THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Civil Action No. 2017-CP-23-03372
Appellate Case No. 2018-001393

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 REPLY BRIEF

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Introduction

Respondents (hereafter, "Greenville Bistro" or "GB") do not rebut the County's arguments. Instead, GB recites irrelevant history and injects flawed legal argument in its statement of facts.

GB does not dispute that it is operating a nightclub in an S-1 district in violation of the Zoning Ordinance. By failing to argue this issue in its brief, GB waives any response to it. *Fields v. Melrose Ltd. P'Ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (1993).

More important, under *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002), the County is entitled to its requested injunction because it has shown that it has an ordinance governing GB's operations and has shown that GB is violating that ordinance. For this reason alone, this Court should reverse with instructions that an injunction issue.

Separately, the County is entitled to an injunction prohibiting GB from operating an adult cabaret (one kind of sexually oriented business) within 1,500 feet of certain sensitive land uses, contrary to the County's 1995 sexually oriented business ordinance ("Ordinance 2673" or the "1995 SOB Ordinance"). In fact, our Supreme Court has already upheld the SOB Ordinance and a permanent injunction against operating a sexually oriented business at GB's location, 805 Frontage Road (the "Property"). *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003) (affirming injunction against previous operator (Platinum Plus)). Since GB operates a sexually oriented business, an injunction should issue on this ground as well.

GB erroneously argues that the trial court lacks power to enjoin violations of the 1995 SOB Ordinance. It parrots the trial court's erroneous reasoning that, under Rule 205, SCACR, it could not grant relief to enforce the 1995 SOB Ordinance because a 2017 Amendment (Ordinance 4869) to the 1995 ordinance was on appeal. But this ignores that GB's operations are illegal under the language of the 1995 SOB Ordinance that was left unchanged by the amendment.

GB also argues that this Court cannot consider the appeal under Rule 208(b)(1)(B), SCACR because the County has not included GB's Rule 205 argument as one of the County's "issues" on appeal. But this argument is flawed. First, this ignores GB's Zoning Ordinance, which is entirely independent of the Rule 205 holding. Second, as to the SOB Ordinance, the Rule 205 holding is subsidiary to the full relief that the County seeks on appeal: a reversal with instructions that the trial court enter an injunction. The County's second issue on appeal specifically argues that the trial court abused its discretion in failing to enjoin GB's ongoing violation of the 1995 SOB Ordinance, and necessarily—and specifically—argues that the trial court erred in its Rule 205 holding. (*See* Aplts. Br. at 2-3, 12-15 (Heading III.B.: "The appeal of the 2017 injunction does not preclude relief against ongoing violations of the 1995 SOB Ordinance.").)

Reply to GB's Statement of the Case

1. GB's statement of the case should be disregarded for violating Rule 208(b)(4), SCACR, which requires the brief to "contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." GB repeatedly fails to cite record evidence for its factual assertions, many of which contain no record support whatsoever and are thus misleading.

2. GB's brief contains false assertions about the prior tenant, Platinum Plus.[1] For example, GB's assertion that Platinum Plus was not a sexually oriented business is proven false by the South Carolina Supreme Court's decision in *Kenwood Enterprises*. 353 S.C. at 162, 577 S.E.2d

[1] It is worth reiterating that many of GB's asserted facts (such as those about Platinum Plus) are largely irrelevant here; nevertheless, they are refuted here because they are misleading and/or false. The relevant, and undisputed, facts are that: (1) GB operates a nightclub in violation of the Zoning Ordinance, justifying an injunction against that ongoing violation, and (2) GB operates an adult cabaret (a sexually oriented business) in violation of the 1995 SOB Ordinance, justifying an injunction against that ongoing violation.

at 430 (finding that "Platinum Plus, Heartbreakers, and Diamonds are all 'sexually oriented businesses,' as that term is defined by the [1995 SOB] Ordinance," specifically, that "these businesses all feature adult entertainment by persons 'who appear in a state of nudity,' and therefore fall under the Ordinance's definition of 'adult cabaret'") (footnote omitted).

3. GB asserts (Resp. Br. at 2) that from 1999 to 2015, Platinum Plus operated without issue. That, too, is demonstrably false. *Kenwood Enters., Inc.*, 353 S.C. at 162, 577 S.E.2d at 430 (observing that "both Platinum Plus and Heartbreakers violate the Ordinance's 1500-foot location requirement" and affirming permanent injunction against them).

Additionally, Platinum Plus was bound by a 2002 Consent Order that prevented it (and other strip club plaintiffs) from "engag[ing] in activities that if conducted, would constitute their business as a 'sexually oriented business' as that term is defined in Greenville County Ordinance 2673." (R. p. 242, lines 3-5.) But in April 2015, the Greenville County Solicitor brought a nuisance action against Platinum Plus for violating the 2002 Consent Order. This resulted in a 2015 Consent Order that required Platinum Plus to close for 180 days. When it reopened, it continued operating a strip club in violation of both consent orders. In July 2016, the trial court imposed contempt sanctions (the "2016 Contempt Order"), including a $100,000 fine and an additional 180-day closure. (R. pp. 262-263, 271-274.)

4. GB admits that it "undertook to resume the operation in essentially the same form as Platinum Plus" (Resp. Br. at 3[2]), but GB otherwise mischaracterizes the commencement of its business. After appealing the 2016 Contempt Order, Platinum Plus abandoned the property and,

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[2] GB believes that adding food service makes it different than *Platinum Plus*, but that distinction is not meaningful. The presence or absence of food service is of no moment. GB, like Platinum Plus before it, regularly features nudity and exposure of specified anatomical areas, so it too is an adult cabaret under the 1995 SOB Ordinance.

in December 2016, the property owner entered into a lease with Greenville Bistro, LLC. (R. p. 302, ¶¶ 1, 5.) Greenville Bistro, LLC disclaimed any connection to "the former tenants to whom the Court's previous Orders were directed." (R. p. 306, line 4.) Based on these representations, the court issued a February 2017 Order releasing Greenville Bistro from the Consent Orders, but it sternly warned against operating a sexually oriented business:

> 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.*"

(R. p. 306, lines 10-16 (emphasis added).)

Thus, the February 10, 2017 order did not give "explicit approval" to GB commencing "a similar business" as Platinum Plus, since sexually oriented businesses have long been prohibited at the Property (by both the 1995 SOB Ordinance and the 2001 permanent injunction affirmed in *Kenwood Enterprises*). The February 10, 2017 order—to which the County was not a party—did only three things: (1) released the real property at 805 Frontage Road from certain previous orders of the trial court, (2) refused to impose monitoring requirements on the new tenant, Greenville Bistro, and (3) emphasized that full compliance with all applicable laws and ordinances was expected. (R. pp. 303-306.)

Shortly thereafter, the County Attorney wrote Greenville Bistro a letter explaining that Greenville Bistro would be in violation of the 1,500-foot setback requirements if it operated a sexually oriented business at 805 Frontage Road. (R. pp. 307-308.) Greenville Bistro obtained a Certificate of Occupancy to operate as a "restaurant" (R. p. 283) and, despite the warnings, promptly began operating a sexually oriented business, specifically an adult cabaret. As

unrefuted record evidence shows, GB's business "format" of having nude dancers that display their breasts and buttocks and that erotically touch those same body parts, makes it a sexually oriented business—which is illegal at 805 Frontage Road. (Aplts. Br. at 6-7) (giving definitions and citations to record evidence); *Kenwood Enters.*, 353 S.C. at 162 n.4, 577 S.E.2d at 431 n.4.

5. GB claims that its establishment (Bucks, Rack & Ribs) "is operated so that dancers do not display 'specified anatomical areas,' or engage in 'specified sexual activities,'" (Resp. Br. at 5), but the claim is unsupported by any record citation and is in fact proven false by unrefuted testimony of both private investigators and law enforcement officers. (Aplts. Br. at 6-7 (defining "nudity" and "specified sexual activities" from 1995 SOB Ordinance and citing March 13, 2018 hearing testimony detailing such activities at GB in the late 2017 and early 2018).)

6. GB claims that the 2017 Amendment is "banning a form of expression expressly permitted by the Consent Order applicable to *Bucks, Racks & Ribs*." (Resp. Br. at 5.) This legal argument is irrelevant, because the County showed that GB is operating illegally under the 1995 SOB Ordinance, without reliance on the 2017 Amendment (which simply added one prong to the "adult cabaret" definition). The argument is also wrong. Neither the 1995 SOB Ordinance nor the 2017 Amendment bans expression, but merely regulates its location. *Kenwood Enters.*, 353 S.C. at 168, 577 S.E.2d at 434 ("[T]he Ordinance does not outright ban either nude dancing or sexually oriented businesses. Instead, it regulates the location of such businesses.").

Unrefuted evidence shows that GB could legally operate in hundreds of locations in Greenville County that do not violate the relevant setback requirements. (R. p. 324, ¶¶ 5-7.)

Reply to GB's Statement of Facts

1. Like GB's statement of the case, GB's statement of facts should be disregarded per Rule 208(b)(4), SCACR for repeatedly failing to cite record evidence for its assertions.

2. GB's statement of facts should also be disregarded because it is rife with legal argument, in violation of Rule 208(b)(1)(C), SCACR, which limits the statement to uncontested facts.

3. GB argues that it is a restaurant with "live entertainment as a customary, accessory use," and that it therefore need not comply with adult business regulations at its location. (Resp. Br. at 6.) First, this is a legal argument. Second, GB lacks evidence in its brief (or in the record below) to support this characterization of its business. Numerous eyewitness observations show that nude live entertainment with alcohol sales is GB's primary business. (*See* Aplt. Br. at 4-7.)

In any event, GB cannot explain how having live entertainment as an accessory use would exempt it from either the zoning rule for nightclubs or the SOB Ordinance's location rules.

In fact, the County's Zoning Ordinance requires even accessory uses to comply with zoning district requirements. (*See* R. p. 329, Zoning Ord. § 4:1 ("[A]ccessory uses ... shall meet the requirements of Article 6."); R. p. 315, Zoning Ord. Ch. 6 (permitting nightclubs only in C-2 districts).) It is undisputed that GB does not satisfy the district requirement for nightclubs.

Likewise, the 1995 SOB Ordinance requires sexually oriented businesses to comply with the 1500-foot separation requirement from residential districts, churches, and schools. (R. p. 297, 1995 SOB Ord. Sec. 12(b).) The Zoning Ordinance reiterates this rule. (R. pp. 310, 318, Zoning Ord. Ch. 6 excerpts (requiring adult entertainment establishments to comply with the "current provisions of County Adult Oriented Business Ordinance No. 2673").)

4. GB block-quotes the trial court's June 2, 2017 order granting in part and denying in part a temporary restraining order. (Resp. Br. at 8.) That order, however, was in effect only until the hearing on GB's motion for a temporary injunction, which occurred on June 16, 2017. Plaintiffs' quotation of an expired temporary restraining order is irrelevant and serves only to confuse.

5. GB also mischaracterizes the County's motion for a temporary injunction, claiming that

"the bulk of the Motion relies on Ordinance 4869," and that in 2018, the County sought "the exact antithesis of the relief ***already granted*** by the Court of Common Pleas" in 2017 (Resp. Br. at 10.) That is wrong. The County's June 2017 motion sought relief principally under the 1995 SOB Ordinance and also under the 2017 Amendment, which merely added one prong to the adult cabaret definition. On GB's motion, that prong was enjoined in July 2017. So, when the County filed its brief before the March 2018 hearing on the County's own motion, the County made it clear that "[t]he County does not seek relief under Ordinance 4869, which was temporarily enjoined and is on appeal." (R. p. 112 n.1.) GB's attempt to distract from its persistent violations of the 1995 SOB Ordinance are unavailing.

Reply Argument

I. GB fails to address the County's argument that GB's illegal nightclub operations should be enjoined under the Zoning Ordinance, and therefore waives any response to same.

The County's opening brief explained that the trial court erred by refusing to enjoin GB's illegal nightclub operations. Undisputed evidence below shows that GB is operating a nightclub in the S-1 district and is, therefore, in clear violation of the Zoning Ordinance. (Aplts. Br. at 4-5, 8-9.) Under *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002), this entitles the County to obtain injunctive relief.

GB spends the entirety of its brief defending the trial court's decision not to enjoin GB on *other grounds* (violations of the 1995 SOB Ordinance) and opts not to address the trial court's failure to reach GB's Zoning Ordinance violation. GB's brief does not dispute the clear evidence of its illegal nightclub operations. GB has, thus, abandoned any defense to these arguments. *Fields v. Melrose Ltd. P'Ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (1993) (holding that issue "not argued in the brief is deemed abandoned").

For this reason alone, this Court should reverse with instructions that the trial court enjoin GB's ongoing violation of the Zoning Ordinance.

II. GB ignores the County's entitlement to injunctive relief under the 1995 SOB Ordinance, and GB's Rule 205 argument ignores controlling law.

A. GB ignores the County's argument that GB's illegal adult cabaret operations warrant an injunction under the 1995 SOB Ordinance.

The County's opening brief also shows that the trial court should have enjoined GB from violating the 1995 SOB Ordinance. Undisputed evidence shows that GB is operating an adult cabaret and that GB's location violates the 1,500-foot setback for adult cabarets in multiple ways. (Aplts. Br. at 6-7, 10-11.) The County, has thus, shown that it has an ordinance governing the situation and a violation of the ordinance. Under *Simpkins*, it is entitled to an injunction.

GB's brief does not argue against this contention, so GB waives any response to it on appeal. *Fields*, 312 S.C. at 106, 439 S.E.2d at 285. This Court should reverse with instructions that the trial court enjoin GB's ongoing violation of the 1995 SOB Ordinance.

B. GB's argument that Rule 205 precludes an injunction under the 1995 SOB Ordinance contravenes the language of Rule 205 and this Court's decisions interpreting it.

GB spends the entirety of its argument on the trial court's holding that it lacked the power to rule on the County's request for an injunction based on Rule 205, SCACR.[3] Rule 205 grants appellate courts exclusive jurisdiction over an appeal after the notice of appeal is served, but specifies that "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with **matters not affected by the appeal.**" (emphasis added).

Under *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012), it is reversible error for a trial court to refuse to rule where a party is seeking relief not affected by the

[3] GB's Rule 205 argument is not relevant to the County's separate entitlement to relief under the Zoning Ordinance, as no part of the Zoning Ordinance is on appeal.

appeal.[4] The County's initial brief carefully explained how *Tillman* is on all fours here because the County's 2017 appeal was specifically limited to that portion of the 2017 Order that did not affect other relief sought by the County (i.e., under the Zoning Ordinance and under the 1995 SOB Ordinance). (Aplts. Br. at 12-15.) GB block-quotes *Tillman*, but does not answer the County's analysis, which need not be repeated here.

GB ignores the limited scope of the County's 2017 notice of appeal and how the relief sought at the March 2018 hearing was limited to matters not affected by that appeal.

Instead, GB focuses on the language of the County's June 2017 motion. But, it is the scope of the *appeal* that is relevant under Rule 205, because only matters affected by the appeal are off limits to the trial court. The appeal does not concern either the Zoning Ordinance or the 1995 SOB Ordinance, so the trial court was free to grant relief under those ordinances since there is "no action the appellate courts could take resolving [that] appeal that would affect" the County's right to relief under either of those ordinances. *Tillman*, 398 S.C. at 256, 728 S.E.2d at 51.

The County's March 2018 pre-hearing brief made it clear that, under *Tillman*, "the issue sought to be litigated in the lower court" did not include the limited issue that was on appeal. *Id.*; (R. p. 112 n.1 ("The County does not seek relief under Ordinance 4869, which was temporarily enjoined and is on appeal.").) There was no need for, nor rule requiring, a formal amendment to the County's request for relief, as the County had already clearly and in writing specified that it was requesting relief only under the Zoning Ordinance and the provisions of the 1995 SOB Ordinance unaffected by Ordinance 4869, which added one new prong ("semi-nudity") to the

[4] GB also relies on Rule 241, SCACR, which concerns supersedeas and automatic stays. But as explained in the County's initial brief (p. 12, n.4), Rule 241 is irrelevant because no motion was made under that rule and because "the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal." *Tillman*, 398 S.C. at 255, 728 S.E.2d at 51.

adult cabaret definition.

In any event, the County's motion itself seeks (and has always sought) relief under multiple provisions of the 1995 SOB Ordinance that are unaffected by the 2017 Amendment and, thus, are unaffected by the appeal of the 2017 Order temporarily enjoining that amendment.

For example, the motion relied on the wholly separate "specified sexual activities" prong of the "adult cabaret" definition to show that GB is an adult cabaret. (R. p. 65, lines 22-24 (explaining that "GB is also an adult cabaret because it regularly features live performances" involving "specified sexual activities," including "lap dances" and "dancers erotically touching their own, and others, buttocks, breasts, and genital areas").) The "specified sexual activities" prong of the definition exists only in the 1995 SOB Ordinance.

Similarly, the 1,500-foot buffer rule—the substantive rule being enforced—is found only in the 1995 SOB Ordinance. It was that rule under which the Supreme Court previously upheld a permanent injunction against any sexually oriented business operating at GB's location. *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003).

For these reasons, Rule 205 does not preclude relief against GB's persistent violations of the Zoning Ordinance and the 1995 SOB Ordinance, and the trial court erred in ruling otherwise.

C. GB's Rule 208 argument is also unavailing.

GB argues that under Rule 208, the County's statement of the issues does not challenge the trial court's refusal (based on Rule 205) to rule on the County's request for injunctive relief under the 1995 Zoning Ordinance. But, the County's second issue states that the trial court abused its discretion in failing to grant injunctive relief under the 1995 SOB Ordinance, and explains the trial court's erroneous determination under Rule 205. (Aplts. Br. at 2, 12-15.) The County's statement of issues thus affords ample notice as to the arguments pressed on appeal and complies with Rule 208(b)(1)(B), SCACR.

Rule 208(b)(1)(B), SCACR exists so that "the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Under Rule 208, an appellate court can consider any "issue if it is *reasonably clear* from an appellant's arguments." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

The County's opening brief satisfies this standard. It explained that the issues on appeal are (1) whether "the trial court abuse[d] its discretion in failing to enjoin GB's operation in violation of the Zoning Ordinance," and (2) whether "the trial court abuse[d] its discretion in failing to enjoin GB's operation in violation of the 1995 SOB Ordinance." (Aplts. Br. at 2-3.)

The second issue encompasses the trial court's erroneous determination under Rule 205. Page 2 of the County's final brief summarizes the error under Rule 205. More important, under heading III.B., the County's final brief spends four pages explaining why, under Rule 205, "[t]he appeal of the 2017 injunction does not preclude relief against ongoing violations of the 1995 SOB Ordinance." (Aplts. Br. at 12-15.)

Contrary to GB's suggestion, that the County pressed the trial court's Rule 205 error on appeal is not only "*reasonably clear*," but perfectly clear from the County's arguments. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

GB's citations are inapposite. In *Brown v. Odom*, --- S.E.2d ---, No. 2015-2628, 2018 WL 4472278 (S.C. Ct. App., Sep. 19, 2018), the petitioner argued separate, independent reasons why including a property in the marital estate for a divorce action was error; one of these reasons was omitted from his statement of issues and was thus unpreserved. *Id.* at *6 & n.4. But here, the Rule 205 error is subsumed in the County's second issue. That error was the principal way that the trial court abused its discretion in denying an injunction under the 1995 SOB Ordinance.

In *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277-78, 715 S.E.2d 362, 367 (Ct. App. 2011), the appellants argued only against the trial court's finding that they were personally liable to a former employee. Because that sole issue of error did not challenge the trial court's award of damages to the former employee or its mode of calculating an attorney fee award to the former employee, the court determined that appellants had waived those issues. *Id.* And in *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the trial court found that multiple statutes granted police officers sovereign immunity in a wrongful death action. The petitioner argued that one of the statutes did not grant sovereign immunity, but "left the court of appeals to 'grope in the dark' as to the other sovereign immunity statute." *Id.* at 348.

In contrast to these cases, the County did not leave the Court to "grope in the dark" about its arguments. *Jones*, 387 S.C. at 346, 692 S.E.2d at 903. The County spent pages explaining why the trial court abused its discretion in erroneously concluding that Rule 205 precluded it from granting an injunction under the 1995 SOB Ordinance. (Aplt. Br. at 2, 12-15.) GB has responded to the County's Rule 205 argument, showing that it is not "in the dark" about the County's contentions on appeal. GB's Rule 208 contention is without merit.

Conclusion

For the reasons stated above, this Court should reverse the trial court's order and instruct the court to enter a temporary injunction enjoining GB from operating a nightclub in an S-1 district in violation of the Zoning Ordinance. Separately, this Court should also instruct the trial court to enjoin GB from operating an adult cabaret in violation of the location restrictions in section 12(b) of the 1995 SOB Ordinance.

Respectfully submitted,

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Dated: December 20, 2018
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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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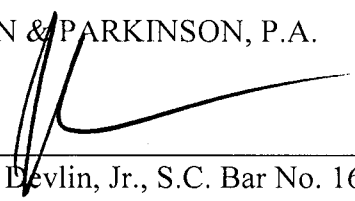

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