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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable John Hamilton Smith, Special Referee

Case No. 2010-CP-40-8943R

Columbia Venture, LLC, ... Appellant,

v.

Richland County, ... Respondent.

REPLY

The Association of State Floodplain Managers, Inc. ("ASFPM") filed a Motion for Leave to File an *Amicus* Brief in this matter on September 8, 2014. Appellant Columbia Venture has filed a return opposing this Motion. Appellant argues that the Court should deny the Motion and refuse to accept the Brief because the motion is (supposedly) untimely, the motion fails to meet a federal court test limiting the circumstances in which an *amicus* brief should be accepted, and the *amicus* brief is (again, supposedly) irrelevant or redundant. This Court should reject these arguments.

The Brief of *Amicus Curiae* is Not Untimely

Appellant contends that the ASFPM's motion for leave to file a brief of *amicus curiae* is untimely. Appellant points to the briefing deadlines found in Rules 208 and 211, SCACR. (Return, p. 2). Appellant also notes that ASFPM did not ask the Court to accept the brief supposedly out of time. (Return, p. 2 n. 1).

As this Court knows, the deadlines set forth in Rules 208 and Rule 211 apply to *merits* briefs of the *parties*, not briefs of *amicus curiae*. See Rule 208 (references briefs filed by "appellant" or "respondent" as well as by "appellant" in reply); Rule 211(a) ("Within twenty days after the service of the Record on Appeal, each *party* shall serve a copy of his final brief(s)....") (emphasis added). Appellant's Return conspicuously omits the emphasized language of Rule 211.

Rule 213, SCACR, *does* provide that a brief of *amicus* "shall comply with the requirements of Rules 208(b) and 211." Rule 208(b), however, governs contents of the brief, as the Rule's subheading informs. Although Rule 213 appears to import the entire language of Rule 211 (including the timing portion of Rule 211(a)), as a practical matter, Rule 213 merely imports the "content" or structural requirements of Rule 211. This must be so given the reference in Rule 213 to Rule 208(b).

Furthermore, Rule 213 limits a brief of *amicus curiae* "to argument of the issues on appeal as presented by the parties...." Thus, the *amicus* brief cannot be filed until after the *parties* file their merits briefs.

Undersigned counsel is aware that this Court accepted an *amicus* brief from the United States Chamber of Commerce on the Friday before oral argument in *Babb v. Lee*

County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013). Even a cursory amount of legal research reveals that the Court has accepted *amicus* briefs even *after* the Court has filed a decision. *See, e.g., Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) (Court accepted *amicus* of the South Carolina Defense Trial Attorneys' Association after the Court granted rehearing); *James v. Anne's Inc.*, 390 S.C. 188, 190 n.1, 701 S.E.2d 730, 731 n.1 (2010) (Court noted "[t]hree organizations, the South Carolina Association for Justice, the South Carolina Injured Workers' Advocates, and the South Carolina Appleseed Legal Justice Center, filed a joint Brief of *Amici Curiae* in support of the petition for rehearing, and we granted their motion to participate in oral argument. An *Amicus Brief* opposing the petition [for rehearing] was filed by the South Carolina Self–Insurers Association, Inc."); *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (Court received "numerous *amici* briefs" following its initial decision in the case); *In re Michael H.*, 360 S.C. 540, 542, 602 S.E.2d 729, 730 (2004) (Court stated it filed an opinion but "subsequently, we granted the State's petition for rehearing and a motion by the South Carolina Victim's Assistance Network to file an *amicus* brief.").

This Court has a history and practice of freely accepting briefs of *amicus curiae* at *any* stage of the appellate process. The Court should not be swayed to reject the *amicus* brief on the ground that the brief is untimely. This argument misreads the Rules and ignores this Court's historical practice.

The Brief of *Amicus* is Appropriate

ASFPM's *amicus* brief is intended to help this Court reach a well-reasoned decision by offering discussion, insights and data that are not found or fully-developed in the parties' briefs. The *amicus* brief also attempts to provide accurate and corrected information concerning the National Flood Insurance Program ("NFIP"). For example, in the Respondent's Brief, Richland County has recounted how its officials, prior to Columbia Venture's purchase of the property, became concerned about liability associated with accepting responsibility for levee maintenance and its efforts after Appellant purchased the property to understand the issues presented by Columbia Venture's proposed project. Respondent has also referred to a presentation made by Dr. Gerald Galloway, who explained to the County lessons learned from the Midwest Flood of 1993, including the risks associated with over-reliance on levees. ASFPM's brief provides a more detailed factual discussion for this Court to better understand these flood liability issues with which Respondent grappled.

ASFPM also felt compelled to submit its *amicus* brief due to some of the arguments that the Appellant made in *its* brief. Appellant conspicuously omitted *any* acknowledgment of the dangers of floods or the very real risks posed by levees, as well as gross misstatements regarding the NFIP. ASFPM also felt compelled by Appellant's characterization of the levee certification process relating to its pre-purchase expectations, and the very serious consequences that Appellant's takings theories could present to communities across the United States.

Appellant claims that ASFPM's *amicus* brief is an irrelevant "position paper on

the alleged hazards of levees and advocacy to local governments to ban or discourage levee usage in the communities." (Return, pp. 3-4). There is nothing "alleged" or "irrelevant" in the ASFPM brief. ASFPM's staff engineers and flood policy experts who participated in drafting the ASFPM brief brought forward widely accepted information concerning risks associated with levees, as reflected in the *amicus* brief's citations to ASFPM's reports along with materials published by the United States Geological Survey, the National Committee on Levee Safety, the Interagency Floodplain Management Task Force, the Congressional Research Office and many other respected, credible organizations.

Appellant argues that the information contained in ASFPM's conditionally filed *amicus* brief is at odds with Richland County's floodplain management policies by virtue of Richland County's ordinance provisions regulating levees within its jurisdiction. (Return, p. 4). Put another way, Appellant asserts that the mere existence of Richland County ordinances that address levees means that Richland County disagrees with what Appellant inaccurately describes as ASFPM's policy position that all levees should be banned. As Appellant described in its brief, the Manning agricultural levees were in existence long before the County enacted land use regulations, including its levee design and maintenance standards. See (Appellant's Final Brief, p. 6). The County subsequently adopted storm drainage regulations in the 1970s requiring any levee within its jurisdiction that protect residential and commercial development be constructed in a manner that would result in larger levees than those set forth in 44 C.F.R. § 65.10. This fact does not reflect a position by the County to *encourage* development behind levees. Instead, the

County's levee standards reflect the reality that levees existed within its jurisdiction and thus the need to regulate levee construction and maintenance. Further, the additional expense associated with the County's more protective levee regulations could very well reflect an intent to *discourage* development behind levees. Had Richland County found ASFPM's conditionally filed *amicus* brief objectionable, the County surely would have filed a return to ASFPM's motion for leave to file its brief. Richland County has not done so.

Appellant argues that ASFPM's Motion should be denied based upon federal court cases purportedly defining a "true *amicus*" as an impartial friend of the court, not an advocate for either party. While this may have been the preferred view in the early history of American jurisprudence, it is widely accepted today that *amicus* briefs may weigh in on the side of one party over another. 16 S.C. Jur. *Brief of Amicus Curiae* § 2, citing *Universal Oil Products Co. v. Root Refrigerating Co.*, 328 U. S. 575 (1946).

In citing to *Ryan v. Commodity Future's Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) for its proposition that *amicus* briefs should be impartial, Appellant omitted the very next sentence from Judge Posner's opinion in *Ryan* – "We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted." *Ryan* at 1063. As United States District Judge Larimer stated over 20 years ago:

> District courts have broad discretion in deciding whether to accept *amicus* briefs. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982). The partiality of a would-be *amicus* is a factor to consider in making that decision, but "[t]here is no rule ... that *amici* must be totally disinterested." *Id.* Indeed, "by the nature of things an *amicus* is not normally impartial." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir.1970).

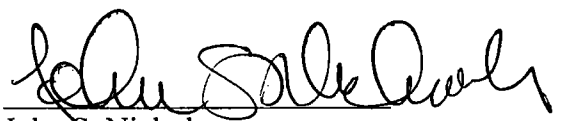
Concerned Area Residents for The Environment v. Southview Farm, 834 F.Supp. 1410, 1413 (W.D.N.Y. 1993).

Appellant asks this Court to deny ASFPM's Motion based on its belief that a federal court test to determine whether an *amicus* brief is helpful to the court, as articulated in *Ryan* and *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) is applicable here, and that ASFPM's brief allegedly fails to meet this test. (Return, p. 3). South Carolina courts have not adopted the test that Appellant advances. In South Carolina, the granting of a motion for leave to file an *amicus* brief is within the sound discretion of this Court. ASFPM seeks this Court's discretion in accepting its brief as the brief does, in fact, inform the Court on the issues in the principal appeal.

CONCLUSION

For the reasons stated ASFPM requests that the Court grant its motion and accept the brief of *amicus curiae* that ASFPM conditionally filed along with its motion.

Respectfully submitted,



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September 23, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Reply to Return to Motion by the Association of State Floodplain Managers for Leave to File Brief of Amicus Curiae* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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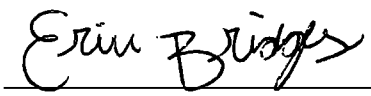

September 23, 2014
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