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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jocelyn Newman, Circuit Court Judge

**RECEIVED**  
APR 22 2019  
SC Court of Appeals

Case No. 2016-CP-40-03478  
Appellate Tracking No.: 2018-001062

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 TO SUPPLEMENT RECORD  
RULE 212, SOUTH CAROLINA APPELLATE COURT RULES &  
HOLD REPLY BRIEF DEADLINE IN ABEYANCE

As authorized by Rule 212, *South Carolina Appellate Court Rules*, the Appellant prays for an Order authorizing the including of Brian Cook’s January 10, 2018, employment contract (copy attached) in the Record on Appeal. This motion is based on the following grounds:

On February 9, 2018, Brian Cook testified in the Court of Common Pleas as follows:

Q. Okay. So are—can we make an appointment to come see you to sit down and talk to you to figure out what we can and cannot do?

A. Certainly

Q. And how would we do that?

A. We can set it up today if you like.

Q. Well, before you leave, are you agreeable to giving us a date and time to come to your office and discuss that [curing deficiencies and getting a general retail license]

A. We're specifically talking about how to establish a business that meets the zoning ordinance and not anything related to any open court cases, absolutely.

Q. Sure. Absolutely. That's what we'd like to do. Thank you for that.

A. Yes, sir.

Transcript of Record, February 2018, page 53, line 14—page 54, line 3

As soon as Appellant attempted to do exactly what Mr. Cook testified he should do, he learned that Mr. Cook was not employed by the City, and through the Freedom Of Information Act, learned that a month before he gave the above quoted testimony, he signed a contract of employment with the Town of Blythewood. (See attached contract.)

There is no dispute that this information was not presented to the circuit court, but every court has the inherent authority to control the conduct within it, and every court takes perjury seriously, classifying it as extrinsic fraud for which judgements can be set aside under Rule 60:

The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney—an officer of the court—suborns perjury or intentionally conceals documents he or she effectively precludes the opposing party from having his day in court. These actions by an attorney constitute extrinsic fraud. Moreover, we note that, while their analysis does not turn on the categorization of fraud as intrinsic or extrinsic, numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court. See *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072 (2d circ. 1972) (institution of action by attorney who knew that there was complete defense to action might be fraud upon the court); *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4<sup>th</sup> Cir 1982) (“[I]nvolvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court.”); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4<sup>th</sup> Cir. 1987) (“A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony.”); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5<sup>th</sup> Cir. 1978) (fabrication of evidence where attorney is implicated is fraud upon

the court); *H. K. Porter Co. v. Good year Tire & Rubber*, 536 F.2d 1115, 1119 (6<sup>th</sup> Cir) (“Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.”); *Dixon v. Comm’n of Internal Revenue*, 2003 WL 1216290 (9<sup>th</sup> Cir. 2003) (fraud on the court occurred where attorneys entered into secret settlement agreements with taxpayers in exchange for false testimony); *Synanan Found, Inc. v. Bernstein*, 503 A.2d 1254 (C.C. 1986 (attorney subornation of perjury and false statements to trial court constitute fraud upon the court); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 489 (E.D.Wis. 1978) (noting distinction between perjury involving officers of the court and witness or party); see 12 James Wm. Moore *et. al.*, *Moore’s Federal Practice* ¶ 60-21[4][b] (3d ed. 2002)

Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceals documents, extrinsic fraud constituting a fraud upon the court occurs.

Here, it is impossible that Mr. Cook did not know that he signed a contract with the Town of Blythewood a month before he took the stand and testified he would be available to meet with Appellant and resolve this case. Whether Mr. Bergthold knew that or did not know that is incapable of determination from the record. Since the facts are irrefutable, and since Mr. Cook obviously did not and would not meet with the Appellant, the question for this Court is:

Does this Court allow Appellant to supplement the record to include the true facts to be considered as they apply to the circuit court’s discretion in granting an injunction, or

Does this Court remand the matter back to the circuit court to allow the circuit court to obtain jurisdiction to entertain a Rule 60(b) motion?

The Appellant has no preference as to the remedy, but the attached document shows that Mr. Cook did not testify truthfully and deprived both the circuit court and the Appellant from knowing that his promise of an open door policy was false and designed to mislead the circuit court into believing the City is acting reasonably. If this Court chooses to remand the case for Mr. Cook to be recalled, then Appellant can inquire as to when the City’s counsel learned he had accepted employment with another municipality.

### **Conclusion**

Based on the foregoing, it cannot be disputed that the circuit court made its decision based on the presentation of false testimony. Therefore, the Appellant respectfully prays for an Order of the Court:

- A) Allowing Appellant to supplement the record with Mr. Cook's January 10, 2018, employment contract with the Town of Blythewood so this Court can weigh that evidence in evaluating whether the lower court's discretionary decision is based on incorrect facts, or, in the alternative
- B) Remanding the case back to circuit court to allow Appellant to recall Mr. Cook and examine him under oath about his perjured testimony, and
- C) Holding the Appellant's Reply Brief filing deadline in abeyance pending a decision on the City's objections to Appellants Designation of Contents of Record on Appeal and a decision on supplementing the record as requested here.

Respectfully submitted.

April 17, 2019



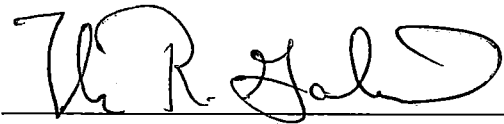
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Thomas R. Goldstein, #2186.  
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P. O. Box 711121  
N. Charleston, South Carolina 29415-1121  
(843) 554-4291 (843) 554-5566 (fax)  
E-mail: [tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)

CERTIFICATE OF COUNSEL

I certify that prior to filing this motion, I did attempt to consult with opposing counsel in an effort to resolve this issue but was unable to resolve the issue.

April 17, 2019



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## II. TERM OF EMPLOYMENT:

Employee may be available to report for duty prior to March 1, 2018. Nonetheless, Employee and the Town agree that Employee shall serve as Town Administrator for a term of two years, such term to commence effective as of March 1, 2018 and terminate on March 1, 2020. Employee's term of employment shall be automatically renewed for successive or "rolling" two-year terms with a beginning date of March 1, unless (1) either party terminates pursuant to Section III, or (2) either party, by at least November 30 of the second year of any renewal term, informs the other party of its intent not to renew the Agreement. In the event the Town informs Employee of its intent not to renew, Employee shall have the option to either continue his employment until the effective date of termination or resign his position without further notice to the Town. The Town shall have no obligation to make any further payments or compensation to Employee beyond the end of the term of employment.

## III. TERMINATION:

### A. By the Town:

Nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the Town to terminate the services of Employee at any time. The Town may terminate the Employee immediately for cause, which is defined as the Employee's material breach of this agreement, neglect, continued failure or inability to perform, poor performance of duties, consistent failure to obtain assigned objectives, misappropriation of Town property or assets, intentional damage to Town property, insubordination, dishonesty, conviction of a felony, violation of Town policy or performance of any act (including any dishonest, fraudulent, illegal, immoral, or unethical act) detrimental to the interest of the Town. In such event, the Town shall have no obligation to make any further payments or compensation to Employee. Except in the event of termination with notice to Employee as set forth in Section II above, should the Town choose to terminate Employee's employment without cause, the Town agrees to pay Employee, upon separation: (1) a sum equal to three (3) months pay at Employee's then existing compensation rate, which may be payable at the Town's discretion either monthly or in a lump sum; and (2) continuation of the Town's payment of the Employer's portion of any premiums for insurance afforded to the Employee hereunder for a period of three (3) months. The official date of separation shall be specified by the Town on or after the date when the notice of termination is delivered.

### B. By Employee:

Employee shall give the Town sixty (60) days' written notice of his election to terminate this Agreement. In the event of an election by Employee to terminate, Employee shall not be entitled to receive the termination pay provided in Section III, A of this Agreement but shall receive payment for any earned, unused vacation leave.

## IV. COMPENSATION:

The Employee shall be paid an annual salary of Seventy-Five Thousand (\$ 75,000.00) Dollars. After the initial 180 days of service, Town Council shall perform an interim evaluation of Employee's performance and may elect to increase Employee's salary if deemed appropriate. Thereafter, the Town agrees to compensate Employee for his services at the annual base salary rate set by the Council following Employee's annual evaluation and salary review and payable in installments at the same time as other employees of the Town are paid. Employee is not subject to any general employee cost-of-living salary increases.

V. **EXEMPTION FROM OVERTIME:**

It is agreed and understood that Employee is exempt from the overtime provisions of the Fair Labor Standards Act, and is not eligible for overtime for any hours worked beyond a normal work period.

VI. **WORK SCHEDULE:**

It is recognized that Employee must devote a great deal of time to Town business outside the normal office hours of the Town and beyond a 40 hour work week. The Mayor shall establish an appropriate work schedule.

VII. **OTHER BENEFITS:**

At the Town's expense, the Town agrees that it will provide Employee, in addition to Employee's compensation, with any and all fringe benefits that apply to other employees and all benefits as described below:

- A. **PERSONAL INSURANCE:** Insurance policies for medical, dental, life, and other health and welfare benefits shall be provided by the Town on the same basis and in the same amounts and percentage contributions as are provided to other general employees.
- B. **VACATION, SICK LEAVE AND HOLIDAYS:** On the same basis as provided to other general employees of the Town at the time of this Agreement, the Employee shall be entitled to vacation and sick leave, holidays and other such fringe benefits as are provided to other general employees.
- C. **RETIREMENT CONTRIBUTIONS:** On the same basis and in the same percentage contributions as are provided to other general employees of the Town at the time of this Agreement, the Town shall contribute retirement fund payments for his benefit in the State Retirement System as required by the South Carolina Public Employee Benefits Authority (PEBA).

- D. CELL PHONE: Employee agrees that he will provide a cell phone that is technologically compatible with Town communication systems and agrees that his cell phone number can be provided to appropriate Town personnel and officials for contact. The parties will evaluate cell phone needs and expenses and make appropriate adjustments as deemed necessary.
- E. PROFESSIONAL GROWTH & DEVELOPMENT: Subject to appropriations by Town Council, the Town may provide for certain of the expenses of Employee's continued professional growth and development and certain of the costs of participating in national, state, and local governmental management and planning associations. The Town will reimburse Employee for Employee's expenses for membership in the South Carolina City/County Management Association, and a nationally and state recognized planning association ( e.g. APA and SCAPA). Subject to annual appropriation by Town Council, the Town agrees to pay for the travel and subsistence expenses of Employee for professional and official travel, meetings, and occasions adequate to pursue necessary official and other functions for the Town.

VIII. ANNUAL GOALS AND REVIEWS: Without limitation on the ability of Council to meet with Employee at other times during the year for discussion of goals and evaluation of performance, the following events shall occur during the course of this Agreement:

- A. GOAL SETTING FOR UPCOMING YEAR: At least annually, the Town Council will meet with the Employee to define such goals and performance objectives that the Council determines necessary for the proper operation of the Town of Blythewood.
- B. ANNUAL PERFORMANCE EVALUATION: On or before the anniversary date of this Agreement, the Mayor and Town Council shall review and evaluate Employee's performance during the preceding year.
- C. ANNUAL PERFORMANCE REVIEW: Upon completion of the annual performance review, the Mayor and Town Council shall confer with Employee and provide Employee an opportunity to discuss the results of the review with the Mayor and Town Council.
- D. ANNUAL COMPENSATION AND OTHER BENEFITS REVIEW: Following each annual performance review, the Town Council may increase Employee's compensation and/or other benefits in such amounts and to such extent as the Town Council determines is desirable based upon the performance of the Employee.
- E. NO REDUCTION OF BENEFITS: The Town shall not, at any time during the term of this Agreement, reduce the salary, compensation, or other financial

benefits of Employee, except to the degree of such a reduction for all employees of the Town.

X. **BONDING:**

The Town shall bear the full cost of any bond required of the Employee under any law or ordinance.

XI. **NOTICES:**

All notices pursuant to this Agreement shall be given by deposit in the custody of the United States Postal Service, postage prepaid, addressed to the Town to Mayor of the Town of Blythewood, 171 Langford Road, Blythewood, S.C. 29016, and addressed to Employee by his name and to his current home address as shown in his Town personnel file.

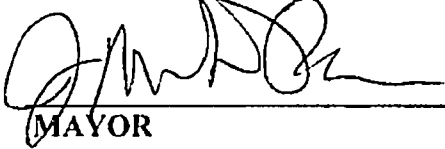
Alternatively, notices required pursuant to this Agreement may be personally served in the same manner as is applicable to civil judicial practice. Notice shall be deemed given as of the date of personal service or as of the date of deposit of such written notice in the course of transmission in the United States Postal Service.

XII. **GENERAL PROVISIONS:**

- A. This Agreement constitutes the entire understanding and agreement of the parties.
- B. If any provision, or any portion thereof, contained in this Agreement is held unlawful, invalid or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected and shall remain in full force and effect. The parties agree to immediately renegotiate any part or provision in this Agreement rendered or declared invalid.
- C. The applicable state or federal taxes upon any benefits or amounts provided for Employee in this Agreement shall be the sole responsibility of Employee.
- D. Employee shall not be required to reside within the Town limits of Blythewood.
- E. This Agreement shall be effective as of the date of approval by Blythewood Town Council.

IN WITNESS WHEREOF, the Town has caused this Agreement to be signed and executed in its behalf by its Mayor, and duly attested by its Town Clerk, on the 11<sup>th</sup> day of January, 2018, and Employee has signed and executed this Agreement on the 10<sup>th</sup> day of January, 2018.

**TOWN OF BLYTHEWOOD:**

  
\_\_\_\_\_  
MAYOR

**EMPLOYEE:**

  
\_\_\_\_\_

**ATTEST:**

  
\_\_\_\_\_  
TOWN CLERK

**WITNESS AS TO EMPLOYEE:**

  
\_\_\_\_\_

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
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and

City of Columbia Zoning Administrator, .....  
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vs.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Motion To Supplement the Record and hold the filing deadline in abeyance on the Respondent, City of Columbia, by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2019, addressed to its attorney of record, Peter M. Balthazor, Riley, Pope & Laney, L.L.C. at P. O. Box 11412, Columbia, S. C. 29205.

April 17, 2019



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Attorneys for Appellant

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April 17, 2019

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Fax: (843) 554-5566

Ms. Jenny A. Kitchings,  
Clerk of Court  
South Carolina Court of Appeals,  
ATTN.: Jessica, case manager  
P. O. Box 11629  
Columbia, S. C. 29211

Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478  
Appellate Tracking Number: 2018-001062  
(See also: Appellate Tracking Number: 2017-000561)

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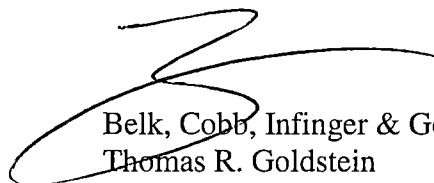
APR 22 2019

SC Court of Appeals

Dear Ms. Kitchings,

I enclose an original and six copies of a Return to Respondent's objections and a Motion to Supplement Record (and hold briefing deadline in abeyance). I also enclose a proof of service for each one and our firm's check in the amount of \$50.00. Would you be so kind as to file these with the Court? By copy of this letter, I am serving copies on opposing counsel. I thank you in advance for your attention to this request. With kind regards, I am

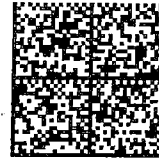
Very truly yours,



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

TRG/  
enclosure: Return, Motion, check no. 18721  
cc:  
Mr. Trevor P. Eddy  
Mr. Peter M. Balthazor  
Riley, Pope & Laney, L.L.C.  
P. O. Box 11412  
Columbia, S. C. 29211

PRIORITY MAIL



US POSTAGE  
\$ 007.35<sup>0</sup>  
02 1P  
0001168646 APR 17 2019  
MAILED FROM ZIP CODE 29405

**First Class Mail**

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

Ms. Jenny A. Kitchings,  
Clerk of Court  
South Carolina Court of Appeals,  
ATTN.: Jessica, case manager  
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