

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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OCT 01 2019

APPEAL FROM HORRY COUNTY

S.C. SUPREME COURT

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-001134

City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, ..... Respondents,

v.

Horry County, ..... Appellant.

**RESPONDENTS' MOTION TO STRIKE AND MEMORANDUM IN SUPPORT**

Pursuant to Rules 209, 210, and 240, SCACR, Respondent City of Myrtle Beach, for Itself and a Class of Similarly Situated Plaintiffs, ("City") respectfully moves this Court for an order striking Appellant Horry County's ("County") designation of "County's Confidential Memorandum for June 14, 2019 Hearing" to be included in the Record on Appeal, as the appellate courts of this state have clearly explicated the standard that trial briefs submitted to the lower court by the parties do not constitute a part of the record on appeal and, moreover, the designation and consideration of the County's confidential submission under these circumstances violates the City's due process rights, Rule 210(c), SCACR, and this Court's issue preservation requirements. In support of this motion, the City states as follows:

1. This appeal concerns the circuit court's grant of the City's motion to preliminary enjoin the County from collecting a uniform service charge on accommodations, prepared food and beverage, and admissions within Horry County municipalities. Pursuant to this Court's

Order No. 2015-09-10-01 regarding the Civil Motions Pilot Program, the parties submitted supporting memoranda and exhibits for their respective positions well in advance of the hearing.

2. During a telephonic status conference held on May 20, 2019, the circuit court requested that the parties submit condensed pre-hearing briefs summarizing the parties' respective positions. The briefs were due June 6, 2019, and the circuit court directed the parties to limit the briefs to eight pages in length. On the due date, the court further directed the parties that the briefs "are to be emailed to the Court and not shared with opposing counsel." Exhibit A hereto. The City submitted its confidential hearing brief to chambers later that day via email only. Upon information and belief, the County did so as well. Consistent with the circuit court's directive, the parties did not exchange their respective confidential trial briefs. As a result, neither the City nor the County had an opportunity to review the other's respective confidential briefs to the circuit court in this regard. Pertinent to the within motion, the City had no opportunity to respond to any new, and thus improper, arguments contained within the County's confidential brief.

3. During the June 14, 2019 hearing, the County neither referenced nor cited to its confidential brief. A copy of the transcript of the June 14, 2019 hearing is attached hereto as Exhibit B. The circuit court's order granting the City's motion for preliminary injunction listed the materials upon which the court relied but did not identify either confidential brief submitted by the parties, or arguments contained therein. The County did not mention or reference the confidential brief in any subsequent briefing or arguments before the circuit court. The County's Initial Brief to this Court only notes that the parties submitted confidential briefs and does not cite to any portions of it in support of the County's arguments. Yet the County's initial

Designation of Matter nevertheless includes the “County’s Confidential Memorandum for June 14, 2019 Hearing.”

4. The appellate courts of this state, including this Court, have unequivocally stated that trial briefs submitted to the lower court are not a part of the record before that court and therefore may not be included in the Record on Appeal. *See, e.g., Hays v. Adair*, 267 S.C. 291, 297, 227 S.E.2d 665, 668 (1976) (“Respondents raise a question as to the form of appellant's exceptions, both of which are based on ‘the pleadings and briefs.’ As respondents point out, **trial briefs do not constitute a part of the record before the court and thus no exception can be properly based upon them.**”) (emphasis added); *Gurley v. United Servs. Auto. Ass’n*, 279 S.C. 449, 453, 309 S.E.2d 11, 13 (Ct. App. 1983) (“Trial briefs do not constitute a part of the record on appeal.”) (citing *Hays, supra*); *Glenn v. Sch. Dist. No. Five of Anderson Cty.*, 294 S.C. 530, 537, 366 S.E.2d 47, 51 (Ct. App. 1988) (same).

5. Beyond those controlling pronouncements of this Court and the Court of Appeals, the City believes that one of the purposes of the County’s designation of its confidential brief might be to demonstrate that it raised many of the unpreserved arguments in its Initial Brief to the circuit court, some of which improperly appeared publicly for the first time in the County’s Rule 59(e), SCRCF, Motion to Reconsider. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (“An issue may not be raised for the first time in a motion to reconsider.”). Consideration of these arguments, which the City did not have an opportunity to address below, violates the City’s right to due process, Rule 210(c), SCACR, and this Court’s issue preservation rules.

6. “The essential requirements of due process . . . are notice and an opportunity and an opportunity to respond. The opportunity to present reasons, either in person or in writing,

why proposed action should not be taken is a fundamental due process requirement.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). “[E]x parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.” *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). Such communications also violate the due process guarantee of “the opportunity to respond.” *Id.* at 1376. Setting aside the propriety of including confidential trial briefs in the Record on Appeal, this Court has also recognized the impropriety of considering confidential memoranda that were not provided to the opposing party. *See State Bd. of Medical Exam’rs of S.C. v. Fenwick Hall, Inc.*, 300 S.C. 274, 276, 387 S.E.2d 458, 459 (1990) (observing that the error of considering a confidential memorandum when ruling on a Rule 12(b)(6), SCRCF, motion to dismiss “was exacerbated by the fact that the memorandum was not made available to [the appellant] nor was it a part of the record”).

7. Consideration of the County’s confidential memorandum will violate these entrenched rights. The circuit court requested that the parties each submit a “summarizing” brief which, by definition, cannot include new or additional arguments. If the County’s confidential brief contains new or additional arguments, as the City believes it may, the circuit court correctly disregarded it and this Court cannot allow it to be part of the record, serve as a basis for the appeal, or resurrect an argument that is otherwise unpreserved for this Court’s review. *See Gurley*, 279 S.C. at 453, 279 S.E.2d at 13 (“Where the record does not reflect a point has been raised or decided in the lower court, that point cannot be considered on appeal.”) (citing *Murphy v. Hagan*, 275 S.C. 334, 271 S.E.2d 311 (1980)). Due process forbids the County from keeping arguments advanced in secret to the circuit court without the City’s knowledge close to its chest,

only to then spring them on appeal and ask that the circuit court be reversed based on such arguments of which the City did not have notice or an occasion to address below.<sup>1</sup>

8. Moreover, the fact that the County submitted its confidential trial brief to the circuit court does not render it in compliance with Rule 210(c), SCACR (providing, in pertinent part, that “matter which was not presented to the lower court or tribunal” shall not be included within the Record on Appeal). Any fair reading of Rule 210(c) limits a party’s inclusion of arguments and documents in the Record on Appeal which were publicly submitted and filed in the proceedings below such that the opposing party had an opportunity to review and respond to same. This is part and parcel of this Court’s well-established issue preservation rules. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (citing Rule 210(c), among other sources, for the proposition that “[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled upon by the lower court”). The error preservation requirement exists “to enable to the lower court to rule properly after it has considered *all* relevant facts, law, and arguments.” *I’on v. LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added). This necessarily includes arguments *against* a certain proposition; matter cannot be “presented to the lower court or tribunal” without notice to the opposing party and an opportunity to respond. Allowing arguments made in confidential hearing briefs which a respondent never had the chance to counter would eviscerate and is directly contrary to this requirement.

9. If issues discussed in the County’s memorandum were important enough to form the basis for reversal of the circuit court, the County should have openly raised them on the

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<sup>1</sup> If the County’s confidential memorandum complied with the Court’s request and did not contain new or additional arguments, it is irrelevant and should not be included in the Record on Appeal. *See* Rule 209(c), SCACR (“A party shall not include any matter in his Designation which is not relevant to the appeal.”)

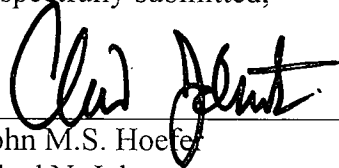
record below. That way, the City and the circuit court could have fully addressed them. The County cannot sandbag the City by making confidential arguments to the circuit court, keeping them from the City prior to the circuit court's ruling, and then asking this Court to reverse based on them. *See id.* (describing the issue preservation requirements as also “prevent[ing] 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 an opportunity to prove his case”).

10. Prior to filing the within motion, the undersigned consulted with counsel for the County to inquire as to what legitimate purpose inclusion of the County's confidential trial brief might serve, to provide notice of the City's intent to move to strike the brief, and to request the County's agreement to retract its designation of the confidential brief. The County indicated that it believes inclusion of the trial brief in the Record on Appeal is proper and refused to agree to remove it from the County's designation. The City thus has no choice but to move this Court for an order striking this improper designation.

11. The City therefore respectfully requests that this Court grant this motion and strike the County's designation of the “County's Confidential Memorandum for June 14, 2019 Hearing.” Based on the fact that the City has neither received nor reviewed the County's confidential trial brief or its contents, the City submits that it would be improper to require the City to file its Initial Brief without the benefit of a meaningful opportunity to review and respond to the brief, assuming this Court does not adhere to its prior precedent of refusing to allow confidential trial briefs to become a part of the Record on Appeal. Consequently, and concurrent herewith, the City also files a Motion for Second Extension of Time to extend the deadline to file the City's Initial Brief of Respondents and Designation of Matter to be Included in the Record on

Appeal. Should the Court agree to strike the County's designation, the City is requesting an additional 10 days following the filing of such decision on this motion to file its Initial Brief and Designation of Matter. Should the Court disagree and decline to strike the County's designation, the City is respectfully requesting the Court to direct the County to provide the City its confidential trial brief, and that the City be provided an additional 10 days following its receipt of the brief to file the Initial Brief and Designation of Matter.

Respectfully submitted,



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October 1, 2019

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**CERTIFICATE OF SERVICE**

This is to certify that I, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondent City of Myrtle Beach's **Motion to Strike Appellant Horry County's Designation of its Confidential Trial Brief as a document to be included in the Record on Appeal**, and its **Motion for Extension of Time to serve its Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows::

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Elizabeth Kurtz

Columbia, South Carolina  
This 1<sup>st</sup> day of October, 2019