THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2017-CP-23-03372
Appellate Case No. 2017-001747

Greenville Bistro, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and Frontage Road Associates, Inc., a South Carolina Corporation,.....Respondents,

v.

Greenville County, a Political Subdivision of the State of South Carolina, and Will Lewis, in his Official Capacity as Sheriff of Greenville County,.....Appellants.

INITIAL BRIEF OF RESPONDENTS

O. W. Bannister
SC Bar No. 506; Fed. ID No. 1184
Luke A. Burke
SC Bar No. 100033; Fed. ID No. 11322
401 Pettigru Street (29601)
P. O. Box 10007 (29603)
Greenville, South Carolina
Phone (864) 298-0084; Fax (864) 298-0146
E-mail: owBannister@bannisterwyatt.com
LBurke@bannisterwyatt.com
Co-Counsel for Respondents

Luke Lirot
Admitted *Pro Hac Vice*
Florida Bar Number 714836
2240 Belleair Road Suite 190
Clearwater, Florida 33764
Phone (727) 536-2100; Fax (727) 536-2110
E-Mail: Luke2@LirotLaw.com
Co-Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

South Carolina Cases

Federal Cases

UNITED STATES STATUTES

SOUTH CAROLINA STATUTES

GREENVILLE COUNTY CODE

STATEMENT OF ISSUES ON APPEAL

Did the Court of Common Pleas abuse its discretion by granting a Preliminary Injunction to preserve the *status quo ante* during the pendency of the subject litigation?

STATEMENT OF THE CASE

Plaintiffs/Respondents commenced this action on May 23, 2017, seeking declaratory and injunctive relief to require Defendants to comply with an earlier Court of Common Pleas Order, and against the enforcement of certain Greenville County ordinances which purported to regulate the content of entertainment, *i.e.*, the speech offered by Respondent, Greenville Bistro. The Complaint did not seek damages from Defendants. Appellants contrarily assert that they were not bound by the earlier Court of Common Pleas Order and that the ordinances at issue were constitutional, therefore, that there is no basis to enjoin the enforcement of the Greenville County Ordinances at issue.

On May 24, 2017, Respondents filed a Motion for Temporary Injunction and also requested an *ex parte* Temporary Restraining Order. On June 1, 2017, the Court of Common Pleas held a hearing on Plaintiffs' Motion for a Temporary Restraining Order, and granted said motion in part:

> After reviewing the pleadings and hearing argument of counsel, the Court finds that the Plaintiffs have met the requirements for a Temporary Restraining Order and grants Plaintiffs' Motion on a limited basis as set forth herein. One of the arguments made by the Defendants is that Bistro's operation of the current business violates the zoning ordinance of Greenville County and the nature of the business for which the Permit and/or Certificate of Occupancy was issued and Greenville County had threatened to shut down Bistro's business and had issued citations to employees for violating various ordinances. Bistro's business is similar to the business previously operated at this location which is defined as an "adult cabaret" and was governed by various Consent Orders from previous Court actions. Bistro argued that it was a "successor" to the previous business and that the prior Consent Orders would apply to Bistro and its operation. The Court finds that there is an

> issue of whether Bistro has a right to continue operating an "adult cabaret" as a non-conforming business under the previous Orders and as a "successor" to the previous business. Therefore, at this juncture and pending a more thorough hearing on Plaintiffs' Motion for Temporary Injunction, the Plaintiff will be allowed to continue operating as an "adult cabaret" in compliance with existing County Ordinances even though it may be nonconforming with County Ordinance 2673 and other zoning ordinances and its current permit and/or Certificate of Occupancy. **Therefore, the Defendants are restrained from closing the Plaintiffs business and from issuing citations based on nonconformity with zoning or operation of an "adult cabaret"** contrary to its permit and/or certificate of occupancy pending the hearing on Plaintiffs' Motion for Temporary Injunction. But this does not limit the applicability or enforceability of any other County Ordinances. For this limited restraining Order, the Plaintiffs must post security in the amount of $1000.

June 2, 2017, Order, pp. 1 - 2, [Emphasis Added].

On June 16, 2017, the Court of Common Pleas heard oral argument on Plaintiffs' Motion for Preliminary Injunction and, on July 17, 2017, the Court of Common Pleas granted in part Plaintiffs' Motion for Temporary Injunction. On August 15, 2017, Appellants served their Notice of Appeal.

STATEMENT OF FACTS

The subject property was operated from 1999 through 2015 as a nightclub named "*Platinum Plus*," presenting female entertainers who, while scantily glad, did not display "specified anatomical areas," or appear "semi-nude," both as defined by the Greenville County Code, and was, therefore, not considered to be a sexually oriented Adult Use.

The property which is the subject of this action is located in unincorporated Greenville County. *Platinum Plus* was licensed by the State of South Carolina to sell alcoholic beverages by the drink. *Platinum Plus* was operated by an entity known as Elephant, Inc., which was a South Carolina corporation.

There are three other clubs in Greenville County: *Lust, Scores* and *Lady Godiva,* all of which operate using the same generic business model and which compete with *Platinum Plus.* Since opening in 1999, *Platinum Plus* operated for many years without incident. However, starting in 2015, the business, as then operated by Elephant, Inc., began to attract intense scrutiny from law enforcement. For unknown reasons, the other three similarly situated clubs did not, and do not, draw the same concentrated scrutiny as does *Platinum Plus.* [1]

As a result of this increased scrutiny, on April 17, 2015, the County, through the Solicitor's Office, brought a nuisance abatement action (Case No. 2015-CP-23-02597), under S.C. Code § 15-43-10, *et. seq.,* against *Platinum Plus.* This civil action resulted in a Consent Order filed June 3, 2015 which Consent Order, ("2015 Order"), adopted an earlier Consent Order ("2002 Order"), entered in 2002.

The 2015 Consent Order resulted in Elephant, Inc., shuttering the doors of *Platinum Plus* from May 8, 2015, until November 8, 2015. Upon reopening, Elephant, Inc., continued to allegedly violate the Consent Order, with the result that *Platinum Plus* was again shuttered from approximately August 10, 2016. until February 7, 2017. Portions the second order closing *Platinum Plus* are presently on appeal to this Court (Case No. 2016-001695).

Thereafter, Frontage Road and Elephant, Inc., terminated their business relationship and Frontage Road and Greenville Bistro entered into a Lease Agreement, ("Lease Agreement"), by which Greenville Bistro undertook to resume the operation in essentially the same form as *Platinum Plus* but with the critical addition of food service on the premises. The Court of

[1] The County's Initial Brief (at p. 5), asserts, without record references, that "the County sued multiple sexually oriented businesses." That claim is not developed in the record below, and, to the best of Respondents' information and belief, is untrue.

Common Pleas then, in Case No, 2015-CP-23-02597, on February 9, 2017, issued a new Order which found in part:

> The Court must be mindful of the fact that the previous Orders of this Court were based upon the conduct allowed and/or condoned by Elephant, Inc. and Kenwood Gaines, [principal of Elephant, Inc.,] which conduct constituted a violation of the 2002 Order and was also found to be a nuisance within the applicable statutes. The removal of Elephant, Inc. and Kenwood Gaines from possession of the property at 805 Frontage Road and their subsequent abandonment of the lease and the premises appears to have effectively abated the nuisance.

("February, 2017, Order.")

While the Court of Common Pleas noted that Greenville Bistro intended "to commence operations of a similar business" (*Ibid.*), the Court also noted that the previous findings of a nuisance and orders of closure were "directed personally to Gaines, and Elephant, Inc." (*Id.*, at 4).

Whether or not its entertainers display "specified anatomical areas," the entertainment being provided by Greenville Bistro constitutes free expression protected by the First Amendment to the Constitution of the United States and by Article I, § 2 of the Constitution of the State of South Carolina.

The first reference to Adult-Oriented Entertainment Establishments in the Greenville County Code was as section 2-5.71 of the 1976 Code. [2] The current Adult-Oriented Entertainment Establishments regulations were established by Ordinance 2673, adopted in 1995, ("1995 Code"). [3] Portions of the regulations found in Chapter 2.5 of the Greenville County Code have been modified by judicial decisions: *see, e.g. Harkins v. Greenville County*, 340 S.C. 606,

[2] Likely as a result of the Supreme Court approving this type of regulation in June, 1976: *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440 (1976).

[3] The County's Initial Brief incorrectly states that the County began to regulate sexually-oriented Adult Uses in 1995.

533 S.E.2d 886 S.C. 2000).

Although *Bucks, Racks & Ribs,* is operated so that dancers do not display "specified anatomical areas," or engage in "specified sexual activities," Greenville County began treating the business as a "Sexually-oriented Entertainment Establishment." In fact, in response to the Court of Common Pleas's explicit approval of Greenville Bistro commencing operation, (February, 2017, Order), Greenville County purported to adopt Ordinance 4869, ("Ordinance 4869"), which included a new definition of "semi-nude," banning a form of expression already prohibited by the Consent Order applicable to *Bucks, Racks & Ribs*.

On this issue, Appellants' Initial Brief, (at page 5), is incorrect. Greenville Bistro did not intend to, nor did it, nor does it, operate as a sexually-oriented Adult Use under the 1995 Code. However, on February 21, 2017, 12 days after the Court of Common Pleas entered its Consent Order permitting Respondents to open and operate in their present format, Greenville County adopted Ordinance 4869 which added to the Code a new definition of "semi-nudity," which the County claims brings Greenville Bistro under the purview of the amended Code.

Thus, the issue before the Court of Common Pleas, and now this Court, is not the constitutionality of the 1995 Code, which has been largely sustained, [4] but the constitutionality of Ordinance 4869, the enforcement of which the Court of Common Pleas temporarily enjoined. It was on Ordinance 4869 that the Court of Common Pleas focused its attention in its July, 2017,

[4] Although Respondents will argue below that parts of the *Harkins* decision departed from established South Carolina precedent, which precedent has been subsequently reaffirmed, thereby casting doubt on the continued controlling status of *Harkins*. The same infirmities exist in the South Carolina Supreme Court's decision in *Greenville County v. Kenwood Enterprises, Inc.*, 352 S.C. 157, 577 S.E.2d 428 (2001). In fact, one holding in *Kenwood Enterprises,* not germane hereto, has already been overruled: *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).

Order.

Further, despite the Court of Common Pleas explicitly approving *Bucks, Racks & Ribs* operating a similar business, Greenville County was, until the Court of Common Pleas entered its Temporary Restraining Order, (June, 2017, Order), trying to prevent ***any*** form of entertainment or expression at the subject property. In fact, in their discussion of the February, 2017, Order, Appellants again mis-state the substance of the Order. (Initial Brief at 8.)

The key proviso in that Order was that there is and was no "connection" between Greenville Bistro and the previous operators of the business, Elephant, Inc., and Kenwood Gaines. The February, 2017 Order, did require compliance with all applicable Greenville County Ordinances, but that requirement is immaterial since the enforcement of Ordinance 4869 has been restrained, and then enjoined, making it inapplicable.

Another misleading issue raised in Appellants' Initial Brief relates to the issue of the Certificate of Occupancy. Appellants complaint that the Certificate of Occupancy (Complaint Exhibit E), for Greenville Bistro permits a restaurant, not an adult cabaret. However, as Appellants do acknowledge in their Brief (p. 10) an adult cabaret includes a restaurant:

> *Adult cabaret* means a nightclub, bar, **restaurant** or similar commercial establishment which regularly features:
> ...

Greenville County Code, § 2.5-72.

Thus, Greenville County's own code belies its own argument: the Certificate of Occupancy is for a restaurant and an adult cabaret can be a restaurant. There are no irregularities related to the issuance and applicability of the Certificate of Occupancy.

Not one, but two judges (Gravely, J and Stilwell, J), of the Court of Common Pleas have

found Greenville County's current regulation of sexually-oriented Adult Uses to be constitutionally infirm and restrained, and subsequently enjoined, the County from enforcing parts of those regulations.

SUMMARY OF ARGUMENT

The Court of Common Pleas did not abuse its discretion in entering the Partial Temporary Injunction in July, 2017. The Court of Common Pleas's July, 2017 Order is well reasoned, factually accurate and supported, and legally sufficient and should be sustained.

The action for injunctive relief is an action in equity which asserted that Greenville County acted inequitably by entering into a Consent Order permitting a "similar business" to operate at the subject location and then vitiating that Consent Order by passing Ordinance 4869 which the County now claims precludes the operation of the business to which it consented 12 days earlier.

Greenville County's Initial Brief focuses on an alleged presumption of constitutionality which it claims attaches to the ordinances at issue. However, the Court of Common Pleas is exercising concurrent jurisdiction with the United States District Court and is required to apply **Federal** constitutional law to Respondents' civil rights claims pursuant to 42 U.S.C. 1983. Under Federal law, the ordinances at issue are **presumptively unconstitutional**, thereby negating Appellant's entire argument.

ARGUMENT

I. STANDARD OF REVIEW

Respondents concur with Appellants that the standard of review is whether or not the lower court abused its discretion in granting a Temporary Injunction: *Hook Point, LLC v. Branch Banking & Trust Co.,* 397 S.C. 507, 725 S.E.2d 681 (2012):

> The grant of an injunction is reviewed for abuse of discretion. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App.2005).

Id., at 511, 725 S.E.2d at 683.

II. THE INJUNCTION WAS PROPERLY GRANTED

a. The Nature of the Action

Respondents also concur that an action for injunctive relief is a proceeding in equity: *Buffington v. T.O.E. Enterprises,* 680 S.E.2d 289, 383 S.C. 388 (S.C., 2009). *See also, Strategic Resources v. BCS Life Ins. Co.,* 627 S.E.2d 687, 689; 367 S.C. 540 (S.C., 2006).

However, it is vital to note that the jurisdiction of the Court of Common Pleas was invoked, in part, pursuant to 42 U.S.C. 1983. [5] Pursuant to *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990), the Court of Common Pleas has concurrent jurisdiction with the United States District Court over Respondents' Federal civil rights issues. The Court of Common Pleas acknowledged this basis for its jurisdiction (July 17, 2017 Order at 1), and based its July 17, 2017, Order in large part on the Federal cases cited by Respondents in their Memorandum of Law in support of the Motion for Temporary Injunction, (*see* July 17, 2017 Order at 3, 4, Respondents' Memorandum of Law). It should be noted that Appellants' Initial Brief makes absolutely no reference to the Federal law cited by Respondents in their Memorandum of Law or cited by the Court of Common Pleas. This omission should be seen as fatal to the County's appeal.

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[5] Because of the pendency of quasi-criminal charges (Complaint Exhibit H), Respondents anticipated that bringing their complaint in the United States District Court would lead to that Court abstaining from adjudicating the complaint. Accordingly, Respondents brought their Federal civil rights claims to the Court of Common Pleas.

b. Standards for Injunctive Relief

The three prongs for injunctive relief are set out in *Rawlinson Road Homeowners v. Jackson,* 395 S.C. 25, 716 S.E.2d 337 (S.C. App. 2011):

> A party seeking injunctive relief "must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Denman v. City of Columbia,* 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010) (internal citations and quotation marks omitted).

Id., at 35.

More recently, the South Carolina Supreme Court held:

> ... An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Cnty. of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App.2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.,* 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *see Transcontinental Gas Pipe Line Corp. v. Porter,* 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made. When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and "when other issues are brought to trial, they are determined without reference to the temporary injunction." *Helsel v. City of N. Myrtle Beach,* 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (*citing Alston v. Limehouse,* 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders")). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

Allegro v. Scully, 409 S.C. 392, 762 S.E.2d 54 (S.C. 2014).

As the Court of Common Pleas found, Respondents met each prong of the test for

injunctive relief: irreparable harm, a likelihood of success on the merits and no adequate remedy at law. Based on the articulation of the facts necessary to support these findings, there can be no argument that the Court of Common Pleas abused its discretion in granting the Temporary Injunction. Thus, the decision of the Court of Common Pleas should be affirmed.

c. Irreparable Injury Is Presumed

While Appellants, (Initial Brief at 13, 14, 15, 17, citing *inter alia*, to *Harkins, supra*), may be correct that even laws in derogation of First Amendment freedoms are presumed to be constitutional under South Carolina law, they are presumptively **unconstitutional** under **federal law:**

> ***...[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the first Amendment.*** In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," *ante,* at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*. ...
>
> However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight' it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions.

Schad v. Borough of Mt. Ephraim, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) [Emphasis added].

Schad has been followed:

> ... Regardless of the weight the trial court chose to afford to Adultworld's evidence of lack of relocation sites, where a plaintiff makes a *prima facie* showing of infringement of First Amendment rights, the presumption of validity of a zoning ordinance disappears.

Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985)

> ... However, "the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. ...

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988)

See, also, National Association for the Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3rd Cir., 2016); *Ben Rich Trading, Inc. v. City of Vineland,* 126 F.3d 155 (3d Cir. 1997); and *City of Watseka v. Illinois Public Action Council,* 796 F.2d 1547 (7th Cir. 1986)

Likewise, under Federal law, the loss of First Amendment freedoms, for even minimal periods of time, as a matter of law, constitutes irreparable harm: *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). Consistent with *Elrod,* the Fourth Circuit has held:

> Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion); see also *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). ...

International Refugee Assistance Project v. Trump,857 F.3d 554, 602 (4th Cir. May 25, 2017, *en banc*), vacated as moot, 138 S.Ct. 353 (2017).

> More importantly, the mere showing of a deprivation of First Amendment or other federally protected rights in and of itself establishes both injury and damage. *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1965).

Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177 (N.D. Oh., 1979).

Further demonstrating the irreparable harm caused by Appellants' actions are the following cases:

> Deprivations of constitutional rights are usually held to constitute irreparable injury as a matter of law. *American Fed. of Gov. Employees, Loc. 1858 v. Callaway,* [398 F.Supp. 176 (N.D. Al. 1975)]; *Sampson v. Murray,* 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

International Association of Firefighters v. City Sylacauga, 436 F.Supp. 482 (N.D. Al. 1977).

> ... Irreparable injury inevitably occurs where there are property or other rights which are violated and for which there is no remedy other than injunctive relief. ...

National Association of Radiation Survivors v. Walters, 589 F.Supp. 1302 (N.D. Ca. 1984); reversed on other grounds, 473 U.S. 305, 105 S.Ct. 3180 (1985).

> ... irreparable injury is assumed to flow from a constitutional violation and plaintiffs are not required to show harm beyond that violation. 11 Wright & Miller's [Federal Practice and Procedure] § 2948 at 440.

Decker v. United States Department of Labor, 473 F.Supp. 770 (E.D. Wi. 1979).

Regardless of the efforts to downplay this important element, the County cannot escape the fact that irreparable harm is presumed when the government tries to restrict speech by limiting the content of expressive activity.

d. Likelihood of Success on the Merits

The "regulations" which Greenville County is attempting to enforce against Respondents are clearly an effort to regulate the "content" of the expression, *i.e.,* the nature of the entertainment being offered. This is constitutionally impermissible: *See Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 536; 100 S.Ct, 2326 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)).

A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least-restrictive narrow tailoring to serve it, *see United States v. Playboy Entertainment Group, Inc.,*529 U.S. 803, 813; 120 S.Ct. 1878 (2000), since merely protecting listeners from offense at the message, the "primary effect," is not a

legitimate interest of the government. *See also Cohen v. California,* 403 U.S. 15, 24-25; 91 S.Ct. 1780 (1971), as observed frequently, "strict scrutiny leaves few survivors." The Greenville County regulations are destined to meet this fate.

In the instant case, the County has not commissioned or considered any studies specific to the current characteristics or impact of Respondents' business. Respondents have shown a likelihood of success on these issues.

e. Respondents Have No Adequate Remedy at Law

It was clear to the Court of Common Pleas that Respondents had no adequate remedy at law because Appellants' efforts to unconstitutionally regulate Respondents' business threaten Respondents with several forms of irreparable harm. The first form of irreparable harm for which, as a matter of law, there is no adequate remedy at law, is found in the loss of Constitutional rights and freedoms as set out in the Complaint herein. These rights and freedoms include the right to free speech, the right to due process of law, the right to equal protection of the law, and right to have the orders of the Courts obeyed.

> ... If an injury cannot be adequately remedied at law, because damages would be either inadequate or unascertainable, the injury is generally held irreparable.

Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S.Ct. 256, (1929).

There was no remedy at law for the irreparable injuries being inflicted on Respondents by Appellants' actions. The complaint herein shows that Greenville County's actions unlawfully and unconstitutionally deprived Respondents of their First Amendment rights without due process of law and unlawfully and unconstitutionally impair a wide variety of other Constitutional rights. Thus, Greenville County's actions represented the loss of Constitutional freedoms which, even for a minimal period of time, constitutes irreparable harm for which there is no adequate remedy at

law.

Second, the loss of income from Respondent' business is also irreparable harm which is ripe for injunctive relief and for which there is no adequate remedy at law:

> ... Numerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm. *See Tri State Generation [v. Shoshone River Power, Inc.,* 805 F.2d 351 (10th Cir. 1986)]; *Roso-lino Beverage Distributors, Inc. v. Coca Cola Bottling Co.,* 749 F.2d 124, 125-26 (2d Cir. 1984); *Otero Savings & Loan Ass'n v. Federal Reserve Bank,* 665 F.2d 275, 278 (10th Cir. 1981); *Federal Leasing, Inc., v. Underwriters at Lloyd's,* 650 F.2d 495, 500 (4th Cir. 1981); *Valdez v. Applegate,* 616 F.2d 570, 572 (10th Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.,* 588 F.2d 24, 28-29 (2d Cir. 1978), cert. denied, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979); *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205 (2d Cir. 1970); *Associated Producers Co. v. City of Independence,* 648 F.Supp. 1255, 1258 (W.D. o. 1986); *Stanley Fizer Associates, Inc. v. Sport-Billy Productions Rolf Deyhle,* 608 F.Supp. 1033, 1035 (S.D. N.Y. 1985); *Great Salt Lake Minerals & Chemicals Corp. v. Marsh,* 596 F.Supp. 548, 557 (D.Utah 1984).

Zurn Constructors, Inc. v. B.F. Goodrich Company, 685 F.Supp. 1172 (D.Kan. 1988).

The Fourth Circuit elaborated on the issue of an inadequate remedy at law discussed in *Federal Leasing, Inc., v. Underwriters at Lloyd's,* 650 F.2d 495, 500 (4th Cir. 1981), in an opinion directly applicable and relevant to the instant case:

> The district court found that RPM would be more harmed by the absence of an injunction than would MCAR if an injunction were issued. This finding is not erroneous, given evidence that RPM is likely to suffer economic injury severe enough to put it out of business if MCAR is allowed to provide photographic information to the customers RPM now services. While purely economic injury does not constitute irreparable harm sufficient to warrant injunctive relief, we have held that the right to continue a business is not measurable solely in economic terms. *See Federal Leasing, Inc. v. Underwriters at Lloyd's,* 650 F.2d 495, 500 (4th Cir. 1981); *Blackwelder, [Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d at 189, 196 (4th Cir. 1977)] 550 F.2d at 197.

Montgomery County Assoc. of Realtors v. Realty Photo Master, 993 F.2d 1538, (4th Cir. 1993).

Had Greenville County been permitted to continue its violation of the Court of Common Pleas' Orders and take enforcement actions including expelling all of Respondent' customers, revoking Respondent's Certificate of Occupancy and shuttering Respondents' business by requiring the immediate cessation of the offering of protected speech, then Respondents would be suffering economic damage sufficient to put them out of business, irreparable harm for which there is no adequate remedy at law.

Finally, any measurable financial harm is counter-balanced by the hardship on Respondents, which implicates basic principles of judicial obedience and cannot be valued in monetary terms: *Feller v. Brock*, 802 F.2d 722, 727, (4th Cir. 1986). Accordingly, Greenville County's failure to comply with the Court of Common Pleas Order also constitutes irreparable harm for which there is no adequate remedy at law.

III. THE INJUNCTION COMPLIES WITH THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

a. The Contents of the Injunction

Appellants complain (Initial Brief at 14), that all that Ordinance 4869 did was to add a definition of "semi-nudity" to the County Code and include "semi-nude" as a defining characteristic of an adult cabaret. Appellants also complain (*Ibid.*), that such a regulation has neem consistently upheld by other courts.

That is not the point.

As the Court of Common Pleas properly noted, (July 17, 2017 Order at 2):

> ... That Order (February, 2017) simply allows Greenville Bistro to open and operate a "similar business" to that of the former tenant. Judge Simmons Order further provided that "in the event that Greenville Bistro or any other adult entertainment venue commences operation at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected." Twelve days after this Court entered its Order that had the effect of allowing Greenville Bistro to

> open and operate, the County adopted Ordinance 4869, which purports to amend the definition of an adult cabaret to regulate establishments offering "semi-nude" entertainment. Once Greenville Bistro commenced its operations Defendants believed those operations were in violation of various County regulations and ordinances and began to enforce those regulations against Plaintiffs.

Id., at 2.

That finding is at the heart of this matter: Greenville County agreed to a consent order permitting a similar business to the previous business to operate at the subject location, and, 12 days later, amended its code to preclude that similar business from operating, thereby vitiating the Consent Order to which it agreed 12 days earlier. Sitting in equity, the Court of Common Pleas properly held that Greenville County's actions were inequitable and properly enjoined those actions.

Further, the Injunction Order does comply with Rule 65, SCRCP, which provides:

> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 65, SCRCP.

The July 17, 2017, Order: 1) sets forth the reasons for its issuance, (pp.3 - 6), which reasons track the three prongs of *Rawlinson Road*; 2) does so on its own, and not by reference to any other documents, *Ibid.*; and 3), sets out in detail and with precision, the acts to be restrained, (p. 6). The July 17, 2017, Order is legally sufficient.

b. Evaluation on the Merits

The Court of Common Pleas, consistent with decided South Carolina law, stated that its

decision was made "... without regard to the ultimate merits of the case," (July 17, 2017 Order, p. 5.) The Court of Common Pleas based this part of its decision on *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32; 413 S.E.2d 824, 826, (1992): "... Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."

Appellants' reliance on *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001), (Initial Brief at 15), is misplaced. First, while it would have been helpful for the Court of Common Pleas to identify which count of the Complaint on which it focused: (I, enforcement of the Consent Orders or II, the unconstitutionality of Ordinance 4869), it appears from the tenor of the July 17, 2017, Order was the vindication of First Amendment rights established by the earlier consent orders and vitiated by Ordinance 4869, and not on the constitutional issues.

The *Curtis* court actually held:

> ... The trial court in this case found Curtis was not likely to succeed on the merits because he had not established a valid infringement upon a fundamental constitutional right. Although the trial judge ruled on the merits of Curtis' constitutional arguments, **it was necessary to determine the likelihood of success on the merits.** Furthermore, according to *Hutchison, supra,* [*v. York County,* 86 S.C. 396, 68 S.E. 577 (1910)] it was proper for the trial judge to consider the merits because Curtis' *prima facie* case depended on an allegation that section 16-13-470 was unconstitutional.

Curtis at 576, 549 S.E.2d 601, [Emphasis Added].

The operative language in *Curtis* is whether or not a constitutional analysis is "necessary to determine the likelihood of success on the merits." In the case *sub judice*, a constitutional analysis is not necessary because the case is easily decided on the vitiation of the earlier Consent Orders by Ordinance 4869, without reaching the constitutional issues.

Here, once again, Appellants argue the presumed constitutionality of the Ordinances.

This is only half true. As set out above, when the Court of Common Pleas' jurisdiction was invoked pursuant to 42 U.S.C. 1983, and, under Federal law, the ordinances are presumptively unconstitutional. The omission of any discussion of this issue is fatal to the County's appeal.

With respect to Appellants' argument (Initial Brief at 16) that the South Carolina Supreme Court has found that Section 2.5 allows adequate alternative avenues of communication for sexually-oriented Adult Uses, it is ludicrous to assert that an 18 year old opinion can govern land use issues. Zoning conditions change and what may have been available as a "location" 18 years agois of no precedential value currently. That noted, this Court need not reach that issue: the Court of Common Pleas appears to have focused its decision on the vitiation of the Consent Orders by Ordinance 4869, and not on the constitutional issues.

Appellants' "final, irrefutable" reason for overturning the Court of Common Pleas (Initial Brief at 17), is that the South Carolina Supreme Court, in *Kenwood Enterprises*, affirmed a permanent injunction against the operation of a sexually oriented business at the subject location. This argument is specious for several reasons. Greenville Bistro does not operate a sexually oriented business as such a use was defined at the time *Kenwood Enterprises* was decided. In fact, Greenville Bistro's present use is not a sexually oriented business as now defined. Rather, this matter is governed by the 2002, 2015 and 2017 Consent Orders, the last of which, until it was vitiated by the adoption of Ordinance 4869, permitted the operation of a "similar business" to that of Respondents on the subject property.

c. Irreparable Harm

Respondents have clearly established irreparable harm as a matter of law, as set out above. With respect to Appellants' 105 year old injunction case, (Initial Brief at 18), *Alston v. Bell*, 93

S.C. 553, 77 S.E. 727 (1913), while this case may or may not be applicable to Respondents' constitutional claims, it has no bearing on the claim that Greenville County violated the February, 2017, Consent Order by adopting Ordinance 4869 which vitiated the Consent Order.

Further, *Alston* rests, once again, on a presumption of validity attaching to an ordinance. As demonstrated throughout this Brief, the Court of Common Pleas is exercising concurrent jurisdiction with the United States District Court, and, therefore, must apply Federal law which deems the ordinances to be **presumptively unconstitutional.**

West Virginia Club Owners v. Musgrove, 553 F.3d 292, (4th Cir. 2009) is cited (Initial Brief at 18) for the correct proposition that there is a link between the "irreparable harm" and "likelihood of success on the merits" of a temporary injunction proceeding. That link has been proved by Respondents, particularly when it is recalled that the Court of Common Pleas is adjudicating Federal law, which presumes the ordinances at issue to be unconstitutional.

Also, *Maryland v. King*, 567 U.S. 1301, 133 S.Ct. 1 (2012), while implicating Fourth Amendment rights, does not even involve First Amendment rights. [6] As established throughout Respondents' Initial Brief, this case implicates First Amendment rights which means that the Court of Common Pleas, exercising its jurisdiction over Respondents' civil rights claims, properly applied the **presumption of invalidity** which attaches to laws in derogation of First Amendment freedoms under Federal law.

d. Inadequate Remedy at Law

[6] It is also important to note that this case is **not** a decision of the Supreme Court of the United States, but a decision by Chief Justice Roberts in his capacity as Circuit Justice for the Fourth Circuit ruling on an application for a stay of a Maryland Court of Appeals decision pending the Supreme Court's ruling on a petition for writ of certiorari.

Here (Initial Brief, pp. 18 - 19), Appellants reiterate their earlier argument to which Respondents have responded above. No further response to this argument is necessary.

CONCLUSION

The Court of Common Pleas, siting in equity, and exercising jurisdiction over Respondents' federal civil rights claims, appropriately and properly entered the Temporary Injunction at issue herein. The Court found that the three prongs of a temporary injunction application established by *Rawlinson Road, supra*, were met: irreparable harm, the likelihood of success on the merits, and the lack of an adequate remedy at law. The Court's Order also fully complies with Rule 65 SCRCP.

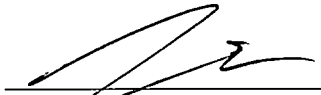
Because this action was brought under concurrent Federal law, the "presumption of validity" that allegedly attaches to laws in derogation of First Amendment freedoms under South Carolina law is reversed, and these laws come before the Court with a heavy presumption of constitutional invalidity.

The Court of Common Pleas, as a court in equity, found that it was inequitable for Greenville County to vitiate a Consent Order into which it had entered only 12 days earlier, and found that, applying federal civil rights law, Respondents have a substantial likelihood of success on the merits.

The decision of the Court of Common Pleas should be sustained and upheld.

Respectfully submitted,

BANNISTER & WYATT, LLC



O. W. Bannister
SC Bar No. 506; Fed. ID No. 1184

Luke A. Burke
SC Bar No. 100033; Fed. ID No. 11322
401 Pettigru Street (29601)
P. O. Box 10007 (29603)
Greenville, South Carolina
Phone: (864) 298-0084; Fax: (864) 298-0146
Co-Counsel for Plaintiffs

And for:

Luke Lirot, Esq.
Florida Bar Number 714836
LUKE CHARLES LIROT, P.A.
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
Telephone: (727) 536-2100
Facsimile: (727) 536-2110
Co-Counsel for Plaintiffs
Admitted *Pro Hac Vice*

Dated: February 9, 2018

Greenville, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

C. A. NO. 2017-CP-23-03372
Appellate Case No. 2017-001747

Greenville Bistro, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and Frontage Road Associates, Inc., a South Carolina Corporation, ...Respondents,

vs.

Greenville County, a Political Subdivision of the State of South Carolina, and Will Lewis, in his Official Capacity as Sheriff of Greenville County, ...Appellants.

PROOF OF SERVICE

The undersigned certifies that a true copy of the foregoing:

INITIAL BRIEF OF RESPONDENTS

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

was this 9th day of February, 2018, mailed, postage prepaid to:

John Robert Devlin, Jr., Esq.
Devlin & Parkinson, P.A.
P.O. Box 10387
Greenville, SC 29603

Scott D. Bergthold, Esq.
Law Office of Scott D. Bergthold, P.L.L.C.
2290 Ogletree Ave., Suite 106
Chattanooga, TN 37421

Jenny Abbott Kitchings, Clerk
Court of Appeals
P. O. Box 11629
Columbia, SC 29211

SWORN TO before me this 9th
day of February, 2018.

NOTARY PUBLIC for South Carolina
PRINT NAME: Luke A. Burke
My Commission Expires: 4-25-22

BANNISTER, WYATT & STALVEY, LLC

Kaitlyn Bouchillon
P. O. Box 10007, Greenville, SC 29603
P (864) 298-0084; F (8/64) 298-0146

BANNISTER, WYATT & STALVEY, LLC
ATTORNEYS AT LAW

O.W. BANNISTER | JOHN F. WYATT | JAMES W. BANNISTER | BRUCE W. BANNISTER | ALEX R. STALVEY
WILLIAM J. MCDONALD | LUKE A. BURKE | MARCELO TORRICOS | J. ELIZABETH MCCOOL
401 PETTIGRU STREET-29601 | PO BOX 10007-29603 | GREENVILLE, SC | PHONE: (864) 298-0084 | FAX: (864) 298-0146

February 9, 2018

VIA U.S. MAIL
Jenny Abbott Kitchings, Clerk
Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Greenville Bistro, LLC, et al. v. Greenville County, et al.
Appellate Case Number: 2017-001747
Case Number: 2017-CP-23-03372

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the following:

1. Initial Brief of Respondents;
2. Respondents' Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the originals and return clocked stamped copies to me in the enclosed self-addressed stamped envelope.

By copy of this letter and the Proof of Service, I am serving a copy of the Initial Brief of Respondents upon counsel of record.

Thank you for your time and attention. Should have any questions, please do not hesitate to contact me.

Yours truly,
BANNISTER, WYATT & STALVEY, LLC

Luke A. Burke

LAB/kb
Enc. (As Stated)

cc: John R. Devlin, Jr., Esq. (w/ enclosures)
Scott D. Bergthold, Esq. (w/enclosures)
Client (w/enclosures)