IN 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. 2017-002585

Cole Towing and Recovery, LLC, Appellant,

v.

City of Spartanburg and Spartanburg City Council, Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. BY FAILING TO INCLUDE IN THE STATEMENT OF ISSUES AND BY FAILING TO PROVIDE ARGUMENT IN BRIEF, DID APPELLANT FAIL TO PRESERVE FOR APPEAL ANY ISSUES RELATED TO THE CIRCUIT COURT'S RULINGS ON PREEMPTION, EQUAL PROTECTION, GROSS NEGLIGENCE, INVERSE CONDEMNATION, CITY COUNCIL AS A SEPARATE DEFENDANT, AND APPLICABILITY OF THE ORDINANCE TO MULTI-FAMILY DWELLINGS?

II. DID THE CIRCUIT COURT CORRECTLY RULE THAT THE CITY'S NONCONSENSUAL TOWING ORDINANCE DID NOT CRIMINALIZE OTHERWISE LAWFUL ACTIVITY?

III. BY FAILING TO MAKE A POST-ORDER RULE 59(e) MOTION, DID APPELLANT FAIL TO PRESERVE FOR APPEAL ANY ISSUE CONCERNING THE LEGAL SUFFICIENCY OF THE CITY COUNCIL'S LEGISLATIVE FINDINGS ON "PREDATORY PRACTICES"?

IV. BY FAILING TO MAKE A POST-ORDER RULE 59(e) MOTION, DID APPELLANT FAIL TO PRESERVE FOR APPEAL ANY ISSUE CONCERNING THE ORDINANCE'S FACTUAL BASIS FOR A FEE SCHEDULE?

V. DID THE CIRCUIT COURT CORRECTLY RULE THAT THE CITY HAS THE LEGAL AUTHORITY TO REGULATE PRACTICES RELATED TO NONCONSENSUAL TOWING AND TO SET A SCHEDULE FOR NONCONSENSUAL TOWING FEES?

VI. DID THE CIRCUIT COURT PROPERLY CONCLUDE APPELLANT FAILED TO ESTABLISH A CLAIM FOR IMPAIRMENT OF EXISTING CONTRACTS IN VIOLATION OF THE UNITED STATES CONSTITUTION OR IN TORT?

STATEMENT OF THE CASE

Procedural History

By its Complaint filed on April 27, 2017, Cole Towing and Recovery, LLC ("Cole" or "Cole Towing"), a towing company operating both inside and outside of the City of Spartanburg, challenged the constitutionality and legality of an Ordinance enacted by the City of Spartanburg ("the City" or "Spartanburg"), through its City Council, on April 10, 2017. The Ordinance, entitled as "AN ORDINANCE TO AMEND THE CODE OF THE CITY OF SPARTANBURG 1988, CHAPTER 23, 'WRECKERS AND WRECKING SERVICES' BY ADDING SECTIONS 23-14 THRU 23-19 TO PROVIDE FOR 'NONCONSENSUAL BOOTING AND TOWING'" ("the Ordinance" or "the City Ordinance" or "the Spartanburg Ordinance") regulated aspects (including maximum fees) of the nonconsensual booting, towing and storage of motor vehicles from privately owned property. (R. pp. 104-113).

The Complaint prayed for a declaration by the Court that the Ordinance was invalid on the grounds that it (1) conflicted with and was preempted by S.C. Code §16-11-760, (2) violated the Contracts Clause of the United States Constitution, (3) violated 49 U.S.C. §14501(c)(1), and (4) dealt with subject matter beyond its authority and police power by imposing price controls, burdening interstate commerce and violating Cole's equal protection and due process rights. The Complaint also sought a declaration that the Ordinance's scope did not apply to multi-family residential property. Cole also sought monetary damages with causes of action for (1) interference with contractual relations, (2) gross negligence and (3) inverse condemnation. (R. pp. 26-34). The City and the City Council (collectively, "the City") timely answered the Complaint on June 1,

2017, denying the allegations and asserting defenses. (R. pp. 35-42). The parties engaged in or had the opportunity to engage in written discovery.

Concurrent with the filing of its Complaint, Cole moved for injunctive relief from enforcement of the Ordinance. This motion was denied by the Honorable R. Keith Kelly, Circuit Court Judge, after hearing, on June 23, 2017, on the grounds that Cole failed to show irreparable harm or lack of adequate remedy to justify a temporary injunction.

On June 29, 2017, Cole filed a Motion for Summary Judgment on several grounds: (1) the Ordinance was an unconstitutional market regulation beyond the authority of the City to enact, (2) the Ordinance violated the Equal Protection clauses, (3) the Ordinance unlawfully criminalized lawful behavior, (4) preemption under State law, (5) preemption under Federal law, and (6) impairment of existing contracts in violation of the United States Constitution. (R. pp. 43-44). Cole's memorandum in support of its motion (captioned as a Brief) added the ground that the Ordinance did not include multi-family residential property. (R. pp. 45-54).

The City, on July 18, 2017, filed a Motion for Summary Judgment on the grounds that (1) the City acted within its power and authority in regulating, by Ordinance, nonconsensual towing practices within its own City limits, (2) the Ordinance was not preempted by State or Federal law, (3) the Ordinance was not an unlawful criminalization of lawful conduct, (4) the Ordinance did not violate Equal Protection, (5) the Ordinance was not an unconstitutional market regulation, (6) the Ordinance did not constitute inverse condemnation or an unconstitutional impairment of contract, (7) enactment of the Ordinance did not constitute negligence and the City was entitled to

immunity to suit in tort under the South Carolina Tort Claims Act, and (8) the City Council was not a proper Defendant. (R. pp. 76-92).

A hearing on the cross motions for summary judgment was held before the Honorable J. Derham Cole, Circuit Court Judge, on August 2, 2017 (R. pp. 182-208), and the motions were taken under advisement. On October 16, Judge Cole filed a Form 4C Order denying Cole's motion for summary judgment and granting the City's motion for summary judgment. (R. pp. 22-24). A formal final Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment was filed on December 5, 2017. (R. pp. 1-21). No post-Order pleadings or motions were filed in the Circuit Court. Cole filed a Notice of Appeal on December 22, 2017.

STATEMENT OF THE FACTS

The City adopts the facts of the case as stated in the "The Ordinance and Additional Factual Background" section of the circuit court Order (R. pp. 2-5), and incorporates those facts by this reference. The City also offers additional factual background below and throughout the City's arguments.

The Affidavit of the City's Paul Smith shows that Cole, and two other towing companies, applied for nonconsensual towing permits. (R. pp. 128-145). The Affidavit of City Manager Ed Memmott includes the City Council minutes for the two meetings at which the Ordinance received the required two readings before adoption. (R. pp. 114-127). The Supplemental Affidavit of the City Manager includes the transcript of the public comments session before the City Council on April 10, 2017, at which the City Council enacted the Ordinance on second reading. (R. pp. 176-181; more clearly legible at R. pp. 209-226).

The transcript of the public comments session illustrates some examples of the complaints received by the City from citizens of predatory practices related to nonconsensual tows at apartment complexes within the City. One citizen told the Council that her elderly mother faced charges of more than $1,000 to recover possession of her car, which was towed from her own apartment complex and for which she had a parking permit from the complex. (R. pp. 177-178 and 211-214). The public comments also included complaints by citizens that tow truck operators, including those employed by Cole, patrolled parking lots looking for vehicles that had expired license tags or were parked on or over the painted lines for parking spaces. Other citizens expressed fear and desperation for being threatened and mistreated by tow truck operators during tows. (R. pp. 179-180, 216-218 and 220-221). Other reports were given that vehicles were being towed in spite of displaying proper parking permits issued by the apartment complex because the tow truck operator did not believe the complex would issue certain guest passes. (R. pp. 179-180 and 219-220). Finally, two citizens also complained that Cole moved vehicles to improper positions in order to photograph a purported parking violation before towing. (R. pp. 178 and 212; 176-181 and 209-225).

The City Manager, by Affidavit, identified similar ordinances by the cities of Greenville, Myrtle Beach, Florence and Charleston. (R. pp. 148-175). The City Manager also stated, in Affidavit, that he developed the fee schedule contained in the Ordinance based on "charges comparable to those of surrounding communities" and that he "personally met with Christopher M. Cole and considered his feedback on the amount of fees." (R. p. 102).

The Ordinance was amended by two amendatory ordinances given final readings in July and in November 2017. The amendments do not impact the issues before the circuit court or this Court.

STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) quoting Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App.1999).

The Order of the circuit court sets out a comprehensive statement of the standard of review for the trial court. (R. pp. 5-6). The City wishes to adopt and incorporate that statement of the standard of review. That statement includes the well known principle that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). As also cited by the circuit court, "For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010).

ARGUMENT

II. **BY FAILING TO INCLUDE IN THE STATEMENT OF ISSUES AND BY FAILING TO PROVIDE ARGUMENT IN BRIEF, APPELLANT FAILED TO PRESERVE FOR APPEAL ANY ISSUES RELATED TO THE CIRCUIT COURT'S RULINGS ON PREEMPTION, EQUAL PROTECTION, GROSS NEGLIGENCE, INVERSE CONDEMNATION, CITY COUNCIL AS A SEPARATE DEFENDANT, AND APPLICABILITY OF THE ORDINANCE TO MULTI-FAMILY DWELLINGS.**

In its Statement of the Issues and its argument, Appellant identifies for appeal only the three issues of unlawful criminalization of lawful behavior, authority to impose a fee schedule, and unconstitutional impairment of existing contracts. These three issues do not pertain or relate to the other rulings by the circuit court on preemption (R. pp. 9-11), equal protection (R. pp. 13-14), inverse condemnation (R. p. 15), gross negligence (R. pp. 17-18), City Council as a separate defendant (R. p. 18), and applicability of the Ordinance to multi-family dwellings (R. pp. 18-19). Cole has abandoned any right to challenge the circuit court's rulings on these other issues.

Pursuant to Rule 208(b)(1)(B), SCACR: "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." First Union National Bank of South Carolina v. Soden, 333 S.C. 554, 556, 511 S.E.2d 372, 378 (Ct. App. 1998).

II. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY'S NONCONSENSUAL TOWING ORDINANCE DOES NOT CRIMINALIZE OTHERWISE LAWFUL ACTIVITY.

In its first listed Argument in Brief, Cole argues that the Spartanburg Ordinance criminalizes behavior that is lawful under State law, specifically, that it criminalizes behavior that is lawful under S.C. Code § 16-11-760. Cole essentially argues that, because § 16-11-760 relates to towing from private property, all other conduct related to towing from private property is lawful unless made unlawful by that State statute. This argument, however, misconstrues both § 16-11-760 and the State cases on the issue of criminalization of lawful conduct. Cole fails to identify the Statewide criminal statute that legalizes the predatory towing practices described in the Ordinance.

Subsection (D) of § 16-11-760 imposes a criminal penalty **only** for a violator of subsection (A) of § 16-11-760, that is, only for a person who parks a vehicle on the private property of another without the consent of the owner of the private property. This limited focus of the criminal penalty cannot reasonably be construed to declare as lawful (either expressly or by implication) all actions by private property owners or by towing companies related to towing from private property. Rather, § 16-11-760 simply does not address with criminal penalties any particular actions of private property owners and of towing companies related to towing from private property. This silence is not equivalent to a declaration of lawfulness under State criminal law. The City Ordinance, with its focus on actions of the private property owner and towing companies rather than on the vehicle drivers, simply speaks where State law is silent. See the discussion and

analysis in Bugsy's, Inc. v. City of Myrtle Beach, 340 S. C. 87, 95, 530 S. E.2d 890, 894 (2000), on the related issue of preemption.[1]

The circuit court's ruling on the criminalization issue also is fully supported by a plain reading of the language of Section 14 ("General law provisions not to be set aside") of Article VIII ("Local Government") of the South Carolina Constitution, the Home Rule Amendment provision that is the basis for the criminalization analysis by our State courts. The Constitutional prohibition is that, in enacting provisions required or authorized by the Article, "general law provisions applicable to the following matters shall not be set aside: ... (5) criminal laws and the penalties and sanctions for the transgression thereof." The Spartanburg Ordinance does not set aside, expressly or by implication, any State criminal laws or penalties.

Cole cites, in passing and without elaboration, City of North Charleston v. Harper, 306 S. C.153, 410 S. E. 2d 569 (1991), for the principle that local governments may not enact ordinances that impose greater or lesser penalties than those established by State law. City of North Charleston is inapplicable to our case. The municipal ordinance in City of North Charleston set a mandatory thirty-day sentence for simple possession of marijuana while a State statute for the same offense provided for imprisonment up to thirty days and a fine of $100 to $200. This presented a clear situation in which the ordinance, by requiring a greater penalty for the same offense, conflicted with and "set aside" a criminal penalty provided by State law, in contravention of Article VIII, section

[1] As discussed in the City's Argument I above, Cole's Brief fails to set out any argument on appeal that the Spartanburg Ordinance is preempted by State or Federal law. In its argument on criminalization, Cole even assumes "*arguendo*" a lack of preemption. (Initial Brief p. 4). The circuit court in our case correctly analyzed and correctly ruled against Cole's claims of preemption of the Ordinance under State law and preemption of the Ordinance under Federal law. (R. pp. 9-11).

14 of the South Carolina Constitution. "A local government may not forbid what the legislature expressly has licensed, authorized, or required." 306 S.C. at 157, 410 S.E.2d at 571.

The Spartanburg Ordinance does impose a different criminal penalty for violation of its provisions (up to $500 and/or 30 days in jai) than does § 16-11-760 (D) for a violation of its specified provision ($25 to $100 or 30 days in jail). However, as mentioned above, the criminal penalties in the State statute are directed only toward persons who park on private property without the consent of the owner of the private property. The penalties in the City Ordinance are not directed at the vehicle driver but at the towing company or private property owner that violates the requirements of the Ordinance. The criminal penalties in the Ordinance and in the State statute are directed at different parties because the criminal offenses are different. This is not a situation of conflict of penalty for the same criminal offense, and City of North Charleston does not apply.

Although citing several cases in its Argument I in Brief, Cole appears to rely principally on Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S. C. 602, 666 S.E.2d 912 (2008), and Connor v. Town of Hilton Head, 314 S. C. 251, 442 S.E.2d 608 (1994). In Beachfront, as understood by the City, the Court determined, for reasons that are not apparent from the decision, that State law allowed smoking in a restaurant, and that the municipal ordinance at issue prohibiting indoor workplace smoking could not impose a criminal penalty if the indoor workplace were a restaurant. In Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1994), a municipal ordinance that totally prohibited nude and semi-nude barroom dancing was determined by the Court to

conflict with (or "set aside" in the language of Article VIII, section 14 of the State Constitution) State statutes governing nudity that did not prohibit nude dancing in itself ("per se").

Unlike the ordinances in Beachfront and Connor, Spartanburg's nonconsensual towing ordinance does not totally prohibit the activity it seeks to regulate. The Spartanburg ordinance does not prohibit nonconsensual towing; it merely seeks to regulate certain predatory towing practices. In its Order, the circuit court correctly analyzed this distinction, expressly distinguishing Connor and relying instead on Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000). (R. pp. 11-13).

Cole in Brief does not distinguish, or even mention, Bugsy's but, in the view of both the City and of the circuit court in its Order, the case is instructive and authoritative on this issue of criminalization. In Bugsy, businesses operating video poker machines challenged the validity of a city zoning ordinance provision that limited the ability of the businesses to contend the machines were accessory uses in one certain zone. (Under the zoning ordinance as a whole, the machines were allowed outright as a principal use in seven zoning districts.) The Court in Bugsy's first concluded that the ordinance was not expressly or impliedly preempted by State regulation of video poker machines. The Court then concluded that the zoning ordinance, despite its provision for criminal penalties, did not criminalize activity that was legal statewide:

> Although Ordinance 96-56 provides criminal penalties for its violation, it does not criminalize the operation of video poker game machines. It merely provides criminal penalties for violation of provisions of the zoning ordinance. So long as businesses comply with the zoning ordinance, they can operate video game machines.

340 S. C. at 97, 530 S. E.2d at 895.

The circuit court in our case below correctly applied this rationale of Bugsy's. As concluded by the circuit court in its Order,

> The Bugsy's court explicitly rejected the Connor analysis relied upon by Cole because the Bugsy's ordinance did not criminalize the totality of the conduct. Criminal penalties in an ordinance do not, by their presence alone, render the ordinance invalid so long as the conduct can continue to occur through compliance with the ordinance.
>
> As in Bugsy's, the Ordinance involved here does not criminalize the totality of the conduct of nonconsensual towing. Rather, the Ordinance criminalizes the failure by a property owner or towing company to comply with its requirements related to nonconsensual towing. So long as Cole complies with the provisions of the Ordinance, it is permitted to operate its tow trucks. The Ordinance is valid since it imposes penalties consistent with statutory law and does not criminalize the entirety of nonconsensual towing. (Emphasis in original).
>
> (R. pp.12-13).

The remaining cases cited by Cole do not support its argument on unconstitutional criminalization of lawful conduct. The municipal ordinance at issue in Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) prohibited appearing nude in public, and the Court expressly followed the rationale of Connor in its analysis of the State statutes involving nudity. In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Court found the municipal ordinance penalty was non-criminal when the ordinance designated a violation as an "infraction" for which only a fine was authorized. In Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996), the Court held unconstitutional, as special legislation, a State statute that allowed a county local option by referendum on allowing video game cash payouts.

The effect of the local option feature, according to the Martin court, also was to have different criminal laws in different counties when statewide uniformity was required. These cases are distinguishable on their facts from our case.

The City contends that the State Supreme Court's favorable review of a similar nonconsensual towing ordinance in Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000), encompassed the criminalization issue raised by Cole. In argument at the motions hearing, Cole sought to minimize the applicability of Quality Towing on the criminalization issue. Cole's argument at the hearing was that criminal penalties were not involved in the Myrtle Beach ordinance in Quality Towing. (R. pp. 189-190). In its memorandum in support of its summary judgment motion, Cole cited to the language of the Quality Towing decision that, "There are no penalties specified in the [Myrtle Beach] ordinance for violations by towing companies." (340 S.C. at 36, 530 S.E.2d at 372). (R. pp. 50-51). However, the Myrtle Beach ordinance, according to the Quality Towing Court, did contain criminal penalties for private property owners who failed to follow the requirements of the ordinance. "Subsection (b) makes the property owner guilty of a misdemeanor if it has a vehicle towed without complying with the signage requirements in subsection (a) or if the vehicle is shown to have been legally parked." (340 S.C. at 34, 530 S.E.2d at 371).

Cole's further characterization in this Argument of private property owners as "victims" (Initial Brief pp. 2 and 4) does nothing to render doubtful the circuit court's ruling on this issue or any other issue. The circuit court, in its Order, correctly analyzed and correctly ruled on the criminalization issue in our case.

III. BY FAILING TO MAKE A POST-ORDER RULE 59(e) MOTION, APPELLANT FAILED TO PRESERVE FOR APPEAL ANY ISSUE CONCERNING THE LEGAL SUFFICIENCY OF THE CITY COUNCIL'S LEGISLATIVE FINDINGS ON "PREDATORY PRACTICES."

Cole's second listed Argument in Brief (Initial Brief pp. 4-9) is a grab bag of allegations concerning the Ordinance. The heading of the Argument asserts that, because of genuine issues of material fact, the circuit court erred in upholding the Ordinance's imposition of a fee schedule for nonconsensual towing. Cole's argument opens with allegations that: (1) the setting of a fee schedule exceeded municipal authority and usurped private contractual rights (Initial Brief p. 6); (2) the fee schedule limits the rights of private property owners as "victims" of illegal parking (Initial Brief pp. 6-7); and (3) Cole's own rates, according to the conclusory allegations of Cole's Affidavit, are "based on market rates" (Initial Brief p. 7). Following these allegations, Cole's argument returns to the language of the heading of its Argument with the assertion that "there was a genuine question as to whether predatory practices actually existed." (Initial Brief pp. 7-8). Along the way, Cole points to its principal's Affidavit and its Exhibits as adequate to raise this issue of fact. Cole then concludes by arguing lack of municipal authority to enact a fee schedule, based on the reasoning of a North Carolina case.

Cole's Affidavit is largely insufficient to create any genuine issue of material fact. Rule 56(e), SCRCP, provides that affidavits in support or opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." See Rule 56, SCRCP; Bank of

America v. Draper, 405 S.C. 214, 224, 746 S.E.2d 478, 483 (2013). Cole's Affidavit, among other things, is made largely without the support of specific facts and contains conclusory statements as to ultimate issues. Such an affidavit is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. See Whitner v. Duke Power Company, 277 S.C. 397, 288 S.E.2d 389 (1982) (an affidavit stating an individual lacked authority to act was insufficient to create a genuine issue of material fact to survive summary judgment). Self-serving affidavits espousing conclusions as to the purpose of another party's actions are not competent evidence. Germann v. New York Life Ins. Co., 286 S.C. 34 (1985) (a question of fact is not created by the affidavit of a party concluding that the purpose for which a trust was created no longer existed).

The only "genuine issue of material fact" specified by Cole in its second Argument is "whether predatory practices actually existed" (Initial Brief p. 7), also restated as "whether there is [sic] are in fact "predatory practices" to support the ordinance..." (Initial Brief p. 8). Cole also re-asserts this same argument in its third listed Argument. (Initial Brief pp. 10-11).

However, the legal sufficiency of the Ordinance's legislative findings on "predatory practices" is, for the reason discussed below, not properly an issue in this case. Neither Cole's Complaint (Complaint) nor its Motion for Summary Judgment (R. pp. 43-44) raised the issue.

In its Order, the circuit court summarized the Ordinance's findings and descriptions of predatory practices as part of the circuit court's detailed summary of the Ordinance provisions. (R. pp. 3-4). The circuit court, in its Order, also provided a description of the factual predicate for the Ordinance, as reflected by the public

statements at the City Council hearing and the Affidavit and Supplemental Affidavit of the City Manager:

> The May 2017 Affidavit of City Manager Ed Memmott included minutes from the two Council meetings at which the ordinance was read. The Supplemental Affidavit of the City Manager, filed with the City's Motion on July 18, 2017, included a transcription of the "Public Comments" section of the City Council meeting on April 10, 2017, at which the Ordinance was given second reading. Those items reflect comments to the Council from members of the public related to the subject matter of the Ordinance. These comments fully support the statement in the City Manager's first Affidavit that the Ordinance was adopted against a background of citizen complaints about predatory nonconsensual towing practices.[2]
>
> (R. p. 4; R. pp. 101-127; R. pp. 146-181).

To the extent Cole maintains that the circuit court should have considered and made a specific ruling on the legal sufficiency of the facts for the "predatory practices" basis for the Ordinance, Cole should have requested such a ruling from the circuit court. Such a request should have been either at the hearing on the cross-motions for summary judgment or by way of a Rule 59(e), SCRCP, motion after the issuance of the Order. However, Cole made no such request at the hearing on the cross-motions for summary judgment (R. pp. 182-208) or after the Order by motion to the circuit court judge.

Having failed to make such a request of the circuit court, Cole has failed to preserve this issue for appellate review. Bugsy's v. City of Myrtle Beach, 340 S.C. at 97,

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[2] The Affidavit of the City Manager provided that the City adopted the Ordinance "[f]ollowing numerous complaints by its citizens." (R. p. 102). The Supplemental Affidavit of the City Manager provided that the transcript of public comments at a Council meeting was attached "[t]o illustrate the type of complaints received by the City of Spartanburg prior to enactment of the Ordinance under challenge in this case." (R. pp. 146-147).

530 S.E.2d at 895, citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997), citing Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (where trial judge did not explicitly rule on issue at trial and party did not make Rule 59(e), SCRCP, motion to amend for a ruling, it is error for an appellate court to consider the issue). The Court should not entertain argument from Cole on this issue.

IV. BY FAILING TO MAKE A POST-ORDER RULE 59(e) MOTION, APPELLANT FAILED TO PRESERVE FOR APPEAL ANY ISSUE CONCERNING THE ORDINANCE'S FACTUAL BASIS FOR A FEE SCHEDULE.

As with the contention on appeal concerning the insufficiency of legislative findings on "predatory practices," an appeal preservation issue also forecloses any argument by Cole that the Ordinance's fee schedule lacks a sufficient factual basis. Cole raises this argument on the fee schedule in both its second listed Argument and its third listed Argument. Cole asserts that the Affidavit of its principal (R. pp. 55-75) creates a factual issue on whether the fee schedule reflects market rates or is legally sufficient.

In support of the argument, Cole cites to the statement of its principal in the Affidavit that Cole's rates "are based upon market rates" and that the Ordinance sets rates "that are well below industry rates including the South Carolina Highway Patrol, insurance companies and the banks." (R. pp. 56 and 58). Cole also cites to the 2017 Wrecker Rotation Fee Schedule for the State Department of Public Safety attached as Exhibit A to the Affidavit. (R. pp. 61-62).

The schedule of maximum towing fees set by the City Ordinance is contained in Section 23-19(a) (R. pp. 73-74 and 111-112). Subsection (b) provides that the City Manager will set the fees from time to time. Subsection (c) provides:

> The city manager shall set the fee in an amount that is high enough that property owners can reasonably expect to receive timely service from competent providers when a request for service is placed. However, the fee shall not be so high that it is punitive. The removal or immobilization of the vehicle having been found to be sufficiently punitive that an additional monetary penalty is unwarranted.
>
> (R. pp. 74 and 112).

In his Affidavit, the City Manager stated:

> The City established a fee schedule in The Ordinance for towing and storage charges comparable to those of surrounding communities. I personally met with Christopher M. Cole [the principal of Cole who authored the Affidavit upon which Cole relies] and considered his feedback on the amount of the fees.
>
> (R. p. 102).

The circuit court made no ruling in its Order on the specific issue of the sufficiency of the factual basis for the Ordinance's fee schedule. To the extent Cole contends an additional "genuine issue of material fact" is presented on whether there was a sufficient factual basis for the specific towing fees set by the Ordinance, Cole should have sought such a ruling from the circuit court before or after the Order.

Having failed to make such a request, Cole also has not preserved that issue for appellate review. Bugsy's v. City of Myrtle Beach, 340 S.C. at 97, 530 S.E.2d at 895, citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997), citing Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (where trial judge did not explicitly rule on issue at trial and party did not make Rule 59(e), SCRCP, motion to amend for a ruling, it

is error for an appellate court to consider the issue). The Court should not entertain argument from Cole on this issue.[3]

V. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY HAS THE LEGAL AUTHORITY TO REGULATE PRACTICES RELATED TO NONCONSENSUAL TOWING AND TO SET A SCHEDULE FOR NONCONSENSUAL TOWING FEES.

When the issue of municipal authority to regulate nonconsensual towing is considered on the merits, the City urges, as the circuit court concluded, that the City clearly has the legal authority, under controlling South Carolina law, to regulate practices related to nonconsensual towing and to set a schedule of fees for nonconsensual towing. The circuit court concluded that the City Ordinance is consistent with State law and "is a valid exercise of power and authority by the City" (R. pp. 6-8), and that the City Ordinance "was enacted pursuant to the lawful power and authority of the City, is not preempted by or in conflict with State or Federal law, and is constitutional." (R. p. 19).

The circuit court's analysis of South Carolina law on municipal authority (R. pp. 6-8) is sound and correct. The circuit court also correctly cited to, and relied on, the State

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[3] The Court in I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), further explained this preservation requirement:

> The losing party must first try to convince the lower court it is [sic] has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Supreme Court's previous analysis of these questions of municipal authority and ordinance consistency with State law in the context of a nonconsensual towing ordinance. In Quality Towing v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000), the Supreme Court held that municipal regulation of aspects of nonconsensual towing from private property did not conflict with State law.[4]

In Quality Towing, the Supreme Court rejected the argument of the towing company (which was represented by Cole's counsel in this case) that Myrtle Beach lacked the authority to regulate nonconsensual towing permits, sign content, price controls and records on the grounds that such regulations conflicted with S.C. Code § 16-11-760. The Myrtle Beach towing ordinance included a maximum fee schedule. ("The ordinance also imposes maximum fees which can be charged for towing and storage. § 23-133(d)." 340 S.C. at 35-36, 530 S.E.2d at 372). The trial court in Quality Towing specifically upheld the validity of the fee schedule. 340 S.C. at 33, 530 S.E.2d at 371. Despite its argument of lack of municipal authority, Cole's Main Brief fails to mention or cite Quality Towing.

As observed by the circuit court (R. p. 8), Cole provided no citations to State law that called into question the power of the City to adopt the Ordinance and Cole pointed to no State law inconsistent or irreconcilable with the provisions of the Ordinance. This observation remains true for Cole's argument in Main Brief to this Court. As pertinent South Carolina precedent, Quality Towing controls this case on the issue of authority to enact a maximum fee schedule. The North Carolina case cited by Cole in Main Brief,

[4] Ordinances similar to the Spartanburg ordinance have been enacted in a number of municipalities throughout the State as referenced in the Supplemental Affidavit of the City Manager, including Greenville, Myrtle Beach, Florence and Charleston.

King v. Town of Chapel Hill, 367 N.C. 400, 758 S.E.2d 364 (2014), rests on different principles of foreign law and is distinguishable on that basis.

King's holding that Chapel Hill exceeded its authority by imposing a fee schedule rests on a strain of law on municipal powers, also known as Dillon's Rule, that has been expressly overruled in South Carolina. In King, the North Carolina Supreme Court cited prior case law and its State Constitution for the principle that:

> Accordingly, municipalities are limited to exercising those powers "expressly conferred" or "necessarily implied" from enabling legislation passed by the General Assembly...But when...broadly construed...grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.
>
> 367 N.C. at 404-405, 758 S.E.2d at 369.

This description of municipal authority corresponds to the description of Dillon's Rule by our Supreme Court in Williams v. Town of Hilton Head, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993):

> A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

The Court in Williams concluded that, by enacting the Home Rule Act in 1976 subsequent to the Home Rule amendments to the State Constitution, the State legislature:

> intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30; bestow upon municipalities the authority to enact

> regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state.
>
> 311 S. C. 422, 429 S. E. 2d at 805.

Cole's citation to King provides no sound basis for reversing the circuit court on the issue of municipal authority to regulate nonconsensual towing and impose maximum fee schedules. Rather, Quality Towing provides sound State law precedent and should control. The circuit court should be affirmed.

VI. THE CIRCUIT COURT PROPERLY CONCLUDED APPELLANT FAILED TO ESTABLISH A CLAIM FOR IMPAIRMENT OF EXISTING CONTRACTS IN VIOLATION OF THE UNITED STATES CONSTITUTION OR IN TORT.

Cole and the City **both** filed motions for summary judgment on this issue. By its motion, Cole presumably asserted that no genuine issue of material fact existed. Cross motions for summary judgment "authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." Alltel Communications, Inc. v. S.C. Department of Revenue, 399 S.C. 313, 319 n.2, 731 S.E. 2d 869, 872 n.2 (2012). "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." Wiegand v. U.S. Auto Association, 391 S.C. 159, 163, 705 S.E. 2d 432, 434 (2011).

Cole's third listed Argument claims the circuit court overlooked the existence of a

genuine issue of material fact in denying Cole's claim of impairment of existing contracts.[5] However, Cole's argument in its Main Brief fails to identify any such genuine issue of material fact. If the purported material fact or facts relate to Cole's contracts with private property owners, then any shortcoming of proof by failing to provide the actual towing contracts is self-inflicted by Cole.

In its articulation of the standard of review (R. p. 5), the circuit court noted the requirement for a party's showing on an element essential to the party's case. "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Carolina Alliance for Fair Employment v. S.C. Department of Labor, Licensing and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

Cole failed to produce any of its towing contracts to the circuit court. (R. p. 17). In the absence of the contracts, the circuit court concluded that Cole presented no evidence of substantial contractual impairment (under either its Constitutional claim or its tort claim). (R. p. 17). Without the contracts, Cole was unable to establish that the terms of the contracts referenced any particular fees or entitled Cole to charge any particular fees or entitled Cole to undertake any particular towing or storage activities or were materially changed because of the Ordinance. Without the contracts and this evidence, Cole was unable to establish the Ordinance's impairment of contract under

[5] Cole's third listed Argument also reiterated Cole's claim (originally set out in its second listed Argument) that the existence of "predatory practices" to "support the ordinance" was an unresolved issue of fact. (Compare Initial Brief pp. 4 and 7-8 to pp. 10-11). The City, in response, reiterates its positions above concerning Cole's challenge to the existence of predatory practices.

the Constitution or in tort. Again, the City's towing ordinance does not prohibit towing; it merely regulates towing practices. Cole can continue to tow if it complies with the ordinance.

The circuit court correctly analyzed the controlling legal principles on impairment of contract. The circuit court also properly ruled on this claim or claims by Cole.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the circuit court.

July 18, 2018

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

RECEIVED
JUL 18 2018
SC Court of Appeals

Case No. 2017-002585

Cole Towing and Recovery, LLC,

Appellant,

v.

City of Spartanburg and Spartanburg City Council,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b).

July 18, 2018

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