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.

BRIEF OF RESPONDENTS

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RESPONSE TO APPELLANTS' "PRELIMINARY STATEMENT"

Only one of the seven paragraphs in Appellants' "Preliminary Statement" addresses the question of the jurisdiction of the Court of Common Pleas. As will be demonstrated below, this appeal turns entirely on the question of the jurisdiction of the Court of Common Pleas, so the other six paragraphs of the "Preliminary Statement" are irrelevant and immaterial.

As to paragraph six of the "Preliminary Statement," purporting to deal with the jurisdictional issue, Respondents will demonstrate through the points and authorities recited below that Appellants' arguments on this issue are entirely without merit.

STATEMENT OF ISSUES ON APPEAL

Did the Court of Common Pleas err by finding that it lacked jurisdiction to grant a Preliminary Injunction which Injunction would have interfered with the jurisdiction of this Court? Because the Court of Common Pleas lacked jurisdiction to grant Defendants' Injunction, Appellants'/Defendants' other arguments are utterly irrelevant and immaterial. Accordingly, Respondents do not address these "issues" herein, instead relying on their briefing in first appeal between these parties, emanating from the same Court of Common Pleas action, Case. 2017-001747.

In the event that this Court properly affirms the grant of a Temporary Injunction in favor of Plaintiffs/Respondent, which is the issue pending before this Court in Case 2017-001747, such a result automatically dooms Appellants'/Defendants efforts to secure a Temporary Injunction in their favor. Accordingly, Respondents rest on their briefs in Case 2017-001747, which case should be decided before, or concurrently, with the decision of this Court in this matter.

More critically, Appellants' Statement of Issues on Appeal (Br. of App. 2-3) makes no reference to the jurisdictional issue. (Although fatally omitted as an Issue on Appeal, Appellants' Initial Brief (pp. 12-14) does purport to assert a jurisdictional issue to which Respondents will respond. The failure to identify the jurisdictional issue as an Issue on Appeal is contrary 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.

As will be set out below, the omission of the jurisdictional issue from Appellants' "Statement of the Issues on Appeal," is absolutely fatal to their appeal.

STATEMENT OF THE CASE

A. THE HISTORY OF THE CONTROVERSY BETWEEN THE PARTIES

The property which is the subject of this litigation is located in unincorporated Greenville County and, from 1999 through 2015, housed a nightclub named *"Platinum Plus,"* presenting female entertainers who, while scantily glad, did not display "specified anatomical areas," or appear "semi-nude," both as defined by the Greenville County Code, and was, therefore, not considered to be an Adult Use. *Platinum Plus* was licensed by the State of South Carolina to sell alcoholic beverages by the drink. *Platinum Plus* was operated by an entity known as Elephant, Inc., which was a South Carolina corporation.

There are three other clubs in Greenville County: *Lust, Scores* and *Lady Godiva,* operating using the same "business model" as *Platinum Plus,* and which competed with *Platinum Plus.* Since opening in 1999, *Platinum Plus* operated for years without incident. However, starting in 2015, the business, as then operated by Elephant, Inc., began to attract intense scrutiny from law

enforcement. For unknown reasons, the other three similarly situated clubs did not, and do not, draw the same concentrated scrutiny as does *Platinum Plus.*

As a result of this increased scrutiny, on April 17, 2015, the County, through the Solicitor's Office, brought a nuisance abatement action (Case No. 2015-CP-23-02597), under S.C. Code Section 15-43-10, et. seq., against *Platinum Plus.* This civil action resulted in a Consent Order filed June 3, 2015 which Consent Order, ("2015 Order") (R. pp. 245-258) as more fully set out in Count I of the Complaint herein, adopted an earlier Consent Order entered in 2002 ("2002 Order") (R. pp. 241-244). It is this Consent Order that is the center of Count I of the instant complaint.

The 2015 Consent Order resulted in Elephant, Inc., shuttering the doors of *Platinum Plus* from May 8, 2015, until November 8, 2015. Upon reopening, Elephant, Inc., continued to allegedly violate the Consent Order, with the result that *Platinum Plus* was again shuttered from approximately August 10, 2016 until February 7, 2017. Portions of the second order closing *Platinum Plus* are presently on appeal to the South Carolina Court of Appeals.[1]

Thereafter, Frontage Road and Elephant, Inc., terminated their business relationship and Frontage Road and Greenville Bistro entered into a Lease Agreement (R. pp. 277-278), by which Greenville Bistro undertook to resume the operation in essentially the same form as *Platinum Plus* but with the critical addition of food service on the premises. The Court of Common Pleas, in Case No. 2015-CP-23-02597, on February 9, 2017, issued a new Order which found in part:

> The Court must be mindful of the fact that the previous Orders of this Court were based upon the conduct allowed and/or condoned by Elephant, Inc. and Kenwood Gaines, [principal of Elephant, Inc.,] which conduct constituted a violation of the 2002 Order and was

[1] It appears that the current posture of the *Elephant* appeal is that the Court and the parties are attempting to identify mutually acceptable dates for oral argument in February 2019.

> also found to be a nuisance within the applicable statutes. The removal of Elephant, Inc. and Kenwood Gaines from possession of the property at 805 Frontage Road and their subsequent abandonment of the lease and the premises appears to have effectively abated the nuisance.

(R. p. 305).

While the Court noted that Greenville Bistro intended "to commence operations of a similar business" (R. p. 305), the Court also noted that the previous findings of a nuisance and orders of closure were "directed personally to Gaines, and Elephant, Inc." (R. p. 306), and certainly not at Respondents herein, Greenville Bistro or Frontage Road.

B. A BRIEF DESCRIPTION OF THE REGULATIONS AT ISSUE

Whether or not its entertainers display "specified anatomical areas," (thus appearing "nude" or "semi-nude"), the entertainment provided by Greenville Bistro constitutes free expression protected by the First Amendment to the Constitution of the United States and by Article I, § 2 of the Constitution of the State of South Carolina.

The first reference to Adult-Oriented Entertainment Establishments in the Greenville County Code was as section 2-5.71 of the 1976 Code. The current Adult-Oriented Entertainment Establishments were established by Ordinance 2673, adopted in 1995. Portions of the regulations found in Chapter 2.5 of the Greenville County Code have been modified by judicial decisions. *See, e.g. Harkins v. Greenville County,* 340 S.C. 606, 533 S.E.2d 886 (2000).

Although *Bucks, Racks & Ribs,* is operated so that dancers do not display "specified anatomical areas," engage in "specified sexual activities," or appear "semi-nude," Greenville County is now treating the business as a "Sexually-oriented Entertainment Establishment." In fact, in response to the Court of Common Pleas' explicit approval of Greenville Bistro

commencing operation, (R. p. 306), Greenville County purported to adopt Ordinance 4869, ("Ordinance 4869") (R. pp. 284-286), purporting to adopt a new definition of "semi-nude," banning a form of expression expressly permitted by the Consent Order applicable to *Bucks, Racks & Ribs.*

Further, despite the Court of Common Pleas explicitly approving *Bucks, Racks & Ribs* operating a similar business, Greenville County is now trying to prevent any form of entertainment or expression at the subject property. This amounts to a blatant constitutional violation.

STATEMENT OF FACTS

The factual and procedural history of the action below, leading to and supporting the denial of the injunction at issue, is critical to an understanding of the issues in this appeal. On July 17, 2017, the Court of Common Pleas issued a Temporary Injunction enjoining Defendants from enforcing Ordinance 4869 against Plaintiffs, (R. pp. 17-23), which ordinance purported to broaden the definition of an adult cabaret to include the presentation of "semi-nude" entertainment and to broaden the definition of "semi-nude.". That injunction means that the only activity that would trigger the application of the County's sexually oriented business ordinance to Plaintiffs' business would be if the dancers were to appear nude or were to display "specified anatomical areas:"

> (3) Adult cabaret means a nightclub, bar, **restaurant**, or similar commercial establishment which regularly features:
>
> (a) Persons who appear in a state of nudity: or
>
> (b) Live performances which are characterized by the exposure of" specified anatomical areas" or by "specified sexual activities" or
>
> ...
>
> (10) Nudity or a state of nudity means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.
>
> ...

> (12) Semi-nude means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female-breast, as well as portions of the body covered by supporting straps or devices.
>
> ...
> (15) Specified anatomical areas means the male genitals in a state of sexual arousal or the vulva or more intimate parts of the female genitals.

(R. pp. 290-291) [Emphasis Added].

Since an adult cabaret is described as, *inter alia,* being a restaurant, and since a restaurant is a permitted use on the subject location, (R. pp. 309-318), and since the Certificate of Occupancy issued by Greenville County (R. p. 283), is for a restaurant, there can be no question that the County's adult entertainment regulations, pre-Ordinance 4869, are completely inapplicable to this matter. Thus, the only mechanism by which the County might obtain the relief it seeks is via Ordinance 4869, the enforcement of which has already been enjoined by the Court of Common Pleas.

No matter what arbitrary and standardless measurements Defendants' agents might make, there can be no suggestion that the performers at Plaintiffs' business, offering live entertainment as a customary, accessory use to a restaurant, are appearing in a state of nudity or are displaying "specified anatomical areas." Since Plaintiffs are operating a restaurant with its customary accessory use:

> 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

There is not, and cannot be, a violation of the permitted use schedule of the Greenville County Zoning Ordinance. Further, 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.

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 is a restaurant, offering the customary accessory use of live entertainment, and is thus a permitted use in the zoning district applicable to the site.

In response to Greenville County's effort to stifle free speech and tortuously interfere with Plaintiffs' legitimate business, 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 patently unconstitutional regulations against Plaintiffs.

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: [2]

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

> 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. ...

(R. p. 15).

After a number of routine procedural and administrative matters moved through the Court, Greenville County filed an Answer and a Counterclaim for injunctive relief on June 14, 2017. (R. pp. 43-62). The next day, on June 15, 2017, Greenville County filed its own Motion for Temporary Injunction. (R. pp. 63-68).

Defendants' Motion for Temporary Injunction was subsequently set for hearing for July 1, 2017, which hearing was subsequently cancelled. In the meantime, the Court of Common Pleas, (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. (R. pp. 17-23). On August 16, 2017, Greenville County filed its Notice of Appeal from the Order partially granting Plaintiffs' Motion for Temporary Injunction. That appeal is pending in front of this Court in Case 2017-001747.

On or about January 19, 2018, Greenville County noticed for hearing on March 13, 2018, its pending Motion for Temporary Injunction, originally set for hearing on July 1, 2017. Of critical importance to this appeal is that said Motion focused primarily on Ordinance 4869:

> There are three relevant definitions in that Ordinance. First, the definition of "adult cabaret" was set forth in Ordinance No. 2673, and **amended by Ordinance No. 4869,**...

(R. pp. 64-65) [Emphasis Added].

Although some minor parts of the Motion rely on the pre-Ordinance 4869 code, the bulk of the Motion relies on Ordinance 4869, particularly on the latter Ordinance's amendments to the operative definitions. Appellants' Motion for Temporary Injunction was filed ***before*** the Court of Common Pleas enjoined enforcement of Ordinance 4869 in favor of Respondents, and ***was never amended.*** Even though it was approximately six months between the Court of Common Pleas granting Respondents' Motion for Temporary Injunction and Appellants setting their unamended Motion for Temporary Injunction for hearing, Appellants chose not to amend their Motion.[3]

Based on the issuance of the prior Order granting Plaintiffs' injunction, and based on the pending appellate case, the appropriate course of conduct by the Court of Common Pleas was to stay or abate the County's request pending the adjudication of the appellate action currently under advisement by this Court. The Court of Common Pleas followed the appropriate course of conduct.

In its Motion for Temporary Injunction, Greenville County, as to Count I thereof, 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;...

(R. p. 67).

In their Brief of Appellant in this Court's Case 2017-001747, Defendants identify the issues on appeal as:

---

[3] In a subsequent Memorandum and at oral argument before the Court of Common Pleas, Appellants attempted to limit their Motion to the pre-Ordinance 4869 Code, but they never amended the operative motion.

> 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.

(R. p. 357).

In its Order Partially Granting Plaintiffs' Motion for Temporary Injunction, the Court of Common Pleas 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;

(R. p. 22).

Comparing the relief sought by Defendants in their Motion, Defendants' Statement of Issues on Appeal, and the Court of Common Pleas' Temporary Injunction Order, it is clear that the relief sought in Defendants' Temporary Injunction Motion is the exact antithesis of the relief ***already granted*** by the Court of Common Pleas. This relief, as stated in the County's statement of the issues on appeal, (above), is now being appealed to this Court.

It should be noted that while, in its Brief (Br. of App. 6, n.3), the County disclaims its reliance on the enjoined Ordinance 4869 as a basis for its Motion for Temporary Injunction. This is just a desperate attempt to mislead the Court, because, in fact, the actual Motion reads:

> GB is an "adult cabaret," one kind of SOB regulated by the County's SOB Ordinance. There are three relevant definitions in

that Ordinance. First, the definition of "adult cabaret" was set forth 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."

(R. p. 290).

Second, "state of semi-nudity" 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.

(R. p. 285).

(R. pp. 64-65) [Emphasis Added].

Therefore, it is disingenuous at best, and, more clearly, an affirmative effort to mislead the Court, to claim that the County's Motion for Temporary Injunction was not grounded on the enjoined Ordinance. More importantly, while Greenville County supplemented its **briefing** on its Motion for Temporary Injunction, it **never** supplemented or amended the actual motion. The Court of Common Pleas was entirely justified in denying the Motion, since it dealt with the same issues already addressed in the prior injunction and sought, more likely directly, but certainly indirectly,

for the Court of Common Pleas to sit as its own appellate court. In sum, no aspect of the County's Motion was appropriate, either procedurally or substantively.

STANDARD OF REVIEW

The question of a Court's jurisdiction is fundamental:

> The subject matter jurisdiction of a court is fundamental and can be raised at any time. *Brown v. State,* 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001).

State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (Ct. App. 2003).

> ... "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." *Lake v. Reeder Const. Co.,* 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998). The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Anderson v. Anderson,* 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). *See Fielden v. Fielden,* 274 S.C. 219, 262 S.E.2d 43 (1980); *Harden v. South Carolina State Highway Dept.,* 266 S.C. 119, 221 S.E.2d 851 (1976); *State v. Gorie,* 256 S.C. 539, 183 S.E.2d 334 (1971). ...

Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835 (Ct. App. 1999).

Since Respondents will demonstrate conclusively *infra* that the Court of Common Pleas lacked jurisdiction, this Court's review should stop with the jurisdictional question and no other standard of review need be applied. Because the Court of Common Pleas properly adjudicated the jurisdictional issue, there was no error of law in the denial of the Temporary Injunction, (*Ellis v. Davidson,* 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004)) and, therefore, no abuse of discretion, (*Levine v. Spartanburg Reg'l Servs. Dist., Inc.,* 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005)).

ARGUMENT

I. APPELLANTS' OMMISSION OF THE JURISDICTIONAL ISSUE FROM ITS STATEMENT OF ISSUES ON APPEAL PRECLUDES THIS COURT'S REVERSAL OF THE COURT OF COMMON PLEAS' JURISDICTIONAL RULING.

Appellants' Statement of the Issues on Appeal (Br. of App. 2-3) identifies two issues on which Appellants seek review:

> ... Did the trial court abuse its discretion in failing to enjoin GB's operation in violation of the Zoning Ordinance?
>
> ... Did the trial court abuse its discretion in failing to enjoin GB's operation in violation of the 1995 SOB Ordinance"

Br. of App. 2-3.

Clearly absent from Appellants' Statement of the Issues on Appeal is the fundamental question of the Court of Common Pleas' jurisdiction to entertain the County's motion in the procedural posture of this case. SCACR Rule 208(b)(1) provides:

> (b) Content. The initial briefs under this Rule and the final briefs under Rule 211 shall contain:
>
> (1) Brief of Appellant. The brief of appellant shall contain under appropriate headings and in the order here indicated:
>
> ...
>
> (B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. **Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.**

SCACR 208, [Emphasis Added].

There is, and can be, no question that Appellants did not set forth the jurisdictional question in their Statement of the Issues on Appeal. While the Rule gives this Court some latitude in this realm by the use of "ordinarily," the Courts have strictly construed the Rule, finding that issues not set forth in the Statement of Issues on Appeal are **not** preserved for review:

> ... This issue is unpreserved because Husband failed to include the issue in the statement of issues on appeal. *See* 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.").

Brown v. Odom, ___ S.E.2d ___, 2018 WL 4472278 (S.C. Ct. App., September 19, 2018).

> ... The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court. 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." *Id.* "Every ground of appeal ought to be so distinctly stated 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." *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) (citation omitted).

Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010), abrogated on other grounds, *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018).

> Appellants argue the master erred in awarding damages to Allen; however, this issue was not included in Appellant's sole statement of the issue on appeal. Therefore, we need not address this argument on the merits. *See* 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.").

Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011); *see also, State v. Tennant,* 394 S.C. 5, 714 S.E.2d 297, 304 (2011).

Appellants' failure to include the jurisdictional issue in its Statement of Issues on Appeal means that the critical aspect of the decision of the Court of Common Pleas, that it lacked

jurisdiction to grant the Temporary Injunction because of the appeal pending in this Court, is not properly preserved for review by this Court, and Respondents respectfully suggest that this omission compels the resolution of this appeal in Respondents' favor.

II. GREENVILLE COUNTY'S APPEAL OF THE 2017 TEMPORARY INJUNCTION DEPRIVED THE COURT OF COMMON PLEAS OF JURISDICTION TO GRANT THE COUNTY'S REQUESTED TEMPORARY INJUNCTION.

The Court of Common Pleas properly adjudicated Respondents' jurisdictional argument, concluding:

> 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.**

(R. p. 12) [Emphasis in original].

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.

It should be noted that 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.

Therefore, 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: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal...." 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: "Nothing in these Rules shall prohibit the lower court ... from proceeding with matters not affected by the appeal." 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. 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 affected by the appeal).

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

In the case *sub judice,* Greenville County, contrary to the assertion in its Brief (at p. 12), seeks precisely what the rule prohibits: it seeks an injunction enforcing Ordinance 4869, the enforcement of which this Court has already enjoined. Granting Greenville County's Motion for Temporary Injunction would have directly and expressly interfered with the exclusive jurisdiction of this Court. Again directing the Court's attention to Appellants' actual motion, quoted above, the County sought relief pursuant to Ordinance 4869 and the County did not modify its motion after the Court of Common Pleas initially granted Respondents' Motion for Temporary Injunction.

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 n.7, 659 S.E.2d 112, 122 n.7 (2008).

More directly, the South Carolina Supreme Court acknowledged the import 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 (2016) [Emphasis in Original].

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 (2013). More directly on point, in *SPAPW v. SC Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 287 (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. at 598–99.

Accordingly, since the relief sought by Appellants in their Motion before the Court of Common Pleas for Temporary Injunction would have directly contravened the relief already granted to Respondents by the Court of Common Pleas on July 17, 2017, granting the relief sought by Appellants would have directly interfered with the jurisdiction of this Court Appeals, in violation of Rule 205, SCACR. Accordingly, Appellants' Motion for Temporary Injunction was properly denied pending the determination of the exact same issues on appeal.

CONCLUSION

Appellants did not identify the jurisdictional question as an issue on appeal. The jurisdictional question was the key basis for the denial of Appellants' Motion for Temporary Injunction. Therefore, pursuant to Rule 208 B(1)(b), SCARP, this issue was not preserved for appeal and the appeal should be summarily decided in favor of Respondents.

Appellants' Motion for Temporary Injunction was filed before the Court of Common Pleas enjoined enforcement of Ordinance 4869 against Respondents. The Motion was never amended although Appellants had ample opportunity to do so. The Court of Common Pleas properly found that:

> ... 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. ...

(R. p. 12)

The Court of Common Pleas did not abuse its discretion by denying Appellants' Motion for Temporary Injunction and there was no error of law in the Court's decision. Accordingly, the denial of Appellants' Motion for Temporary Injunction should be affirmed by this Court.

Respectfully submitted,
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Dated: December 17, 2018.

Greenville, South Carolina

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

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SC Court of Appeals

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 the Brief of Respondents in the above-captioned case complies with Rule 211(b) of the *South Carolina Appellate Court Rules* and with Supreme Court Order dated April 15, 2014, regarding personal identifiers and sensitive information.

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