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Oct 28 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Judge

Case No. 2022-000162

Tammy Batten West,

Appellant,

v.

American Honda Motor Company, Inc.,

Respondent.

Motion to Amend Appellants' Reply Brief in Light of Change to Respondent's Brief

Appellant Tammy West (Consumer) moves to amend her Final Reply Brief, as a reference in the Final Brief of Respondent (Manufacturer) that was not in the Initial Brief of Manufacturer makes part of Consumer's Reply Brief impossible to follow.

Manufacturer's Initial Brief contained a reference that required the reader to expend effort to determine what document Manufacturer was relying on. Consumer's Initial Reply Brief explained how to find the source for Manufacturer's contention. Manufacturer's Final Brief adds the direct reference to Manufacturer's source.¹

Discussion

Manufacturer's Initial Brief stated, "Plaintiff's counsel even acknowledged in August 2020 . . . that he was continuing this litigation solely in the attempt to obtain more attorney's fees."

¹ On October 17, 2024, the Clerk of Court, via email, directed the parties to file six bound copies within ten days. Consumer's counsel reached out to Manufacturer's counsel by telephone and email beginning the morning of Monday, October 21. She asked Manufacturer to move to delete the new reference or supplement its brief, but has had no affirmative response.

(Manufacturer’s Initial Br. p. 3). Manufacturer’s Initial Brief supported its assertion only with “*Id.* at ¶ 21.” The “*Id.* at ¶ 21” referred to the affidavit of Manufacturer’s own counsel, and specifically to a paragraph wherein Manufacturer’s counsel paraphrased an August 25, 2020 letter from Consumer’s counsel. But an attorney’s paraphrasing of a document is not evidence. Technically, Manufacturer’s Initial Brief did not support its assertion with any evidence or citation to authority.

Consumer’s Initial Reply Brief explained that “It takes a bit of work” to determine the source on which Manufacturer intended to rely for its paraphrase. (Consumer’s Initial Reply Br. p. 5). In fact, it took 143 words for Consumer to explain to what she believed Manufacturer had intended to refer. (*Id.*) The text is provided in the Attachment. Consumer concluded that Manufacturer was indirectly referring to the August 25, 2020 letter. (*Id.*) Consumer disagreed with Manufacturer’s paraphrase: “But that August 25, 2020 letter actually stated” (*Id.* pp. 5-6) (quoting the letter).²

Manufacturer’s Final Brief diverges from Manufacturer’s Initial Brief by adding a direct reference to that letter. Manufacturer’s Final brief references both the paragraph of its counsel’s affidavit paraphrasing the letter, via its reference to “R. pp. 994,” and references the letter directly via its citation to record pages “1100-1102.” (Manufacturer’s Final Br. p. 3).

That will make the reader of the final briefs wonder why Consumer is saying that Respondent did not directly reference a document that Manufacturer’s Final Brief directly references. Either the new reference in Manufacturer’s Final Brief should be struck; or Manufacturer should move to amend its brief to account for the change—which motion, if granted,

² Consumer’s opening brief had corrected a similar problem in Manufacturer’s filing below concerning the same letter. (Consumer’s Initial Br. pp. 38-39). Manufacturer’s Opposition to Consumer’s fees motion claimed that ““by August 25, 2020, [Consumer’s counsel] had conceded in writing that that AHM had offered a full recovery to the Plaintiff.”” (*Id.*) (quoting Manufacturer’s Opp’n p. 17). That Opposition required one to track up 16 pages to find that Manufacturer’s source was the affidavit of its own counsel. (*Id.*) That affidavit in turn references the August 25, 2020 letter. Accordingly, Consumer’s opening brief explained that Manufacturer was relying on and mis-stating the contents of that letter. (*Id.*)

would presumably let Consumer amend her brief in reply; or Consumer's Final Brief should be modified in light of the divergence between Manufacturer's Initial and Final Briefs.

As Manufacturer has not moved to correct its filing, the Court should strike the new reference from Manufacturers' brief or allow Consumer to modify her brief to account for Manufacturer's new reference. Consumer prefers allowing Manufacturer to retain its new reference and amending Consumer's brief as proposed in the Attachment, as that option makes it easiest for readers of the final briefs to identify Manufacturer's source. Consumer does not expect to be prejudiced by making Manufacturer's source more readily apparent, as Consumer is confident the Court will accept her direct quotations from the letter as what that letter actually stated over Manufacturer's attempts to paraphrase the letter as stating the opposite. *Compare* Consumer's Br. pp. 39-40 (quoting the letter) *and* Consumer's Reply Br. pp. 5-6 (quoting the letter) *with* Manufacturer's Final Reply Br. p. 3) (purporting to paraphrase both its counsel's affidavit and the letter).

Consumer requests the deadline for filing bound copies be stayed pending the Court's ruling on this motion.

Respectfully submitted,

s/Brooks R. Fudenberg
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October 27, 2024

s/C. Steven Moskos
C. Steven Moskos
C. STEVEN MOSKOS, P.A.
6650 Rivers Ave., Ste 210
N. Charleston, SC 29406
Tel.: (843) 763-5297
Steve@moskoslawfirm.com

Attorneys for Appellant

Attachment to
Motion to Amend Appellants' Reply Brief in Light of Change to Respondent's Brief

The Final Reply Brief currently states (p. 5),

Manufacturer's source for its claim is an August 25, 2020 letter from Consumer's counsel to Manufacturer's counsel. It takes a bit of work to dig out Manufacturer's actual source, because Manufacturer's reference on page 3 of its brief to "*Id.* at ¶ 21" is a reference to Exhibit 1 of Honda's Opposition to Plaintiff's Motion for Attorney's Fees ("Honda's Opposition Exh. 1") at ¶ 21. Exhibit 1 to Honda's Opposition is an affidavit of Manufacturer's counsel. (R. pp. 988-995). Paragraph 21 of that affidavit makes the false assertion that "Plaintiff's counsel acknowledged on August 25, 2020, that AHM [American Honda Motors] offered a full repurchase amount to Plaintiff." (R. p. 994 ¶ 21). It provides only one reference to support its false assertion: "*See* Letter from Steven Moskos, August 25, 2020, attached as Exhibit N." (*Id.*). But that August 25, 2020 letter actually stated,

The amendment would make that read,

Manufacturer's only source for its claim is an August 25, 2020 letter from Consumer's counsel to Manufacturer's counsel. But that August 25, 2020 letter actually stated,

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Tammy Batten West,

Appellant

v.

American Honda Motor Company, Inc.,

Respondent.

Proof of Service

I certify that a copy of the Motion to Amend Appellants' Reply Brief in Light of Change to Respondent's Brief, with its Attachment, was served today on Respondent by serving Respondent's Counsel of Record, Patrick J. Cleary, via email addressed to:

patrick.cleary@bowmanandbrooke.com.

A copy of the email serving Respondent is attached.

October 27, 2024

s/ Brooks R. Fudenberg
Brooks R. Fudenberg
LAW OFFICE OF BROOKS R. FUDENBERG,
LLC
14 Ashe Street
Charleston, SC 29403
Brooks R. Fudenberg@Fudenberglaw.com
843-696-8911

From: [Brooks R. Fudenberg](#)
To: [Patrick Cleary](#)
Cc: [Steve Moskos](#)
Subject: West VS American Honda Motor Co. Inc, 2022-000162, RE: Final Brief
Date: Sunday, October 27, 2024 9:07:47 PM
Attachments: [Mot. Amend App.'s Br. in light of change to Resp't's Br.pdf](#)
[Attachment to Motion to Amend.pdf](#)

Patrick,

Please find attached my Client's motion, which I hereby serve upon you.

Brooks R. Fudenberg
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14 Ashe Street
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843-696-8911
910-401-1242 (eFax)

THIS COMMUNICATION MAY CONTAIN CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT OR ATTORNEY WORK PRODUCT INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE CONTACT THE SENDER AND THEN DESTROY THIS COMMUNICATION

From: Brooks R. Fudenberg
Sent: Tuesday, October 22, 2024 12:00 PM
To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Subject: RE: Final Brief

Patrick,

I was thinking you would move to fix the Final Brief by striking the additional citation to the Record. But as a compromise, I think it will be OK if you move to Supplement the Initial Brief. I expect my Return to the Motion would say I do not object, provided the Court lets me amend my Final Brief to remove the part that was obviated by your adding the citation.

You might want to send the motion by me before you file it to be sure we are on the same page.

If that is not agreeable, I will file my own motion.

Please let me know promptly if we have agreement. I will need to get my motion in soon if we do not.

Thanks,

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From: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Sent: Monday, October 21, 2024 10:56 AM
To: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>
Subject: RE: Final Brief

Brooks,

Thanks. Are you referring to our Initial Brief or our Final Brief? We wouldn't be supplementing the Final Brief, just the Initial Brief.

It might just be a motion for clarification on this point.

Patrick J. Cleary
Partner
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Patrick.Cleary@bowmanandbrooke.com

From: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>
Sent: Monday, October 21, 2024 10:19 AM
To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Subject: RE: Final Brief

Yes, Patrick, we cited it in our Reply, pointing out that Respondent had not cited it.

Given what you write below, I think you should file a motion to supplement your brief.

Would it help if I offered to pay half the cost of re-reprinting your Brief? It can't be much: The whole thing is 18 pages, including the Title page and all.

Regards,

Brooks

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From: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Sent: Monday, October 21, 2024 9:52 AM
To: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>
Subject: RE: Final Brief

Brooks,

Thank you – we will not be exchanging bound copies.

I think we will agree to disagree on the citation to the record on appeal – what we did was supplement the initial citation refer to the affidavit (which clearly identifies Mr. Moskos’s letter) and then the actual letter itself (which is in the record on appeal, and incidentally, cited by Appellant).

Patrick

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From: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>
Sent: Monday, October 21, 2024 9:46 AM
To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Subject: RE: Final Brief

Patrick,

Thanks for the Response re bound copies.

I take “The references in the initial brief **shall be revised to indicate where the material appears in the Record on Appeal.** These **revised references may be in place of or in addition to** the initial references” to mean the Initial Brief might say, “Contract p. 2,” and the Final Brief can say, “R. p. 106” or “Contract p. 2, R. p. 106.” I don’t take it to mean, “Add whatever citations you want.”

Regards,

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From: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Sent: Monday, October 21, 2024 9:19 AM

To: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>

Subject: RE: Final Brief

Brooks,

I am fine foregoing the exchange of bound copies. I have electronic versions of the final brief and record on appeal. If you would like to exchange bound versions, we would be happy to do so.

I point out the following provision of Rule 211 for you.

(b) Content. The final brief(s) shall be identical to the brief(s) previously served under Rule 208, except for the following:

(1) References to the Record. The references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal. These revised references **may be in place of or in addition to the initial references**, and shall be in the form indicated by the following examples: (R. p. 15, line 4) (R. p. 75, lines 8-20) (R. p. 90, line 1-p. 101, line 14) (R. pp. 29-31).

Patrick

Patrick J. Cleary

Partner

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Patrick.Cleary@bowmanandbrooke.com

From: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>

Sent: Monday, October 21, 2024 9:17 AM

To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>

Subject: Final Brief

Patrick,

You didn't say whether you want us to exchange bound copies.

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From: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>

Sent: Monday, October 21, 2024 9:03 AM

To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>

Cc: Brianna Arnone Bowling <Brianna.Bowling@bowmanandbrooke.com>

Subject: Additional pages

From: Brooks R. Fudenberg <Brooks.R.Fudenberg@FudenbergLaw.com>
Sent: Monday, October 21, 2024 8:58 AM
To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>
Cc: Brianna Arnone Bowling <Brianna.Bowling@bowmanandbrooke.com>
Subject: P. 3

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