

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Robert E. Hood, Circuit Court Judge

---

Case No. 2016-CP-40-03478  
Appellate Tracking No.: 2017-000561

---

**RECEIVED**  
JAN 09 2018  
SC Court of Appeals

Cricket Store 17, L.L.C. d/b/a Taboo ..... Appellant,

vs.

City of Columbia Board of Zoning Appeals..... Respondent,

And

City of Columbia Zoning Administrator, ..... Counterclaimant,

vs.

Cricket Store 17, L.L.C. d/b/a Taboo, ..... Counterdefendant.

---

MOTION FOR LEAVE TO FILE RECORD ON APPEAL  
RESPONSE TO RESPONDENT'S MOTION TO DISMISS

---

Cricket Store 17, L.L.C. moves for an Order of the Court granting appellant permission to file the Record on Appeal as filed. This motion is based on the following grounds:

The Court required appellant's record on appeal to be filed on or before December 7, 2017. Appellant delivered the record on appeal to the U.P.S. Packaging Center for delivery on Thursday, December 12, 2017. The five-day delay is the result of excusable neglect in the following particulars:

- (1) The Record on Appeal has 47 color copies, which respondent insisted be included in the record on appeal. The duplication of so many color copies caused a technical delay in the preparation of the Record on Appeal.
- (2) The appellant attempted to communicate with respondent on numerous occasions concerning the Record on Appeal, including, but not limited to, whether respondent insisted on color copies. However, respondent refused to cooperate with appellant. Appellant attempted to transport the rough draft of the record on appeal in person to respondent, so the parties could review it together to resolve appellant's questions about the designation, including the need for color copies and to address the fact that respondent's designations required multiple printings of the same documents. Respondent refused to meet with appellant's counsel to review the proposed Record on Appeal, and on November 2, 2017, the appellant, in an effort to cooperate and streamline the Record on Appeal, provided respondent an electronic version of the entire proposed record on appeal. On November 6, 2017, appellant sent respondent a prompt, asking if he had a chance to look at the Record on Appeal. On November 12, 2017, respondent replied with several objections that appellant did not fully understand. On November 17, 2017, the appellant's effort to meet the respondent's objections was becoming more muddled, and appellant wrote to opposing counsel on November 17<sup>th</sup> by e-mail:

Pete,

I'm sure you realize that NOW it's too late to delete pages without forcing me to start all over again. I will ask Pro Copy what that will cost and let you know. The whole purpose of my proposal to sit down with you was to go through the record on appeal and figure all this out BEFORE I had the pages numbered. If Pro Copy will do it for less than fifty bucks, I'll absorb the cost; otherwise, I'll ask you if you want to let it go like it is or pay for the renumbering. I know I'm offensive and irritating, but sometimes it's worth it to put up with me for a few minutes to achieve a goal.

The respondent replied:

Tommy,

I'm sure this will come off the wrong way, but here goes. It is the Appellant's responsibility to put the record together after the parties have designated materials.

I clearly and concisely designated Respondent's materials as required by the court rules and I provided further explanation to you on October 26 as to the materials to be included in the Record. This was after you sent me a Word version of the proposed Table of Contents for the Record. My October 26th explanation was before you sent anything to a printer. However, upon receiving the pdf draft from the printer, it was clear that the Record still failed to include items designated by Respondent, and some of the items were incomplete. I then outlined my position regarding the pdf in an email sent to you on November 12, wherein I set forth what items should and should **not** be included in the Record.

I have never had a face-to-face meeting to put together an appellate record.<sup>1</sup> I am not going to be blamed for any cost issues with the Record, and my client is not going to pay for putting the record together. I'm at a loss as to what is so difficult about printing the materials the parties have designated and binding them.

Thank you.

The above cited exchanges are included here to demonstrate that: A) appellant was diligently attempting to assemble the Record on Appeal, and B) there were numerous technical difficulties over which respondent refused to cooperate.

Therefore, while appellant transmitted the Record on Appeal five days late, the delay was the result of appellant's being left to grope in the dark as to how to resolve questions about the designations and to deal with the technical difficulties occasioned by the numerous color copies and the renumbering of the Record. The delay was not due to any inattentiveness to the case as the above exchange demonstrates. Moreover, the respondent neither identifies or demonstrates any "legal prejudice" suffered by it by appellant getting the Record on Appeal assembled and mailed five days

---

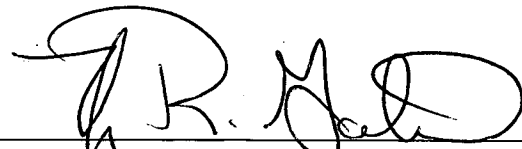
<sup>1</sup> Prior to 1986, circuit court rules required lawyers to meet to "settle the record."

after its due date. "Legal prejudice. . . is such as deprives defendant of substantive rights of property, or concerns his defense, which will not be available, or may be endangered in a second suit." *Black's Law Dictionary*, 5<sup>th</sup> Edition, "Legal Prejudice."

Because appellant diligently pursued the filing of the Record on Appeal and because the respondent can identify no prejudice or even delay occasioned from filing five days late, the appellant respectfully prays for an Order of the Court accepting the Record on Appeal as filed.

Respectfully submitted,

January 7, 2018



Thomas R. Goldstein, #2186.  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 711121  
N. Charleston, South Carolina 29415-1121  
(843) 554-4291 (843) 554-5566 (fax)  
E-mail: [tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

#### CERTIFICATE OF COUNSEL

I certify that prior to filing this motion, I attempted to consult with opposing counsel in an effort to resolve this issue.

January 7, 2018



Thomas R. Goldstein, #2186.  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 711121  
N. Charleston, South Carolina 29415-1121  
(843) 554-4291 (843) 554-5566 (fax)  
E-mail: [tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)

**RECEIVED**

JAN 09 2018

SC Court of Appeals

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-03478

RECEIVED  
JAN 09 2018  
SC Court of Appeals

Cricket Store 17, L.L.C. d/b/a Taboo ..... Appellant,

vs.

City of Columbia Board of Zoning Appeals..... Respondent,

and

City of Columbia Zoning Administrator, .....  
Counterclaimant,

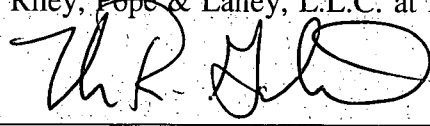
vs.

Cricket Store 17, L.L.C. d/b/a Taboo, ..... Counterdefendant.

PROOF OF SERVICE

I certify that I have served the Motion for Leave of Court to Accept Record on Appeal as filed and appellant's Reply to Motion to Dismiss on the Respondent, City of Columbia, by depositing a copy of it in the United States Mail, postage prepaid, on January 7, 2018, addressed to its attorney of record, Peter M. Balthazor, Riley, Pope & Laney, L.L.C. at P. O. Box 11412, Columbia, S. C. 29205.

January 7, 2018



Thomas R. Goldstein, S. C. Bar #2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554-4291  
Attorneys for Appellant

**BELK, COBB, INFINGER AND GOLDSTEIN, P.A.**

Harry C. Belk (1919-2003)  
Dale T. Cobb, Jr.

ATTORNEYS AT LAW  
2344 COSGROVE AVENUE  
CHARLESTON, SC 29405

Mailing Address:  
P.O. Box 71121  
Charleston, SC  
zip 29415-1121  
Ph: (843) 554-4291  
Fax: (843) 554-5566

Peggy M. Infinger  
pinfinger@cobblaw.net  
Thomas R. Goldstein  
tgoldstein@cobblaw.net

January 7, 2018

Hon. Jenny Abbott Kitchings,  
South Carolina Court of Appeals,  
ATTN.: Jessica, case manager  
1220 Senate Street  
Columbia, S. C. 29201

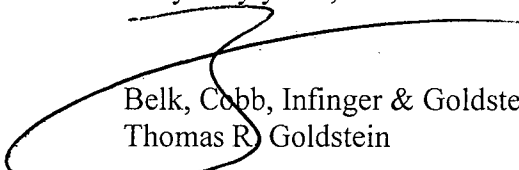
**RECEIVED**  
JAN 09 2018  
SC Court of Appeals

Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478  
Appellate Tracking Number: 2017-000561

Dear Ms. Kitchings,

I enclose an original and seven copies of a Motion for Leave to File the Record on Appeal Out of Time and a Return to respondent's Motion to Dismiss. I also enclose a certificate of service and our firm's check in the amount of \$25.00 to cover the filing fee for the Motion. Would you be so kind as to file the original and return one copy of each marked filed in the envelope provided? By copy of this letter I am providing a copy to opposing counsel. With kind regards, I am

Very truly yours,

  
Belk, Cobb, Infinger & Goldstein, P.A.  
Thomas R. Goldstein

TRG/

enclosure: Motion to File Record On Appeal, Return to Motion to Dismiss, certificate of service, check No.: 18150

cc: Mr. Peter M. Balthazor, Esq. (with enclosure)

Mr. Peter M. Balthazor

Riley, Pope & Laney, L.L.C.

P. O. Box 11412

Columbia, S. C. 29211



U.S. POSTAGE  
PAID  
NORTH CHARLESTON, SC  
29405  
JAN 08, 18  
AMOUNT  
**\$3.77**  
R2305K143215-12

1024 29201

Belk, Cobb, Infinger & Goldstein, PA  
P. O. Box 71121  
Charleston, S. C. 29415-1121

**RECEIVED**  
JAN 09 2018  
SC Court of Appeals

Hon. Jenny Abbott Kitchings,  
South Carolina Court of Appeals,  
ATTN.: Jessica, case manager  
1220 Senate Street  
Columbia, S. C. 29201

Expected Delivery Day: 01/10/2018

**USPS TRACKING NUMBER**

9505 5102 6343 8008 0884 94