

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-42-01468903
Appellate Case No. 2017-002585

RECEIVED
MAR 12 2018
SC Court of Appeals

Cole Towing and Recovery, LLC,.....Appellant,

v.

City of Spartanburg and Spartanburg City Council,..... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1. Did the circuit court erred in granting summary judgment where municipality exceeded its authority to enact ordinance criminalizing behavior that is lawful under state statutory scheme?
2. Did the circuit court err by granting summary judgment where there were genuine issues of material fact as to whether municipality exceeded its authority to enact ordinance imposing, among other things, a fee schedule for nonconsensual towing from private property?
3. Did the circuit court err in granting summary judgment where there were genuine issues of material facts necessary to a determination of whether ordinance violated contract clause?

STATEMENT OF THE CASE

Cole Towing and Recovery, LLC, initiated this case by the filing and service of a Summons and Complaint on April 27, 2017. On April 28, 2017, Cole Towing filed a Motion for temporary relief. A hearing was held on June 1, 2017, after which an order was entered on June 23, 2017, denying Plaintiff's motion for temporary relief. The City of Spartanburg and the Spartanburg City Counsel filed an Answer on June 1, 2017. The parties each filed motions for summary judgment and a hearing was subsequently held on August 2, 2017, before the Hon. J. Derham Cole, in Spartanburg County Court of Common Pleas. An Form 4 Order granting summary judgment in favor of the City of Spartanburg and the Spartanburg City Counsel was entered on October 16, 2017. A formal Order was entered on December 5, 2017. A timely notice of appeal filed and this brief follows.

ARGUMENT

I. MUNICIPALITY EXCEEDED ITS AUTHORITY TO ENACT ORDINANCE THAT CRIMINALIZED BEHAVIOR THAT IS LAWFUL UNDER STATE STATUTORY SCHEME.

The circuit court erred in granting summary judgment upholding the City's ordinance which prohibited and criminalized the Plaintiff's towing of vehicles as contracted by owners of private properties, an activity which is lawful under State law.

"In determining the validity of a local ordinance, the inquiry is twofold: did the local government have the power to enact the ordinance; and, if so, is the ordinance consistent with the Constitution and general law of this State. Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997)." Beachfront Entm't, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 605, 666 S.E.2d 912, 913 (2008).

Under State law it is illegal to park on private property. As victims under that statute, owners of private property may tow offending vehicles off of their property. Title 16, *Crimes and Offense, Trespasses and Unlawful Use of Property of Other, Parking on private property without permission; removal of vehicles; lien for towing and storage, sale of vehicles, penalty for violations*, South Carolina Code Ann. Section 16-11-760 provides in pertinent part;

(A) It is unlawful for a person to park a vehicle, as defined in Section 56-5-5630, on the private property of another without the owner's consent. If the property is for commercial use, the owner must post a notice in a conspicuous place on the borders of the property near each entrance prohibiting parking. Proof of the posting is considered notice conclusive against the person making entry.

(B) A vehicle found parked on private property may be towed and stored at the expense of the registered owner or lienholder, and charges for towing, storing, preserving the vehicle, and expenses incurred if the owner and lienholder are notified pursuant to Section 29-15-10 constitute a lien against the vehicle, provided that the towing company makes notification to the law enforcement

agency pursuant to Section 56-5-2525.

(C) If the vehicle is not claimed by the owner, lienholder, or his agent, the vehicle must be sold pursuant to Section 29-15-10 by a magistrate in the county in which the vehicle was towed or stored.

(D) A person violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned for not more than thirty days. This punishment is in addition to the other remedies authorized in this section.

Section 16-11-760.

The City of Spartanburg's ordinance states "It shall be unlawful to charge for the nonconsensual towing of any motor vehicle ...except under the following circumstances" and goes on to require an approved sign with the name and number of the towing service, development of signs by the City, Signs placed at each entrance that are clearly and unmistakably visible, on the scene payment for release, certification of equipment, insurance, books and records, approval of the placement of signs, audits and maximum charges related to towing.

The City Ordinance in question criminalizes towing otherwise in compliance with the state statute. The City ordinance makes criminal what was legal under state law by imposing a fine of \$500 per violation and/or 30 days in prison.

In Beachfront Entm't, Inc. v. Town of Sullivan's Island, *supra*, the Court found a local ordinance invalid where it criminalized conduct that was not illegal under State law. Reasoning that Article VIII, § 14, of our State Constitution requires uniformity regarding the criminal law of this State, the Court held that local governments may not criminalize conduct that is legal under a statewide criminal law. *See Foothills Brewing; Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996).

Assuming *arguendo* that the neither the Federal government nor the State have preempted the regulation of towing, such that a local government may therefore criminalize the contractual towing of vehicles from private property, it nonetheless can do so only to the extent consistent with State law. See City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local governments may not enact ordinances that impose greater or lesser penalties than those established by state law). Here the City's ordinance is invalid in that it imposes a criminal penalty for towing vehicles in compliance with the express provisions of state law. It further frustrates the rights of victims as intended and contemplated under the statute. Contractual towing from private property that was not illegal under State law is made illegal under the City ordinance. Since the City has criminalized conduct that is not unlawful under relevant State law, the City exceeded its power in enacting the ordinance in question. Connor v. Town of Hilton Head Island, 314 S.C. 251, 254, 442 S.E.2d 608, 610 (1994). As in Conner and Beachfront, the penalty provision of the City's ordinance in the present case is unconstitutional because it conflicts with provisions, intent and purpose of State law by imposing a criminal penalty for conduct that is not illegal under State law. The order of the circuit court granting summary judgment for the Respondents should therefore be reversed and summary judgment granted for the Appellants.

II. SUMMARY JUDGMENT WAS IMPROPER WHERE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF SPARTANBURG EXCEEDED ITS AUTHORITY TO ENACT ORDINANCE IMPOSING A FEE SCHEDULE FOR NONCONSENSUAL TOWING FROM PRIVATE PROPERTY.

The circuit court erred in granting summary judgment upholding the City's ordinance that imposes a fee schedule for nonconsensual towing of vehicles unlawfully parked on private

property.

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. *Id.* In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

The City of Spartanburg is vested with powers pursuant to S.C. Code Section § 5-7-30

which provides in pertinent part that each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it. *See* S.C. Code Ann. § 5-7-30.

Here the City set mandatory requirements, including a fee schedule, relating to towing of vehicles illegally parked in violation of State law. (“SEC. 23-19. MAXIMUM CHARGES FOR TOWING, BOOTING AND FEES RELATED THERETO; METHODS OF PAYMENT AND INVOICE/RECEIPTS.”) The ordinance usurped the right of private parties to set such fees by contract. The preamble to the ordinance provides that the basis of the ordinance is “to protect the public and reasonably balance the property rights and interests associated with the towing of privately owned vehicles from privately owned commercial property.” Ord. p. 1. The public that the City purports to protect would be those violating S.C. Code Section 16-11-760 by parking illegally on properly posted private property. The City’s ordinance limits the rights of victims (private property owners) as created by state statute and frustrates the purpose and intent of the statute.

In South Carolina “The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings. S.C. Const. art. I, § 24. Under S.C. Code Section 16-11-760 victims (in this case the owners of private

residential complexes) have the statutory right to tow vehicles from their property and to directly or indirectly recover fees for doing so. The City's ordinance has, in effect, upended the victim's rights under State statute by finding that offenders of Code Section 16-11-760 require protection from their victims. This is clearly contrary to State law.

This appeal involves whether the record presents any genuine question as to a material fact on the issue. The stated basis for the City's ordinance is that the victims under Section 16-11-760 are engaged in "predatory practices." R. p. _____. The City in its trail brief claimed to have "raised serious concerns of price gouging, questionable towing, failure to return vehicles to citizens, failure to provide receipts and retrieval of personal items from towed vehicles." *See* Supp. aff. Ed Memmott. While the City offered minutes of a council meeting where several people complained about having their cars towed, their complaints revealed that towing was based for the most part on a parking violation, or at the direction of a law enforcement officer. The record also shows that the City failed to consult industry experts, private property owners, or other towing companies before enacting the ordinance. Aff. Cole p. 3. The record further shows evidence that the fees Appellant charged for non-consensual towing were based on market rates. Affidavit of Cole, p. 2 of 6. Accordingly, there was a genuine question as to whether predatory practices actually existed. The record further shows that the City's ordinance set mandatory maximum set charges well below market rates, including the rates for the towing of vehicles from public roadways. Aff. Cole, R. p. _____. Appellant provided testimony that the City's purpose in enacting the statute was solely for the purpose of putting it out of business. Aff. Cole p. 4. Plaintiff further offered evidence that the ordinance would have a chilling affect on victim's exercising their rights under Section 16-11-760, as well as having a detrimental effect on

apartment owners and the surrounding neighborhoods. Aff. Cole, R. p. _____. Given the record in the present case, a material question of fact exists as to whether there is in fact “predatory practices” to support the ordinance as necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it. See S.C. Code Ann. § 5-7-30.

In analyzing whether a municipality had the authority to enact price regulations on towing from private property in Chapel Hill, the Supreme Court of North Carolina found that there is no rational relationship between regulating fees and protecting health, safety, or welfare. King v. Town of Chapel Hill, 367 N.C. 400, 758 S.E.2d 364 (2014). The court in King further found that the fee schedule provision implicates the fundamental right to “earn a livelihood.” King, citing Roller v. Allen, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957). In King the Court reasoned that “While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable.” King citing State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940).

In King the Court cited its duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor. *Const. art. I, § 1*; Roller, 245 N.C. at 525, 96 S.E.2d at 859 (“A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them.” (*citations omitted*)). Despite an expansive reading of North Carolina’s enabling statute for municipalities (N.C.G.S. § 160A–174), which allows a municipality to regulate acts detrimental to the health, safety, or welfare of

its citizens, the King court found that a city or town may not create a fee schedule similar to the one at issue in the present case. The Court in King found that the prices that citizens pay for towing are wholly unrelated to the protection of citizen health or safety, leaving only the question of whether the fee schedule provision falls under the protection of citizen welfare. King found that allowing a municipality to engage in price setting under the general and undefined rubric of “welfare” could subject other enterprises not only to price setting but also to officious and inappropriate regulation of other aspects of local businesses. Accordingly, the Court in King held that a municipality exceeds its authority by imposing a fee schedule for nonconsensual towing from private lots.

Here, the Plaintiff brought suit alleging that the City exceeded its authority in setting a fee schedule for towing of offenders’ vehicles as provided by S.C. Code Section 16-11-760 . The issue on appeal is whether there was a genuine question of material fact presented by the evidence existing in the record at the time of the motion for summary judgment. The allegation that the City’s ordinance, in addition to being inconsistent with State law, exceeds the City’s proper exercise of powers, turn on findings of facts of whether such regulation is “necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it”. *See* S.C. Code Ann. § 5-7-30. The testimony and evidence in record create a genuine issue of material facts necessary to the determination of whether the ordinance is necessary and proper and therefore a proper exercise of power in this case. The circuit court’s grant of summary judgment was therefore in error.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACTS NECESSARY TO A DETERMINATION OF WHETHER ORDINANCE VIOLATED CONTRACT CLAUSE.

This appeal involves whether the record presents any genuine issue question of material fact relating to the nonconsensual towing of vehicles from private property within the City. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

The stated basis for the City's ordinance is that the victims under Section 16-11-760 are engaged in "predatory practices." Plaintiff offered testimony that the City failed to consult industry experts, private property owners, or other towing companies. Aff. Cole p. 3. Plaintiff also offered evidence that fees charged for non-consensual towing were based on market rates. Affidavit of Cole, p. 2 of 6. Plaintiff also offered evidence that the City's ordinance intentionally set rates below market rates, including the rates for SCHP towing from public roadways, in an

attempt to put it out of business. Aff. Cole p. 4. Plaintiff has further offered evidence that the ordinance will have a chilling affect on victim's exercising their rights under S.C. Code Section 16-11-760, as well as a detrimental effect on apartment owners and the surrounding neighborhoods. R. p. _____. Given the record, a material question of fact exists as to the whether there is are in fact "predatory practices" to support the ordinance as necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it. *See* S.C. Code Ann. § 5-7-30.

The record shows that the Plaintiff had numerous existing contracts with private property owners that entitled it to post, tow and charge in a certain manner. The Contract Clauses of the State and Federal Constitutions limit the impairment of the Plaintiff's contracts. South Carolina's Constitution provides:

No bill of attainder, ex post facto law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

S.C. Const. article I, § 4 (*emphasis added*); *see also* U.S. Const. art. I, § 10 (also prohibiting the impairment of contracts).

To establish a Contract Clause violation, the Court must examine "(1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; [401 S.C. 29] and whether the impairment is substantial." Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000) (*citing* Gen. Motors Corp. v. Romein, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992)). Plaintiff's contracts authorized the Plaintiff to tow vehicles from the owner's property in compliance with 16-11-760 and set fees accordingly. Plaintiff testified that the fees are in accord with market rates. The City's ordinance impairs the Plaintiff's contractual

rights and obligations by limiting the rates it is allowed to charge, as well as other conditions of towing. The ordinance therefore retroactively alters the Plaintiff's contracts. The City thereby substantially impairs pre-existing contracts by materially changing their terms. See Hodges, 3451 S.C. 94, 533 S.E.2d at 585-86, (holding "[f]or purposes of Contract Clause analysis, a statute can be said to impair a contract when it alters the reasonable expectations of the contracting parties"); Henry v. Alexander, 186 S.C. 17, 194 S.E. 649 (1937) (holding a deviation from the terms of a contract constitutes an impairment of contract); Superior Motors, Inc. v. Winnebago Indus., Inc., 359 F.Supp. 773, 777 (D.S.C.1973) (stating impairment of contract occurs when legislation "attempts to make material alterations in the character, terms or the legal effect of an existing contract").

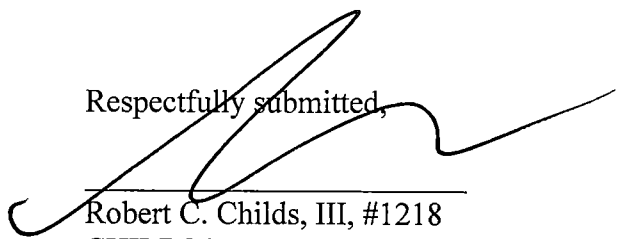
Because the ordinance substantially impairs Plaintiff's contractual rights, the Court must determine whether the Act is reasonable and necessary to effectuate a legitimate legislative purpose. Ken Moorhead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 545, 476 S.E.2d 481, 488-89 (1996). "Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency." *Id.* All of the foregoing are factual questions and can only be resolved by summary judgment if the record is sufficient to establish a basis for the City's impairment of the Plaintiff's contracts. Even if the record contains any evidence to support such findings, the question remains as to whether the record as a whole presents any genuine question of material fact. If there is conflicting evidence, summary

judgment is not appropriate. Here there remains a controversy over whether there is an emergency, that the ordinance provides for the protection of a basic societal interest rather than a favored group, whether the law is sufficiently tailored to the emergency at hand, or whether the imposed conditions are reasonable and appropriately limited. The circuit court's grant of summary judgment was therefore in error.

CONCLUSION

Based on the foregoing the decision of the lower court granting summary judgment should be reversed.

Respectfully submitted,



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March 7, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas
J. Derham Cole, Circuit Court Judge

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CERTIFICATE OF SERVICE

I certify that on March 7, 2018, I served the Appellant's Initial Brief and Designation of Matter on the Respondents by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as indicated below, and to others if so indicated:

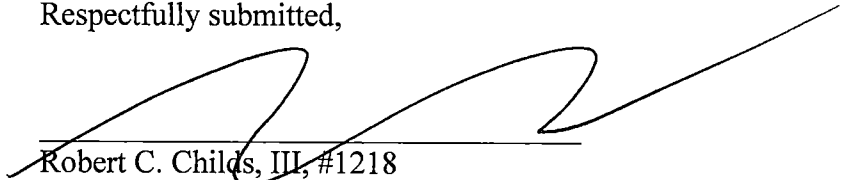
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SC Court of Appeals

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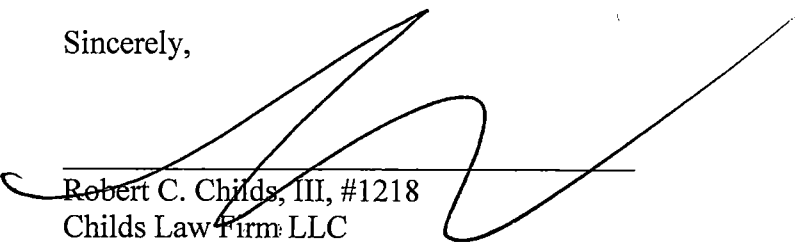
Re: Cole Towing and Recovery, LLC, Appellant v. City of Spartanburg and Spartanburg
City Council, Respondent
Appellate C.A. No.: 2017-002585

Dear Ms. Kitchings:

Enclosed for filing is the Appellant's Initial Brief and Designation of Matter on the
Respondents and Certificate of Service regarding the above referenced case.

With kind regards, I remain

Sincerely,



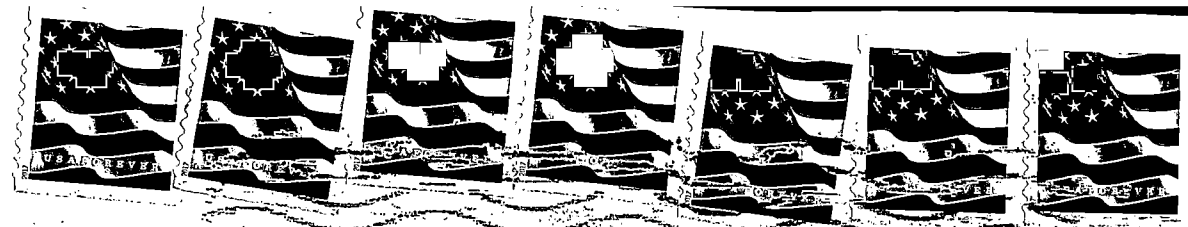
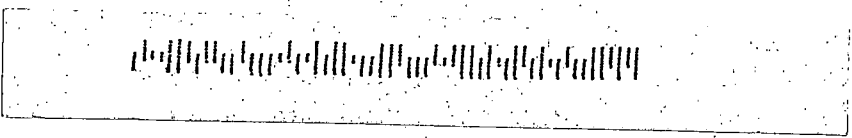
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