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. 2016-000460

DomainsNewMedia.com, LLC.....Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce .....Appellant.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO MOTION TO STRIKE

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Respondent, Domainsnewmedia.com, LLC, hereby submits this reply to the Appellant's return to Respondent's motion to strike. As the return was served via hand-delivery to the undersigned's law office, on September 26, 2015, this reply is timely.[1]

ARGUMENT IN REPLY

I. The letter subject of this motion is neither properly a part of the record on appeal nor appropriate for judicial notice by this Court in this appeal.

The Court should not make Item 14 of Appellant's designation of matter, "Letter from Taylor Smith to Stephen Riley, Town Manager, dated May 17, 2016," (hereinafter "letter") or footnote 2 on page 25 of Appellant's initial brief a part of the record on appeal in this matter, nor should the court take judicial notice of the letter The letter was not sent on behalf of the Respondent, as the letter itself plainly states, was never presented to the trial court, is not relevant to the issues in this appeal, and is not the sort of thing of which judicial notice is proper.

When a court takes judicial notice of a fact it admits into evidence and considers, without proof of the facts, matters of common and general knowledge. Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 517 (5th ed. 2013) (citing Law Firm of Paul L. Erickson, P.A. v. Boykin, 375 S.C. 204, 651 S.E.2d 606 (Ct. App. 2007), *rev'd on other grounds*, 383 S.C. 497, 681 S.E.2d 575 (2009); South Carolina Dept. of Social Services v. Janice C., 383 S.C. 221, 678 S.E.2d 463 (Ct. App. 2009)). A fact that can be judicially noticed "must be one not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources

[1] Respondent understands that Appellant's counsel has submitted or will be submitting for filing a corrected proof service of this return.

whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE. "Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available source of indisputable reliability, it is not subject to judicial notice." Masters v. Rodgers Development Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (citing Moss v. Aetna Life Insurance Co., 267 S.C. 370, 228 S.E.2d 108 (1976); State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935)).

While it is also true that judicial notice may be taken at any stage of the proceeding, pursuant to Rule 201(f), SCRE, "appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable." Masters, 283 S.C. at 256. The 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. Sanders & Nichols, supra at 517 (citing Matter of Harry C., 280 S.C. 308, 313 S.E.2d 287 (1984)). "Thus, original judicial notice of adjudicative facts at the appellate level is limited to matters which are indisputable." Id. (citing Harry, 280 S.C. at 308); accord Masters 283 S.C. at 256.

There are several aspects of the letter that demonstrate it is an inappropriate item to be judicially noticed.

First of all, there is indeed dispute with the Appellant's repeated assertions that the letter "was sent on behalf of Respondent and that the positions contained in the letter are those of Respondent." Those assertions are incorrect. The respondent in this

matter is DomainsNewMedia.com, LLC. As the letter itself states, it was sent on behalf of Mr. Skip Hoagland. The Appellant cannot change that simply by stating over and over, incorrectly, that the letter was sent on behalf the Respondent. It was not. Frankly, since Rule 210(c), SCACR, plainly prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal[,]"on whose behalf the letter was sent should be of no importance to the outcome of this motion.

The Appellant asks this Court to take a dangerous path. The Appellant's designation of new factual material for inclusion in the record on appeal illustrates the very problem that would flow from departing from Rule 210(c)'s limitation of the record to matter presented to the trial court. If the Respondent were to counter the Appellant's argument by demonstrating to this appellate court that Mr. Hoagland is not even a member of DomainsNewMedia.com, LLC anymore, that would require the inclusion in the record of still more matter that was never presented to the trial court, thus compounding the violation of the Appellate Court Rules. That would do even more to transform this appeal into what the Appellant apparently desires, a new hearing on a new record.

The position of Respondent in this matter is that the letter is also not inconsistent with Respondent's position in this case. At issue in this appeal is whether the trial court was correct to rule that the Appellant, which accepts public funds *en masse*, is a public body for purposes of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq*. The position of Mr. Hoagland took in the letter subject of this motion is that the Hilton Head Island Town Council, which first began to have a written contract with the Appellant in 2015, likely violated its own

procurement code in the way it entered into a contract with the Appellant for the latter to serve as the town's designated marketing organization.

The letter certainly does not establish that the relationship between the Town of Hilton Head and the Appellant is an arm's length one. Further, it is certainly disputed that the relationship between the Respondent and the Town of Hilton Head Island is entirely contractual and entirely for the provisions of services. The undersigned attorney, acting on behalf of a different client than the Respondent, drafted the subject letter to explain to the town council that there was a document, purportedly created in 2015, with which it purportedly entered into a relationship with the Appellant "that appears to be a contract for services" because that is what the document states that it is. If the document is what its title says it is, then any formalization of a relationship between the town and Appellant would need to comply with the town's procurement code. The letter does not state that the relationship between the town and Appellant is now one where Appellant supplies "specific goods or services on an arms-length basis," nor does it purport to provide an opinion on whether the document even meets the requirements of a contract. Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 401 S.E.2d 161, 165 (1990).

The letter is also not the sort of thing judicial notice is *for*. "[O]riginal judicial notice of adjudicative facts at the appellate level is limited to matters which are indisput***able***." Masters, 283 S.C. at 256 (emphasis added). Whether a letter was sent and on whose behalf it was sent are things that are capable of dispute. Such things are not the sort of fact that is "so notorious that the court may properly assume its existence without proof." Id. at 255. The Appellant has not asked the Court to take judicial

notice that the sun rises in the east and sets in the west, that a clear sky typically appears blue in the daytime, or that candy usually contains sugar. "The modern trend" – consistent with South Carolina jurisprudence – "is to limit judicial notice to 'indisputables' – matters of common knowledge or matters capable of certain verification." Id. at 255 n. 1.

Perhaps more important to the outcome of this motion is that all of the things raised by the Appellant in its return are about its characterization of the letter, not what is at issue in this motion, which is whether the Appellant's designation of this letter for inclusion in the record on appeal and its reference to it in this brief. Even if the letter were relevant to some issue in this appeal, it would still not be proper to designate it or reference it in a brief, because there are *two* limitations to what may be included in the record on appeal: the matter must be relevant to the issues in the appeal, Rule 209(c), SCACR, *and* the matter must have been presented to the lower court, Rule 210(c), SCACR.

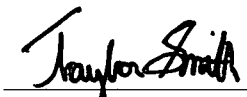
II. Respondent has not taken inconsistent positions, the Appellant concedes the inapplicability of judicial estoppel, and the Appellant's return indicates the letter is not relevant to its arguments.

Respondent has not taken inconsistent positions in the subject letter and this matter for two principal reasons: 1) the positions taken by the undersigned were not on behalf of the same client and 2) the substantive positions as stated in the subject letter and this matter are not inconsistent with the Respondent's position as a matter of principle. Furthermore, Appellant's return itself states that the elements of judicial estoppel are not satisfied here, so it is curious why Appellant decided to allude to that doctrine. Finally, if the Appellant, as its return states, "does not rely upon the letter or

the representations made in the letter to make any of the legal arguments in the initial brief[,]" why did it designate the letter for inclusion in the record on appeal at all? If that is true, then the designation of the letter violated Rule 209(c)'s prohibition on the inclusion of irrelevant matter in the record on appeal.

Respondent's motion to strike should be granted. The Appellant's brief and designation plainly violate the Appellate Court Rules.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the foregoing reply by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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