

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

GREENVILLE BISTRO, LLC, a South
Carolina Limited Liability Company, d/b/a
Bucks racks & Ribs, and FRONTAGE
ROAD ASSOCIATES, INC., a South
Carolina Corporation,

C.A. No.: 2017-CP-23-03372

Plaintiffs,

RECEIVED

V.

JUL 26 2018

GREENVILLE COUNTY, a Political
Subdivision of the State of South
Carolina, and WILL LEWIS, in his
Official Capacity as Sheriff of
Greenville County,

SC Court of Appeals

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR TEMPORARY INJUNCTION

This Motion came to be heard before this Court on Defendants' Motion for Temporary Injunction on March 13, 2018. The Court, having heard the arguments of counsel, having reviewed the file and being otherwise fully advised in the premises, finds, for the purposes of this Motion only, as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs assert that they are operating a restaurant on the subject property and that offering live entertainment is a customary, accessory use to a restaurant. They rely on the definitions in the County Code to support their argument:

Accessory Use. A use of land or of a building or portion thereof customarily incidental to the principal use of the land or building and located on the same lot with such principal use. ...

Appendix A, Article 4, Greenville County Code

2. Greenville County defines a restaurant – which is a permitted use in the S-1 Zoning District, and thus on the subject site – as:

Restaurant. An establishment that sells prepared food for consumption. Restaurants shall be classified as follows:

b) **General.** An establishment that sells food for consumption on or off the premises. Restaurants have a designated full-service kitchen, dining room equipment, and staff to prepare and serve meals. The sale of alcoholic beverages, beer, and wine must be licensed by the State Alcoholic Beverage Licensing Board. *Ibid.*

3. Greenville Bistro sells food for consumption on or off the premises; has a designated full-service kitchen, has dining room equipment, and has a staff to prepare and serve meals. Therefore, it meets the definition of restaurant, offering the customary accessory use of live entertainment.

4. In response to Greenville County's conduct as described in the Complaint, Plaintiffs commenced this action on May 23, 2017. Plaintiffs sought an *ex parte* temporary restraining order, a temporary injunction, and, ultimately, a declaratory judgment in their favor, leading to injunctive relief prohibiting the enforcement of the County's regulations against Plaintiffs on constitutional grounds.

5. Plaintiffs' application for a temporary restraining order was set for oral argument on May 30, 2017, and the application was granted in part on June 2, 2017:¹

Therefore, the Defendants are restrained from closing the Plaintiffs business and from issuing citations based on nonconformity with zoning or operation of an "adult cabaret" contrary to its permit and/or certificate of occupancy pending the hearing on Plaintiffs' Motion for Temporary Injunction. But this does not limit the applicability or enforceability of any other County Ordinances. ...

Order, June 2, 2017.

¹ The Order was signed on June 1, 2017, but was not docketed until June 2, 2017.

6. Greenville County filed an Answer and a Counterclaim for injunctive relief on June 14, 2017.

7. The next day, on June 15, 2017, Greenville County filed its own Motion for Temporary Injunction. Defendants' Motion for Temporary Injunction was subsequently set for hearing for July 1, 2017, which hearing was subsequently cancelled. In the meantime, this Court, (Stillwell, J.), heard oral argument on Plaintiffs' Motion for Temporary Injunction on June 16, 2017 and, on July 17, 2017, partially granted Plaintiffs' Motion for Temporary Injunction.

8. On August 16, 2017, Greenville County filed its Notice of Appeal from the Order partially granting Plaintiffs' Motion for Temporary Injunction. On or about January 19, 2018, Greenville County provided Notice of a hearing on March 13, 2018 for its pending Motion for Temporary Injunction (which had originally been set for hearing on July 1, 2017.)

9. In its Motion for Temporary Injunction, Greenville County, as to Count I, relying solely and wholly on the amendment to its Adult Use Ordinance enacted by Ordinance 4869, seeks:

On Count 1, a temporary injunction prohibiting Plaintiffs from operating or allowing a sexually oriented business, specifically an adult cabaret, at 805 Frontage Road; ...

Defendants' Motion for Temporary Injunction, filed June 15, 2017, page 5.

10. In their Initial Brief on appeal, Defendants identify the issues on appeal as:

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.

Appellants' Initial Brief in *Greenville Bistro, etc., et.al., v. Greenville County and Will Lewis, etc., et.al.*, Appellate Case No. 2017-001747, brief dated December 11, 2017, at page 2.

11. In its Order Partially Granting Plaintiffs' Motion for Temporary Injunction, this Court held:

Defendants, Greenville County and Will Lewis, their officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location;

Order Partially Granting Temporary Injunction, filed July 17, 2017, page 6.

12. On March 12, 2018, this Court heard argument from the parties on the Defendants' Motion for Temporary Injunction.

13. During this hearing, the Defendants argued that the Order Partially Granting Temporary Injunction, filed July 17, 2017, concluded that Plaintiffs were not found to be "successors" to Elephant, Inc.

14. The Defendants argument in support of its Motion was based on the application of the prior "adult entertainment" ordinance 2673.

15. The Defendants also argued that the Order Partially Granting Temporary Injunction provided that "The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of the issuance of the February 9, 2017, Order."

16. The Defendants offered evidence and testimony of the alleged "business model" of the subject business, in an effort to show a variety of violations of Ordinance 2673, even though their Motion made no such distinctions between Ordinance 2673, and Ordinance 4869, which was adopted only a few days after the Plaintiffs began operating the subject establishment.

17. The Defendants also offered the testimony of Steven Smith, a Private Investigator who was a retired SLED Director.

18. Mr. Smith testified about his experiences at the subject business on October 3rd and 4th, 2017, first alleging that various female performers exposed “bare buttocks” and “bare breasts,” but, on cross-examination, conceding that the performers had varying degrees of coverage. He further testified as to his experiences as the “recipient” of various “contact dances” he had with the performers, as well as other activities that he described involving other customers of the subject business. He offered a report into evidence.

19. The next witness called by Defendants was Keith Johnson, also a retired SLED agent.

20. Mr. Johnson also testified about his experiences at the subject business on October 3rd and 4th, 2017, also alleging that various female performers exposed “bare buttocks” and “bare breasts,” and also conceding, on cross-examination, that the performers had varying degrees of coverage. He also testified as to his experiences as the “recipient” of various “contact dances” he had with the performers, as well as other activities that he described involving other customers of the subject business.

21. The next witness called by the Defendants was Shannon Piller, an Investigator with the Greenville County Sheriff’s Office.

22. Deputy Piller testified about his experiences at the subject business on March 7th and 8th, 2018, and he also testified that various female performers exposed “bare buttocks” and “bare breasts,” and described other conduct engaged in by the performers. Ultimately, Deputy Piller testified, on cross-examination, that the performers had varying degrees of coverage. He, too, testified as to his experiences as the “recipient” of various “contact dances” he had with the

performers, as well as other activities that he described involving other customers of the subject business.

II. CONCLUSIONS OF LAW

23. After reviewing all matters, the Court finds that the crux of Defendants' Motion are the issues currently on appeal to the South Carolina Court of Appeals.

24. Rule 205, SCACR provides:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. *Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.*

Rule 205, SCACR, emphasis added.

25. Rule 241, SCACR, provides for automatic stays in many instances. However, the pendency of an appeal from a Temporary Injunction is not one such instance, Rule 241(b)(8).

However, Rule 241(c) provides:

(c) Supersedeas or Lifting of Automatic Stay.

(1) After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.

Rule 241(c), SCACR.

26. Based on the foregoing, this matter is governed by both Rules 205 and 241(c), SCACR. The South Carolina courts have construed these rules:

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: ... Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal. The rule states: ... Rule 205, SCACR; see also Rule 241(a), SCACR (“The lower court ... retains jurisdiction over matters not affected by the appeal...”). Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court’s power to proceed with the action and address matters not affected by the appeal.³ Rather, the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a “matter[] affected by the appeal” under Rules 205 and 241(a). See *Arnal v. Fraser*, 371 S.C. 512, 518–19, 641 S.E.2d 419, 422 (2007) (per curiam) (explaining that Rules 205 and 241(a) permit the family court’s action on matters not affected by the appeal and prohibit action on matters that are affected by the appeal).

³ The reference in Rules 205 and 241(a) to the “jurisdiction” of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or “matter,” during the pendency of the appeal.

Tillman v. Oakes, 398 S.C. 245, 256; 728 S.E.2d 45 51 (S.C. App., 2012), [Footnote 4 omitted].

27. In the case *sub judice*, Greenville County seeks precisely what the rule prohibits: it seeks an injunction, based on the plain language of the Motion filed before the Order granting the Plaintiffs’ relief, enforcing Ordinance 4869, the enforcement of which this Court has already enjoined. Granting Greenville County’s Motion for Temporary Injunction would directly and expressly interfere with the exclusive jurisdiction of the South Carolina Court of Appeals.

28. Rule 205, SCACR has been further applied:

We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal. See Rules 205 & 225, SCACR.

Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112, 122, footnote 7, (S.C. 2008).

29. More directly, the South Carolina Supreme Court acknowledged the importance of the rule, holding:

Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over “*matters affected by the appeal*,” which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App.2012) (“[T]he lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).”); *Black’s Law Dictionary* 68 (10th ed. 2014) (defining “affect” as “to produce an effect on; to influence in some way”).

Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 533; 787 S.E.2d 485, 493 (S.C.), [Emphasis in Original].

30. Even a settlement agreement affecting the issues on appeal may not be approved by a lower court during the pendency of the appeal: *Jim Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 138; 742 S.E.2d 867, 868 (S.C., 2013).

31. More directly on point, in *SPAPW v. SC Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (S.C., 2001), the Court noted with apparent approval, the granting by the Court of Appeals of supersedeas stays to preserve the *status quo* as that case made its way through the Courts, 345 S.C. 598-9.

32. Accordingly, since the relief sought by defendants in their Motion for Temporary Injunction would possibly contravene the relief already granted to Plaintiffs on July 17, 2017, granting the relief sought by Defendants would directly interfere with the jurisdiction of the South Carolina Court of Appeals, in violation of Rule 205, SCACR.

33. As an additional consideration, one circuit court judge cannot constructively overrule an order made by another circuit judge in the same case on the same set of facts. See *Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69 (SC 1960); *Cook v. Taylor*,

272 S.C. 536 (SC 1979); and *State v. Britain*, 263 S.C. 363 (SC 1974).

34. The Defendants' Motion was predicated on both Ordinance 2673 *and* Ordinance 4869 and no Amended Motion limiting the basis under which they sought relief was filed, and no effort was made under Rule 241(b)(8), SCACR to seek an "exception" to the general rule that a notice of appeal operates as a stay for the duration of the appeal unless lifted by order of the lower court. The Court would note that Defendant's original Motion for Temporary Injunction was filed on June 15, 2017 which sought relief as to both Ordinances 2673 and 4869 and no amended Motion was filed limiting the Motion to Ordinance 2673. Defendant's Counsel argued that its Memorandum filed prior to the hearing on March 8, 2018, 5 days prior to the hearing constituted an appropriate amendment to its original Motion. This confirms that the Defendants' Motion is no different from the issues which are currently pending on appeal.

35. Additionally, while the Defendants are attempting to deviate from their operative Motion and purportedly seek relief under Ordinance 2673, attempting to ignore the adoption of Ordinance 4869, the granting of the Order Partially Granting Temporary Injunction does not result in any finding that Ordinance 4869 has been vitiated or rendered unenforceable, it is simply enjoined.

36. Counties have the authority to enact regulations, resolutions, and ordinances which are not inconsistent with the South Carolina Constitution and general law of the State. S.C.Code Ann. § 4-9-120 (1976). In general, ordinances are repealed by the passage of a new ordinance. *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (Ct.App.1993), citing *Lominick v. City of Aiken*, 244 S.C. 32, 135 S.E.2d 305 (1964).

37. Since the injunction against the enforcement of Ordinance 4869 did not operate to "repeal" that Ordinance, and it is clearly an amendment to Ordinance 2673, this Court does not

have the authority to simply ignore a presumptively valid ordinance, 4869, simply because it is enjoined, nor can the Court look solely to the provisions of Ordinance 2673, since it has effectively been amended by Ordinance 4869.

CONCLUSION

This Court concludes that the Defendants' Motion was predicated on both Ordinance 2673 *and* Ordinance 4869, no Amended Motion limiting the basis under which they sought relief was filed, and no effort was made under Rule 241(b)(8), SCACR to seek an "exception" to the general rule that a notice of appeal operates as a stay for the duration of the appeal unless lifted by order of the lower court.

Any granting of the relief requested by Defendants would clearly impact the pending appeal, which, absent the utilization of the procedures set forth in Rule 241(b)(8), SCACR, this Court has no authority to do. Finally, Ordinance 4869 has not been vitiated or rendered unenforceable, it is simply enjoined, not repealed, so this Court has no authority to ignore presumptively valid Ordinance 4869 simply because it is enjoined and entertain the relief the Defendants seek solely as to the provisions of Ordinance 2673, since it has effectively been amended by Ordinance 4869.

Therefore, the Court finds that the Defendant has not met its burden establishing that it is entitled to an Injunction and its Motion is hereby **DENIED**.

May 16, 2018

Signature Page of Hon. Perry H. Gravely set forth on following page



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755