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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

Honorable William Jeffrey Young, Presiding Judge

Case No. 2010-CP-26- 05964

Appellate Case No. 2013-000195

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

v.

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

FINAL BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR IN FINDING THERE WAS NO REMAINING JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES?

B. DID THE TRIAL COURT ERR BY INCLUDING IN ITS ORDER ERRONEOUS FINDINGS UNSUPPORTED BY THE RECORD THAT HAVE A COLLATERAL EFFECT ON MATTERS ACKNOWLEDGED BY THE TRIAL COURT AS EXISTING BUT NOT PROPERLY BEFORE THE TRIAL COURT?

II. STATEMENT OF THE CASE

On July 6, 2010, Appellant William H. Bailey, Jr. (hereinafter "Bailey," "Plaintiff," or "Appellant") commenced this civil action in the Horry County Court of Common Pleas, Fifteenth Judicial Circuit, seeking declaratory and injunctive relief, in addition to an award of costs and attorney fees, against his former employer, the City of North Myrtle Beach (hereinafter the "City," "Defendant," or "Respondent"). (R. pp. 26–27.)

The City of North Myrtle Beach is organized and managed under the council-manager form of government as described in the South Carolina Code of Laws at S.C. Code Ann. §§ 5-13-10 *et seq.* (1976). (R. p. 23, ¶ 5; R. pp. 36–37; R. pp. 40–41; R. p. 23, ¶ 5; R. pp. 222–223; R. pp. 226–227; R. p. 147, lines 9–18.) The City Manager's powers and duties are set forth in the South Carolina Code of Laws at S.C. Code Ann. § 5-13-90, S.C. Code Ann. § 8-17-160 (1976), and the Code of Ordinances of the City of North Myrtle Beach at Chapter 2, Article III,

§§ 2-56 *et seq*. (R. p. 23, ¶ 6; R. pp. 40–41; R. pp. 226–227; R. p. 148, lines 13–21.) Recognizing the Respondent's form of government, the terms "Respondent," "City," and/or "City Manager" may be used interchangeably herein.

At the time of his termination from employment, Bailey was employed in the Respondent's Public Safety Department as a Police Lieutenant. (R. p. 302; R. p. 173, lines 7–8.) Following Bailey's termination from employment by the Respondent's City Manager (R. pp. 34–35; R. pp. 220–221; R. pp. 305–306, ¶¶ 9–10; R. p. 119, lines 18–20), Bailey timely filed a request for an employee grievance hearing pursuant to the Respondent's Employee Personnel Manual procedures in effect at the time of his termination from employment. (R. pp. 29–33; R. pp. 36–39; R. p. 215–219; R. pp. 222–225; R. p. 128, lines 2–4; R. p. 157, lines 9–12; R. p. 157, lines 17–21; R. p. 157, line 25 – p. 158, line 4.) By Ordinance of the Respondent's City Council, the provisions of which were incorporated by reference into the Respondent's Code of Ordinances pursuant to Chapter 17, Article I, § 17-2 (R. p. 332; R. p. 117, lines 23–24), the Respondent had adopted an employee grievance procedure in accordance with the "County and Municipal Employees Grievance Procedure Act," S.C. Code Ann. §§ 8-17-110 to -160 (1976) (hereinafter the "Act"). After initially confirming that Bailey was entitled to an employee grievance hearing (R. p. 156, lines 12–16), and commencing the scheduling of such a hearing (R. pp. 36–37; R. pp. 222–223; R. p. 157, line 9 – p. 158, line 6), the Respondent's City Manager, acting through counsel, reversed the decision to hold an employee grievance hearing

for Bailey and based that reversal upon an opinion of Respondent's counsel. (R. pp. 40–41; R. pp. 226–227; R. p. 129, line 23 – p. 130, line 2; R. p. 131, line 24 – p. 132, line 5; R. p. 206, lines 19–23; R. p. 207, lines 13–17.)

In lieu of an employee grievance hearing authorized and organized under the Respondent's existing employee personnel procedures (R. pp. 29–33; R. pp. 215–219; R. p. 332), the Respondent, by and through its counsel, offered Bailey an opportunity to be heard in an undefined format of an unprecedented public hearing on City property as to his reasons why the separation from employment was unjustified. (R. pp. 40–41; R. pp. 226–227; R. p. 133, lines 2–5; R. p. 134, lines 3–10; R. p. 208, lines 15–19.) Procedural rules for such a hearing were not contained in the Respondent's Code of Ordinances (R. p. 133, lines 7–15), and were not contained in the letter of Respondent's counsel wherein the hearing was offered, but were to be prescribed by the Respondent's City Manager, before whom Bailey might speak in a setting for which no rules of conduct had been established. (R. pp. 40–41; R. pp. 226–227.) There was no indication that Bailey would be allowed to call witnesses or submit evidence other than his testimony, and no indication that the City would be required to respond to any statement made by Bailey, or offer any opinion or comment as to the matters raised by Bailey. The Respondent's City Manager also indicated that the proceeding (called a "name clearing" hearing by the Respondent's City Manager (R. p. 208, lines 22–23) but undefined anywhere in the Respondent's

Code of Ordinances (R. p. 133, lines 7–10)) would not impact on the decision to terminate Bailey from employment. (R. pp. 40–41; R. pp. 226–227.)

In addition to seeking an employee grievance hearing through this present action, Bailey also sought to have the court issue a declaratory judgment that the Respondent's City Manager had no authority under the Respondent's Code of Ordinances to expend public monies on holding such a "name clearing" hearing that was foreign to the policies and procedures that had been adopted by the Respondent's City Council. (R. p. 26, ¶ 26; CITY OF NORTH MYRTLE BEACH, S.C., CODE OF ORDINANCES ch. 2, art. III, §§ 2-56 *et seq.*) In addition, Bailey sought a declaratory judgment that counsel for the Respondent's City Manager should be disqualified from representing, advising, counseling or instructing the Respondent's employee grievance committee when the conduct of the Respondent's City Manager was the subject of the complaint to be heard by that grievance committee. (R. p. 26, ¶ 27; R. p. 27, ¶ A.)

In his request for injunctive relief (R. p. 26, ¶ 29; R. p. 27, ¶ B), Bailey sought an order or orders of the lower court that the Respondent and its employees and agents must grant Bailey an employee grievance hearing in accordance with the Employee Personnel Manual that the Respondent's City Council had adopted by Ordinance in force at the time of his demand (R. p. 332; R. pp. 29–33; R. pp. 215–219; R. p. 117, lines 23–24); that such a hearing should only be conducted in accordance with the established procedures set forth in the Respondent's Employee

Personnel Manual as adopted by Ordinance of the Respondent's City Council (R. p. 332; R. p. 27, ¶ B; R. pp. 29–33; R. pp. 215–219); and, that counsel for the Respondent's City Manager should be disqualified from representing, advising, counseling or instructing any employee grievance committee of the Respondent in which the conduct of its City Manager was the subject of the complaint to be heard by that employee grievance committee. (R. p. 27, ¶ B.)

Finally, Bailey asked the court for an award of costs and attorney fees in connection with the action pursuant to S.C. Code Ann. § 15-77-300 (1976). (R. p. 27, ¶ C.)

In two (2) Motions to Dismiss the Plaintiff's lawsuit, the first dated July 29, 2010 and filed July 30, 2010, and the second dated nearly two years later on July 26, 2012 and filed July 31, 2012, the Respondent denied that Bailey was entitled to the relief sought by him. (R. pp. 324–327.) Respondent's denial was based upon several grounds, including that Bailey was an at-will employee and had no right to seek enforcement of the Respondent's Code of Ordinances affecting his former employment. (R. pp. 325–327; R. pp. 331–332.) Respondent also asserted that Bailey had retired from employment and had not been terminated. (R. pp. 40–41; R. p. 43, ¶ II; R. pp. 226–227.) The Respondent also generally sought dismissal of the action under Rule 12(b)(6), SCRCP. (R. p. 43, ¶ I; R. p. 324.)

The lower court (Hon. Benjamin H. Culbertson) heard the Respondent's July 29, 2010 Motion to Dismiss (R. p. 324) on March 9, 2011, and denied the Motion

by Form 4 Order dated March 9, 2011 and filed March 17, 2011. The Respondent failed thereafter to timely file an Answer pursuant to Rule 12(a), SCRCP, and Bailey sought and was granted an Entry of Default against the Respondent pursuant to Rule 55, SCRCP. The Entry of Default was signed by the lower court on April 12, 2011 and filed April 14, 2011. On April 25, 2011, the Respondent filed a Motion to Set Aside Entry of Default and to File Answer Out of Time, along with its Answer in this action. On July 6, 2011, Bailey filed his Return to Respondent's Motion to Set Aside Default, objecting to the setting aside of the Entry of Default. Bailey subsequently filed a Motion Seeking Summary Judgment on July 18, 2011 in the event the lower court set aside the Respondent's Default.

On May 16, 2011, following the lower court's denial of Respondent's Motion to Dismiss, but before the court held a hearing on the merits of the action, the Respondent's City Council gave First Reading to an Ordinance that, *inter alia*, abolished the Respondent's employee grievance committee in its entirety and removed all employee grievance procedures from the Respondent's Employee Personnel Manual. Second Reading by the Respondent's City Council occurred on June 6, 2011. A copy of the Ordinance was admitted without objection into the evidence of this case. (R. pp. 308–314; R. p. 140, lines 16–22.)

When the lower court (Hon. Benjamin H. Culbertson) heard the Respondent's Motion to Set Aside Entry of Default on August 31, 2011, Bailey withdrew his

objection to the setting aside of the default and the lower court so ordered on that same day by Form 4 Order, filed on September 12, 2011.

The lower court (Hon. Benjamin H. Culbertson) took Bailey's Motion for Summary Judgment under advisement, and subsequently denied the Motion by Order dated November 22, 2011 and filed November 23, 2011. (R. pp. 4–5.) In its Order dated November 22, 2011, the lower court found that Bailey's cause of action seeking injunctive relief was moot as to the actual holding of a employee grievance hearing since the Respondent had chosen to abolish the procedure in its entirety (R. p. 331), but the lower court did not dismiss Bailey's entire case as moot. (R. pp. 4–5.)

Bailey filed a Motion Seeking Leave to File an Amended Complaint on December 14, 2011, which the lower court (Hon. Benjamin H. Culbertson) continued by Order dated April 29, 2012, and denied by Form 4 Order dated July 23, 2012. (R. pp. 6–7.) The lower court, in its July 23, 2012 Form 4 Order, also ordered that Bailey's "cause of action for declaratory relief is still pending in this case and shall be scheduled for trial." (R. pp. 6–7.)

Thereafter, the Respondent filed a second Motion to Dismiss, dated July 26, 2012 and filed July 31, 2012, seeking to have to the lower court hold the entire action as moot pursuant to Rule 12(c), SCRCP. (R. pp. 325–327.)

The trial court (Hon. W. Jeffrey Young) heard the remaining issues in the action, including the Respondent's [second] Motion to Dismiss dated July 26, 2012 (R. pp. 235–237), in a non-jury trial on October 11, 2012, at which time the trial court

denied the Respondent's [second] Motion to Dismiss. (R. p. 97, line 2 – p. 114, line 24.) Respondent renewed its motion two additional times as motions for Directed Verdict at the close of Bailey's case (R. p. 204, line 20 – p. 205, line 5) and at the end of the trial (R. p. 214, lines 22–25).

On November 13, 2012, the trial court issued its Order, which was filed with the Clerk of Court on November 27, 2012. (R. pp. 8–19.) In its Order the trial court found there was no justiciable case or controversy between the parties and that the court lacked jurisdiction to grant a declaratory judgment. (R. pp. 13–16.) The trial court further concluded that even if the court had jurisdiction, the Appellant was not entitled to a declaratory judgment that he was entitled to an employee grievance hearing because he retired. (R. p. 19.)

Bailey timely filed his Motion for Reconsideration, dated November 21, 2012 and filed November 26, 2012, which the court denied by Order dated January 12, 2013 and filed January 23, 2013. (R. pp. 328–330; R. pp. 20–22.)

This Appeal followed by Bailey's timely filed Notice of Appeal dated January 28, 2013. The Appellant received the October 11, 2012 trial transcript from the court reporter on February 6, 2013.

III. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO REMAINING JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES.

The relief sought by Bailey was not moot at the time of the October 11, 2012 trial before the Honorable W. Jeffrey Young. Bailey sought a Declaration that at the time of his demand for an employee grievance hearing and the commencement of this action, he was entitled to a hearing under the Respondent's Code of Ordinances (R. pp. 29–33; R. p. 215–219; R. p. 331–332) and a Declaration that his liberty interest in his good name may have been impugned. Bailey also sought costs and attorney fees pursuant to S.C. Code Ann. § 15-77-300 (1976). (R. p. 24, ¶¶ 9–12; R. pp. 38–39; R. pp. 224–225.)

There are three prerequisites that must be established prior to the recovery of costs and attorney fees by a party contesting state actions: (1) the contesting party must be the *prevailing party*; (2) the court must find that the agency acted without substantial justification in pressing its claim against the party; and (3) the court must find that there are no special circumstances that would make an award of attorney's fees unjust. City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005); Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) ("Substantial justification" is a lesser standard of conduct than "frivolous").

In a case arising under the South Carolina Freedom of Information Act with somewhat analogous circumstances where a challenge to the actions of a public body

was raised, fees were awarded even though the wrong was rectified after the commencement of a lawsuit. Sloan v. Friends of the Hunley, Inc., 393 S.C. 152, 711 S.E.2d 895 (2011). In the present case, there was no attempt to rectify the wrong, rather the Respondent intentionally acted to abolish its grievance procedures to deny Bailey his lawful right to a hearing before the Respondent's employee grievance committee. (R. pp. 34–35; R. pp. 220–221; R. p. 156, lines 4–16.) However, as shown below, the Respondent's action was ineffective under its Code of Ordinances, because Bailey's right to the hearing had vested at the time of his demand (R. p. 331), and later abolition of the employee grievance procedure by the Respondent did not moot Bailey's rights under the Respondent's Employee Personnel Manual, the relevant portions of which were admitted as Plaintiff's Trial Exhibit 1. (R. pp. 215–219; R. p. 331.) Those provisions expressly provide that a "discharge" is included in the matters that are properly the subject of a grievance by an employee of the Respondent.

As confirmed by the South Carolina Court of Appeals in Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (citing Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)):

> "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." . . . "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." (Citations omitted.)

Pond Place at 16, 567 S.E.2d at 889.

In Sloan v. Greenville Co., 356 S.C. 531, 590 S.E.2d 8 (Ct. App. 2003) (hereinafter "Sloan I"), a taxpayer sought a declaratory action against the county government, alleging the county failed to comply with its ordinances governing procurement of construction services on three public works projects. The defendant county government asserted the cases were not justiciable (in part) because the issues were moot, since the public works projects had been completed. Sloan I at 543, 590 S.E.2d at 345.

The Court of Appeals held that there remained a justiciable controversy even though the particular projects had become a moot issue as they had all been completed before trial. The issue of compliance with the procurement ordinances was of public importance, the issue was capable of repetition, and it was not improbable that similar challenges could navigate the litigation process before the question at issue became an academic one. Sloan I at 555, 590 S.E.2d at 351.

The Court of Appeals also observed that despite an issue's mootness,

> [T]here are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

<u>Sloan I</u> at 356 S.C. 531, 552 590 S.E.2d 8, 349 (citing <u>Curtis v. State</u>, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). The determination whether a particular suit raises "questions of imperative and manifest urgency" must be decided on an individual basis. <u>Sloan v. Greenville Co.</u>, 361 S.C. 568, 606 S.E.2d 464 (2004).

In the present case, Bailey sought to have the court determine his right to an employee grievance hearing to which he was entitled under the terms of Respondent's Employee Personnel Manual (R. pp. 331–332), a manual codified into the Respondent's Code of Ordinances in effect at the time of his demand for such a hearing and at the time of the filing of his Complaint. (R. p. 332; R. pp. 29–33; R. pp. 215–219; R. p. 116, lines 16–21; R. p. 156, lines 12–16.) Chapter 1, § 1-4 of the Respondent's Code of Ordinances, provides expressly that "[t]he repeal of an ordinance, or its expiration by virtue of any provision contained therein, *shall not affect any right accrued* . . . or any proceeding commenced before the repeal took effect or the ordinance expired." (Emphasis added.) (R. p. 331.) Accordingly, Bailey's right to an employee grievance hearing became vested upon his demand after having been issued the ultimatum and then terminated. Any subsequent action by the Respondent's City Council could not have then foreclosed Bailey's lawful right to an employee grievance hearing. (R. p. 331.)

After initially confirming that Bailey was entitled to the employee grievance hearing he demanded, and commencing the scheduling of such a hearing (R. pp. 36–39; R. pp. 222–223; R. pp. 224–225), the Respondent's City Manager,

acting through counsel, reversed the decision to hold an employee grievance hearing for Bailey and based that reversal upon an uninformed opinion of Respondent's counsel that Bailey had, in fact, retired from employment in lieu of being terminated. (R. pp. 40–41; R. pp. 226–227; R. p. 132, lines 2–5.) Respondent's counsel admitted in her testimony that she had neither consulted with Bailey nor reviewed the records of South Carolina Police Officers Retirement System ("PORS"). (R. pp. 228–302; R. p. 211, lines 11 – p. 212, line 10.) Respondent's counsel based her opinion upon her reading of a pleading in a separate but related lawsuit (Horry County Court of Common Pleas Civil Action No. 2010-CP-26-05145) (R. pp. 48–96); however, she failed to distinguish for the trial court the alternate causes of action pled against co-defendants in the other action.

The Respondent's abolition of the entire employee grievance procedure was designed to prejudice Bailey, but was ineffective as a matter of law. (R. pp. 331–332.) This action was taken during the pendency of Bailey's lawsuit and specifically after the Respondent's Motion to Dismiss was denied on March 15, 2011. (R. p. 324; R. pp. 308–314; R. p. 140, lines 16–20.) The Respondent's action was taken in violation of Bailey's vested right to an employee grievance hearing under the Respondent's Code of Ordinances at Chapter 1, § 1-4 (R. p. 331), and Chapter 17, Article I, § 17-2 (R. p. 332), as those Ordinances existed at the time of Bailey's demand for an employee grievance hearing and at the time of commencement of Bailey's lawsuit. The Ordinance abolishing the procedure

was initiated by the Respondent's staff and litigation counsel prior to May 12, 2011, and finalized on June 4, 2011 with the second reading by the Respondent's City Council. (R. pp. 308–314.)

Pursuant to Rule 201 of the South Carolina Rules of Evidence, the trial court and this Honorable Court of Appeals may take judicial notice of the Respondent's Code of Ordinances at any time in the proceedings. The lower court's ruling by the Honorable Benjamin H. Culbertson that the demand for an employee grievance hearing was moot (R. pp. 4–5; R. p. 331) was in error, and that error was continued by the Honorable W. Jeffrey Young at the proceeding giving rise to this present Appeal. (R. p. 106, lines 10–12; R. p. 110, lines 7–9.)

Respondent's actions are capable of repetition in an attempt to evade review by the courts of unlawful action that also violates public policy. Should Bailey's case be considered moot by this Honorable Court, the Respondent and those similarly situated would have an effective license to disregard rules codified as law into an Ordinance. (R. p. 332.) For example, the Respondent could re-introduce an identical employee grievance procedure immediately after concluding litigation with Bailey, and thereby return to the procedure the Respondent had followed for many years only to again abolish it if a challenge arose similar to that made by Bailey.

The South Carolina General Assembly found that "a uniform procedure to resolve grievances of county and municipal employees arising from their public employment will contribute to more harmonious relations between public employers

and public employees and result in an improvement in public service. . . ." (S.C. Code Ann. § 8-17-110), and set forth in subsequent sections of the Act the required procedures (S.C. Code Ann. §§ 8-17-120 to -160 (1976)). That Act mandates that a plan "shall conform substantially" with S.C. Code Ann. § 8-17-120 (1976). See, e.g., Bunting v. City of Columbia, 639 F.2d 1090, 1095 (4th Cir. 1981) ("Since Columbia has adopted a plan, § 8-17-120 mandates that the plan "shall conform substantially" to the provisions of the Act. We hold that Columbia's plan differs in a material respect from that set forth in the Act.").

The actions of the Respondent are actions of a governmental agency subverting the stated public policy of the General Assembly by refusing to conform to lawfully created procedures. By abolishing its employee grievance procedures *ex post facto*, the Respondent attempted to circumvent sound public policy established by the General Assembly and thereby deprive Bailey of his lawful right to an employee grievance hearing pursuant to long-established employee grievance procedures. (R. pp. 308–314.) The Respondent's conduct raises important questions of public interest for the future guidance of local governments, however abstract or moot the question may have become in the immediate contest (which the Appellant does not concede). Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88, 96–97 (1947). These issues are of imperative and manifest urgency and a justiciable controversy exists in the present case. The Court should assert jurisdiction and

establish a rule for future conduct of public bodies in a matter declared by the legislature as one of important public interest.

In Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 169–170 (2000), the United States Supreme Court, in considering illegal discharges of chemicals into the North Tyger River in Roebuck, South Carolina, explained:

> A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. [Citation omitted.] If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968). The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. Ibid.

The Respondent has admitted that any public employee would have a liberty interest in having a hearing to clear their name "if they believe their good name has been dishonored and irrespective of what policies there are, ..." (R. pp. 40–41; R. p. 208, lines 1–10; R. pp. 226–227), but denied that an employee grievance hearing would be an appropriate forum. (R. p. 208, lines 11–21.)

In justifying that position of the Respondent, counsel for Respondent referenced the decided case of Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987). (R. p. 209, lines 12–21.) However, the case was misstated by Respondent's

counsel, who testified as a witness. The Eubanks case did not address (because it was not an issue in the case) whether applying to draw retirement benefits effective after separation from employment was a form of "resignation" from employment. As a result, the Court subsequently misapplied Eubanks in its written Order. ("The question is whether, faced with a choice between resigning or being fired, he chose – albeit under pressure – to resign by retiring.") (R. p. 17.)

In Eubanks, three city employees, Eubanks, Casey and Wiggins were falsely accused of malfeasance in office as employees of the City of Myrtle Beach; they each were offered the opportunity to resign with severance or be terminated from employment. Before an investigation by the State Law Enforcement Division ("SLED") was completed, the three employees were suspended from office with pay. Eubanks at 59, 354 S.E.2d at 900. SLED completed its investigation in January 1983, and found no evidence of wrongdoing implicating the three employees. Notwithstanding the foregoing, the city manager offered Eubanks, Casey and Wiggins an alternative of resignation or termination. Wiggins resigned with severance pay; Casey and Eubanks were terminated. Casey and Eubanks requested and received an employee grievance hearing. Wiggins's request was refused because he had resigned. Eubanks at 60, 354 S.E.2d at 900.

In addition to the city grievance committee hearing, all three city employees were made subject to a complaint to the State Ethics Commission on a charge of using a public office for personal gain. Eubanks at 60, 354 S.E.2d at 900. At the State

Ethics Commission hearing, Eubanks and Casey were afforded the right to cross-examine witnesses in a formal hearing where the city manager was not the presiding officer nor a member of the deliberating body. As a result of the hearing all charges against them were dismissed. Eubanks at 60, 354 S.E.2d at 900.

After allowing Eubanks and Casey to have a grievance hearing, the city manager refused to rehire any of the employees, despite the State Ethics Commission hearing and dismissal and despite the city grievance committee's recommendation of rehiring Casey though not Eubanks. Eubanks at 61, 354 S.E.2d at 901. The Supreme Court held that sufficient due process to avoid a risk of an incorrect decision was satisfied by the right to cross-examine witnesses at the State Ethics Commission.

As in the present case, the Respondent's City Manager had made statements beforehand to the local press implying dishonesty by the discharged employees. The Supreme Court upheld awards of $75,000 in libel damages against Smith in favor of Eubanks and Wiggins. Eubanks at 63, 354 S.E.2d at 902.

In the present case, no charges have been asserted against Bailey, and he is not the subject of an investigation by the State Ethics Commission; however, his reputation and good standing in the community have been impugned by statements of the Respondent's City Manager. (R. p. 175, lines 10–25.) Bailey has not been afforded anything other than an opportunity to make a public statement, to which the Respondent would not agree to reply or to allow witness testimony. (R. pp. 40–41; R. pp. 226–227.) The Respondent's unprecedented and vaguely described ad hoc

name clearing hearing affords no more right of redress to Bailey than could be exercised by standing on any street corner and proclaiming his position to pedestrians. Further, the Respondent in abolishing its long-standing employee grievance procedures did not offer a "name clearing hearing" as a substitute, whether in the format suggested by the Respondent's City Manager, or akin to the procedures before the State Ethics Commission where, for instance, evidence under oath is submitted and cross-examination allowed. (S.C. Code Ann. § 8-13-320(10)(f) (1976); Eubanks at 62, 354 S.E.2d at 901.) Accordingly, there remain justiciable issues worthy of the declaratory relief sought.

The trial court regarded the issue of whether Bailey should have had an opportunity to clear his name as irrelevant: "This isn't about a name clearing hearing, we're not going into that, this is about whether or not he is entitled to a grievance hearing." (R. p. 213, lines 12–15.) However, when issuing its Order, the trial court made an erroneous finding that Bailey had retired before he was terminated from employment, and considered the Eubanks case controlling. (R. p. 17.) This finding constituted error by the trial court, both as to matters of fact and as an application of law.

B. THE TRIAL COURT ERRED BY INCLUDING IN ITS ORDER ERRONEOUS FINDINGS UNSUPPORTED BY THE RECORD THAT HAVE A COLLATERAL EFFECT ON MATTERS ACKNOWLEDGED BY THE TRIAL COURT AS EXISTING BUT NOT PROPERLY BEFORE THE TRIAL COURT.

The trial court regarded the issue of whether Bailey should have had an opportunity to clear his name as irrelevant: "This isn't about a name clearing hearing, we're not going into that, this is about whether or not he is entitled to a grievance hearing." (R. p. 213, lines 12–15.) However, when issuing its Order, the trial court made an erroneous finding that Bailey had retired before he was terminated from employment, and considered the Eubanks case controlling. (R. p. 17.) There is no evidence in the record that Bailey resigned or that he ever chose to resign by retiring. In fact, the only evidence before the trial court was that the Respondent's City Manager issued an ultimatum to Bailey to resign or be terminated by 3:00pm on April 29, 2010. (R. p. 122, lines 18–23.) The Respondent's City Manager did not receive an unconditional letter of resignation from Bailey. (R. p. 122, line 24 – p. 123, line 13.) Bailey testified he was terminated from employment and did not resign. (R. p. 172, lines 15–22.)

The trial court erred in fact when making a finding that Bailey "resign[ed] by retiring" in lieu of being terminated. (R. p. 17.) The trial court erroneously confused the terms " retiring" and "resigning," and considered them to be synonymous when in the present case they are in fact distinguishable. The trial court ignored (without

comment) the testimony of the only witnesses who had actual knowledge of the events as they occurred, and failed to recognize a very important distinction between "retiring" from the City of North Myrtle Beach and Bailey's applying for accrued benefits with a different entity, the PORS, after Bailey was terminated. The Respondent's City Manager confirmed he eventually terminated Bailey effective April 30, 2010. (R. p. 130, lines 15–24.) Bailey took retirement under the PORS on May 1, 2010. (R. p. 265, p. 273; R. p. 185, lines 15–17.) Bailey was terminated before his retirement under the PORS became effective.

Similarly, the trial court erred by confusing Bailey's purchase of five (5) years additional service credits within the PORS as evidence that Bailey had retired before being terminated. (R. p. 17.) Any active member of PORS may purchase up to five (5) years of non-qualified service credit at any time while employed. (R. p. 167, line 21 – p. 168, line 3.)

Only a few days after an earlier employee grievance hearing convened by the Respondent in April 2010, at the request of Bailey who contested a prior disciplinary action (R. p. 118, line 25 – p. 119, line 9; R. p. 130, lines 15–24), the Respondent's City Manager demanded that Bailey resign from employment or he would be terminated on April 29, 2010. (R. p. 122, lines 18–23.) The Respondent's City Manager in fact issued the ultimatum to Bailey because of his testimony in his earlier employee grievance hearing (R. p. 119, lines 18–25; R. p. 120, lines 3–19; R. p. 171, line 19 – p. 172, line 6; R. p. 174, lines 18–22), in violation of the

non-retaliation provision of S.C. Code Ann. § 8-17-330 (1976) ("An employee must not be disciplined or otherwise prejudiced in employment for exercising rights or testifying under these processes."). Bailey refused to resign as demanded. (R. p. 121, lines 15–19; R. p. 122, line 18 – p. 123, line 8; R. p. 154, lines 2–18; R. p. 171, line 13 – p. 172, line 3; R. p. 172, lines 21–22; R. p. 173, lines 1–3; R. p. 175, lines 10–20; R. p. 176, line 21 – p. 177, line 4; R. p. 181, lines 22–23.) Thereafter, the Respondent's City Manager terminated Bailey from employment. (R. p. 119, lines 18–20; R. p. 121, lines 15–20; R. p. 122, lines 13–16; R. p. 122, lines 18–25; R. p. 123, lines 1–8; R. p. 124, lines 10–25; R. p. 125, lines 1–11; R. p. 126, line 22 – p. 127, line 2; R. p. 128, lines 5–7; R. p. 130, lines 15–24; R. p. 135, lines 8–10; R. p. 150, lines 22–24; R. p. 159, lines 10–12; R. p. 161, lines 18–19; R. p. 162, lines 23–24; R. p. 167, lines 8–11; R. p. 171, lines 24–25; R. p. 172, lines 1–3; R. p. 172, lines 15–18; R. p. 172 lines 21–22; R. p. 172, lines 24–25; R. p. 173, lines 1–3.) However, without consulting or informing Bailey, the Respondent's City Manager decided to alter Bailey's date of termination by one day allegedly in order to allow Bailey to benefit from the Respondent's health insurance policy for employees who participate in a qualified retirement plan after twenty (20) years of service with the Respondent. (R. pp. 34–35; R. pp. 220–221; R. p. 124, lines 7–25; R. p. 125, lines 1–11; R. p. 155, lines 6–10.) The City's policy affording health insurance coverage to retirees does not, however, distinguish between whether the participation in retirement is through the Respondent's plan of retirement or through

the PORS. (R. pp. 315–316.) Without any notice to Bailey, the Respondent's City Manager unilaterally altered the date of termination to April 30, 2010. (R. pp. 34–35; R. pp. 220–221; R. p. 125, lines 3–8; R. p. 128, lines 17–25; R. p. 152, lines 3–13.)

Plaintiff's Trial Exhibit 6 was admitted without objection (R. p. 182, lines 2–8) and consisted of the PORS's records pertaining to Bailey (R. pp. 228–302). Bailey was a member of the PORS and had been for approximately twenty (20) years prior to his termination from employment. According to the Respondent's City Manager, Bailey was terminated from employment. (R. pp. 34–35; R. pp. 220–221; R. p. 119, lines 18–20; R. p. 120, lines 15–17; R. p. 123, lines 20–21; R. p. 124, line 24 – p. 125, line 2; R. p. 130, lines 17–19; R. p. 154, lines 1–8; R. p. 161, lines 18–19; R. p. 162, lines 22–24; R. p. 170, lines 20–21; R. p. 171, lines 24–25; R. p. 172, lines 16–18; R. p. 173, lines 1–3.)

Plaintiff's Trial Exhibit 6 includes a copy of the PORS Service Retirement Application completed by Bailey on April 30, 2010 (R. p. 264), prior to Bailey being informed that the Respondent's City Manager had changed his date of termination. (R. pp. 34–35; R. pp. 220–221; R. p. 125, lines 3–8; R. p. 128, lines 17–25; R. p. 152, lines 3–13.) The application is a standard form used by the PORS. It expressly states on the top of the form, *inter alia*, that "Applications for retirement may be filed as early as six months prior to, and up to three months after, your service effective date." (R. p. 264.) Bailey's application reflects his understanding that the last day he would be on the Respondent's payroll "will be

or was . . . 04-29-2010," which is consistent with the ultimatum given Bailey and his understanding on the day that Bailey completed his application. (R. p. 264.)

Plaintiff's Trial Exhibit 2, admitted without objection (R. pp. 152, lines 10–15), evidences Respondent's admission, through Respondent's counsel, that Bailey was not informed until May 2, 2010 that the Respondent's City Manager altered Bailey's termination date without advising Bailey. (R. pp. 34–35; R. pp. 220–221; R. p. 152, lines 3–23; R. p. 154, lines 10–18; R. p. 176, line 7 – p. 177, line 4.) Clearly in light of Respondent's admission and the record, it could not have been found by the lower court that Bailey "resigned by retiring" (R. p. 17) when the only information available to Bailey was that he had been terminated with the effective date of April 29, 2010, one day prior to Bailey's submission of his application for retirement (R. p. 264).

Bailey's PORS application was accepted and placed "on hold" by the PORS pending confirmation by the Respondent of Bailey's last date of employment and confirmation that Bailey would receive a full month's credit for service during the month of April 2010. (R. pp. 245–246; R. pp. 264–265; R. pp. 269–271.) Thus, the application could not proceed, and Bailey could not have retired, until the Respondent provided information, including confirmation of the last day of employment, which was not submitted by Respondent to the PORS until May 19, 2010. (R. pp. 235; R. pp. 245–247; R. p. 265; R. pp. 269–271; R. p. 183, line 13 – p. 184, line 19.)

The effective date upon which Bailey's retirement benefits became payable from the PORS post-dated the date of his separation from employment from the Respondent. (R. pp. 264–265; R. pp. 267–268; R. p 273.) When on May 19, 2010 the Respondent's payroll clerk completed the PORS application information, the Respondent indicated the date of Bailey's termination was April 30, 2010, and that the effective date of retirement for Bailey would be May 1, 2010. (R. p. 265.) The testimony of each—Respondent's City Manager Smithson, Respondent's attorney Stephen Savitz and Bailey—the only trial witnesses who had direct knowledge as to the issue, was consistent. Bailey refused to resign from his employment in response to the ultimatum issued to him. (R. pp. 34–35; R. pp. 220–221; R. p. 121, lines 15–19; R. p. 122, line 18 – p. 123, line 8; R. p. 154, lines 2–18; R. p. 171, line 13 – p. 172, line 3; R. p. 172, lines 21–22; R. p. 173, lines 1–3; R. p. 175, lines 10–20; R. p. 176, line 21 – p. 177, line 4; R. p. 181, lines 22–23.)

On May 28, 2010, the Appellant sought to have an employee grievance committee hearing concerning the ultimatum given him and his termination from employment. (R. pp. 38–39; R. pp. 224–225; R. p. 178, lines 10–14.) The Respondent, through counsel, acknowledged Bailey's request on June 8, 2010 and confirmed with Bailey's counsel that an employee grievance hearing would be convened. (R. pp. 36–37; R. pp. 222–223; R. p. 157, lines 1–5; R. p. 179, lines 11–23.) Counsel for the Respondent also confirmed that Bailey had not resigned but had been terminated from employment. (R. pp. 34–37; R. pp. 220–223;

R. p. 153, line 24 – p. 154, line 12; R. p. 154, lines 22–24; R. p. 160, lines 2–8; R. p. 160, lines 18–19; R. p. 162, lines 2–24.) Bailey's right to an employee grievance hearing vested on the date of his demand, under the Respondent's Code of Ordinances in force at the time of his demand. (R. pp. 38–39; R. pp. 224–225; R. pp. 331–332.)

When Bailey applied for unemployment benefits from the South Carolina Department of Employment and Workforce ("SCDEW"), the Respondent opposed the application on July 29, 2010 upon the grounds that Bailey had been terminated for cause. (R. p. 139, lines 2–24.) Thus, the only testimony before the trial court—from the Appellant, the Respondent's City Manager, Respondent's counsel, and the Respondent's Assistant City Manager—was unanimous: Bailey was terminated from employment and the Respondent so represented by sworn testimony at least until late July 2010 in a contested hearing before the SCDEW. (R. p. 137, line 11 – p. 139, line 24.)

The Respondent's Assistant City Manager, Steve Thomas, testified to the trial court that the Respondent had opposed Bailey's application for unemployment benefits from SCDEW because the Respondent took the position that Bailey had been terminated for cause. (R. p. 139, lines 18–24.) That assertion by the City was after Respondent's counsel, Linda Edwards, had opined to the Respondent and asserted to Bailey's counsel that "because Mr. Bailey chose to retire in lieu of being terminated, he is not entitled to a hearing before the City's grievance committee." (R. pp. 40–41; R. pp. 226–227; R. p. 206, lines 13–18.) Despite what the

Respondent's counsel had argued, the Respondent continued to maintain on the record that Bailey had been terminated. Bailey was entitled to rely on the Respondent's actions and was not precluded from pressing his demand for an employee grievance hearing because the Respondent's counsel had offered an opinion that conflicted with the actions and sworn testimony of the Respondent.

The testimony and admitted evidence also indicate a confusion and/or contradiction in the Respondent's position on this point: the Respondent's City Manager testified that he deferred the date of Bailey's termination so that Bailey could retire and receive continued health insurance benefits from Respondent. (R. p. 129, lines 1–8.) Moreover, the Respondent admits that Bailey never submitted a letter of resignation. (R. p. 122, line 24 – p. 123, line 7.) Thus, the trial court erred in its finding of fact that Bailey retired in lieu of being terminated (R. p. 17), and further erred as a matter of law in making that erroneous finding. "If a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though an appellate court cannot give effective relief in the present case." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); Holden v. Cribb, 349 S.C. 132, 138, 561 S.E.2d 634, 638 (Ct. App. 2002).

The issue of whether Bailey made moot his rights to seek monetary redress for termination of his employment was not an issue before the trial court. However, the trial court's unsupported finding concerning whether Bailey retired in lieu of being

terminated raises significant collateral consequences in other pending litigation between the parties. (R. p. 8, n.1; R. pp. 48–96.) Thus, when the trial court ruled that Bailey retired in lieu of being terminated (R. p. 17), and made that an alternative ground for its Order, the trial court erred as a matter of law because the issue was not properly before the trial court for determination, and because such findings may have a collateral effect on other pending litigation between the parties.

IV. CONCLUSION

Appellant William H. Bailey, Jr. respectfully seeks the following relief:

(A) That the Appeal of the Appellant be granted and that the matter be returned to the Circuit Court for Horry County for an Order consistent with the Court of Appeals findings that:

(1) There remained justiciable controversies between the parties at the time of the hearing, concerning issues of public policy and the possibility of repetition of unjustified actions by the Respondent; and

(2) That Appellant was entitled to the grievance hearing that he demanded and that the Respondent denied Bailey's grievance without justification;

(3) That the trial court had discretion under statute, including but not limited to S.C. Code Ann. § 15-77-300 (1976), to award

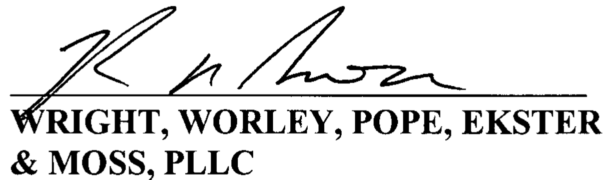
costs and attorney fees to Bailey if the trial court found that the actions of the municipal Respondent were without substantial justification;

(4) That the trial court erred in finding that Bailey chose to "resign by retiring"; and

(5) That the trial court erred in making findings on matters not properly before the trial court but holding the possibility of collateral effect on other litigation between the parties.

The Appellant requests oral argument before this Honorable Court.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. The undersigned further certifies that this Final Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.

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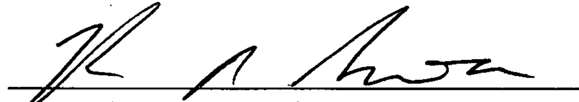

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable William Jeffrey Young, Presiding Judge

Case No. 2010-CP-26- 05964

Appellate Case No. 2013-000195

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

v.

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

PROOF OF SERVICE

I certify that I have served a copy of the **Final Brief of Appellant** in the above-captioned appeal on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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