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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY

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' REPLY IN SUPPORT OF ITS MOTION TO STRIKE

Pursuant to Rules 209, 210, and 240, SCACR, Respondent City of Myrtle Beach, for Itself and a Class of Similarly Situated Plaintiffs, ("City") respectfully files this reply to the County's return and in support of its motion seeking an order of this Court 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. For the reasons described below and in the City's motion and supporting memorandum, the County's designation and the proposed inclusion of the County's confidential hearing brief to the circuit court is improper, and the Court should grant the City's motion.

In addition, although the City's motion for an extension related to this motion to strike was mooted by the City's timely filing of its initial brief, this reply also addresses the unfounded and improper *ad hominem* allegations lodged against the City and its counsel in the County's return to that motion.

I. The County's confidential hearing brief should be stricken from its Designation of Matter for inclusion in the Record on Appeal.

The County opposes the City's motion to strike from its designation of matter the County's confidential hearing brief from the record on appeal, advancing a number of simplistic, *ipse dixit* arguments that ignore this Court's clear precedent and the plain language of the Rules under which the hearing briefs were submitted to the circuit court. The County's arguments are unpersuasive and unavailing.

Initially, the County ignores the clear prohibition against the inclusion of its brief in the record on appeal based on the precedent of this Court and the court of appeals cited in the City's motion. These opinions state unequivocally that trial briefs submitted to the lower court are not a part of the record before the circuit 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). Rather than address these clear holdings, the County merely contends that it has characterized the submission to the trial court as a memorandum, not a brief; therefore, it is so, and this Court is foreclosed from applying its clear precedent. Were it that simple, the County could likewise write this Court's opinion reversing the circuit court altogether and save the parties—and the Court—the time and effort associated with considering the issues on appeal.

Unfortunately for the County, that is not the case. In fact, the above-cited precedents apply the plain language of the civil rule under which pre-trial hearing briefs may be required by a circuit court, which makes clear that such briefs are expressly *not* a part of the record before the circuit court, and therefore cannot be a part of the Record on Appeal. South Carolina Rule of Civil Procedure 16 governs the procedures for all pre-trial matters in the circuit court. Subsection (a), entitled "Pre-trial Hearings," provides that "the court may in its discretion or upon motion of any party direct the attorneys for the parties to appear before it for a hearing to consider . . . (7) [t]he disposition of pending motions." Unquestionably, the June 14, 2019, hearing before the circuit court on the parties' respective motions for preliminary injunction was a "pre-trial hearing" for the express purpose of "[t]he disposition of pending motions."

Subsection (c) of Rule 16, SCRCP, entitled "Pre-trial Briefs," further provides that "[a]t or **prior to a pre-trial hearing**, counsel for each party shall provide to the judge a uniform brief containing the matters listed below. The pre-trial brief shall be provided to the judge and served on all parties or counsel of record at the same time and by the same means. . . . **The pre-trial brief is solely for the use of the court at the pre-trial hearing, and shall not be filed with or made part of the record in the action**." (emphasis supplied). Thus, the plain language of the Rule under which the circuit court requested pre-trial hearing briefs from the parties makes absolutely clear that they are not a part of the record before the circuit court. At the risk of stating the obvious, if a document was not a part of the record before the circuit court, then it does not qualify for inclusion in the Record on Appeal under Rules 209 and 210, SCACR. The fact that Rule 16(c), SCRCP, directs that pre-trial hearing briefs are to be provided to opposing counsel, and here the circuit court in its discretion under Rule 16, *see* Rule 16(a) (proscribing pre-trial hearing procedures and providing that "the court may **in its discretion** or upon motion of any

party direct the attorneys for the parties to," *inter alia*, submit pre-trial hearing briefs) (emphasis supplied), directed the briefs to be confidential and submitted directly to the court is of no moment. Under Rule 16(c), SCRCP, even when the briefs are submitted to opposing counsel they are expressly not a part of the record before the circuit court; therefore, the fact that the circuit court in its discretion directed the parties to submit confidential pre-hearing trial briefs only strengthens and further supports the City's argument that it should not be included in the record before this Court.

Beyond the County's argument that self-identifying a document as a memorandum suffices to avoid application of the Rules and this Court's precedent, the County further asserts that the undisclosed contents of its hearing brief are *per se* relevant to the issues challenged in this appeal by virtue of its unverifiable assertion that it contains written arguments and positions of the County in support of the motions for preliminary injunction. The County's *ipse dixit* approach to advancing legal arguments to this Court is emblematic of the heavy-handed assertions of power and the disregard of the City's autonomous governance that the County has demonstrated to the City and the other municipalities in Horry County giving rise to this lawsuit in the first place. Setting aside the fact that this Court is simply told to take the County at its word in this regard, neither the Court nor the City is capable of substantiating the County's claim, as the hearing brief has yet to be provided for public review.[1]

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[1] The County later asserts that, "[i]f the City would have asked for the Memorandum, the County would have gladly shared it with them." Return at 8. The County's gamesmanship is plainly evident. As indicated in support of its motion, prior to filing this motion to strike, and even though the Rules do not require same, the City consulted with counsel for the County related to this motion and the inclusion of the County's pre-trial hearing brief in an effort to avoid filing the motion (given the clear precedent against its inclusion), and therein plainly stated that "the City does not have the benefit of knowing or addressing its contents." *See* Ex. A, Consultation of Counsel. The County did not offer to send its confidential brief at the time, nor did it submit it as an attachment to its return to this motion, despite now implying its willingness

The County further presumptively asserts that the hearing brief is necessary for "this Court to fulfill its appellate function," and concludes for the Court that "[f]or this Court to provide a meaningful appellate review of the circuit court's decision, this Court should have the benefit of hearing and seeing all of the arguments made by the County." Return at 4. But this assertion is betrayed by the County's conduct in this appeal to date. This Court may take judicial notice of the fact that, in seeking a supersedeas of the circuit court's order before the Court of Appeals, the County filed a 1,278-page appendix under Rule 241(d), SCACR, supposedly containing all facts and arguments which it contended would support the extraordinary relief of a supersedeas it sought. Yet the County did not include its confidential hearing brief to the circuit court in that appendix, which it was permitted to compile and submit to the court of appeals without the input or consent of the City (and which petition the County further requested be granted on an *ex-parte* basis). If the County's brief was not relevant to an inquiry of whether it would be appropriate to supersede the circuit court's injunction order, then its suggestion now that "meaningful appellate review" may not be had absence its inclusion, is at best hyperbole. Because the County's own conduct in this appeal demonstrates its belief that the confidential hearing briefs are not necessary for inclusion in the records compiled for review of the circuit court's injunction order, the County's most recent justification is unavailing.

Further, in suggesting that the mere fact that the hearing brief was submitted confidentially to the circuit court[2] is sufficient to qualify its inclusion under Rule 210(c), the

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to do so. Any suggestion that the City has not been "diligent" in this regard is spurious. Instead, the County prefers to keep the City and the Court in the dark in an effort to continue to keep the brief confidential until the City cannot review and respond to it in writing.

[2] The County's non-sequitur argument about "consent" of the City by virtue of its compliance with the circuit court's directive to the parties to submit confidential hearing briefs is a rabbit hole and string cite-supported argument that is irrelevant to the issue before the Court. The Court need look no further than the County's summation of this argument, which suggests

County very clearly misapprehends the record requirements and error preservation rules of this Court. It is not sufficient to state that the County—the non-moving party of the City's motion for preliminary injunction, which is the sole issue[3] before the Court in this appeal—had the opportunity to advance new arguments to the circuit court under the cloak of a confidential hearing brief. Error preservation rules 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). The point, therefore, is that the City, as the movant, did not have an opportunity to review and respond to any arguments made by the County in its hearing brief, which, even under Rule 220(c), SCACR, arguably might prevent the City from developing and advancing arguments against the propositions advanced by the County in this appeal; stated differently, matter cannot be "presented to the lower court or tribunal" without notice to the opposing party and an opportunity to respond. As the City argued in its motion, allowing the County to advance arguments in this appeal which it made in confidential hearing briefs, and which the City never had the chance to counter, would eviscerate, and is directly contrary to, this requirement.

The County states that "[i]t is perplexing why the City would want to exclude this part of the story from this Court." Return at 5. It may be perplexing to the County, but common sense

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that, had the County known it would not have been able to include this confidential hearing brief in a record on appeal of any resulting appeal from the City's motion for injunctive relief (which had not even been considered by the circuit court at the time), then it would have simply disregarded the circuit court's directive to submit a confidential hearing brief. Return at 6 ("The County would not have consented to this arrangement to exclude any submissions being kept from this Court's review."). Indeed. It is, to say the least, an astounding assertion that the County has the ability to withhold its consent, and thereby frustrate, a directive of the circuit court under Rule 16 if the directive does not suit the County. Yet, that is the astonishing essence of the County's contention.

[3] The County did not appeal from the circuit court's denial of its motion for preliminary injunction as to the City's collection of its unrelated local hospitality and accommodations taxes enacted under separate statutory provisions and authority.

and fairness suggest the result advocated by the City complies with this Court's precedent regarding the content of the Record on Appeal. Intentionally or not, the County seems to disregard the fact that a striking of this confidential hearing brief only stands to serve the goal of the efficient administration of the appeal by this Court by excluding clearly unpreserved arguments. Indeed, should the County's hearing brief contain arguments that were not advanced in its public filings, their inclusion in the Record on Appeal would not confer preserved status on those unpreserved arguments as they would fail the "ruled upon" part of the two-part preservation test. *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").

Instead, the point of striking the County's improper inclusion of the hearing brief is that it "prevents [the County] from keeping an ace card up [its] sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give [it] an opportunity to prove [its] case." *I'on*, 338 S.C. at 422, 526 S.E.2d at 724; *see also State v. Torrence*, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J. concurring in part and writing for the majority in part) (finding that an appellant's attempt at "sandbagging" arguments in hopes reversal on appeal does not overcome the "contemporaneous objection requirement to preserve legal errors [which] operates to procedurally preclude a[n appellant] from allowing error to occur at trial and then complaining of it on appeal."). The County essentially admits that it is holding arguments contained in the confidential brief to argue to this Court in its Reply Brief or at oral argument. *See* Return at 4 ("[T]he County may further cite to the Memorandum in its reply and at oral argument."); *but see Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474 n.2, 492 S.E.2d

808, 811 n.2 (Ct. App. 1997) ("An appellant may not . . . use the reply brief to argue issues not argued in the initial brief."). Such a forecasted improper use of a document which is not permitted to be included in the first place, could be avoided by striking the document at this stage.

In sum, the plain language of Rule 16, SCRCP, and this Court's precedent clearly prohibit the inclusion of the County's confidential pre-trial hearing brief in the Record on Appeal. The County's return demonstrates a marked misapprehension of the application and basic purpose of these rules, and the County's attempts to distinguish and overcome these clear prohibitions are unsuccessful, demonstrating, if anything, more of a reason for this Court to apply its rules and precedents to exclude the brief from the Record on Appeal.

II. In the alternative, the Court should direct the County to immediately provide the City with a copy of its pre-trial hearing brief and afford the City the opportunity to file an amended initial brief addressing any previously-unraised and still-unpreserved arguments therein.

Although inclusion of the County's confidential pre-trial hearing brief in the Record on Appeal should not be permitted for all of the reasons discussed in the City's motion and hereinabove, should this Court disagree and nevertheless allow its inclusion and consideration in this appeal, fairness dictates that the City be permitted to review and respond to the arguments contained therein, regardless of whether they are preserved or not. In the event the Court declines to strike the brief, the City therefore respectfully requests the Court to direct the County to publicly file a copy of its brief in advance of the Record on Appeal and afford the City the opportunity to review same and file a revised initial brief (or supplemental brief if that is the Court's preference) addressing any unpreserved arguments contained in the brief.

III. The County's pre-emptive *ad hominem* attacks against the City and its counsel are false and should therefore not be countenanced by the Court.

Although the City's motion for an extension of time to file its initial brief was rendered moot by the City's timely filing of same on October 9, 2019, the City regretfully must take this opportunity to respond to the extraordinarily false and improper attacks leveled against it in the County's return. In what can only be described as unwarranted and gratuitous, the County's return amazingly presumed, falsely, that the City would not timely file its Initial Brief of Respondent, *see* Return at 7 ("in all likelihood, the City will fail to file its initial brief by the October 9 deadline"), and then proceeds to impugn the undersigned's professionalism and integrity based on that false presumption over the course of three pages. To say that these attacks fail to live up to the Court's mandates of civility and professionalism would be a monumental understatement. *See In re Anonymous Member of S.C. Bar*, 392 S.C. 328, 335, 709 S.E.2d 633, 637 (2011) (citing the lawyer's oath set forth in Rule 402(k), SCACR, which provides that "[t]o opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications...."). To the contrary, the County pre-emptively made these baseless allegations absent any demonstrated conduct by the City and without knowing whether or not the City would timely file is brief.

Having incorrectly assumed non-compliance with the Rules, the County's return proceeds to go "all-in" with ascribing malfeasance to the City's intent and actions with respect to an event which never occurred:

- "The City has no regard for the deadlines of this Court has established." Return at 7.
- "The City seems to view the Appellate Court Rules and the previous order from the Court of Appeals establishing the October 9 deadline for the City's initial brief as optional, not compulsory." *Id.*
- "[T]he City has failed to act diligently to meet the deadline currently in place." *Id.* at 8.

- "And this is not the first time the City has failed to act diligently." *Id.*
- "The City seems to be under the impression that it can set the pace and set the terms for when it will submit its brief." *Id.* at 9.
- "[A]ppellate review of the injunction should not be delayed because of the City's dilatory tactics." *Id.*

Each of the above-quoted statements by the County in its Return is categorically false. And each of the statements is based on an assumption that did not occur. The County's allegations that the City has no regard for this Court's deadlines, or that it has failed to act in a diligent manner in this appeal is specious, given the incontrovertible evidence that the City has timely filed all of its responses and its initial brief. Instead, the County's allegations appear to derive from the fact that the City had the audacity to request a *first* extension of time to file its initial brief, which the court of appeals granted over the County's written objection. Any suggestion that the City has failed to comply with the appellate court rules by making motions pursuant to the procedures provided in those rules is sophistic in the extreme.[4]

Far from the decorum this Court demands, the County's false statements represent *ad hominem* attacks which are advanced, apparently, for the sole purpose of disparaging the City and its counsel to this Court. The City is at a loss for the provocation behind these attacks; the issues that are a part of this case are hotly contested by the parties, but the civility oath demands

[4] The County's return is at least the fifth time in the limited briefing of this appeal that it has alluded to supposed harm that it is suffering as a result of the injunctive relief granted by the circuit court, insinuating each time that the rights of the City to timely respond to the County's appellate filings should be diminished or consideration expedited. Return at 9 ("[A]ppellate review of the injunction should not be delayed because of the City's dilatory tactics."); County Pet. for Supersedeas at 20 (arguing the petition should be granted *ex parte* and opposing extension); County Resp. in Opp. of City Mot. Enlargement of Time (same); County Initial Br. (arguing for continuation of status quo); County Resp. to City Mot. for First Ext. of Time to File Initial Br. (opposing extension). The Court should take note, however, that despite the County's willingness to improperly castigate the City, it has not filed a motion or otherwise requested this Court—or the court of appeals—to expedite consideration of this appeal as it may do under Rule 263(b), SCACR.

that disagreements are limited to the merits of the contested issues in the case, and the City and its counsel should not be pre-emptively disparaged by the County under false pretenses and to achieve some ulterior purpose.[5]

CONCLUSION

For all of the reasons set forth herein and in its motion, the City 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." Should the Court deny this motion, the City respectfully requests that the Court direct the County to file its confidential brief in advance of the Record of Appeal and provide leave to the City to file an amended initial brief, or such other supplemental filing as the Court deems appropriate.

Respectfully submitted,

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Attorneys for Respondents

Columbia, South Carolina
October 14, 2019

[5] Counsel for the City regrets that these issues must be aired in this forum, but they could not allow these attacks to stand unrefuted and discharge their duty to vigorously represent the City's interests in this matter.

EXHIBIT A

From: Gilliam, James
To: Chad Johnston
Cc: Lambert, Grayson; Golding, Henrietta
Subject: RE: City of Myrtle Beach et al. v. Horry County, Appellate Case No. 2019-001133
Date: Monday, September 30, 2019 4:39:46 PM

Chad:

I am well. I hope you are too.

I do not follow how the inclusion of a memorandum the County submitted to the circuit court in support of its position violates Rule 210(c). To the contrary, that seems to me to be precisely the type of material one should include in the Record on Appeal to show the appellate court the arguments that were made to the circuit court. That is our purpose for its inclusion, and we cannot agree to remove it.

Jim

AL • DE • FL • GA
MS • NC • SC • TN

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360 Attorneys. 19 Offices. 1 Firm. Southeast Strong.

From: Chad Johnston <CJohnston@Willoughbyhoefer.com>
Sent: Friday, September 27, 2019 3:12 PM
To: Gilliam, James <JGilliam@burr.com>
Subject: City of Myrtle Beach et al. v. Horry County, Appellate Case No. 2019-001133

[EXTERNAL EMAIL]

Jim,

I hope this finds you well. As you know, we are in the process of drafting the Respondents Brief in the Hospitality Fee case. I am reaching out regarding a document identified in the County's Designation of Matter to be Included in the Record on Appeal. Specifically, the Designation identifies the "County's Confidential Memorandum for June 14, 2019 Hearing" which the County, at Judge Seals' specific request, submitted directly to Chambers in advance of the June 14 hearing. Based on Judge Seals' June 6, 2019 direction that the briefs not be exchanged by the parties, the City was not privy to the County's submission (just as the County was not privy to ours). In reviewing your Initial Appellants Brief, we did not see a specific citation to the hearing brief, other than a reference to simply note that Judge Seals requested briefs from the parties. I wanted to confirm whether the County intends on including it in the final Record on Appeal, and if so, what legitimate purpose the County contends it serves? It was not made a part of the record below, was not referenced in the hearing, Judge Seals did not indicate he relied on it in issuing any of his orders below, and the City does not have the benefit of knowing or addressing its contents. It would therefore be our position that inclusion of the County's confidential hearing brief in the Record does not comply with Rule 210(c) and

would be improper. We are considering moving to strike it, but I wanted to reach out to you first to see if we can avoid doing so. I appreciate the County's consideration of this request. Please advise of the County's position on this issue by Tuesday, October 1 at noon.

Regards,
Chad

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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 **Reply in Support of its Motion to Strike Appellant Horry County's Designation of its Confidential Trial Brief as a document 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 14th day of October, 2019