, and the Town attorneys. Moreover, it is undisputed that the relationship between the Chamber and the Town is contractual and for the provision of services. Respondent and the Chamber now appear to agree on this point, which previously they had not.

By including the letter in the Designation of Matter and referencing it in the brief, the Chamber is not trying to "transform this appeal into a new hearing on the record," as Respondent contends. The Chamber does not rely upon the letter or the representations made in the letter to make any of the legal arguments in the initial brief. The Chamber references the letter in a footnote and acknowledges that the letter was not before the trial court because it was sent to the Town after the trial court rendered its decision.

Moreover, contrary to what Respondent argues, this is not an instance of "newly discovered evidence" such that the Chamber should have filed a Rule 60(b) motion. There is no newly discovered evidence in the letter. What is new is Respondent's position. After winning summary judgment by arguing the relationship between the Chamber and the Town was not arm's length, Respondent is now publicly acknowledging the arm's-length nature of the relationship.

Because the letter is relevant to the issue on appeal and is subject to judicial notice, the letter should be included in the record on appeal. If not included in the record, the Court should at least take judicial notice of the letter and its contents.

II. Respondent should be estopped from taking inconsistent positions.

The letter should also be included in the record on appeal or judicially noticed by this Court because it shows Respondent publicly taking inconsistent positions to the detriment of the integrity of the court system and the truth-seeking function of the courts.

"'Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.'" *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 505, 725 S.E.2d 676, 680 (2012) (quoting *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)). The doctrine "'comes into play when the court is forced to take a position based on a factual assertion.'" *Wright v. Hiester Constr. Co., Inc.*, 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010) (quoting *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003)).

"'The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary.'" *City of N. Myrtle*

Beach, 397 S.C. at 506, 725 S.E.2d at 680 (quoting *Cothran*, 357 S.C. at 215, 592 S.E.2d at 631). Judicial estoppel, therefore, "sustains the truth-seeking function of the courts." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). As noted by this Court,

> When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Id. (footnote omitted).

The elements of judicial estoppel are as follows:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; (5) the two positions must be totally inconsistent.

Auto Owners Ins. Co. v. Rhodes, 385 S.C. 83, 99, 682 S.E.2d 857, 866 n.6 (Ct. App. 2009).

Although the facts presented by Respondent's motion to strike do not fully satisfy all five elements of judicial estoppel, the circumstances surrounding the motion directly implicate the purpose of judicial estoppel to prevent parties from taking inconsistent positions in court or related proceedings. Respondent has taken two totally inconsistent positions in this case: one before the trial court and the other before the Town of Hilton Head Island. The positions were taken in related proceedings and involving the same parties. Respondent successfully argued to the trial court that the Chamber is a public body, that it does not have an arm's-length relationship with the public bodies it serves, and that it should be subject to FOIA. Based on these representations, the trial court specifically found that the Chamber does not supply goods

and services to the local government entity on an arm's-length basis, and used this finding to conclude that the Chamber is a public body. Respondent used the court system and FOIA's overly broad definition of "public body" to obtain one result, and is now using the local procurement code and its requirements to obtain another. Respondent should be estopped from taking these totally inconsistent positions.

Because the letter represents a change in position regarding the nature of the relationship between the Chamber and the Town, and ultimately whether the Chamber is a public body subject to FOIA, the Court should be permitted to consider it when deciding this case.

CONCLUSION

The motion to strike should be denied. Respondent's letter to the Town of Hilton Head Island is relevant to the issue on appeal and is subject to judicial notice. It is undisputed that the letter was written on behalf of Respondent and shows Respondent taking a different view of the facts in this case. Respondent's acknowledgement that the Chamber has a contractual relationship with the Town and the contract is for the provision of services completely undermines Respondent's prior arguments that the relationship between the Chamber and the Town is not arm's length and is not for the provision of services and therefore the Chamber is a public body.

Because the letter is relevant, subject to judicial notice, and represents a change in position, the letter should be made a part of the record on appeal. If not made a part of the record in this case, the letter should at least be subject to judicial notice.

SOWELL GRAY STEPP & LAFFITTE, LLC

By: ______________________

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PROOF OF SERVICE

I certify that I have caused the service of Appellant's Return to Motion to Strike upon Respondent by hand delivery on September 23, 2016, addressed to its attorney of record, Taylor M. Smith, Harrison & Radeker, P.A., 923 Calhoun Street, Columbia, South Carolina 29201.

SOWELL GRAY STEPP & LAFFITTE, LLC

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Attorneys for Appellant