THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728
Appellate Case No. 2013-002341

LNV Corporation ..... Respondent

v.

Affordable Hospitality Group–Anderson, LLC; Diversified Capital Investment Group, LLC; Jay Berlye; Anderson County, South Carolina, and the State of South Carolina ..... Defendants,

Of Whom Affordable Hospitality Group–Anderson, LLC; Diversified Capital Investment Group, LLC; and Jay Berlye are ..... Appellants.

[INITIAL] REPLY BRIEF OF APPELLANTS

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Abbreviations

For easier reading of initial briefs, Appellants have adopted the following short titles in place of the full titles of pleadings, motions and orders (arranged chronologically below):

Pleading, Motion or Order	Short Title
Respondent's Verified Complaint (Sept. 13, 2011)	Complaint
Appellants' Amended Answer & Counterclaim (Nov. 28, 2011)	AA&CC
Respondent's Answer to AA&CC (Jan. 9, 2012)	Answer
Respondent's 12(b)(6) Motion to Dismiss (Jan. 9, 2012)	12(b)(6) Motion
Appellants' Memo. Opposing 12(b)(6) Motion (Feb.28, 2012)	App. 12(b)(6) Memo.
Respondent's Memo Supporting 12(b)(6) Motion (Feb. 28, 2012)	Resp. 12(b)(6) Memo.
Transcript of Hearing on February 29, 2012	Feb. Trans.
Appellants' Supplemental 12(b)(6) Memorandum (Apr. 2, 2012)	App. Supp. Memo.
Respondent's Reply Brief (Apr. 12, 2012)	Resp. Reply
Dismissal Order (November 14, 2012)	Dismissal Order
Appellants' 59(e) Motion (Nov. 26, 2012)	59(e) Motion
Appellants' Motion to Amend AA&CC (Nov. 26, 2012)	Motion to Amend
Respondent's Memo Opposing 59(e) Motion (May 6, 2013)	Resp. 59(e) Memo.
Respondent's Memo Opposing Motion to Amend (May 6, 2013)	Resp. Amend. Memo.
Order Denying 59(e) Motion (June 10, 2013)	Interim Order
Order Vacating June 10, 2013 (July 1, 2013)	Vacating Order
Transcript of Hearing on September 12, 2013	Sept. Trans.
Order Denying Appellants' Motions (September 23, 2013)	Denial Order

Introduction

Respondent's Initial Brief makes difficult reading. The difficulties are discussed in this Reply Brief by way of a General Reply. Nevertheless, diligent search seems to reveal three coherent arguments which are individually addressed. Respondent contends that:

> (1) A new rationale, introduced *sua sponte* by a trial court for the first time in a final order, provides an additional sustaining ground to affirm the trial court denial of a motion under Rule 59(e) South Carolina Rules Civil of Procedure (SCRCP);
>
> (2) Upon receiving such a surprise order the moving party is required to file a successive motion under Rule 59(e) SCRCP before seeking appellate review; and
>
> (3) A party, timely seeking reconsideration of a trial court order dismissing its counterclaims under Rule 12(b)(6) SCRCP and simultaneously moving to amend its pleading by supplementing allegations of ultimate facts with additional evidentiary facts, may be charged with undue delay for filing its motion to amend after receiving the dismissal order.

None of these arguments has merit.

Standard of Review

Both parties agree upon the proper standard for disposition and appellate review of motions to dismiss under Rule 12(b)(6) SCRCP. Respondent cites Cole Vision Corp. v. Hobbs, 394 S.C. 144, 714 S.E. 2d 537 (2011), taking an excerpt from the following passage:

> In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. [citation omitted] Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. [citation omitted] The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. [citation omitted] In reviewing the dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard as the circuit court. [citation omitted]

714 S.E. 2d at 539.

Appellants cited the more recent decision in Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, 721 S.E. 2d 423 (2012) which states:

> " On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." [citation omitted] " That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. [citation omitted]

721 S.E. 2d at 426.

As demonstrated in the General Reply below, the Respondent's Initial Brief strays very far from the foregoing South Carolina standards. Repeatedly, Respondent states factual conclusions when the Record contains only the conflicting claims of the parties' pleadings with supporting exhibits. Discovery has barely commenced. From such a Record, all inferences

should be (and should have been) drawn in the light most favorable to the Appellants. Such inferences support recovery by the Appellants on all their counterclaims.

By way of example, Appellants allege in their pleading with supporting exhibits, that Haven Trust Bank and Appellants fully performed under the November 2007 loan commitment letter (hereinafter, the "Basic Contract") from the Appellants' acceptance of the loan commitment on November 6, 2007, until Haven Trust Bank was closed and placed in receivership on December 12, 2008. The allegations and exhibits are detailed in Appellants' Initial Brief (p. 30) restated below:

> The trial court unequivocally declared the Basic Contract null and void. Even accepting this unqualified and unsupported declaration as correct, the detailed acts of performance would be sufficient under Georgia and South Carolina to affirm the agreement. Soon after accepting the Basic Contract, Appellants paid Haven Trust Bank $10,000 as the "expense deferment fee." (Exhibit A, ¶ 25 to AA&CC). On December 6, 2007, Appellants received SBA authorization for 504 funding of permanent financing for the Microtel. (Exhibit B to App. Supp. Memo.) On May 15, 2008, Appellants and Haven Trust Bank executed the loan construction agreement and loan documents in furtherance of the Basic Contract. (AA&CC ¶ 219.) Haven Trust Bank disbursed millions of dollars to Appellants for the development of the hotel. (AA&CC ¶ 221). Appellants posted a $100,000 certificate of deposit as performance security in furtherance of the Basic Contract. (FDIC Case Update Notification, Exhibit C to App. Supp. Memo.) Most importantly, Appellants unreservedly alleged that they and Haven Trust Bank completely performed all Basic Contract obligations from November 2007 until December 2008. (AA&CC ¶¶ 218–21). Appellants' allegations of performance preclude dismissal on grounds that the Basic Contract failed as a binding agreement.

By contrast, Respondent repeatedly announces factual findings when the pleadings support nothing but inferences. At the outset, the opening sentence of Respondent's "Counter-Statement" declares as a matter of fact that Appellants "defaulted" on the construction loan obligations. (Respondent Brief, p. 1) The Record reveals that Respondent so alleged (¶ 29

Complaint), but provided no date for its occurrence, while Appellants admitted only to some interest non-payments caused by Respondent's failure to complete the transaction and provide permanent financing, while denying Respondent's right to enforce the construction "loan documents." (¶ 34 AA&CC). Similarly, Respondent Brief (pp.14-15) declares that in August 2009, Appellants knew that Respondent had no intention to grant permanent financing as the primary lender under the SBA 504 Authorization for Loan 30896660-07. (Exhibit B to App. Supp. Memo.) To the contrary, Appellants' counterclaims (for example, ¶¶ 231 through 235 AA&CC) repeatedly allege reliance upon such actions as the August 2009 draft commitment as indicating Respondent's intention to perform under the Basic Contract. Only after discovery could the trial court or Respondent correctly claim, for example, that Appellants knew in August 2009 that Respondent had no such intention.

Clearly, both the trial court and Respondent have used a 12(b)(6) motion to forestall discovery of evidence that could resolve the factual issues presented in this case. Had the well-settled rules governing such dismissal motions been followed, this case could have proceeded normally in the trial court and might actually have been tried by now.

Reply Number One: A new rationale, introduced *sua sponte* by a trial court for the first time in a final order, does not provide an additional sustaining ground to affirm the trial court denial of a motion under Rule 59(e) South Carolina Rules Civil of Procedure (SCRCP).

The final order of the trial court denying Appellants' Rule 59(e) motion for the first time announced a new theory of this case. The order declared that the November 2007 loan commitment by Haven Trust Bank to Appellants (hereinafter, the "Basic Contract") became unenforceable at the end of a ninety (90) day expiration period for closing of the construction loan agreement. The construction loan agreement was the initial phase of the Basic Contract which contemplated replacement of the construction loan with permanent financing to include participation by the Small Business Administration (SBA) under its 504 program. (See Appellants' Initial Brief, pp. 8-10.)

In their Initial Brief (Issue Five, pp 33-36), Appellants demonstrated that the trial court finding was erroneous as a matter of law. By its express terms (¶ 21), the Basic Contract was governed by Georgia law.[1] (Exhibit A to AA&CC) Nothing in Georgia law prohibits parties from closing a construction loan agreement, contemplated by a loan commitment letter, even after an expiration period has ended. In the real world, parties close deals by mutual agreement after the original deadline expired all the time, and those transactions are no less valid and binding as a result.

Since this action is stalled at the pleading stage, Appellants also pointed out that the intentions of Haven Trust Bank and the Appellants (in executing the construction loan

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[1] – Given the explanations in Appellants' Brief, it is incomprehensible that the Respondent claims that Appellants would apply Georgia law to a South Carolina foreclosure action touching South Carolina real property. See Respondent Brief, p. 5.

agreement) are a matter of pure speculation. (Appellant Initial Brief, pp. 34-35) Only through discovery can the circumstances of this closing be known.

The proper inference to be drawn from Appellants' pleading was that the parties to the construction loan agreement executed that agreement and accompanying instruments in the course of mutual performance under the Basic Contract. Instead of drawing this proper inference, the trial improperly and prejudicially held that Haven Trust Bank and the Appellants were barred, as a matter of South Carolina law, from going forward with the construction loan.

Defending this erroneous trial court ruling, the Respondent Brief (p. 19) invokes Fender & Latham, Inc., v. First Union of South Carolina, 316 S.C. 48, 446 S.E. 2d 228 (Ct. App. 1994). In Fender, however, the prospective borrower never bothered to provide the prospective lender with a written acceptance of the loan offer, choosing instead to construct a cable television system in reliance upon public statements made by the lender at a city council meeting. (Even the public statement was qualified by a requirement to complete "paperwork.") 446 S.E. 2d at 449-450.

In the present case, the fully executed Basic Contract and subsequent construction loan agreement are exhibits to the pleadings. In other words, the pleadings and exhibits in the Record of this case clearly indicate that the original parties to the Basic Contract duly performed all their obligations. Appellants are confident that, upon remand of this action to the trial court, discovery will support this inference as a matter of fact.

Respondent does not defend the trial court's citation of First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 451 S.E. 2d 907 (Ct. App. 1994). To amplify the comment offered in Appellants' Initial Brief (p. 16, footnote 7), it should noted that First Union was an appeal from

jury trial of an extraordinarily complicated case. As plaintiff, First Union sought to recover an origination fee promised by the defendant, Thomas, in an "exclusive agreement" under which First Union would seek to obtain financing on Thomas' behalf. The fee would be "earned" when Thomas signed a commitment letter from a prospective lender. Such commitment was made by Southern Farm Bureau and accepted by Thomas.

Unfortunately, the financing deal began to unravel when Thomas was unable timely to meet various requirements of Southern Farm Bureau. Thomas was unable to pay two-percent of the loan as consideration for the prospective lender's commitment. First Union sought to salvage the deal by transferring part of its already earned fee to Southern Farm Bureau and informally agreed to collect its fee at closing. The exclusive agreement was never modified to substitute "collected" for "earned."

When the deal finally collapsed, Southern Farm Bureau and Thomas reached a settlement agreement, and Southern Farm Bureau issued a check basically returning Thomas' deposit. First Union managed to attach the check as security for its origination fee early earned. First Union brought action, Thomas responded with counterclaims. The jury agreed with Thomas, and the trial court denied First Union's post-trial motions. The Court of Appeals reversed.

The relevance of the First Union case to the present litigation escapes the Appellants, and it is not demonstrated or even discussed by the Respondent. Nevertheless, invoking *petitio principii*, the trial court seemed to interpret First Union as precedent for the proposition that a contract is enforceable solely because its provisions are binding and, moreover, that no prior agreement, even one of which the subject contract is a part, can also be simultaneously enforceable.

Whether or not the trial court has discovered some heretofore unknown, yet sound, principle of law, the principle has no application to the present case. After all, Appellants' pleadings clearly alleged that the construction loan agreement was executed in reliance upon and pursuant to the Basic Contract. (See Appellants' Initial Brief, p. 30)

Respondent contends, however, that simply because the trial court planted the seed of "unenforceability" in its final order, this surprise *sua sponte* adoption of a new rationale for dismissing Appellants' counterclaims constituted an "additional sustaining ground" for affirmance. Respondent mistakenly invokes I'ON, L.L.C., v. Town of Mt Pleasant, 338 S.C. 526 S.E. 2d 716 (S.C. 2000), because the following definition of "additional sustaining ground" clearly precludes application to this appeal:

> In raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court.

526 S.E. 2d at 722.

The present case does not require resort to the doctrine of additional sustaining grounds, simply because the finding of "unenforceability" based upon the ninety (90) expiration period was the explicit ground for the trial court's holding. (Denial Order, p. 2)

Reply Number Two: Upon receiving the trial court's surprise final order, Appellants were not required to file a successive motion under Rule 59(e) SCRCP before seeking appellate review.

The trial court's final order denied Appellants any opportunity to address its surprising new rationale upon the Record. With respect to the ninety (90) day expiration period, Appellants were simply denied their day in court. Respondent argues that Appellants should have filed a successive motion under Rule 59(e) SCRCP, forgetting that the Dismissal Order of September 23, 2013, was itself a denial of a previously filed motion for reconsideration.

Under South Carolina authorities, the filing of a second or successive Rule 59(e) carries substantial risk. Essentially, a losing party who files a successive motion for reconsideration, which can entail months of delay before hearing and disposition, risks missing the deadline for filing a notice of appeal. Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E. 2d 772 (2004); Coward Hund v. Ball Corporation, 336 S.C. 1, 518 S.E. 2d 56 (Ct. App. 1999).

Often the decision to file a successive motion for reconsideration turns upon a subtle question: did the order on appeal substantively alter the judgment? In Elam, the Supreme Court acknowledged this problem:

> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.

602 S.E. 2d at780-781.

As explained in Appellants' Initial Brief (p. 5), the trial court has at different times

adopted different grounds for dismissing their counterclaims: (1) a November 2009 construction loan modification agreement "released" all counterclaims then existing or yet to arise; (2) the Basic Contract was unenforceable as a "non-final" agreement; (3) the Basic Contract was simply "null and void" (a characterization from the bench on September 12, 2013); and (4) the expiration period discussed above.

Although the trial court's rationale has presented a moving target, in each ruling the result has been the same – dismissal of the counterclaims – regardless of the stated grounds. Given this procedural history, and following the spirit of Elam and Coward, Appellants concluded that a second motion for reconsideration would have been not only unwise but also futile, possibly inviting yet another *sua sponte* discovery of a new rationale.

Reply Number Three: No prejudicial "delay" was occasioned by Appellants' simultaneous filing of a motion to amend along with their motion for reconsideration, both filed after receiving the trial court's final order (dated September 23, 2013, and filed September 30, 2013).

Appellants' Initial Brief (pp. 21-22) dispensed with claims that Respondent would have been prejudiced by an amendment to their counterclaims. The proposed amendments simply provided "evidentiary" facts to allege a continuous course of dealing between the parties after November and throughout 2010 and 2011 up to the filing of this action.

Respondent's Initial Brief (pp. 27-29) contends that Appellants' motion to amend was "tardy." In fact, all actions taken by Appellants have been within time periods specified in court rules: (1) the First Amended Answer and Counterclaim was filed as a matter of right under Rule 15(a) SCRCP; and (2) the 59(e) Motion and Motion to Amend were both filed within ten days from receipt of the Dismissal Order. Respondent's charge of prejudicial "delay" is inexplicable.

Slightly more than eleven months passed from filing of the Respondent's Rule 12(b)(6) motion in January 2012 to its disposition in November 2012. Respondent does not explain how the eleven months (the passage of which was beyond Appellants' control) became "nearly one and one-half years." (Resp. Brief p. 28)

The "delay" of which Respondent complains is the fact that Appellants filed the Motion to Amend "*after* receiving" the Dismissal Order in November 2012. Apparently, Respondent believes that South Carolina authority requires a party, while awaiting a trial court order, to anticipate and pre-empt such order. In the present case, Respondent seems to believe that Appellants should have amended their complaint *before* the trial court filed its order in November 2012.

The cases cited by Respondent do not even suggest such a novel procedural rule. In Foggie v. CSX Transp. Inc., 315 S.C. 17, 431 S.E. 2d 587 (1993), the trial court had concluded that the plaintiff would have been deprived of use of his property by the defendant's amendment, and the Supreme Court affirmed the denial. Appellant's Brief has already disposed of Respondent's false claim that it is paying the receiver. There is no evidence of such payment in the record, nor does the Record provide any information about revenue losses to the Respondent.

In Health Promotion Specialists, LLC, v. S.C. Bd. Of Dentistry, 403 S.C. 623, 743 S.E. 2d 808 (2013) the South Carolina Supreme Court affirmed the finding of a trial court that a delay in seeking to amend was "inexplicable given the seven-year lapse between the filing of the initial complaint and the oral motion." 743 S.E. at 813. Additionally, the amendment evidently sought to supplement the plaintiff's complaint with "additional theories." 743 S.E. 2d at 812. In the present case, no additional theories were proposed by Appellants. Instead evidentiary allegations were offered, supporting the five counterclaims, to inform the trial court that Appellants were prepared to prove a continuous course of dealing by the parties beyond November 2009.

These proposed additional allegations also supported Appellants' firm position that they had no knowledge of Respondent's contemplated wrongdoing, to include an intention not to perform its obligations under the Basic Contract. On this appeal, Respondent contends it never intended to perform such obligations – clearly, a matter requiring discovery (unless Respondent cares to stipulate to its bad faith).

Finally, Respondent's citation of Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E. 2d 269 (Ct. App. 1997), is perhaps the most curious. Respondent proudly notes that Higgins cites Foman v. Davis, 371 U.S. 178 (1962). Yet below is provided the actual

language from Foman:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court]. But outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the [rules].

486 S.E. 2d at 275 (citing from 371 U.S. 182) .

There could be no more appropriate characterization of the trial court's denial of leave to amend in the present case. This is especially so because the trial court stated no reason whatsoever for denying the motion to amend. The only claims of "delay" and "prejudice" appeared briefly in Respondents' trial court memorandum filed in May 2013. As noted above, these claims are addressed in Appellants' Initial Brief.

General Reply

Rather than attempt to re-organize Respondent's Initial Brief, Appellants will simply reply to key points as Respondent's arguments illustrate the trial court deviation from established standards for disposition of dismissal motions under Rule 12(b)(6).

No discovery has been conducted regarding either pleading, leaving the reader to speculate about the evidence yet to be produced. Respondent's Brief and the Record reveal that Respondent acquired the Note, Mortgage and related instruments in May 2009, yet Respondent brought its "foreclosure" action only in September 2011. Pleading ultimate facts, Appellant's Answer and Counterclaim alleged that the parties to the Basic Contract fully performed its terms until closure of Haven Trust Bank in December 2008 and that from May 2009 onward the Appellants relied upon Respondent's actions and communications as manifesting good faith performance under the Basic Contract. Appellant's proposed Second Amended Answer and Complaint alleges specific evidentiary facts that clearly indicate a continuing course of dealing well beyond November 2009.

At various points Respondent's Brief distorts Appellants' description of the permanent financing contemplated by the Basic Contract. Appellants' position is falsely depicted as a claim that permanent financing was "unconditionally" promised by the Basic Contract. (See, for example, Respondent Brief pp. 6-7) In fact, Appellants have consistently acknowledged that the grant of permanent financing and actual SBA 504 funding was conditioned upon satisfaction of standard boilerplate requirements. (Appellant Brief, pp. 8-9.) Whether or not Appellants could have satisfied these boilerplate requirements is not clear from the present Record which contains nothing but pleadings and exhibits.

From the pleadings, very little can be inferred at this stage in the litigation. The Appellants allege (and are confident they can prove) that their obligations under the construction loan agreement – the first stage of the Basic Contract – had been satisfactorily performed. Appellants allege that they, as well as the SBA, were ready, willing and able to close and perform under a permanent financing agreement once the Respondent accomplished necessary SBA paperwork, including a commitment letter essentially replicating the Basic Contract. It is important to understand that under SBA rules, there is very limited opportunity for a substitute primary lender to renegotiate an earlier commitment letter from the original lender. (Appellant Initial Brief, p. 16). Hence, "replicate" is the more appropriate description of Respondent's options in August 2009 and thereafter.

Claims by the Respondent that Appellants could not "qualify" for SBA 504 funding or that Respondent could not truthfully file the SBA Form 2288 cannot be inferred from the present Record. These and other factual claims of Respondent clearly require discovery at the trial court level. They cannot serve to affirm the trial court dismissal of Appellants' counterclaims.

Respondent's Brief (pp. 12-13) summarizes and paraphrases over twenty paragraphs from Appellants' pleading, evidently to demonstrate that the counterclaims all arose prior to November 2009. Appellants direct the Court's attention to the specific paragraphs cited, inviting the Court to find any statement that a given counterclaim arose at any specific time.

As noted above, Appellants' first Amended Answer and Counterclaim simply alleged ultimate facts subject to proof by discovery and trial. Appellants' proposed second Amended Answer and Counterclaim replaces ultimate facts with evidentiary facts that clearly depict a course of dealing well beyond November 2009. Had the trial court granted the motion for

amendment, the Respondent would have been required to admit or deny these evidentiary allegations. Appellants are confident that a truthful responsive pleading to these evidentiary allegations would have precluded any claim that the counterclaims existed prior to November 2009 and were released (prospectively) at that time.

Conclusion

For reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,

February 6, 2014

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THE STATE OF SOUTH CAROLINA
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Of Whom Affordable Hospitality Group–Anderson, LLC; Diversified Capital Investment Group, LLC; and Jay Berlye are ..... Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that the Initial Reply Brief was served upon all counsel of record this 6th day of February 2014, by depositing copies of same in the United States mail, postage prepaid, and addressed as follows:

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Re: LNV Corporation v. Affordable Hospitality Group–Anderson, LLC; Diversified Capital Investment Group, LLC; Jay Berlye; Anderson County, South Carolina and the State of South Carolina
Appellate Case No. 2013-002341

Dear Ms. Kitchings,

Enclosed is the original of the Appellants' Initial Reply Brief. The parties have designated the same materials for inclusion in the Record. Therefore Appellants' original Designation of Material to be Included in the Record on Appeal requires no change.

On January 31, 2014, I requested an extension of time to complete Appellant's Initial Reply Brief. That communication was sent by Priority Mail on Wednesday January 29th, because regular postage would not accomplish delivery until the weekend. Last Wednesday was the first opportunity I had to send the request to this Court due to the inclement weather.

It is now past noon on February 6th – the deadline to serve and file the initial reply brief. Yesterday I inquired telephonically about the status of the extension request. Your docketing clerk curtly informed me to consult C-Track. As of this time, no action has been taken on my request.

To avoid prejudice to Appellants, I am filing and serving the attached brief this afternoon, despite the fact that I have not been able to communicate with all my clients.

Sincerely,

Ronald M. Childress

Enclosure
cc: Mr. A. Mattison Bogan (w/encl.)
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