

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

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

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JAN 28 2019
SC Court of Appeals

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

vs.

The Town of Hanahan, Respondent.

AMENDED 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 accept the previously filed Amended Initial Brief, filed December 20, 2018. This motion is based on the following grounds:

On June 25, 2018, appellant filed his initial brief ("Initial Brief No. 1.")

On September 17, 2018, the respondent filed its brief. That brief contained within it a prayer for dismissal of the entire appeal on the ground that the appellant failed to set out a separately stated Statement of Issues on Appeal.

On October 1, 2018, the appellant requested leave of court to amend his brief to correct the deficiency.

On November 21, 2018, this Court entered its Order authorizing the appellant to amend his initial brief.

On December 27, 2018, the appellant filed his amended brief and designation of contents of record on appeal. (“Initial Brief No. 2.”)

After Appellant filed his Initial Brief No. 2 on December 20th, Respondent’s counsel objected to Brief No. 2 on the ground that it contains more extensive edits than the addition of appellant’s proposed 42-word Statement of Issues on Appeal as set forth in the Motion to Amend. Appellant concedes that the edits are more extensive than the addition of a 42-word Statement of Issues on Appeal. The edits to Brief No. 2 do not change any of the legal arguments raised in Brief No. 1. The additional edits are that Appellant separately stated an argument on a *F.O.I.A.* violation and separately stated an evidentiary argument as Argument 3 as previously contained in Argument No. 2 in his original brief. For the Court’s convenience here are the two table of contents:

Brief No. 1

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 discretion.

A.
The Council deprived appellant of procedural due process. 8

B.
The Council deprived appellant of substantive due process. 26

Brief No. 2

Argument 1.....9
The circuit court assigned the matter to the Master-In-Equity without a proper referral.

Argument 2.....10
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. 10
i. The F.O.I.A. violation deprived appellant of due process..... 24
B.
The Council deprived appellant of substantive due process. 28
Argument 3..... 34
The record contains no admissible evidence of nuisance

The edits to the second brief do not enlarge the issues being appealed or the legal analysis applied to the facts of the case, but merely make the second brief more readable and better organized to better assist the Court in reviewing the case.

Both Brief No. 1 and Brief No. 2 are now filed with this Court, so whatever the Court decides, this application will not delay the disposition of the case. This Court’s November 21, 2018, Order allowing Appellant leave to file an amended brief placed no limitation on appellant on such amendments; however, since respondent reads the Court’s November 21st Order as restricting appellant to a 42-word amendment, the Appellant now seeks leave of Court to authorize the filing of Appellant’s Brief No. 2.

The Appellant asks that the briefing schedule, which would be Respondent’s brief and Appellant’s Reply Brief be held in abeyance pending resolution of this motion.

Respectfully submitted,

January 23, 2019



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

This motion raises an interesting question never before precisely addressed in the caselaw. Because Respondent asserted Appellant's case should be dismissed for failure to include a separately stated Statement Of Issues On Appeal (even though the issues were set forth separately in the Table of Contents and set forth as a heading to each numbered argument), Respondent forced Appellant to involve the Court, and the Court entered an Order on November 21st allowing Appellant to file an amended brief. Respondent contends the Court's November 21st Order limited Appellant to a 42-word amendment, and Appellant contends the Court's November 21st Order contains no such limitation. Appellant contends further that the Respondent's position is akin to

“opening the door” in a trial: by forcing the Appellant to seek leave of Court to amend his initial brief, the Respondent cannot now be heard to complain that the Appellant amends more than Respondent wanted.

This precise issue has never been reported; however, South Carolina case law and the *Rules of Appellate Procedure* allow liberal amendments: Rule 208(b)(7) allows either party to call to the Court’s attention any supplemental citation, identifying for the Court and opposing party into which page of the brief the citation is being entered. Likewise, Rule 212 authorizes supplementation to the record any time before oral argument commences. *Am.Jur.2d* states the general rule: “An appellant may be allowed to supplement its brief when the case is not yet ready for submission. However, the court will deny a motion for an extension of time to file a supplemental brief when an extension would retard the hearing and determination of a case already submitted for decision.” 5 *Am.Jur.2d*, “Appellate Review,” § 519 “Contents of Supplemental Briefs.” *C.J.S.* states the rule this way: “Defects or omissions in the original brief may, by leave of court, be supplied or cured by a supplemental brief or an amendment, at least where the defect in the original brief was not jurisdictional, and where no prejudice results therefrom to respondent.” 4 *C.J.S.*, Appeal and Error, § 621, “Supplemental, Additional, or Amended Briefs.”

In trial courts, amendments are allowed at any time, even after trial. *Soil & Material Engineers v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987). The reason for these rules is obvious. Justice is a search for truth, not a construction of obfuscation and subterfuge, and a lawyer’s duty is foremost to seek justice. “Historically, a lawyer is an officer of the court and is bound to work for the

advancement of justice while faithfully protecting the rightful interests of his clients.”
Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947) As previously cited to this Court,
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]

Both of appellant’s briefs are before the Court, so no matter what the Court
decides, this case will not be delayed. The respondent demonstrates no prejudice by the
Court having the benefit of a better organized appellant’s brief, and a better organized
brief makes this Court’s job of reviewing the case easier. Therefore Appellant
respectfully requests that the Court accept Initial Brief #2 for filing.

Respectfully submitted,

January 23, 2019



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PROOF OF SERVICE

I certify that I have served the Appellant's AMENDED 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 January 23rd, 2019, addressed to its attorney of record, Stafford John McQuillin, III, P. O. Box 340, Charleston, S. C. 29402.

January 23, 2019



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January 23, 2019

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

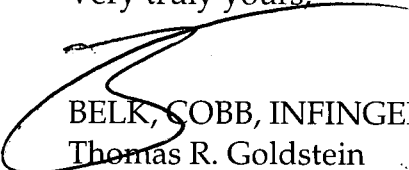
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Re: Benjamin Reyna vs. Town of Hanahan; Case No.: 2016-CP-08-1261
Appellate Case No.: 2017-000796

Dear Ms. Kitchings,

On January 10, 2018, I filed a motion with the Court requesting leave to file an Amended Brief, which I previously filed. However, in looking over my motion, I now realize I forgot to include a prayer holding briefing in abeyance until the Court rules. If the Court accepts the amended brief (Brief #2) as filed, then the Respondent may or may not want to amend its brief in reply. And, of course, I cannot determine how to approach my Reply Brief without knowing if the Court is going to accept Brief # 1 or Brief # 2 as appellant's initial brief. I apologize for this oversight. I ask, therefore, that you please substitute the amended motion for the one I sent on January 10th, and if there is an additional filing fee, please let me know, and I will immediately send it. I thank you in advance 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: amended motion, proof of service
cc: (with enclosure)
Mac McQuillin, Esq.

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