THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Clifton B. Newman, Presiding Judge

Case No.: 2010-CP-26-10848
Appellate Court Case No.: 2015-001398

PAUL CURRY,

Appellant,

v.

TOWN OF ATLANTIC BEACH,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

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July 5, 2016

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Respondent's counsel concludes in Respondent's Brief that the Doctrine of Collateral Estoppel is applicable in this action and acts as a complete bar to the recovery sought by Appellant for Respondent's repeated violations of the South Carolina Freedom of Information Act, contained in §30-4-10, *et seq.*, S.C. Code Ann. (Rev. 2007). In support of Respondent's position, Respondent's counsel references a Consent Order entered into between the parties in a separate action captioned as *Paul Curry v. Town of Atlantic Beach*, Civil Action Number 2005-CP-26-1091, which was signed by the Honorable Cynthia Graham Howe on January 27, 2010. The 2005 case was an action arising out of Respondent's repeated failures to abide by the South Carolina Freedom of Information Act, which was filed on February 28, 2005. Respondent failed to answer or otherwise respond to the underlying allegations in the 2005 action, was held in default, and the matter was referred to Judge Howe, the Master in Equity for Horry County. On September 17, 2009, a status conference was held and as a result, the matter was set for a final hearing on the 2005 action for November 19, 2009. As a result, the January 27, 2010 Order was filed, with consent of the parties.

The Ten (10) page Order in the prior action grants Appellant a Declaratory Judgment that Respondent violated the South Carolina Freedom of Information Act (SCFOIA) in Four (4) specific instances. (R. pp. 323- 324). Likewise, the January 27, 2010 Order grants a permanent injunction to Appellant to prevent further violations of SCFOIA in Four (4) specific categories. (R. p. 324). The January 27, 2010 Order also provides roughly Six (6) pages of Additional Relief, in an effort to prevent further violations of SCFOIA by Respondent. (R. pp. 325- 331).

However, in the Ten (10) pages of the Order from Case Number 2005-CP-26-1091, the term "codified ordinances" is not mentioned once.[1]

Respondent's argument is, effectively, that because "codified ordinances" would fit within the meaning of the term "public records", the permanent injunction section of the January 27, 2010 Order collaterally estops Appellant from obtaining relief in the instant matter before this Court. This argument, however, is fallacious [2] for several reasons. First, it is important to recognize that the January 27, 2010 Order came as a result of an action filed on February 28, 2005.Obviously, Appellant could not have included the specific instances which were litigated in the instant case in the previous case, in that the instant case is predicated upon requests for "codified ordinances", that for the most part, were made subsequent to the filing of the 2005 action. Next, the January 2010 Order does not specifically reference "codified ordinances", but instead, speaks about requested public records generally, with the exception that it specifically references the Minutes of Town Meetings and Agenda of Town Meetings which Appellant had requested prior to the 2005 action. This is consistently reflected in that the text of the January 2010 Order references these general "public records" only twice in the Ten (10) page Order; yet goes into fairly specific detail when addressing the failure to post the Agenda of scheduled Meetings in a timely manner, the practice of Respondent changing the Agenda on short notice, Respondent's use of executive session in Town Meetings, the failure of Respondent to have the Minutes of the Town Meetings available for the public's inspection and copying, requiring the Town Officials to read the *Public Official's Guide to Compliance with South Carolina's*

[1] It is important to note, while the January 27, 2010 Order was introduced as an Exhibit by both parties in the instant action, the underlying Complaint from the 2005 action was not. Therefore, it was never presented to the Trial Court whether this issue was specifically litigated in the 2005 action.

[2] Specifically, it is an *Ignoratio Elenchi* fallacy, which translates to ignorance of refutation, otherwise known as irrelevant thesis fallacy (red herring).

Freedom of Information Act, and sign a statement that they have in fact done so, in addition to other specific relief. It follows from a review of the text of the January 27, 2010 Order, that the issues litigated in the 2005 action were more closely related to other inappropriate actions of Respondent Town in violation of SCFOIA and not the issues related to the "codification of ordinances" which is the basis of the instant action. Thirdly, it appears from a comparison of the Order from the 2005 action and the Complaint in the instant action, that the prior action dealt only with violations of SCFOIA; however, the basis for this action originates from the failure of Respondent to fundamentally abide by §5-7-290, S.C. Code Ann. (Rev. 2004). The January 27, 2010 Order does not mention this code section at all; yet Respondent attempts to persuade this Court that the previous Order resolved this issue. Respondent is attempting to distract this Court from the real issue at the heart of this matter.

Specifically, Respondent argues that the instant action was an attempt by Appellant to force Respondent to use a third party vendor to create a bound volume containing the ordinances of Respondent Town. This argument is categorically and unequivocally false; in fact, it is yet another attempt by Respondent to obfuscate the material issue of this action. To be clear, the dispute has nothing to do with whether Respondent utilizes the services of a publisher to create a bound volume of the current ordinances of Respondent; it concerns whether the ordinances exist at all, and by extension, should they exist, whether the current condition of the ordinances comport with the General Assembly's direction that "[e]ach municipal council shall provide by ordinance for the codification and indexing of all ordinances, either typewritten or printed, and the maintenance of ordinances in a current form reflecting all amendments and repeals." S.C. Code Ann. § 5-7-290 (Rev. 2004). In fact, Appellant's testimony on cross-examination reveals exactly this; that the purpose of this action concerns the fact that the Ordinances of

Respondent Town are not maintained in the condition required by §5-7-290, S.C. Code Ann. (Rev. 2004) in addition to Respondent Town failing to allow the public and specifically relevant hereto, Appellant, to inspect them. (R. p. 128, line 9- p. 129, line 9). This is echoed in the Transcript of the Hearing on Appellant's Rule 59 (e) motion, where the following exchange took place:

> **THE COURT: Now, let me pose this to you counselor. Are there any South Carolina cases that you are aware of that clearly elucidates what constitutes proper codification of an ordinance? Not a dictionary definition but a South Carolina case.**
>
> **MR. MULLINS: No, sir, I don't.**
>
> **THE COURT: So and perhaps that's where— that's what's spurred me to say that I'm being requested to issue an advisory opinion as to what would be adequate codification, whether adequate codification is in notebook form or whether adequate codification has to be in a printed form. Because I think if you were to survey, I don't know, but towns over in America as to what forms their ordinances are put in, I would think you would find a significant number of them do not have bound books.**
>
> **MR. MULLINS: And, judge, I'm not asking that the town bind the book.**
>
> **THE COURT: Okay.**
>
> **MR. MULLINS: I'm asking that they show us the ordinance with any amendments, repeals or actions thereon with an index. That's all we're asking.**

(R. p. 275, line 24- p. 276, line 21). If Respondent chooses to use a publishing service to create such a bound volume, then so be it; it is within their discretion to do so.[3] However, there is no directive that the ordinances must be contained in a bound volume; the law only requires that the ordinances be current, in printed or typewritten form, reflecting all amendments and repeals, with an index and that those ordinances be available for inspection, review and

[3] Interestingly enough, the 2010-2011 Proposed Budget for the Town included a line item to allow for the codification by a publisher, which purportedly set aside $10,700.00 to complete this task. (R. p. 290-298). However, according to the testimony of Mr. Booker, this was not done. (R. p. 219, line 1-p.221, line 2; p. 232, lines 2-23).

copying by the public. In the testimony of Mr. Booker, then the Town Manager for Respondent, it was admitted that Respondent is not in compliance with state law in this respect. (R. p. 219, line 1- p.221, line 2; p.232, lines 2-23). If Respondent had ordinances that comported with §5-7-290, S.C. Code Ann. (Rev. 2004), why then would Respondent include a budget line item to accomplish this task in 2010-2011 and re-state its intention to include this in the 2014-15 Proposed Budget? (R. p. 290-298; p. 224, lines 2-22; p. 232, lines 2-23;). The reasonable and logical answer to this question is that it would not.

Respondent continues its obfuscation of the matter by its misleading suggestion that "Appellant has and was allowed an inspection of Respondent's Town ordinances." (Respondent's Initial Brief, p. 15.) While Appellant admitted during cross-examination that Respondent had produced some specific ordinances, Appellant has never been allowed to review the entire body of what Respondent purports to be the Town Ordinances. (R. p. 98, line 25- p.103, line 16; p.109, line 4- p.111, line 18; p.119, lines 1-21). No matter how loudly Respondent metaphorically screams that Appellant was able to review an ordinance, or that Appellant is trying to force the Town of Atlantic Beach to hire a third party vendor to create a leather bound volume of ordinances for every man, woman and child in the Town, the simple fact of the matter is that all Appellant is seeking is to have Respondent brought into compliance with §5-7-290, S.C. Code Ann. (Rev. 2004); of which, Respondent's own Town Manager, Mr. Booker testified they were in violation. Certainly, it is not unreasonable to hold our local governments to the standard of abiding by the mandates of the General Assembly.

Purportedly in support of Respondent's argument that the Doctrine of Collateral Estoppel bars the relief requested by Appellant, Respondent cited to page 5 of the Trial Court's Order Denying Injunction and Declaratory Relief, adding emphasis to the Order's recitation of the

essential elements necessary for a finding that an action is barred by collateral estoppel, specifically: "Respondent must show that the issue in the present lawsuit was: '**(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.**'" (Respondent's Initial Brief, p. 15, emphasis added in original). While both the Trial Court and Respondent correctly recite the applicable case law and elements relating to the application of the Doctrine of Collateral Estoppel, both the Trial Court and Respondent have misapplied the standard. As was previously indicated above, the Order from the prior 2005 action does not reference "codified ordinances" anywhere within the text of the Ten (10) page Order. Certainly, had it been actually litigated, there would have been some reference in the Order to "codified ordinances". The same is true, had the prior Order actually determined whether codified ordinances for Respondent Town actually existed, as the second prong of the collateral estoppel analysis requires. Yet, notably absent is any reference whatsoever to §5-7-290, S.C. Code Ann. (Rev. 2004) or the term "codified ordinances" in the Order issued in the 2005 action. Lastly, if the existence or non-existence of the "codified ordinances" was "necessary to support the judgment", as required by the third prong of the collateral estoppel analysis, certainly Judge Howe would have included some reference to §5-7-290, S.C. Code Ann. (Rev. 2004) in her Order. Yet, the lack of reference thereto is conspicuous in its absence in the Order from the 2005 action. What is notable is that, aside from the references in the Order relating to the manner in which the Town Meetings should be conducted, requirements for the Agenda of such meetings, and requirements that the Minutes of the Town Meetings be available for inspection, review and copying, *inter alia*, the Order refers to public records in a very broad and general sense. This leads to Appellant's next

point in response to Respondent's erroneous interpretation of Appellant's argument relating to the definition of "public records".

Respondent argued in its Brief that Appellant has changed his position concerning whether Town Ordinances are considered public records pursuant to §30-4-20, S.C. Code Ann. (Rev. 2007). This is purely inaccurate. Appellant maintained at the Trial of this matter that the definition of "public records" would encompass ordinances. (R. p. 125, line 22- p. 126, line 6). Appellant's position remains the same in Appellant's Initial Brief. Respondent has, however, misconstrued a portion of Appellant's argument relating to the fact that the term "ordinances" is not specifically enumerated in the definition of public records contained in §30-4-20, S.C. Code Ann. (Rev. 2007). An extension of that argument is that neither the Order from the 2005 case, nor the instant Order under appeal actually define the term "public records". The point, which Respondent misconstrued, is that while Respondent argues that the prior Order bars Appellant from recovery in the instant matter, neither Order actually specifically includes any language referencing whether or not the Town Ordinances are codified in accordance with §5-7-290, S.C. Code Ann. (Rev. 2004), nor does the prior Order from the 2005 action set forth any findings related to the codification issue at all. While the prior Order does enjoin Respondent from refusing to provide "public records" to Appellant; it can be inferred that had the issue of codification been before the Master in Equity in the 2005 case, the Master would have made a specific finding relating to the codification issue. The fatal flaw to both Respondent and the Trial Court's contention that collateral estoppel applies, is that Judge Howe's Order from the 2005 case is silent as to the issue of codification. As such, Respondent cannot avoid the conclusion that collateral estoppel does not apply in the instant matter.

II. APPELLANT'S CHALLENGE TO THE TRIAL COURT'S FINDING THAT THE DOCTRINE OF *RES JUDICATA* BARRED THE INJUNCTIVE RELIEF REQUESTED BY APPELLANT WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

Respondent argues in its Brief that Appellant's argument relating to the Trial Court's ruling which found that the issues were barred by the Doctrine of *Res Judicata* was not preserved for appellate review. Specifically, Respondent contends that Appellant did not object during the Trial of the matter, nor did Appellant specifically raise the issue in his Rule 59 (e), SCRCP motion, thus depriving the Trial Court an opportunity to rule on the issue and rendering an appellate determination on this issue impossible. This argument is wholly without merit.

First, it is imperative to begin the analysis of the argument advanced by Respondent with Respondent's Answer to the Complaint in this matter. Respondent presented Two (2) defenses in its responsive pleading, namely a specific denial to both causes of action and the affirmative defense of laches. So as an initial starting point, Respondent failed to plead the affirmative defense of *res judicata* to Appellant's Complaint in this matter. Furthermore, from a procedural perspective, although both Respondent and Appellant introduced the Order from the 2005 case into evidence at the Trial of this matter; Respondent failed, either orally or in writing, to move to amend Respondent's pleadings to conform to the evidence presented at Trial pursuant to Rule 15 (b), SCRCP. Therefore, the affirmative defense of *res judicata* was never properly presented or asserted by Respondent during the Trial of the matter. Incidentally, Respondent also failed to conform to Rule 8 (c), SCRCP, which governs the general rules of pleading affirmative defenses. Specifically, Rule 8 (c), SCRCP states: "In a pleading to a preceding pleading, a party shall set forth affirmatively the defenses: ... *res judicata*..., and any other matter constituting an avoidance or affirmative defense." Here, while Respondent did plead

the affirmative defense of laches, it failed to do so in accordance with Rule 8 (c), SCRCP, with respect to the affirmative defense of *res judicata*. As such, Appellant would submit that the Trial Court's interjection of this affirmative defense into the Order in this matter constitutes reversible error, given the fact that Respondent failed to include it in its responsive pleading.

Next, Respondent argued that Appellant failed to object during the Trial of this matter to the assertion of the affirmative defense of *res judicata* and thus, the issue was not preserved for appellate review. Respondent is technically correct that Appellant did not object during the Trial for a justifiable reason, namely, that the issue was raised for the first time by the Trial Court, *sua sponte*, in the Order Denying Injunction and Declaratory Relief filed September 8, 2014. In response, Appellant's counsel filed "Plaintiff's Motion to Reconsider Prior Order Filed on September 8, 2014 and Received by Plaintiff's Counsel on September 15, 2014" on September 24, 2014 seeking to have the Trial Court alter or amend the judgment pursuant to Rules 59 (e) and 52, SCRCP. In Appellant's Rule 59 (e) motion, Appellant identified Eleven (11) specific findings and/ or rulings made by the Trial Court which Appellant sought to have the Trial Court amend. Specifically germane to the issue of *res judicata*, Appellant's Rule 59 (e) motion included the following:

> **1. The Court erred in either making findings of fact, or failing to make findings of fact as set forth below, in that they were not supported by the evidence introduced at trial; 2. The Court did not make findings of fact that were supported by the evidence introduced at trial; and 3. The Court erred in making various conclusions of law as set forth below, and the Court failed to consider and/or rule on various issues raised at trial that have a direct and substantial bearing on the determinate issues of fact and law. 4. The Court erroneously ruled that the prior litigation between the parties is barred by the prior Order which was alleged to have been initiated in 2010. The Court failed to cite the case number that the Court was relying upon in its ruling. Plaintiff seeks clarification in the Order as to the exact case number that the Defendant is relying upon in the Order signed by the Court. 5. Plaintiff seeks a finding of fact that, since the entry of any alleged prior Order, the Plaintiff had made numerous requests for**

the codified municipal ordinances for the Town of Atlantic Beach which were not produced by prior Order or Settlement Agreement and/or Plaintiff seeks a finding in the record that the Town of Atlantic Beach has not codified its municipal ordinances as required by state law under Section 5-7-280 [sic] South Carolina Code of Laws, et seq., as amended... 10. Plaintiff seeks a finding that the Defendant's Order, as drafted by Defendant's counsel relies upon defenses which were not raised in the Answer filed in the case. In addition, the Defendant did not make a Motion to Amend to conform to the evidence produced at trial.

(R. pp. 44- 45). Clearly, the issues related to the Trial Court's ruling to give *res judicata* effect to the issues perceived by the Trial Court to have been addressed in the Order from the 2005 case were raised by Appellant in his Rule 59 (e) motion filed on September 24, 2014. Furthermore, to address Respondent's contention that Appellant failed to raise the issue orally at the hearing held on April 13, 2015 concerning Appellant's Rule 59 (e) motion, Respondent's counsel's recollection is deficient; it was the first matter addressed by Appellant's counsel at the hearing. (R. p. 244, line 14- p.257, line 4). In fact, of the 38 pages of the Transcript from the Rule 59 (e) hearing, the vast majority dealt with the issue of the Trial Court's determination to give *res judicata* effect to the Order from the 2005 case. Obviously Appellant disagreed with and was disappointed by the Trial Court's determination subsequent to the Motion Hearing held April 13, 2015, but to contend, as Respondent is, that Appellant did not raise this issue at every available opportunity is simply irresponsible and disingenuous. It is readily apparent from the Transcripts and pleadings that Appellant has raised this issue in multiple forms, unfortunately to no avail.

To address the heart of the *res judicata* issue, Appellant would submit that the Trial Court's ruling that the instant matter was barred by the Doctrine of *Res Judicata*, was reversible error. Respondent correctly cites in its Brief to *Catawba Indian Nation v. State of South Carolina*, 407 S.C. 526, 756 S.E.2d 900 (2014) in which the South Carolina Supreme Court addressed

the applicability of both collateral estoppel and *res judicata* to Declaratory Judgment actions. In *Catawba Indian Nation*, the Supreme Court, in finding that *res judicata* did not apply in the case before the Court, specifically stated:

> **Although res judicata normally applies to issues that were previously raised or that could have been raised in the prior action, declaratory judgments are distinguishable. As one legal treatise has observed, res judicata does apply to declaratory judgments, but only as to issues *actually decided* by the court: 'Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby but, in addition, also of all matters which could have been presented for adjudication. *A declaratory judgment is not res judicata as to matters not at issue and not passed upon. Unlike other judgments, a declaratory judgment determines only what it actually decides and does not preclude, under res judicata principles, other claims that might have been advanced.'***

Id. at 756 S.E.2d 908 (citing to 22A Am.Jur.2d *Declaratory Judgments* §244 (2013)) (Emphasis contained in original). (See also 50 C.J.S. *Judgments* § 944 (2009) stating "a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced"; Restatement (Second) of Judgments § 33 (1982) stating "a valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them *as to the matters declared*, and, in accordance with the rules of issue preclusion, *as to any issues actually litigated by them and determined in the action.*" (Emphasis added)).

Based upon the *Catawba Indian Nation* case, which cited to multiple respected legal treatises, it is clear that the Trial Court's ruling barring the relief requested by Appellant in the instant action in accordance with the Doctrine of *Res Judicata* was erroneous. The Order from the 2005 case granted Appellant both a Declaratory Judgment and a Permanent Injunction relating to numerous and repeated violations of the SCFOIA by Respondent. In the present action, Appellant sought a Declaratory Judgment that Respondent did not permit the municipal

ordinances to be reviewed and inspected in accordance with both §5-7-290, S.C. Code Ann. (Rev. 2004) and §30-4-100, S. C. Code Ann. (Rev. 2007), that such action was wrongful, and sought a Permanent Injunction requiring Respondent to comply with §5-7-290, S.C. Code Ann. (Rev. 2004) and §30-4-100, S. C. Code Ann. (Rev. 2007) as these statutes related to the municipal ordinances. Due to the position advanced by Respondent at the Trial of the matter vis à vis, Respondent's counsel's remarks, and the witnesses' testimony that the Town's ordinances were not codified in accordance with §5-7-290, S.C. Code Ann. (Rev. 2004), Appellant additionally sought to have the Trial Court declare that Respondent's municipal ordinances were not codified. As was indicated earlier, the Complaint from Case Number 2005-CP-26-1091 was not introduced at the Trial of the matter and may have been definitive with respect to what relief was actually being sought in the earlier action. However, it is clear that this issue was never actually ruled upon by Judge Howe in the 2005 action. Had she done so, the Order would have reflected it clearly. What we are left with, is an argument by Respondent that because municipal ordinances are contained within the definition of "public records", that the reference made by Judge Howe's Order to "public records" amounts to a ruling on this instant matter. There is nothing more; there is nothing less.

In order to accept the position advanced by Respondent here, the Court must be prepared to accept that once an individual brings an action pursuant to SCFOIA, and receives some sort of relief, they are forever barred from bringing any future claims pursuant to SCFOIA, regardless of whether the original claims are related to the later claims. Certainly, had the General Assembly intended such an absurd result; a result that contradicts the singular objective of the SCFOIA to illuminate the activity of governance itself, the General Assembly would have stated so. Alas, such a statement is not contained in the text of the SCFOIA and

Respondent's argument can find no shelter. Notwithstanding the foregoing, Respondent fails to comprehend or acknowledge that the underlying issues involved in this matter relate not to the SCFOIA violations, of which there are many, but instead, the significant failure of Respondent to comply with state law, specifically, §5-7-290, S.C. Code Ann. (Rev. 2004). At every stage of this litigation, Respondent has recklessly confused the issues implicated in this matter; it is unsurprising that this trend continues with respect to the issues claimed to be given *res judicata* effect. Quite simply, the case at bar is fundamentally different from the prior action filed in 2005 and as a result, the instant relief sought should not be precluded as a result.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO EXCLUDE THE WITNESSES OFFERED BY RESPONDENT WHERE RESPONDENT FAILED TO IDENTIFY THE WITNESSES PRIOR TO THE COMMENCEMENT OF THE TRIAL OF THE MATTER.

Respondent argues in its Brief that the Trial Court properly denied Appellant's motion to exclude Respondent's witnesses, namely William Booker, then the Town Manager of Respondent Town; Linda Cheatham, Interim Town Manager; and Cheryl Pereire, an administrative assistant with Respondent Town.[4] Respondent reasons that the Trial Court's ruling on the issue was appropriate given this Court's decision in *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001). However, Respondent is mistaken in its analysis.

In *Jumper*, this Court held that when a trial court is considering whether to impose the sanction of excluding a witness, the trial judge should apply the *Laney* factors, now referred to by Respondent as the *Jumper* factors specifically enumerated as: "(1) the type of witness

[4] Respondent refers to Ms. Pereire as the Town Clerk, however, Ms. Pereire testified that she held many different positions with Respondent Town including administrative clerk, administrative assistant for personnel, and Town Clerk. During the time period relevant to these proceedings, Ms. Pereire was employed as an administrative assistant. (Transcript of Hearing, p. 107, lines 3-13).

involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' names; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party." *Jumper* 348 S.C. at 152. It is important to recognize the factual scenario in *Jumper* involved a pre-trial order entered Ten (10) months prior to the trial that stated all witnesses intended to be used by the parties should be added no later than Ten (10) days prior to the trial and that both parties were to exchange witness lists Ten (10) days before the trial. Ms. Hawkins' counsel apparently sent a facsimile transmission identifying a psychologist as an expert witness she intended to use at the trial approximately Seven (7) or Eight (8) days prior to the trial of the matter in the Family Court. Mr. Jumper's counsel, in response, wrote his objection on the face of the facsimile transmission and returned it to Ms. Hawkins' counsel. At the call of the case, Ms. Hawkins' counsel moved to add the psychologist as an expert witness to which Mr. Jumper's counsel objected. The trial court denied Ms. Hawkins' motion stating that no reason had been presented to persuade the trial judge to deviate from the pre-trial order. On appeal, the trial court was reversed and the matter remanded. In doing so, the Court of Appeals found that the trial court failed to consider the *Laney* factors and thus, abused its discretion in excluding the witness without considering all of the factors. While Respondent is correct in referring to the *Jumper* factors and their applicability in the decision to exclude a witness, *Jumper* can be distinguished from the case at bar. Additionally, Respondent failed to acknowledge the case of *Bryson v. Bryson*, 378 S.C. 502, 662 S.E.2d 611 (Ct. App. 2008), which is more analogous to this matter.

In the instant case, Appellant sent discovery requests to Respondent on February 18, 2011, which were never formally answered by Respondent, although Respondent's counsel, at the

call of the case, began to orally respond to Appellant's discovery requests in open Court. On April 7, 2011, Appellant filed a Motion to Compel responses to these discovery requests. On July 27, 2011, a Hearing was held before the Honorable Benjamin H. Culbertson, which resulted in an Order filed September 16, 2011, which ordered Respondent to provide responses to Appellant's discovery requests within Thirty (30) days of the service of the Order and awarded Appellant attorney's fees for the non-compliance with the discovery process. Even after the Court imposed sanctions against Respondent concerning the failure to cooperate and engage in the discovery process, Respondent failed to answer or respond to Appellant's discovery requests. Furthermore, Respondent failed to satisfy the award of attorney's fees granted by the Order issued by Judge Culbertson on September 16, 2011 until after the conclusion of the Trial giving rise to this appeal.

The factual scenario in this case is distinguishable from that of *Jumper* in that first and foremost, Respondent herein failed to identify ***any witnesses at all*** due to its refusal to participate in the discovery process, both prior and subsequent to being sanctioned by the Court for said refusal. Furthermore, in this action no pre-trial Order was ever issued. In *Jumper*, Ms. Hawkins identified the potential expert witness, albeit the identification was made outside of the parameters the pre-trial Order allowed. An additional distinction can be drawn in that while Appellant presented a pre-trial brief in this matter, Respondent did not.[5] Respondent not only failed to answer discovery requests which would have identified these proposed witnesses, but

[5] Respondent claims in its Brief that Respondent presented a pre-trial brief a year prior to the Trial of this matter; however, Appellant contends that this is inaccurate. (Respondent's Initial Brief, p. 31). While the case appeared on a trial roster during the term that Respondent references, the matter was continued due to a medical issue being experienced by then counsel for Respondent. No pre-trial brief was produced at that time. Additionally, it is notable that while Respondent claims that a pre-trial brief had been presented on January 14, 2013 naming these witnesses, Respondent could not produce a copy at the call of the case on January 13, 2014, and presumably it could not be located in the Court's file. Incidentally Mr. Booker was asked during cross examination how long he knew he would be a witness in this Trial, to which Mr. Booker responded "Couple of days." (R. p. 234, line 22- p. 235, line 1).

it also missed the opportunity to do so by failing to present the Trial Court with a pre-trial brief which would have likewise identified these proposed witnesses. Ultimately, while Respondent argues that the Trial Court's ruling was correct based upon the *Jumper* analysis, there is no evidence to support that the Trial Court actually engaged in a *Jumper* analysis. In fact, it appears that the Trial Court's decision concerning the motion to exclude the witnesses was reached solely based upon the South Carolina Court of Appeals' decision in *Teseniar v. Prof'l Plastering & Stucco*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014). (R. p. 56, line 15- p. 57, line 8). Nothing is contained in the Transcript of the January 13, 2014 hearing that suggests the Trial Court went into any further inquiry on the matter. If, as Respondent implies, and the case law suggests that the decision to exclude a witness without engaging in a *Jumper* style analysis is an abuse of discretion and constitutes reversible error; would it not seem logical that to refuse to exclude a witness without engaging in that analysis likewise constitute an abuse of discretion?

The present scenario is more comparable to that of *Bryson v. Bryson*. In that case, the South Carolina Court of Appeals referred again to the *Jumper* factors when considering whether a witness should be excluded in an action brought by a personal representative of an estate against an individual who held the decedent's power of attorney, and under such authority, transferred substantial assets out of decedent's estate. The defendant in *Bryson* attempted to present a fact witness at the trial who had not been identified in his discovery responses and was not disclosed to the plaintiff until the morning of trial. The special referee allowed the defendant to proffer the witness, although, the witness' testimony was excluded by the special referee after the proffer. On appeal, the Court of Appeals affirmed the special referee's decision to exclude the witness, finding that the special referee considered the *Jumper* factors in

reaching its decision. Furthermore, the *Bryson* Court references the South Carolina Supreme Court decisions in *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 572 (2003) and *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996) ostensibly to imply that due to the drastic effect the exclusion of a witness' testimony could have on the outcome of an action and the preference that cases be decided on the merits as opposed to technicalities, evidence of intentional misconduct, willful disobedience, or gross indifference is necessary to impose such a drastic sanction as the exclusion of a witness.

In the case at bar, Respondent has exhibited an extensive history of failure to abide by the rule of law and Court Orders, as shown not only by the sanctions imposed by the Trial Court for failure to participate in the discovery process, but the numerous failures to conform to SCFOIA, §5-7-290, S.C. Code Ann. (Rev. 2004) and sanctions against the Town in other litigation. Respondent has likewise shown a predilection for being unresponsive or tardy in meeting its obligations or responsibilities; whether it be in submitting a proposed Order, responding to SCFOIA requests, or providing information ordered to be produced. Perhaps most important in this regard is the excessive volatility of Respondent Town's administration, both politically and in the schizophrenic manner in which the leadership of Respondent Town manages its affairs. At times, it appears the systemic failures of Respondent are due to steely defiance; at others, its negligible ability to govern, perhaps even general negligence in that respect. While the source of the problems arising out of Respondent Town's affairs may be difficult to pinpoint, it is clear that there is at least modest evidence of intentional misconduct, willful disobedience, or gross indifference, if not more.

Respondent's Brief attempts to depict several instances prior to and during the Trial of this matter that, according to Respondent's view, indicate that Appellant was on notice that the

witnesses it presented at the Trial would be called. Specifically, with respect to Mr. Booker, then the Town Manager for Respondent Town; Respondent suggests that the fact that Mr. Booker was identified in an Order[6] as the party to be served with any legal process after counsel had been relieved put Appellant on notice that he would be called as a witness in the Trial of this matter. Respondent further attempts to bolster its argument in pointing to the fact that one of the requests for production propounded in this action requested a copy of Mr. Booker's personnel file with Respondent Town, suggesting that the request itself put Appellant on notice that Mr. Booker was likely to be called as a witness.[7] Yet, even if the Order referenced by Respondent existed in this matter, which Appellant specifically questions; it is substantial conjecture to infer that Mr. Booker would be used as a witness simply because, as Town Manager, he was identified as the proper party for service in the absence of an attorney representing the Town, especially in light of the fact that it is within his duties as Town Manager to do so. Furthermore, being an agent for service of process, in a similar mode as that of a registered agent for a corporation, does not address whether or not the individual had personal knowledge of the facts surrounding the matter. As to the notice alleged to have been imputed by the request of Mr. Booker's personnel file, the information was never produced, therefore it is somewhat disingenuous to argue that such a request for that information put Appellant on notice that Mr. Booker would testify at the Trial of the matter. What is striking is that Respondent contends that these events put Appellant on notice that Mr. Booker would be a witness at the Trial; yet, when Mr. Booker was asked about how long he had known he

[6] Respondent refers to an Order signed by Judge Hyman, naming Mr. Booker as the appropriate party for service of process as a result of Town attorneys moving to be relieved as counsel. However, Appellant's counsel, after diligent search cannot locate said Order being issued in this case. There is such an Order in another case between the parties relating to issues arising from the "Atlantic Beach Bikefest" festival, in which Town attorneys were relieved as counsel. Nevertheless, this Order was never submitted into evidence and is outside of the Record in this matter.

[7] For what it's worth, Respondent never produced the personnel file of Mr. Booker and specifically in its Brief, objects to the requested production.

would be testifying at the Trial on cross examination, Mr. Booker indicated that he had only known for a couple of days. (R. p. 234, line 22- p.235, line 1). Surely, if Mr. Booker had only known of his impending testimony for "a couple of days", how could Appellant had known for years, as Respondent now argues?

Likewise, with respect to Ms. Pereire's testimony in addition to Mr. Booker's, Respondent points to the admission of exhibits at the Trial, specifically a letter signed by Ms. Pereire and a letter addressed to Mr. Booker by Appellant, to suggest that Appellant was on notice of their anticipated testimony. (R. p. 16; p. 26). Respondent's position, it appears, is that these witnesses would have been necessary to authenticate the letters; however, Appellant could have and did in fact authenticate both letters during his direct testimony, without the need for these witnesses. With respect to Ms. Cheatham, Respondent asserts that Ms. Cheatham was disclosed on a pre-trial brief submitted at the trial roster meeting a year before the Trial, on January 14, 2013, which Appellant vehemently denies; yet Respondent has failed to provide any documentary proof that the document was provided or even created. No matter the legal contortions which Respondent has employed, Respondent cannot point to anything that supports Respondent's contention that Appellant knew that these witnesses would be called to testify, especially in light of the fact that some of them did not even know themselves more than a few days before the Trial. Apparently, Respondent believes Appellant and Appellant's counsel to be clairvoyant. Certainly, this Court can see that Respondent's argument is not reasonable with respect to Appellant's prior knowledge of these witnesses' participation in the Trial, when viewed within the context of this factual scenario.

Lastly, Respondent seems to contend that Appellant, in proceeding with the Trial of the matter, and, as Respondent claims, refusing to accept a continuance of the Trial, that Appellant

waived the issue of the exclusion of the witnesses. (Respondent's Initial Brief, p. 33). As has been a pattern in Respondent's Brief, Respondent's statement is misleading. Respondent's Brief claims that Appellant's counsel "refused to not make the request for his continuance to depose the witnesses" and cited to the Transcript of the proceeding. The actual exchange referenced by Respondent is as follows:

THE COURT: You want it continued?

MR.MULLINS: If that is my only available remedy. You are the last word on that, Judge.

THE COURT: Well, you know, I'm here and ready to hear whatever matters should be heard in this county. This is a case that is scheduled. As I recall from the roster meeting, we started out with about 40 or 50 and down to about three or four. We're here all week. If you need to depose any witnesses, we can adjourn and you can depose them. I'm not sure what other—other than wanting me to not fully hear the matter or exclude the witnesses, I'm not sure how that would affect the court's ability to be able to hear the matter scheduled if I'm unable to hear witnesses who may have something to add or subtract from the proceeding itself.

MR. MULLINS: I understand, Your Honor. I'm trying to preserve my objection for the record, and I haven't received written discovery responses at all during the case.

...

MS. MOODY: Your Honor, I'm ready to proceed. If the Court sees that we need to go forward, I'm ready to proceed. He's indicating that he wants these documents. Again, I didn't have a copy until today. I made my witnesses available. There aren't any other witnesses. I don't see the need for the town council member's files, I don't know the relevance of that. I don't know the relevance of any other council members—excuse me, employees of the town's records. I don't understand what he needs it for, but I'm not trying to prejudice him in any kind of way. He's had an opportunity to ask them what they know of codification, they explained it. He asked the questions. I believe I haven't had an opportunity to depose his client. I don't see any documents of any depositions with his client. All I know is these letters he presents, we can go off of those letters and proceed and let the Court decide.

THE COURT: This matter was filed in 2010 and we're now in 2014 and been through three lawyers, at least for the defense.

MS. MOODY: At least four lawyers and maybe two councils. And I guess the lawyers—I'm not sure they were entertaining settlement. I'm not in a position

to entertain settlement here today. I just think we need to go forward on the case, actually, but he wants discovery documents.

THE COURT: All right. Yes, sir.

MR. MULLINS: I'm not trying to be obtuse in this matter. I understand, and we're ready to go forward, but I don't think it is fair for there to be a last minute defense and witnesses disclosed, that is my objection. If the Court says no, well, Your Honor, obviously I'm old and have gray hair, so it won't be the first time even Your Honor has told me no.

THE COURT: Let's proceed with the matter, and if at any point in the process because of unavailability of any documents or witnesses, or whatever, if there needs to be a continuance, an adjournment or anything of the proceedings, we'll entertain that. I'm here to hear the matter, and all of the parties are present, so there is no better time than now.

MR. MULLINS: Am I to assume my motion is denied, for the record, so I can proceed?

THE COURT: Yes, sir.

(R. p. 58, line 14- p.59, line 8; p.63, line 3- p.64, line 22). While Respondent may view this as a "refusal to continue" the matter by Appellant; Appellant's perspective is that the Trial Court was insinuating that this Trial was going to proceed, regardless of whether Appellant moved to continue the matter. Appellant was placed into a precarious position where he risked irritating the Trial Court if he advanced his request for a continuance. Furthermore, it is necessary to view this scenario through the lens that the case had been pending at the time of Trial for Four (4) years due to the Respondent's refusal to participate in the matter in any meaningful way prior to Trial. Sure, Respondent can say that Appellant failed to depose witnesses; but let's be clear, Appellant didn't know who Respondent thought would be knowledgeable concerning the facts of this matter until the morning of January 13, 2014. Perhaps, Appellant at great expense, could have subpoenaed every person employed by Respondent during those Four (4) years; but isn't it wasteful to require Appellant to do so, when the Trial Court was unwilling to actually hold Respondent to a reasonable expectation to

engage in the discovery process? Simply put, Respondent has suffered no consequences for its intentional circumvention of the rule of law and instead, Appellant has been subjected to a heightened expectation. Such a result is inequitable.

CONCLUSION

Based upon the arguments presented herein, as well as the arguments advanced in Appellant's Brief, Appellant requests that this Court reverse the decision of the Trial Court and issue an Opinion declaring Respondent to be in violation of §5-7-290, S.C. Code Ann. (Rev. 2004) and §30-4-10, *et seq.*, S.C. Code Ann. (Rev. 2007) and enjoining Respondent from enforcing its municipal ordinances until such time as Respondent has brought itself into compliance with §5-7-290, S.C. Code Ann. (Rev. 2004). Alternatively, Appellant respectfully requests that this Court reverse the decision of the Trial Court and remand the matter for determination consistent with the relief sought in Appellant's Brief.

Respectfully Submitted.

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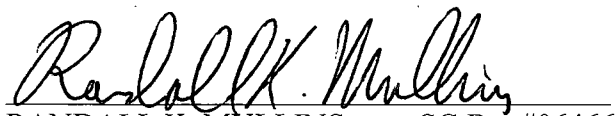

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Dated: July 8, 2016
North Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. Newman, Common Pleas Court Judge

2010-CP-26-10848
Appellate Case No.: 2015-001398

PAUL CURRY,

Appellant,

v.

TOWN OF ATLANTIC BEACH,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Reply Brief complies with Rule 211(b) SCACR.

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PROOF OF SERVICE

I certify that I have served copies of the Final Brief of Appellant, Final Reply Brief of Appellant and Record on Appeal via regular U.S. Mail addressed to the following:

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