

87976

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

RECEIVED

OCT 01 2018

Case No.: 2016-CP-08-01261
Appellate Case No.: 2017-000796

SC Court of Appeals

Benjamin Reyna, d/b/a, El Alamo Restaurant,.....Appellant,

vs.

The Town of Hanahan, ... Respondent.

MOTION FOR LEAVE TO FILE AMENDED INITIAL BRIEF

Pursuant to Rule 240, *South Carolina Appellate Court Rules*, the appellant, Benjamin Reyna, d/b/a, El Alamo Restaurant, requests leave of Court to file and serve an Amended Initial Brief, amending the brief by adding a separately stated, 42-word Statement of Issues on Appeal. (The proposed Statement is attached here. Below it, for the Court's convenience, is the Table of Contents and Arguments headings contained in the initial brief previously filed and served.) This motion is based on the ground that Respondent's brief includes a request for complete dismissal of the entire appeal on the ground that appellant omitted a **separately stated** "Statement of Issues on Appeal." Appellant concedes that the Initial Brief on file does not contain a separately delineated "Statement of Issues on Appeal." The Statement of Issues on Appeal are included in

both the Table of Contents and in each heading before each separately numbered argument. Prior to filing this motion, appellant forwarded the attached proposed 42-word amendment to Respondent's counsel, a copy of which is attached here, and requested consent to insert the Statement of Issues on Appeal.

MEMORANDUM IN SUPPORT OF MOTION
FOR LEAVE TO FILE AMENDED INITIAL BRIEF

RECEIVED

OCT 01 2018

SC Court of Appeals

This motion to amend is based on the ground that rules allowing amendments to pleadings are liberally construed to serve justice, and that appellant's omission of a separately stated Statement of Issues on Appeal is neither material nor prejudiced the respondent since they are contained in the Table of Contents and in each heading preceding each separately numbered argument. Therefore, the respondent understands the legal issues before the Court. The Supreme Court of South Carolina addressed more serious, multiple omissions in *Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992). In that case, appellant failed to include: proper organization and labeling, the issues were not properly "distinctively headed," the table of authorities was not alphabetized or referenced to the brief, the statement of the case contained contested matter and omitted required information, and the arguments contained no citation to either the record or to authority. Moreover, the brief failed to include a proper designation of contents of record on appeal. In short, the brief analyzed in *Henning*, failed to conform to any of the rules. Notwithstanding the numerous, material defects, the Supreme Court held: "Although this Court would be completely justified in dismissing this appeal based on

appellant's numerous violations of the Rules, we decline to do so and deny the motion to dismiss as to the Hennings." See also *Bankers Trust of South Carolina v. South Carolina National Bank*, 284 S.C. 238, 325 S.E.2d 81 (Ct. App. 1985): "Nevertheless, we will consider the issues Bankers Trust argued in its brief and in oral argument before us because they were either fully briefed, argued, **or were readily apparent to the parties during the course of the appeal.**" (emphasis added) [citations omitted] (Parties failed to include pleadings in the record on appeal.) As Judge Bell wrote in *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984): "When this Court comes to construe an exception, it will make its construction as liberal as the language will allow, in order to decide the question involved, unless it is satisfied that the statement has misled the respondent to his prejudice. [citations omitted] The Court is concerned with the substance of the appeal, not technical differences in the issues raised by the exceptions." [citations omitted] Here, the respondent urges a dismissal, not because the Statement of Issues on Appeal are not identified, but rather because they are not separately stated!

Here, the omission of a redundant Statement of Issues on Appeal is mere scrivener's error and does not prevent the respondent from understanding the issues "readily apparent to the [respondent]" or prevent respondent from addressing the legal issues listed in the Table of Contents and/or in the heading before each argument. In fact, Rule 211(b) allows any party to "correct obvious typographical errors and misspellings which were contained in the initial brief." Since the Statement of Issues on Appeal appear in both the Table of Contents and the headings of each numbered argument, appellant's failure to list them separately constitutes nothing more than a

“typographical error,” and respondent’s argument in its brief that the appeal should be dismissed is frivolous. Respondent is attempting to assert a motion to dismiss in its brief when the rules of appellate procedure require to be set out as a separate motion. Rule 240, *South Carolina Appellate Court Rules*. However, because respondent asserts a prayer for dismissal in its brief, appellant does not have the luxury of ignoring it. Respondent contends the appeal should be dismissed because even though appellant sets out the issues twice in the Table of Contents and before each argument, respondent contends Rule 208(b)(1)(B) requires three times. However, this rule does not require that the Statement of Issues on Appeal be separately set out, and thus appellant’s initial brief conforms to the rule as is because each issue is plainly listed twice. Appellant concedes that, as a matter of practice, many lawyers set them out separately, and appellant has no objection to correcting what is nothing more than a scrivener’s error. However, when respondent refused to consent to an amendment, and when respondent asserts the putative omission as grounds for dismissal of the appeal in its brief, the appellant must respond. Significantly, respondent omits a claim of prejudice because there is none. It is more than a stretch to assume distinguished defense counsel could not find the issues on appeal because they are listed only in the Table of Contents and before each Argument. If respondent believed the omission to be either material or to impair its ability to respond, it would have raised the issue by way of a Motion To Dismiss as required by Rule 240. Instead, in the second example of sharp practice in this case, the Respondent sat tight on what it now asserts is a fatal procedural defect requiring dismissal in order to spring it as an alleged bar to this Court addressing the merits of

this case. This sharp practice puts the appellant in the unavoidable position of having to address it via a motion to amend rather than in his Reply Brief.

In conclusion, the defect—if it is a defect—is minor and easily corrected by a simple, 42-word amendment that restates the issues set forth in the Table of Contents and before each Argument, and the Respondent’s refusal to allow such a minor correction violates both the letter and the spirit of the rules designed to insure cases are decided on their merits and not on trivial technicalities.

In addition, until the Court decides if appellant can or cannot amend his brief, the appellant cannot properly frame his Reply Brief and therefore requests an Order suspending appellant’s time limits to reply to respondent’s Brief and holding briefing on the merits in abeyance. Because the assertion in respondent’s brief is a request to dismiss the appeal in its entirety, Rule 240(b) compels suspension of the briefing schedule pending resolution of the appellant’s request to amend.

Respectfully submitted,

September 26, 2018



BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein, S. C. Bar #2186
P.O. Box 71121
Charleston, S. C. 29415-1121
(843) 554-4291, (843) 554-5566 fax
tgoldstein@cobblaw.net
Attorneys for Appellants

RECEIVED

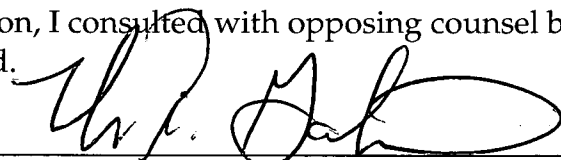
OCT 01 2018

CERTIFICATE OF COUNSEL

SC Court of Appeals

I certify that prior to filing this motion, I consulted with opposing counsel but was unable to resolve the request to amend.

September 26, 2018



Thomas R. Goldstein, S. C. Bar #2186

(PROPOSED) STATEMENT OF ISSUES ON APPEAL

1. Did the Master-in-Equity have jurisdiction to decide the case?
2. Did the City of Hanahan provide due process?
 - A. Did the City of Hanahan provide appellant with minimal procedural due process?
 - B. Is the decision of the City of Hanahan arbitrary and capricious?

TABLE OF CONTENTS (AS FILED)

Argument 1.....	8
The circuit court assigned the matter to the Master-In-Equity without a proper referral.	
Argument 2.....	8
The decision of the City Council is arbitrary, unreasonable, and an obvious abuse of its	
A.	
The Council deprived appellant of procedural due process.	8
B.	
The Council deprived appellant of substantive due process.	26

ARGUMENTS (AS FILED)

Argument 1.

The circuit court referred the matter to the Master-in-Equity, who lacks subject matter jurisdiction.

Argument 2.

The decision of the City Council is arbitrary, unreasonable, and an obvious abuse of its discretion

A. The Council deprived appellant of procedural due process.

B. The Council deprived appellant of substantive due process.

In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

RECEIVED

OCT 01 2018

SC Court of Appeals

Case No.: 2016-CP-08-01261
Appellate Case No. 2017-000796

Benjamin Reyna, d/b/a, El Alamo Restaurant,.....Appellant,

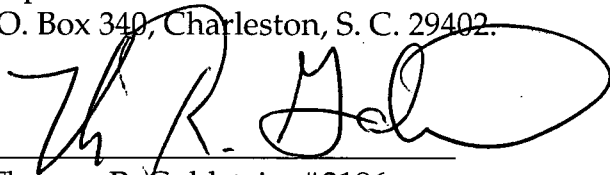
vs.

The Town of Hanahan, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Motion to Amend and Hold Briefing in Abeyance on the Respondent, The Town of Hanahan, by depositing a copy of it in the United States Mail, postage prepaid, on September 27th, 2018, addressed to its attorney of record, Stafford John McQuillin, III, P. O. Box 340, Charleston, S. C. 29402.

September 27, 2018



Thomas R. Goldstein, #2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291; (843) 554-5566 fax
Attorneys for the 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

September 27, 2018

RECEIVED
OCT 01 2018
SC Court of Appeals

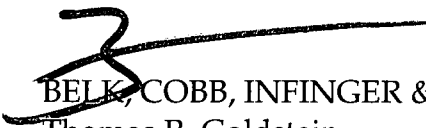
Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Benjamin Reyna vs. Town of Hanahan; Case No.: 2016-CP-08-1261
Appellate Case No.: 2017-000796

Dear Ms. Kitchings,

I enclose an original and seven copies of the appellant's motion to amend initial brief and hold briefing in abeyance. Would you be so kind as to file this with the Court? By copy of this letter, I am sending a copy to opposing counsel. Please let me know if you require anything further to consider this request. I thank you for your attention to this request. With kind regards, I am

Very truly yours,


BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/

enclosure: Motion To Amend Initial Brief and Hold Briefing Schedule in
Abeyance, proof of service, check No. 18465, return envelope

cc: (with enclosure)
Mac McQuillin, Esq.

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

Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RECEIVED
OCT 01 2018
SC Court of Appeals