THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

Case No. 2019-CP-26-01732

City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, ... Respondents,

v.

Horry County, ... Appellant.

RETURN TO MOTION TO TAKE JUDICIAL NOTICE

Pursuant to Rule 240(e), SCACR, the County submits this Return to the City's motion to take judicial notice.

Introduction

The City's motion to take judicial notice seeks to inject settlement discussions and irrelevant facts into this appeal. The City's motion should be denied because it violates Rule 402 (relevant evidence) and Rule 408 (settlement discussions) of the South Carolina Rules of Evidence. Additionally, the "facts" to which the City points do not contradict or impact any position the County has taken in this litigation.

Factual Background

Following the circuit court's injunction (which is the subject of this appeal), the City and the County engaged in ongoing settlement discussions. These settlement discussions occurred at the direction of the circuit court and upon urgings from the executive and legislative branches of government. The discussions continued throughout the briefing of this case. Ultimately, the City and the County were unable to reach a settlement.

As settlement discussions broke down, the City wrote to the County and threatened to file this motion, unless the County agreed to its settlement demands. When the County did not give into the City's demands, the City made good on its threat and asked the Court to take judicial notice of what it deems are two pertinent facts. First, the City asks this Court to take judicial notice of the County's rejection of the settlement agreement in principle. One of the reasons the County rejected the settlement agreement in principle (although not the only reason) was because not all of the municipalities in the County agreed to the settlement agreement in principle. The City contends the position the County is taking on appeal (that municipal consent is not required to collect the Hospitality Fee in the municipalities) is inconsistent with the County's settlement requirement (that all municipalities consent).

Second, the City asks this Court to take judicial notice of a County Council vote to cancel its participation agreement with the South Carolina Department of Transportation ("SCDOT"). The participation agreement would have obligated the County (but not any municipality) to SCDOT for the Interstate 73 project. Prior to

this lawsuit, the County dedicated a portion of the revenue it collected from the Hospitality Fee to that road project. When the City filed this lawsuit and obtained the injunction, the funding source for this project disappeared, and the County was forced to cancel the participation agreement. The City argues the County's cancellation of the participation agreement reveals that the County does not intend to use revenue from the Hospitality Fee for Interstate 73 and that the revenue from the Hospitality Fee is not being used for valid purposes under *Brown v. Horry County*, 308 S.C. 180, 417 S.E.2d 565 (1992).

Argument

I. Settlement Discussions

A. Rule 408 bars settlement discussions from evidence.

Rule 408 makes inadmissible any "[e]vidence or conduct or statements made in compromise negotiations." Rule 408, SCRE. This rule reflects our State's "strong public policy favoring the settlement of disputes." *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010).

The City's request to take judicial notice of the County's requirement that all municipalities in the County agree to the settlement violates Rule 408. County Council made that statement at its December 16, 2019 meeting while discussing the settlement agreement in principle* and considering whether to accept it, and now the

* The "in principle" is key. In a dispute involving public entities, the entity itself has to agree to settle for any agreement to be final.

City wants to use those statements to attack the County's litigation arguments. That is exactly what Rule 408 prohibits.

Likewise, the City's attempt to introduce evidence of the County's rejection of the settlement agreement in principle violates Rule 408. It is axiomatic that evidence related to a settlement proposal is inadmissible under Rule 408 to prove liability. *See, e.g., Hall v. Palmetto Enterprises II, Inc., of Clinton,* 282 S.C. 87, 92, 317 S.E.2d 140, 143 (Ct. App. 1984) ("We also recognize that an offer to compromise the controversy involved in a litigation is generally not admissible as an admission.").

Granting the City's motion would have ramifications beyond this case. If a party may (in the appellate courts, no less) thrust what happened during settlement discussions before the court, litigants would become understandably hesitant to discuss openly various settlement proposals or the most sensitive issues in a case. Not having such discussions makes settlement less likely and thwarts the public policy favoring them. *See Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) ("The public policy favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions.").

Accordingly, this Court should deny the City's motion to take judicial notice of the County's rejection of the settlement agreement in principle and the County's requirement that all municipalities must agree to the settlement agreement in principle.

B. Requiring unanimous municipal consent as a condition of settlement is not inconsistent with the County's litigation position.

The City accuses the County of taking inconsistent positions, when the County required unanimous municipal consent as a condition of settlement. This argument conflates legal requirements for adopting or extending the Hospitality Fee with settlement discussions.

The object of settlement is to end forever a dispute between parties. Here, the City's theory in this lawsuit is that the County cannot collect the Hospitality Fee in the municipalities without municipal consent. Therefore, without unanimous consent from all of the municipalities, it would be imprudent for the County to settle because settling would not accomplish the obvious goal of bringing this litigation to an end. Put another way, if less than all of the municipalities agreed to the settlement, then the County would still theoretically be exposed to litigation from those nonconsenting municipalities. Thus, if the County were to agree to settle, it required the consent of all municipalities. By requiring unanimous municipal consent as a condition to settle, the County was not taking inconsistent positions; rather, it was negotiating prudently.

The County's demand for unanimous consent from the municipalities in settlement does not mean the County is changing its legal position. To be sure, the County has consistently maintained that municipal consent is not required for the County to collect the Hospitality Fee in the municipalities pursuant to S.C. Code § 6-

1-330 and § 6-1-760. This always has been and always will be the County's legal position.

II. Participation agreement with SCDOT

A. The County's cancellation of the participation agreement with SCDOT is not relevant to the issues on appeal.

The key question in this case is whether municipal consent is necessary for the County to collect the Hospitality Fee within the municipalities. The County's cancellation of the participation agreement with SCDOT is not relevant to that question. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. The City makes no argument as to how the cancellation of the participation agreement with SCDOT is probative to the question of whether municipal consent is required. Presumably that is because none exists.

Instead of showing how the cancellation of the participation agreement is relevant to the question on appeal, the City seems to offer this fact as a basis for seeking to amend its complaint and transforming its theory of the case. The City's only theory of the case thus far has focused on whether the Hospitality Fee could legally be collected *in the municipalities* without municipal consent. (Hence, the question now facing this Court.) The City's new theory seeks to invalidate the Hospitality Fee on a countywide basis—even in the unincorporated areas—based on the argument that the revenue from the Hospitality Fee is being used for an improper purpose.

There are multiple reasons to deny the City leave to amend its complaint, particularly at this stage. But for now, this Court should simply deny the City's motion to take judicial notice of the County's cancellation of the participation agreement. It has no relevance to the issues currently on appeal.

Plus, even if the proposed amendment had any merit, it still is procedurally improper to consider it here. This case is currently on appeal. The issues on appeal are set and cannot be changed, and the only issues this Court can address are those issues that were argued below and decided by the circuit court. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). If the City wishes to amend its complaint and construct a new theory of the case, it is not raising its desire to the proper court or at the proper time. The time for amending the City's complaint will come later (assuming its case even survives this appeal). At any rate, any future amendment the City may seek is not relevant to this appeal and should not be considered at this time by this Court.

B. Terminating the participation agreement does not affect the validity of the Hospitality Fee.

The County terminated the participation agreement with SCDOT regarding funding for I-73 on November 19, 2019. According to the City, this termination means that the Hospitality Fee will not be used for Interstate 73 as the County said it would be and that the Hospitality Fee is not a valid fee under *Brown*.

The City is incorrect. The Hospitality Fee is a valid fee under *Brown* as long as its revenue is used for "specific improvements" as required for a fee. *See C.R. Campbell Constr. Co. v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437, 438 (1997).

Those improvements are the ones allowed by statute. *See* S.C. Code § 6-1-530 (identifying valid uses for Hospitality Fee revenue). Stated more simply, as long as the revenue from the Hospitality Fee is used for a purpose approved by the General Assembly, the Hospitality Fee is valid. Therefore, even if the County does not use the revenue from the Hospitality Fee for Interstate 73, the Hospitality Fee is still valid as long as the use complies with § 6-1-530. The City offers no argument that the County seeks to use the revenue from the Hospitality Fee for a purpose not allowed by statute.

From a factual perspective, the City tries to stigmatize the County's cancellation of the participation agreement as nefarious. It is not. Prior to this lawsuit, the County dedicated a portion of the revenue it collected from the Hospitality Fee to Interstate 73. When the City filed this lawsuit and obtained the injunction, the funding source for this project disappeared. The County was thus forced to cancel the participation agreement because of the lawsuit filed by the City. Indeed, the City's lawsuit has placed a cloud of doubt over the Interstate 73 project. The County cannot obligate itself and the public's dollars to the Interstate 73 project without funding for the project.

But the cancellation of the participation agreement does not foreclose the opportunity for another agreement in the future with SCDOT. The County may be able to enter into an agreement in the future should it prevail in this lawsuit and the contemplated funding return.

III. The City's proposed amendment is futile and should be denied.

As discussed already, the City seeks to amend its Complaint and change its theory of the case to invalidate the collection of the Hospitality Fee in the unincorporated areas of the County. Leave to amend its complaint should be denied for at least three reasons.

In the first place, it is inconsistent with the City's entire theory of this case. According to the City, the municipalities had to consent for the County to collect the Hospitality Fee within the municipalities. Thus, its complaint focused on the Hospitality Fee within the municipalities, and that was the scope of the circuit court's injunction. There is no political subdivision that could consent to the Hospitality Fee in the unincorporated areas because no political subdivision other than the County exists in those areas. The City's legal theory is therefore inapplicable outside of the municipalities, and after walking so far down the proverbial road in this case, giving the City leave to amend to assert a new theory in an amended complaint would be tantamount to starting a new lawsuit.

In the second, the City lacks standing to challenge the Hospitality Fee in the unincorporated areas. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (discussing the elements of constitutional standing). The City has not been harmed by the collection of the Hospitality Fee outside of its boundaries, so it has no basis to pursue such a claim.

And in the third, the City has pointed to no evidence of the County using revenue from the Hospitality Fee in contravention of the accepted uses recognized by

the General Assembly in § 6-1-530. As set forth above, the City's argument appears to be that the County does not intend to use the revenue for Interstate 73. Even if that were true, the General Assembly has authorized other uses of the revenue from the Hospitality Fee beyond that for roads providing access to tourist destinations. *See* S.C. Code § 6-1-530 (identifying six valid uses of revenue from the Hospitality Fee).

At bottom, this threat to file an amended complaint appears to be nothing but a bullying tactic designed to force the County into settling this case now. Such a threat should not be given judicial sanction.

Conclusion

The motion should be denied.

Respectfully submitted:

Wm. Grayson Lambert
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211

James K. Gilliam
Adam R. Artigliere
BURR & FORMAN LLP
Poinsett Plaza
104 South Main Street, Suite 700
Greenville, SC 29601

Henrietta U. Golding
BURR & FORMAN LLP
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577

Counsel for Appellant

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CERTIFICATE OF SERVICE

I certify that this RETURN TO MOTION TO TAKE JUDICIAL NOTICE was served on counsel for the Respondent via hand delivery on January 24, 2020:

John M.S. Hoefer
Chad N. Johnston
R. Walker Humphrey, II
Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, SC 29202