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.

APPELLANTS' FINAL BRIEF

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Preliminary Statement

This case has a long backstory, but this appeal presents a simple issue. Greenville County appeals an injunction against the enforcement of its ordinance governing the location of sexually oriented businesses (Ordinance No. 4869), which was entered without any suggestion that the ordinance is invalid. Plaintiff Greenville Bistro, LLC obtained a certificate of occupancy to operate a "restaurant," but then began illegally operating a sexually oriented business and sued.

The trial court recognized that an injunction is a "drastic remedy" that should only be granted if the moving party carries its burden of demonstrating (1) irreparable harm, (2) likelihood of success on the merits, and (3) the absence of an adequate remedy at law. (Injunction Order at 3, R. p. 4) Plaintiffs demonstrated none of these three prerequisites.

As for irreparable harm, the trial court properly stated the law that the "[l]oss of First Amendment freedoms constitutes irreparable injury," (*Id.* at 3, R. p. 4), but then concluded only that "the Plaintiffs would suffer irreparable harm *if* the subject ordinance abridges its constitutional freedom of expression." (*Id.* (emphasis added)) No such finding was made. The trial court did not explain why free speech would be abridged by requiring Plaintiffs to obey a valid law.

The court held that "[t]he Plaintiff has met its burden with respect to" likelihood of success on the merits regarding Ordinance No. 4869, (*id.* at 5, R. p. 6), but gave no reason why this was so.

On inadequate remedy at law, the injunction order states only that "Plaintiffs have no adequate remedy at law because Defendants' efforts to regulate Plaintiffs' business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms." (*Id.*) Again, no reason is given why the Ordinance, which the Court did not rule unconstitutional, would occasion such a loss. Further, Plaintiff provided no argument as to why money damages, if awarded, would not sufficiently compensate it.

For these reasons and for those set forth below, Greenville County brings this appeal.

Statement of Issue on Appeal

When a plaintiff's prima facie case depends on a claim that a law is unconstitutional, the trial judge must consider the merits of that claim to determine its likelihood of success on the merits—a required showing for a temporary injunction. Absent such a showing, the plaintiff cannot prove irreparable harm or inadequate remedy at law, as there is neither harm in complying with a valid law, nor an injury to be remedied.

Here, the trial court enjoined enforcement of Ordinance No. 4869 without stating any reason why the Ordinance might be unconstitutional.

Statement of the Case

On May 23, 2017, Plaintiffs Frontage Road Associates, Inc. ("Landlord") and Greenville Bistro, LLC d/b/a Bucks Racks & Ribs ("Tenant" or "Club") filed a two-count complaint, with exhibits, in the Greenville County Court of Common Pleas. The complaint sought declaratory and injunctive relief against enforcement of Greenville County's Sexually Oriented Business Code ("the Code"), which was established in 1995 by Ordinance No. 2673, and amended in 2017 by Ordinance No. 4869.

Count I claimed that enforcement of the Code violated a 2002 consent order between the County and the *prior* tenant ("Platinum Plus") at 805 Frontage Road (the "Property"), on the theory that the Club is a "successor" of the prior tenant. (Compl. at 10, R. p. 21.) Count II claimed that the Code is unconstitutional on free speech grounds. (*Id.* at 14, R. p. 25)

On May 24, Plaintiffs filed a Motion for Temporary Injunction based on both counts of its complaint. On June 7, the trial court noticed a hearing for June 16.

On June 14, the County filed its Answer and Counterclaim for Injunction, with exhibits.

On June 15, the County responded to Plaintiffs' motion, and filed its own motion for temporary injunction. On June 16, 2017, the trial court held a hearing on Plaintiffs' motion only.

On July 17, the trial court entered its Order for Partial Grant and Partial Denial of Temporary Injunctive Relief (the "Injunction Order" or the "Order"). The Injunction Order rejected the Club's argument, under Count I of its complaint, that it is a "successor" to Platinum Plus. (Inj. Order at 2, R. p. 5.) Nevertheless, pursuant to Count II, the Injunction Order enjoined the County and its agents "from, in any way, enforcing the provisions of Ordinance No. 4869 as to the Plaintiffs at the subject location. . . ." (*Id.* at 6, R. p. 7.) The Injunction Order did not set forth any reason why Ordinance No. 4869 is invalid or unconstitutional.

On August 15, 2017, the County timely served its Notice of Appeal of the Injunction Order.

Statement of the Facts

A. Since 1995, Greenville County's Sexually Oriented Business Code (adopted via Ordinance No. 2673) has prohibited a sexually oriented business at the Property.

For more than 20 years, Greenville County has regulated the location of sexually oriented businesses. In 1995, the County Council adopted Ordinance No. 2673, which defined various types of sexually oriented businesses, including an "adult cabaret," which is "a nightclub, bar, restaurant, or similar commercial establishment which regularly features" the following:

(a) Persons who appear in a state of nudity[1]; or

(b) Live performances which are characterized by the exposure of "specified anatomical areas"[2] or by "specified sexual activities"[3]; or

(c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(Ans. & CC Ex. 1 at 3, R. p. 182)

Section 12(b) of Ordinance No. 2673 prohibits operation of a sexually oriented business within 1500 feet of, *inter alia*, a residential district, a lot devoted primarily to residential use, a church, a child care facility, or a family oriented recreation facility. (*Id.* at 10-11, R. pp. 189-190)

At all relevant times, the Property at 805 Frontage Road has been within 1,500 feet of a

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[1] "*Nudity* or a *state of nudity* means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast." (Ans. & CC Ex. 1 at 4.)

[2] "*Specified anatomical areas* means the male genitals in a state of sexual arousal or the vulva or more intimate parts of the female genitals." (*Id.* at 4.)

[3] "*Specified sexual activities* means any of the following:

(a) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
(c) Masturbation, actual or simulated; or
(d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above."

(*Id.* at 5.)

disqualifying land use. (*See* Ans. & CC Ex. 6, Feb. 24, 2017 Letter, at 1; Hrg. Ex. 19, ¶ 4, R. p. 229)

B. In 2000, the Supreme Court upheld the Code, and in 2003, affirmed a permanent injunction prohibiting Platinum (the prior tenant) from operating a sexually oriented business at the Property.

In 2000, the South Carolina Supreme Court invalidated Ordinance 2673's permitting requirements, but specifically upheld the location restrictions in Section 12. *Harkins v. Greenville County*, 340 S.C. 606, 621, 533 S.E.2d, 886, 893 (2000).

After the Supreme Court upheld the location restrictions, the County sued multiple sexually oriented businesses, including the prior tenants at the Property—Kenwood Enterprises, Inc., and Elephant, Inc. d/b/a Platinum Plus, and Kenwood Gaines (collectively, "Platinum Plus" or "Platinum")—to enjoin them from operating sexually oriented businesses.

On January 19, 2001, the trial court held that "Platinum is located within 1,500 feet of a church, the boundary of residential districts, the property lines of lots devoted primarily to residential use, and a family oriented recreation facility." (*See* Ans. & CC Ex. 2, January 2001 Injunction, at 7, R. p. 201) Accordingly, Platinum "knew that it could not operate a sexually oriented business at its current location. Indeed, following discussions with County officials regarding this fact, Platinum affirmatively represented to County officials that it would not be operating as an adult entertainment establishment." (*Id.* at 7-8, R. pp. 201-202)

After rejecting all of Platinum's claims, the Court entered a permanent injunction:

> Defendants are hereby enjoined from further operation of their businesses in violation of Ordinance 2673 and are ordered to comply with the Ordinance by ceasing operation of their businesses as sexually-oriented businesses at their current locations.

(*Id.* at 26, R. p. 220)

Platinum appealed the injunction, but the South Carolina Supreme Court, in pertinent part,

affirmed. *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003).[4]

Thus, since January 19, 2001, a permanent injunction has been in place preventing the operation of a sexually oriented business at the Property located at 805 Frontage Road.

C. Platinum's collateral suit, while it was unsuccessfully appealing the permanent injunction, did not negate that injunction.

In March 2001, Platinum (and others) sued Greenville County for declaratory relief about the meaning of "nudity" in Ordinance No. 2673—under which Platinum had been enjoined and which it was then challenging on appeal. In January 2002, the court entered a consent order in that case, which it then dismissed without prejudice. *Elephant Inc. v. Greenville County*, Greenville County Court of Common Pleas, No. 01-CP-23-1793. (Compl. Ex. A, 2002 Order, R. p. 133.)

The 2002 Consent Order bound those plaintiffs, including Platinum, all of whom agreed that they would *not* "engage in activities that if conducted, would constitute their business as a 'sexually oriented business' as that term is defined in Greenville County Ordinance 2673." (*Id.* at 2, R. p. 134) Platinum and the other plaintiffs recognized that "[a]t their present locations, Plaintiffs' businesses are in violation of the locational requirements set forth in Section 12 of Ordinance 2673 if their businesses are found to be 'sexually oriented businesses.'" (*Id*, R. p. 134)

The 2002 Consent Order set forth an understanding as to the meaning of the term "state of nudity," and also specifically prohibited any "specified sexual activities" or display of "specified anatomical areas," as those terms are defined in Ordinance No. 2673, on the premises of Platinum and the other clubs involved in that case. (*Id.* at 3, R. p. 135)

The prohibitions in the 2002 Order also bound those plaintiffs' "successors and assigns," which were delineated as persons and entities to whom the plaintiffs "transfer their interest in their

[4] One portion of the *Kenwood Enterprises* decision that is not relevant here—involving the rule for stating a takings claim—was overruled by *Byrd v. City of Hartsville*, 365 S.C. 650 (2005).

businesses." Specifically, "Plaintiffs agree that if they transfer their interest in their businesses, they will inform their successors and assigns of the agreements set forth in this order and that this order shall be binding upon Plaintiffs' successors and assigns." (*Id*, R. p. 135)

The 2002 Order also specified that violations of the order "shall be punishable as contempt of Court and/or the County may pursue any other relief provided by law." (*Id.* at 4, R. p. 136)

Significantly, the order did not state that it was modifying the permanent injunction—entered by a different judge in a separate case—prohibiting the operation of a sexually oriented business at the Property. Nor did (or could) the 2002 Order purport to limit the Greenville County Council from passing legislation or adopting amendments to the Code.

D. In 2015, the trial court closed Platinum for six months as a public nuisance, and in 2016, the court imposed a second six-month closure as well as contempt sanctions.

In April 2015, the Greenville County Solicitor brought an action against Platinum-related entities and persons, including Frontage Road Associates, Inc., Elephant, Inc., and Ken Gaines, alleging that the Property was being operated as a public nuisance. In June 2015, the court entered a consent order, wherein Elephant, Inc. and Gaines stipulated that the Solicitor possessed present sufficient evidence for the court to "find that Platinum Plus Greenville constituted a public nuisance within the meaning of the Nuisance Statute." (Compl. Ex. B, 2015 Consent Order, at 3, R. p. 139). The 2015 Consent Order required Platinum to shut down for 180 days and, thereafter, to comply with extensive monitoring requirements and the 2002 Order.

After the shut-down period, Platinum reopened, but did not change its ways. On April 27, 2016, the Solicitor filed a Verified Petition seeking contempt findings against Elephant, Inc. and Ken Gaines for violating the 2015 Order. On July 27, 2016, the trial court found that Elephant, Inc. and Gaines were operating Platinum Plus in violation of the 2015 Order, and entered criminal and civil contempt sanctions against them, including a $100,000 fine payable to the Clerk of Court,

extension of the monitoring requirements, and an additional 180-day closure. (Compl., Ex. C,[5] 2016 Order, at 4-5 (factual findings, R. p. 155), 13-16 (contempt sanctions, R. pp. 163-166).)

E. Platinum abandoned the closed Property; Frontage Road and Greenville Bistro sought access to it by disavowing any relation to Platinum-related entities and people.

After the trial court entered the 2016 Order, Platinum appealed it but otherwise abandoned the Property. (Ans. & CC Ex. 5, at 2, R. p. 226.) Thereafter, Frontage Road Associates, the owner of the Property, filed a motion to have the Property at 805 Frontage Road released from all orders relating to Platinum (i.e., Elephant, Inc. and Ken Gaines). (*Id.* at 3, R. p. 227) Frontage Road also submitted an affidavit from Jason C. Mohney, the principal of Greenville Bistro, LLC, averring that "neither Ken Gaines, Inc., Elephant, Inc., nor Platinum Plus has any connection with Greenville Bistro, LLC," which entity is "completely separate" from them. (Ans. & CC Ex. 3, at 1 ¶¶ 1, 5, R. p. 221.)

Based on this representation, on February 10, 2017, the trial court released the Property, finding that "the former tenants to whom the Court's previous Orders were directed have now vacated the premises," and that "the Court is without authority to continue or impose the previously ordered ongoing requirements, which were directed personally to Gaines and Elephant, Inc., on a new tenant." (Ans. & CC, Ex. 5, Feb. 2017 Order, at 4, R. p. 228)

The February 2017 Order issued a strong warning against operating a sexually oriented business at the site:

> However, as noted on the record during the hearing on January 26, 2017, in the event evidence later establishes a connection between these parties, the State may immediately move to have all requirements reinstated. Further, and again as noted on the record at the January 26, 2017 hearing, *in the event that Greenville Bistro, or any other adult entertainment venue, commences operating at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected and failure to do so will likely result in further orders, including sanctions against the entities, individual owners and responsible parties.*"

[5] The July 27, 2016 Order is unmarked, but appears between Exhibits B and D of the Complaint.

(*Id.* at 4 (emphasis added) R. p. 228)

F. In February 2017, Greenville County passed an amendment to the Code (Ordinance No. 4869).

On February 21, 2017, the County Council passed, on first reading,[6] Ordinance No. 4869 to update its Sexually Oriented Business Code. (Compl. Ex. G at 2, R. p. 177; Compl. at 11, ¶ 61, R. p. 22) Consistent with several recent cases, Ordinance No. 4869 reaffirmed the Council's focus on mitigating the harmful secondary effects of sexually oriented businesses, and added the phrase "or in a state of semi-nudity" to the definition of "adult cabaret." Ordinance No. 4869. (Compl. Ex. G at 2, R. p. 177) The phrase is defined as follows:

> *Semi-nude* or a *state of semi-nudity* means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

(*Id.*)

G. The County warned Greenville Bistro about the longstanding prohibition on operating a sexually oriented business at the Property.

On February 24, 2017, the County Attorney wrote Greenville Bistro's principal, Jason Mohney, to reiterate that the Sexually Oriented Business Code (a.k.a. Adult Entertainment Ordinance), which consists of "Ordinance Nos. 2673 and 4869," prohibit a sexually oriented business at the Property. (Ans. & CC Ex. 6, Feb. 24, 2017 Letter, at 1, R. p. 229).

The letter explained:

> The Adult Entertainment Ordinance includes several provisions that directly impact the 805 Frontage Road property. The setback provisions in the Adult Entertainment Ordinance require a sexually oriented business (which includes any establishment that features persons who appear in a state of nudity or semi-nudity) to be 1,500 from several

[6] Ordinance No. 4869 was adopted on third and final reading on April 26, 2017. *See Sherman v. Reavis*, 273 S.C. 542, 257 S.E.2d 735 (S.C. 1986) (pending ordinance binding from the time it is first noticed for public hearing).

types of properties and land uses, including the boundary of a residential zoning district. Today, there are two residential boundaries that are less than 1,500 feet from the building at 805 Frontage Road. One is the Roper Mountain Apartments, which is zoned RM-2 (a residentially zoned district); and the other is Bradford Place, which is a single-family residential subdivision, zoned R-M20 (a residentially zoned district). These two properties, and potentially others, will prohibit the operation of a sexually oriented business at 805 Frontage Road.

(*Id.*)

H. In March 2017, Greenville Bistro obtained a Certificate of Occupancy to operate a "restaurant," but then instead opened a sexually oriented business and was ticketed.

On March 27, 2017, Greenville Bistro received a Certificate of Occupancy to operate as a "restaurant" called Buck's Racks & Ribs. (Compl. Ex. F, R. p. 175)

Nevertheless, an inspection on May 11, 2017, revealed that Greenville Bistro was operating a sexually oriented business, specifically an "adult cabaret." (Compl. Ex. H, May 11, 2017 Tickets, R. p. 179) The definition of "adult cabaret" was established in Ordinance No. 2673, and amended by Ordinance No. 4869, to read as follows:

> *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
>
> (a) Persons who appear in a state of nudity, or in a state of semi-nudity; or
> (b) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
> (c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Greenville Bistro operates as an adult cabaret because it regularly features persons who appear in a state of semi-nudity and live performances characterized by an emphasis on specified sexual activities. (Hrg. Ex. 14, Redman Aff. ¶ 5, R. p. 233 ("The dancer's breasts were exposed, except that pasties covered her nipples and areolas. The dancer also wore a type of bikini bottom that exposed her buttocks."); *id.* at ¶ 6, R. p. 233 ("On that visit to Buck's, I saw several other women who were wearing bottoms that exposed their buttocks."); *id.* at ¶¶ 7-9, R. p. 233 (noting

that on a May 24, 2017 return visit, he saw a woman exposing the majority of her buttocks on the large stage, and that he "saw two additional female dancers at Buck's who were wearing attire that exposed their buttocks," but "no menus or advertising for food"); Hrg. Ex. 15, Hunnicutt Aff., ¶¶ 5-9, R. p. 234 (observing exposed female breasts and buttocks, sexual movements on same dates).)

Significantly, Plaintiff never argued that the "performances" or the attire worn by the "performers" complied with either Greenville County Ordinance 2673 or 4869. It is Plaintiff's position instead that it was entitled to rely on the limitations in the 2001 Order which only applied to its predecessors.[7]

I. The trial court enjoined the enforcement of Ordinance No. 4869 without making even a preliminary finding of unconstitutionality.

After a temporary restraining order was granted in part and denied in part on June 1, 2017 (Gravely, J.), the trial court (Stilwell, J.) held a hearing on June 16, 2017, and received evidence and argument from the parties.

The County submitted, *inter alia*, Ordinance No. 2673 (Hrg. Ex. 1, R. p. 180), certified copies of the secondary effects studies supporting the regulations (Hrg. Ex. 1b), the 2001 Injunction against Platinum (Hrg. Ex. 2, R. p. 194), and the South Carolina Supreme Court's decision in *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003), upholding that permanent injunction.

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[7] Despite the clear prohibition against operating a sexually oriented business at the Property, Greenville Bistro has continued—even after being ticketed—to operate such a business. (Hrg. Ex. 16, Hayden Aff. ¶¶ 5-12, R. p. 235 (describing observations on May 18 and May 24, including dancers showing their buttocks, making sexual movements around a pole on stage, offering lap dances, grinding her exposed buttocks on patron's crotch, rubbing her breasts, rubbing her vaginal area, and pressing her breasts against patron's face); Hrg. Ex. 17, Arflin Aff., ¶¶ 5-10, R. p. 237 (describing similar "specified sexual activities" on June 14, including dancers grinding their vaginal areas on pole, erotically rubbing their breasts and fondling their crotches, and simulating intercourse while grinding their butts on patron's covered crotch area); Hrg. Ex. 18, Whitmire Aff. (same), R. p. 240)

The County also submitted the affidavits of code enforcement and law enforcement officers referenced above (Hrg. Exs. 14-18, R. pp. 233-238), and an affidavit from the County's GIS (Geographic Information System) Division Manager showing that while a sexually oriented business is prohibited at 805 Frontage Road, there are 89 zoned parcels (and thousands of parcels in the unzoned portion of the County) that meet the location regulations for sexually oriented businesses. (Hrg. Ex. 19, Hanning Aff. ¶¶ 4-7, R. pp. 241-244)

During the hearing, Judge Stilwell explained his view that the underlying merits of the case are irrelevant to the temporary injunction analysis. "One of those elements is not who's right and who's wrong with respect to the underlying merits of the case." (Hrg. Tr. at 16:6-8, R. p. 107) He was "not convinced that [the merits are] relevant to what I'm here to decide today." (*Id.* at 16-10-11, R. p. 107)

On July 17, 2017, Judge Stilwell issued an order concluding that Greenville Bistro was *not* a successor to Platinum, and thus denied temporary injunctive relief under Plaintiffs' theory in Count I of the Complaint. (Injunction Order at 4, R. p. 5) But the Order enjoined the County from enforcing Ordinance No. 4869—without finding that the Ordinance is somehow unconstitutional, as alleged in Count II of the Complaint. Apparently driven by the proposition that the merits are not relevant to Plaintiffs' burden of showing likelihood of success on the merits, the court made no mention in the Injunction Order of any particular aspect of Ordinance No. 4869.

Instead, the court simply stated that "Plaintiffs would suffer irreparable harm *if* the subject ordinance [4869] abridges its constitutional freedom of expression." (Injunction Order at 4 (emphasis added) R. p. 5) Thus, the court concluded, "Plaintiff has met its burden" as to likelihood of success as to "enforcement of Ordinance 4869," (*Id.* at 5, R. p. 6), and Plaintiffs have no adequate remedy at law regarding such potential "loss of constitutionally protected rights and

freedoms."

The trial court then enjoined the County from enforcing Ordinance No. 4869 "in any way" at "the subject location." (Injunction Order at 6, R. p. 7)

Argument

I. Standard of Review

A trial court's grant of a temporary injunction is reviewed for abuse of discretion. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). "An abuse of that discretion occurs where the trial judge is controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

An action for an injunction is equitable. *Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988). An injunction is not granted as a matter of right, but only when review of all of the evidence establishes that it is necessary to prevent irreparable harm. *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930); *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969). "The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willingly or wantonly neglected." *Seabrook Island Prop. Owner Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 666, 596 S.E.2d 380, 385 (Ct. App. 2004) (internal citations and quotation marks omitted).

To show entitlement to a temporary injunction, the movant must show: (1) that it would suffer irreparable harm if the injunction is not granted, (2) that it has a likelihood of success on the merits, and (3) that there is no adequate remedy at law. *Rawlinson Rd. Homeowners Assoc., Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011).

The burden to obtain an injunction is even greater when one seeks to enjoin legislation designed to protect public health, safety, and welfare. "As with other legislative enactments," our Supreme Court "accords ordinances regulating sexually oriented businesses a presumption of

constitutionality which the attacking party has the burden of overcoming." *Harkins v. Greenville Cty.*, 340 S.C. 606, 621, 533 S.E.2d 886, 894 (2000). This rule applies at the temporary injunction stage. *Alston v. Ball*, 93 S.C. 553, 553, 77 S.E. 727, 728 (1913).

II. The trial court's injunction was controlled by an error of law, namely that it did not have to consider the merits of Plaintiffs' constitutional attack on Ordinance No. 4869 before enjoining that ordinance.

The trial court did not identify any part of Ordinance No. 4869 that was likely invalid or unconstitutional. Nor could it have, as the Ordinance merely added a definition of "semi-nudity," and adult business laws employing that same definition have been upheld as constitutional on numerous occasions. *MJJG Rest., LLC v. Horry Cty.*, 102 F. Supp. 3d 770, 778 n.6, 792 (D.S.C. 2015); *Richland Bookmart, Inc. v. Knox Cty.*, 555 F.3d 512, 528-31 (6th Cir. 2009); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 741 (Ga. 2015); *Keepers, Inc. v. City of Milford*, 944 F. Supp. 2d 129 (D. Conn. 2013); *Ocello v. Koster*, 354 S.W.3d 187 (Mo. 2011); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 294-95 (6th Cir. 2008).

Rather, the trial court explicitly refused to engage the merits of Plaintiffs' constitutional challenges at all, but still enjoined Ordinance No. 4869. In doing so, it abused its discretion.

In a constitutional case, entitlement to a temporary injunction turns on the movant showing a likelihood that it will succeed on the merits of its constitutional claim. *Harkins*, *supra*. If the movant fails to make such a showing, then he cannot show irreparable harm because there is no harm in obeying a valid law. Likewise, there is no need to examine the adequacy of remedies at law (e.g., damages), because one is not entitled to damages for enforcement of a valid law.

Here, the trial court stated that its decision on likelihood of success on the merits "is based solely on the moving party's alleged facts without regard to the ultimate merits of the case." (Injunction Order at 5.) But the trial court did not even *identify* what alleged facts he was relying on, as required by Rule 65(d), SCRCP (requiring every injunction order to "set forth the reasons

for its issuance"). Moreover, a legislative enactment's presumption of constitutionality trumps conclusory allegations and Plaintiffs' invocation of the "free speech" label.

A. The trial court erred in finding that Plaintiffs had met their burden of showing likelihood of success on the merits of their constitutional claim.

The trial judge emphasized that he was not going to engage the merits in considering Plaintiffs' motion for temporary injunction. (Hrg. Tr. 34:13-15, R. p. 126; Injunction Order at 5, R. p. 6.) But governing law *required* the judge to consider the merits of Plaintiffs' constitutional challenges, even at the temporary injunction stage.

When a party brings suit alleging the unconstitutionality of a statute, the trial court must make a preliminary resolution on the merits in order to grant or deny a temporary injunction:

> When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate determination of the case on the merits. However, when a plaintiff's prima facie case depends on an allegation that a statute is unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction.
>
> *Curtis v. State*, 345 S.C. 557, 576-77, 549 S.E.2d 591, 601 (2001).

"While a judge, at chambers, cannot *finally decide* anything as to the merits, he can and ought to look into the merits, whether they present issues of law or fact, and consider them to the extent necessary to enable him to exercise his discretion wisely." *Alston v. Ball*, 93 S.C. 553, 77 S.E. 727, 727-28 (1913). For "even if the complaint states a cause of action for injunction, a temporary injunction should not follow automatically," *Id.* at 728, because "'the court should consider the showing made in opposition thereto, and must determine, *in view of all the circumstances* (italics added), whether an injunction is reasonably essential to protect the legal right of the plaintiffs pending the litigation, subject to review by this court.'" *Id.* (quoting *Crawford v. Lumber Co.*, 77 S.C. 81, 57 S.E. 670 (1907)). Because "[t]he question is one of law, in which the presumption is in favor of the validity of the statute," the reviewing court "must review the constitutional

question." *Id.* (quoting *Hutchison v. York*, 86 S.C. 405, 68 S.E. 578 (1910)).

Here, Plaintiffs' prima facie case depends on an allegation that Ordinance No. 4869 is unconstitutional. (Compl. at 14 ("Count II – Declaratory and Injunctive Relief – Ordinance 4869 Violates Plaintiffs' Free Speech Rights", R. p. 25)) Thus, the trial court should have considered the merits of the constitutional claim in order to determine likelihood of success on the merits, a prerequisite to temporary injunctive relief. *Curtis*, 345 S.C. at 570 ("Because Curtis does not establish an infringement of a constitutional right, the trial court was correct in holding he is not likely to succeed on the merits of the following constitutional challenges."); *id.* at 577 ("[I]t was proper for the trial judge to consider the merits because Curtis' prima facia case depended on an allegation that section 16-13-470 was unconstitutional.")

Because the trial court enjoined Ordinance No. 4869 without identifying any constitutional defect as to which Plaintiffs' had demonstrated a likelihood of success on the merits, the injunction should be reversed for this reason alone.

But even if the trial court had engaged the merits, there would have been no basis for enjoining Ordinance No. 4869.

There is no allegation that the ordinance was not duly adopted, nor that the County Council was somehow prohibited by law or a court order from adopting it. As noted above, the definition that Ordinance No. 4869 added to Ordinance No. 2673 has repeatedly withstood constitutional challenge. *See, e.g., Sensations*, 526 F.3d at 294-95; *MJJG Rest.*, 102 F. Supp. 3d at 778 n.6, 792; *Richland Bookmart*, 555 F.3d 512 at 528-31.

Further, the South Carolina Supreme Court has already rejected challenges to the County's location regulations, which have not changed since they were adopted via Ordinance No. 2673. In

Harkins, the Court held that nine sites in Greenville County's S-1 district constituted "more than enough" sites "where the six Adult Businesses could relocate." 340 S.C. at 621. Now there are 89 sites legally available in that district, along with thousands more in other portions of the County. (Hrg. Ex. 19, Hanning Aff, R. p. 241.)

In *Harkins* and numerous other cases, the Court has upheld adult business ordinances as valid time, place, and manner regulations that served the content-neutral, significant government interest in preventing the negative secondary effects of adult businesses, while allowing adequate alternative sites where such businesses could operate. *See, e.g.*, *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990); *Rothschild v. Richland County Bd. of Adjustment*, 309 S.C. 194, 420 S.E.2d 853 (1992). These decisions rejected arguments (like those asserted here) about the "commercial viability" of alternative sites and the timing and alleged legislative motives for an ordinance's adoption. *Rothschild*, 309 S.C. at 198 (rejecting arguments about commercial viability of alternative sites), *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991) (rejecting commercial viability, timing, and motive arguments); *Cricket Store 17, L.L.C. v. City of Columbia*, 97 F. Supp. 3d 737, 746-47 (D.S.C. 2015), *aff'd*, 676 F. App'x 162, 165 (4th Cir. 2017) (same).

One final, irrefutable reason mandates reversal of the order below. The Supreme Court has already affirmed a *permanent injunction prohibiting a sexually oriented business from operating at this address*, 805 Frontage Road. *Greenville Cty. v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003). The trial court's order effectively undoes that Supreme Court ruling and affirmatively allows a sexually oriented business to operate in a prohibited location, too close to residences, a church, and a child care facility. (Hrg. Ex. 19, Hanning Aff. at 1, ¶ 4, R. p. 241.)

B. Plaintiffs did not demonstrate irreparable harm because obeying Ordinance No. 4869 does not violate their constitutional rights.

The trial court found that Plaintiffs based on the oft-repeated rule that "[t]he loss of First Amendment freedoms constitutes irreparable injury as a matter of law." (Injunction Order at 3 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) R. p. 4). This is true, but stating the rule only begs the question of the whether Ordinance No. 4869 violates the First Amendment. *Id.* In light of the absence of any demonstration that the ordinance is unconstitutional, Plaintiff's claim is defeated by the principle set forth in *Harkins*: "statutes are to be construed in favor of constitutionality, and the court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." 340 S.C. at 602, 533 S.E.2d at 893.

Here, Ordinance No. 4869 does not violate the First Amendment, and the trial court gave no analysis to the contrary. *Alston v. Ball*, 93 S.C. 553, 77 S.E. 727, 728 (1913) (holding that if unconstitutionality of the law is not established, then "the necessity [for a temporary injunction] is not made to appear"); *cf. WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("[A] plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim.").

Because Plaintiffs failed to establish a likelihood of success on their constitutional claim, they failed to carry their burden to show irreparable harm. There is no harm in obeying a valid law. Instead of operating a sexually oriented business in an unlawful location, Plaintiffs could simply operate a restaurant, consistent with the certificate of occupancy that they sought and obtained. It is Greenville County that is harmed by an injunction against a presumptively valid statute targeting negative secondary effects. *Harkins*, 340 S.C. at 621; *accord Maryland v. King*, 567 U.S. 1301, 1301 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

C. Plaintiffs do not lack an adequate remedy at law because there is no need for any remedy against Ordinance No. 4869.

The trial court's "inadequate remedy" discussion merely confirms that the court's injunction is based solely on its erroneous conclusion about likelihood of success on the merits. The trial court stated that "Plaintiffs have no adequate remedy at law because Defendants' efforts to regulate Plaintiffs' business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms." (Injunction Order at 5, R. p. 6) But as shown above, Plaintiffs did not demonstrate that Ordinance No. 4869 is unconstitutional, and thus did not show that its enforcement would cause a loss of constitutional rights. The Injunction Order's conclusion flows directly from its flawed premise.

Finally, Plaintiffs have not cited any authority holding that money damages would be insufficient to remedy any lost profits that Plaintiffs might suffer from having to operate a restaurant, instead of a sexually oriented business, at the Property. And any economic injury, of course, would be wholly self-inflicted—the *Kenwood Enterprises* permanent injunction was entered years ago, and the County Attorney reminded Greenville Bistro about the location restrictions well before it opened. So even if Plaintiffs could, under some theory, show that enforcement is improper, they give no reason why money damages would be inadequate.

For this additional reason, the Injunction Order is flawed.

Conclusion

The County's regulations have prohibited sexually oriented businesses at 805 Frontage Road for more than twenty years. The County obtained a permanent injunction against the prior tenant that enforced the location regulation. Greenville Bistro obtained permission to open a restaurant *only*, but then blatantly opened a sexually oriented business after being warned by the County that it was against the law. The trial court countenanced Greenville Bistro's continued unlawful

operation by enjoining Ordinance No. 4869 without giving a reason that it was invalid or unconstitutional. Its decision to do so is an abuse of discretion.

For all these reasons, this Court should reverse the trial court's injunction prohibiting the enforcement of Greenville County Ordinance No. 4869.

Respectfully submitted,

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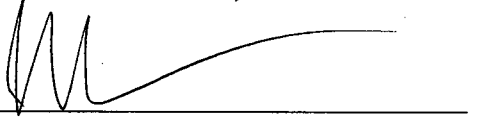

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Dated: April 16, 2018
Greenville, SC

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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