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 Case No.: 2017-000561
Opinion No. 5673

Cricket Store 17 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 RECONSIDER COURT'S JULY 28, 2019 ORDER
MOTION TO HOLD BRIEFING IN ABEYANCE

Trevor Eddy, S. C. Bar No.
The Eddy Law Firm, L.L.C.
Attorneys for Appellant
1522 Lady Street
Columbia, South Carolina 29211
(803) 803-250-5402 (803) 667-3187
E-mail: trevor@theeddylawfirm.com

Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

August 15, 2019

As authorized by Rule 240 of the *South Carolina Appellate Court Rules*, the Appellant moves for an Order amending the Court's July18, 2019, Order striking portions of Appellant's Designation of Contents of Record on Appeal. This motion is based on the following grounds:

On April 16, 2019, the Respondent filed objections to the Appellant's Designation of Contents of Record on Appeal. On April 22, 2019, M.U.S.C. admitted the undersigned for congestive heart failure and related problems. As a result of the heart "attack" that caused the initial admission on the 22nd, the undersigned has been undergoing various out-patient procedures in preparation for a major open heart procedure scheduled for Tuesday, August 20, 2019. Physician estimates for the recovery period following this procedure range from 2-7 days of I.C.U. care followed by estimated 7-30 days of hospitalization.[1]

As a result of hospitalization on April 22nd, followed by multiple one-day admissions for procedures in preparation for open heart surgery, Appellant's counsel neglected to respond to the City's April 16th objections. Appellant submits that the hospitalizations constitute sufficient excusable neglect to allow a late reply and requests further that the Court hold additional briefing matters—filing the record on appeal and final briefs—in abeyance for 60 days.

On April 19th, the City listed 18 objections to Appellant's proposed designations, and the Court's July 28th Order sustained 14 of them, the ones numbered 5-18. Because Appellant is seeking leave of Court based on excusable neglect in failing to reply, to streamline the dispute and promote judicial economy, Appellant agrees to delete the inclusion of documents identified by the City's objections numbers 6, 7, 9, 12, and 18. Thus, the only proposed designations left in dispute are the following:

[1] The surgeon's prediction of recovery time is imprecise, ranging from 2-7 days in I.C.U. and 7-30 days hospitalization. He also says when it is over, there will be improvement. *Dum spiro spero*. The countervailing analysis is: why take the chance at almost 66 years old? There is no rulebook for that answer.

5. Affidavit of Jeff White, February 9, 2018[2]
8. Affidavit of Larry Boyer February 6, 2018
10. Municipal Ordinance 17-82 (Duties of Zoning Administrator)
11. Municipal Ordinance 17-111 (Organization & Procedures of Bd. of Zoning Appeals)
13. Zoning Administrators' January 11, 2016[3] correspondence (Required Compliance)
14. Appellant's February 11, 2016, correspondence (Application for Appeal)
15. Planning Director's February 2016, correspondence (Denial of Application)
16. Appellant's March 1, 2016, correspondence (Application for Appeal)
17. Planning Department's Staff Summary (Zoning Appeal)

AFFIDAVITS

The fundamental disagreement between the parties over these issues is that the City arises from the City's Janus characterizations of the February 9th hearing as an "evidentiary hearing." To be clear, the Clerk of Court's office scheduled the matter as a "motion hearing" on the City's application for injunction. The City refers to this hearing throughout as its **"motion"** hearing:

MR. BERGTHOLD: ---this is our **motion** and I'm—I think he can make any arguments in response to the **motion**, but we have the burden and I think we typically would go first. (Transcript page 4, line 24—page 25, line 2)

Respondent's counsel was, of course, right. The parties were before the Court on a **motion** hearing, and in a **motion** hearing, the Court permits the non-moving party wide latitude in presenting germane factual and legal matters to the Court without the necessity of rigorous adherence to the rules of evidence. See Rule 7(c), *South Carolina Rules of Civil Procedure*: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." The two affidavits in question are properly filed and properly served, the trial court considered them, rejecting the City's only objection of timeliness, and the City took no appeal from the trial court's decision. These affidavits are part of

[2] The City contends there is no "February 9, 2019" affidavit. This hyper-technical objection is typical of the City's conduct in this case. The affidavit is dated "February 6, 2019," and mailed to the Clerk of Court and opposing counsel on the 7th. Counsel brought an extra copy to the hearing on the 9th and the City objected on the ground that it did not receive it two days prior to the hearing. The trial court accepted the affidavit. It is the May 11th affidavit that the City contends was "new" evidence, and to promote judicial economy, Appellant withdraws the May 11th affidavit even though Judge Newman specifically allowed supplemental affidavits. See February 9, 2018, Transcript at pages 65-69

[3] This is a typographical error: January 11, 2016 should be January 28, 2016.

the record below and should be included in the Record on Appeal.

ORDINANCES

The Appellant does not apprehend the City's objection to inclusion of municipal ordinances. Apparently, the City argues that in order to be part of the record, a party must offer the law as evidence. This has never been the rule in South Carolina. Just as ignorance of the law is no excuse for any citizen, the Courts of this State are presumed to know the law and take judicial notice of it. "A court may take judicial notice, whether requested or not." *South Carolina Rules of Evidence*, Rule 2019c). The inclusion of municipal ordinances in the record is a matter of convenience for the Court, especially in this case in which both parties make numerous references to these and other ordinances. An objection to the inclusion of the City of Columbia's ordinances is frivolous.

BOARD OF ZONING APPEALS' RECORD

The remaining objections (numbers 14—17), are to the official communications between the City and the Appellant in the runup to his appeal hearing before the Board of Zoning Appeals. These documents served as the "pleadings" to the Appellant's appearance before the Board of Zoning Appeals. The requests to the City and its responses are the official record of the Board of Zoning Appeals, which was previously provided and certified to the circuit court as part of the court's decision on the merits of Appellant's challenge to the Board's decision not to disqualify the Appellant from an appearance before the Board. See § 6-29-830 S. C., Code, ann. ". . . the board shall file with the clerk a certified copy of the proceedings held before the board of appeals. . ." They are already part of the Record on Appeal from the Board to the circuit court. Therefore, the City is correct when it says "Items 12-18 were not presented to the trial court and admitted into evidence," but that is not the standard in South Carolina. In South Carolina, the non-moving party at a motion hearing is not

required to submit the file to the Court. No court has ever required a lawyer to move into "evidence" the file as it exists in determining a motion. For example, in resisting a motion for summary judgment, a lawyer is not required to move his Answer or his memoranda into evidence for consideration by the Court, and because summary judgment is dispositive, Rule 56(f) specifically allows a non-moving party to supplement the record and make such order as is "just." The issue in this appeal is whether the trial court did or did not properly issue an injunction, and in making that decision, the circuit court considered the matters that were already part of the record—it was not a new case, and a lawyer is not required to re-submit everything previously submitted. (In federal court, cases are assigned to a single judge to ameliorate the re-education process—whether that system is or is not better than the random selection of state court is subject to much debate.)

In short, this dustup is another example of the City's sharp practice, and Appellant would have responded timely had he been in a position to do so. Throughout this litigation, the City has refused to communicate with the Appellant or anyone acting on his behalf—a refusal that extends from the beginning of this tortured litigation to as recently as the last 24 hours. Whether the City is or is not entitled to an injunction is the question on the merits, and it is telling that in making objections to the Appellant's designations, the City identifies no prejudice because there is none. Rather, it is motivated to leverage every technical trick in its unlimited quiver to prevent the Court from having a full picture of the facts as part of its almost nine year war on Appellant. The purpose of courts is to do justice, and justice will be served by allowing either party to make a full and fair record.

RELIEF REQUESTED

Based on the foregoing, the Appellant respectfully requests:

1. That the Appellant be allowed to file this late response to the Respondent's April 16, 2019 objection to designations;

2. That response to this motion and preparation of the Record on Appeal be held in abeyance for a period of 60 days;

3. That the Appellant be allowed to include the nine specified items discussed herein;

4. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

August 15, 2019

Thomas R. Goldstein, S. C. Bar 2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, South Carolina 29415-1121
(843) 554 4291; (843 554 5566—fax)
tgoldstein@cobblaw.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate Case No.: 2018-001062
(See also: Appellate Case No.: 2017-000561)

Cricket Store 17 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 Appellant's Motion to Reopen the Record To Reconsider the Court's July 28, 2019, Order and Motion to Hold Briefing in Abeyance upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2019, addressed to its attorney of record, Peter Balthazor, Riley, Pope, & Laney, L.L.C., P. O. Box 11412, Columbia, S. C. 29211 this 15th day of August, 2019.

August 15, 2019

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

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

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

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

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

August 15, 2019

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

Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478
Appellate Tracking Number: 2018-001062

Dear Ms. Kitchings,

I enclose the appellant's motion to reconsider and hold final briefing in abeyance. I also include our firm's check in the amount of $50.00 to cover the filing fee. Would you be so kind as to file this with the Court and return a clocked copy in the envelope provided? By copy of this letter, I am providing a copy to 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/

encl.: Motion; check No. 18855, return envelope

cc:
Mr. Trevor P. Eddy (e-mail)
Mr. Peter M. Balthazor (e-mail and regular mail)
Riley, Pope & Laney, L.L.C.
P. O. Box 11412
Columbia, S. C. 29211
Mr. Scott Bergthold (e-mail)

First Class Mail

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

RECEIVED
AUG 19 2019
SC Court of Appeals

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