THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209

Op. No. 5072 (Ct. App. filed Jan. 16, 2013)(Shearouse Adv. Sh. No. 3 at 37)
(withdrawn, substituted and refiled Feb. 27, 2013) (*not filed in Shearouse Adv. Sh.*)

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

APPELLANT'S CROSS-PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing directed at the substitute opinion was made and finally ruled on by the Court of Appeals on April 18, 2013. (Supp. App. p. 29).

INTRODUCTION

Pursuant to Rules 242 and 240, SCACR, Appellant/Cross-Petitioner Michael Cunningham ("Appellant") hereby requests that this Court issue a Writ of Certiorari to review the Court of Appeals' decision in *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. Refiled Feb. 27, 2013) (*published but not contained in any Shearouse Advance Sheet*). Specifically, the Court should reverse the Court of Appeals' decision as to Issue I (Breach of Contract claim) and Issue II (Payment of Wages Act claim), and should modify the opinion as to Issue III (Wrongful Discharge claim).

The Court of Appeals affirmed the circuit court's grant of summary judgment for the Petitioner/Respondent Anderson County to Issues I and II. In doing so, the Court of Appeals relied upon *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"). The Court of Appeals also held that the Home Rule Amendments to the State Constitution and the Home Rule Act did not apply to this case. The Court rejected Appellant's argument that even if *Cowart* applied, his contract was enforceable under the exception to Dillon's Rule set forth in *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948). The Court further rejected Appellant's arguments that his claim for severance was enforceable as a proprietary function rather than a governmental function. The Court

of Appeals also held Appellant's claim for sick leave failed because the Court found the contract to be void *ab initio*, the severability clause did not save this claim, and that sick leave was not included within the statutory definition of "wages."

In reversing the trial court on Issue III, the Court rejected Appellant's contention that he was "at will" even though he had a written contract, and misapplied the holdings of *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999), *Culler v. Blue Ridge Elec. Co-op., Inc.,* 309 S.C. 243, 422 S.E.2d 91 (1992) and *Shivers v. John H. Harland Co., Inc.*, 310 S.C. 217, 423 S.E.2d 105 (1992). The Court also erroneously held Appellant's contract was not "at will."

The Court of Appeals' rulings as to Issues I and II are erroneous under settled law of this Court and the statutory law of this State. Although the Court correctly reversed Issue III, its analysis is flawed under this Court's precedents. Furthermore, in ruling on all of the issues, the Court of Appeals erroneously relied upon jurisprudence from other jurisdictions that are meaningfully distinct from this case or inapplicable to this case.

Appellant requests that this Court grant this petition and reverse the Court of Appeals' decision as to Issues I and II. Appellant also requests that the Court modify the Court of Appeals' analysis as to Issue III (Wrongful Discharge claims) and affirm as modified. Finally, Appellant requests that the Court remand the matter with instructions to proceed according to this Court's mandate.

QUESTIONS PRESENTED

I. Did the Court of Appeals erroneously affirm the circuit court's order granting summary judgment for the County on Appellant's claim for breach of contract (Issue I) on the ground that the contract was invalid as a matter of law?

A. The Court erroneously applied *Cowart* to this case to declare Appellant's contract void even though *Cowart* involved a special purpose district and was not subject to the Home Rule Act ("HRA");

B. The Court erroneously relied upon cases from other jurisdictions for its analysis because those cases are distinguishable in a meaningful way from this case;

C. The Court erroneously rejected Appellant's argument that even if the holding of *Cowart* applied, this case was subject to the exception set forth in *Newman* through the language of Sections 4-9-25 and 4-9-620 of the South Carolina Code;

D. The Court erroneously concluded any discussion of Dillon's Rule and the HRA was irrelevant as this case, involving the actions of a county, are controlled by the HRA and not *Cowart* (a case involving a special purpose district and therefore not subject to the HRA);

E. The Court erroneously rejected Appellant's contention that the circuit court's construction of the HRA rendered provisions of the Act superfluous.

F. The Court of Appeals erroneously failed to address Appellant's argument that the payment of severance is a proprietary function rather than a governmental function.

II. Did the Court of Appeals erroneously affirm the circuit court's order granting summary judgment for the County on Appellant's claim for payment for accrued sick leave under the Payment of Wages claim (Issue II) based on the court's finding that the accrued vacation and sick leave were not "wages" under the South Carolina Payment of Wages Act?

III. In reversing the circuit court's ruling on Appellant's claim for wrongful discharge under the public policy exception to employment at will (Issue III), did the Court of Appeals erroneously conclude that Appellant's employment was not "at will" despite the express terms of the contract to the contrary?

STATEMENT OF THE CASE

On April 22, 2009, Michael Cunningham brought an action against Anderson County for breach of contract (Count I), wrongful discharge in violation of public policy (Count II), and failure to pay wages due arising out of the County's termination of Mr. Cunningham from his position as Anderson County Administrator (Count III). (Appx. p. 200). Mr. Cunningham's claims arose out of the County's failure to abide by its employment agreement, including its failure to pay an agreed-upon severance package. Mr. Cunningham also alleged the County terminated him in violation of public policy.

The County filed an answer on May 27, 2009. (Appx. p. 209). The County denied liability, pled several affirmative defenses, and pled a counterclaim based upon civil conspiracy. On June 10, 2009, Mr. Cunningham filed an amended reply to the counterclaim. (Appx. p. 220). On June 25, 2009, the County filed a stipulation of dismissal of the counterclaim with prejudice. (Appx. p.224).

The parties engaged in limited discovery and in February and March 2010 the parties filed cross-motions for summary judgment. (Appx. pp. 226, 258). Following briefing of the issues and a hearing, the trial court entered an order on May 13, 2011, denying Mr. Cunningham's motion and granting the County's motion for summary judgment. (Appx. p. 187).

Mr. Cunningham filed and served his notice of appeal on June 10, 2011. (Appx. p. 294). Following briefing and oral argument the Court of Appeals issued its opinion affirming in part (as to Counts I (breach of contract) and III (statutory wage claim)), reversing in part (as to Count II, Wrongful Discharge) and remanding. *Cunningham v.*

Anderson County, Op. No. 5072 (Ct. App. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3 at 37). Both parties petitioned the Court for rehearing: The County sought rehearing as to Count II (wrongful discharge in violation of public policy) and Mr. Cunningham sought rehearing as to Counts I and III. Mr. Cunningham also sought clarification of the Court's ruling as to Count II.

On February 27, 2013, the Court of Appeals issued an order denying rehearing. (Appx. p. 1). However, the Court withdrew its prior opinion and filed a new opinion in this matter. *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. filed Feb. 27, 2013) (*Not filed in any Shearouse Adv. Sh.*) (Appx. p. 2). The new opinion corrected factual errors, included additional discussion on the resolution of Count I (Breach of Contract), made no changes to the discussion of Count III (Payment of Wages), and added significant discussion to the disposition of Count II (Wrongful Discharge). (Appx. pp. 17-20).

On March 28, 2013, Mr. Cunningham filed and served a Petition for Rehearing from the substituted opinion.[1] (Supp. Appx. pp. 1-28). On March 29, 2013, the County filed this Petition for Writ of Certiorari, seeking review of the Court's disposition of Count II (Wrongful Discharge).[2]

The Court of Appeals denied Mr. Cunningham's Petition for Rehearing directed at the substituted opinion on April 18, 2013. (Supp. Appx. p. 29).

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[1] This Petition was timely as the Court had extended the deadline to March 29, 2013.

[2] The County did not seek rehearing from the substitute opinion.

STATEMENT OF THE FACTS

On November 18, 2008, Anderson County Council voted 5-2 to enter into a Master Employment Agreement ("Contract") with Mr. Cunningham to serve as the County's Administrator. (Appx. p. 386, 390). Mr. Cunningham signed the Contract on November 19, 2008. (Appx. pp. 420, 428). Mr. Cunningham began serving as Administrator on December 1, 2008. (Appx. p. 421).

The Contract provides in part:

> The Administrator *serves at the pleasure of Council*, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(Appx. p. 421, Section 2(A)) (emphasis added). The Contract term was for a period of three (3) years until November 30, 2011. (Appx. p. 421, Section 2(C)). The Contract also provided:

> In the event written notice of intent to not renew this Agreement is not given by either party to this Agreement to the other at least ninety (90) days prior to any annual anniversary of the date first above written, this agreement shall be extended on the same terms and conditions as herein provided, all for a new term consisting of the term then remaining at such annual anniversary date plus an additional period of one (1) year; such that the maximum effective term of this Agreement shall never exceed three (3) years and not be less than the respective term remaining when any notice of intent to not renew is given. Said agreement shall continue thereafter for a continuing, annually renewable term consisting of the respective term then remaining at such annual anniversary date unless written notice of intent to not renew is given by either party to this Agreement to the other at least ninety (90) days prior to any subsequent annual anniversary of the date first above written.

(Appx. pp. 421-422, Section 2(D)). The Contract provided for severance if Mr.

Cunningham was terminated for reasons that do not constitute "cause," which the Contract limits to serious matters such as criminal convictions and refusal to perform the duties of Administrator. (Appx. pp. 422-423, Sections 3(A) and 3(B)).

After a new term of Council commenced in January 2009, the Council continued to recognize and deal with Mr. Cunningham as its Administrator. At the first meeting of the new term, the Council passed a "Resolution" criticizing the manner in which it had hired Mr. Cunningham, but the Council did not attempt to declare the Contract invalid. (Appx. p. 435 (meeting transcript p. 6)). At a meeting on January 16, 2009, then Chair Eddie Moore stated publicly that there was no desire to terminate Mr. Cunningham's employment. (Appx. pp.439-440).

At the February 3, 2009 Council meeting, the personnel committee noted that Mr. Cunningham had rejected an "at will" agreement to replace the Contract. (Appx. p. 444, ll. 20-21). The committee claimed that the "old contract ... is null and void, unenforceable, and therefore he is presently an at-will employee." The committee chair, Bob Waldrep, then made a motion to approve a recommendation which was clarified as stating that "Mr. Cunningham would no longer be an employee of Anderson County," that "that would mean a termination," and "he's been terminated." (Appx. p. R.p.259, ll. 6-7, 12, 16).

Mr. Waldrep confirmed that the reason for the termination was Mr. Cunningham's unwillingness to sign a new "at will" contract. (Appx. p. 498). County Council then voted 5-2 to terminate Mr. Cunningham. (Appx. p. 449). Mr. Cunningham gave notice that he would be requesting a public hearing pursuant to Section 4-9-620 of the South Carolina

Code (the Home Rule Act (the "HRA")).

On February 4, 2009, Chairman Moore provided Mr. Cunningham with written reasons for termination as required by the HRA. (Appx. pp. 451-452). Mr. Moore does not contend that Mr. Cunningham engaged in any misconduct, or that "cause" existed for termination under Section 3(A) of the Contract. (*Id.*).

On March 2, 2009, the Council convened a meeting and voted on a resolution, although the text of the resolution is unclear because of a tape change. (Appx. pp.457-458). The Council then voted 5-2 to terminate Mr. Cunningham. (Appx. p. 461). The County thereafter refused to pay the compensation provided by Section 3(B) of the Contract. (Appx. p.212, ¶¶ 17, 20, 22).

Following discovery, the parties made cross-motions for summary judgment as to each cause of action. Mr. Cunningham contended there was no genuine issue of material fact that the County Council had terminated him without cause as defined by the Contract and had refused to pay compensation due under Section 3(B). (Appx. pp. 226-245). Mr. Cunningham also moved for summary judgment as to his cause of action under the South Carolina Payment of Wages Act, asserting the Contract called for payment for accrued sick leave which the County failed to do. (Appx. pp. 275-276). The County defended on the ground that the three-year contract was void and unenforceable in violation of the "Term Limits Rule," as set forth in *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996). (Appx. pp. 277-283).

The County based its motion for summary judgment on the following grounds: (1)

Mr. Cunningham's breach of contract claim fails because the contract was void under the "Term Limits Rule"; (2) Mr. Cunningham's wrongful discharge claim fails under the South Carolina Tort Claims Act as well as the lack of any clear, unambiguous mandate to violate the law; and (3) Mr. Cunningham's claim for violation of the South Carolina Payment of Wages Act fails because the County paid him all he was due, and the amounts claimed under the severance package are not recoverable under the Act. (Appx. pp. 258-260). The County also argued that the tort of wrongful discharge only applies to "at-will employees," and because Mr. Cunningham alleged the existence of a valid contract with the County, he was not "at-will."

On March 10, 2011, the circuit court held a hearing on the cross-motions for summary judgment. On May 13, 2011, the circuit court entered an order finding:

(A) Mr. Cunningham's claim based upon breach of contract must fail because it was an attempt by a "lame duck" council to bind a successor council under the "term limit rules" set forth in *Cowart* and *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948). The Court rejected Mr. Cunningham's argument that the Contract was permissible under the Home Rule Act. The court concluded the Contract was invalid as a matter of law and Mr. Cunningham had no right of action to enforce it or to seek damages for its breach beyond the term of the old council.

(B) The County was entitled to summary judgment on Mr. Cunningham's claim for wrongful discharge because the public policy exception to termination of employment only applies to at-will employees, and Mr.

Cunningham was never an at-will employee. Instead, he was employed under the Contract.

(C) Mr. Cunningham's claim under the South Carolina Payment of Wages Act also fails because Mr. Cunningham was not entitled to the severance under the void contract. Further, because the payment of accrued sick leave was a portion of severance, and severance is not "wages" under the Act, there was no violation of the Act when the County refused to pay for accrued sick leave.

(Appx. pp. 187-199). The circuit court denied Mr. Cunningham's motion for summary judgment and granted summary judgment for the County as to all causes of action.

Mr. Cunningham appealed the circuit court's order. The Court of Appeals heard oral arguments and subsequently filed its opinion affirming in part (as to Counts I (Breach of Contract) and III (Payment of Wages)) and reversing in part (as to Count II (Wrongful Termination)), and remanding. On cross-Petitions for Rehearing the Court of Appeals denied rehearing but withdrew its opinion and filed a new opinion.

The County proceeded with a Petition to this Court from the original opinion solely as to Count II (wrongful discharge). Mr. Cunningham sought rehearing from the substituted opinion as to all counts, which the Court of Appeals denied.

This Cross-Petition for a writ of certiorari follows.

ARGUMENTS

I. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR THE COUNTY ON APPELLANT'S CLAIM FOR BREACH OF CONTRACT (ISSUE I) ON THE GROUND THAT THE CONTRACT WAS INVALID AS A MATTER OF LAW

A. The Court erroneously applied *Cowart* to this case to declare Appellant's contract void even though *Cowart* involved a special purpose district and was not subject to the Home Rule Act ("HRA")

In affirming the circuit court's decision to hold the employment contract was void, the Court of Appeals relied upon *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"), which involved a special purpose district. (Slip op. at 5-11; Appx. pp. 6-12). In doing so, the Court of Appeals rejected Appellant's argument that the case *sub judice* involves the actions of a county government, not a special purpose district, so that *Cowart* did not control.

According to this Court's precedent, the Home Rule Act did not affect special purpose districts, such as the one at issue in *Cowart*. *See Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts."). In fact, the *Evins* court noted dicta in *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997), which applied Home Rule to special purpose districts, and held "[t]o the extent that *D.W. Flowe* can be read to apply Home Rule to special purpose districts, it is overruled." *Id.*, at n. 7. The holding in *Cowart* is thus irrelevant to the entity and issues involved in the case *sub judice*. Appellant pointed this out to the Court, which

rejected Appellant's arguments.

In affirming the circuit court's decision to hold the employment contract was void, the Court of Appeals stated "[b]y logical extension, the fundamental principle applied in *Cowart I* and *Cowart II* also applies to Anderson County's actions in the present case." (Slip op. at 6; Appx p. 7). In so holding, the Court overlooked or misapprehended that the principles applied in *Cowart I* and *Cowart II* apply to special purpose districts and not to counties.

The Court also overlooked and misapprehended the fact that both counties and municipalities are different from special purpose districts (the entity at issue in *Cowart*). That is, the holding in *Cowart*, which applied common law rules under Dillon's Rule as described in *Newman*, involved a third entity, a special purpose district, which is *not* subject to the Home Rule Act.

In responding the Mr. Cunningham's argument in the original petition for rehearing, the Court stated:

> Despite Cunningham's argument to the contrary, the provisions of the Home Rule Act governing municipal corporations operating under the Council-Manager form of government contain identical language as to municipal managers. See S.C. Code Ann. § 5-13-70 (2004) ("The term of employment of the manager shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the manager for a definite term."). Notwithstanding the existence of section 5-13-70, the courts in *Cowart I* and Cowart *II* continued to endorse the principle that a local governing body cannot bind its successor with regard to the appointment or removal of a public officer.

(Slip op. at 11; Appx p. 12). While it is true that Section 5-13-70 permits a municipality to employ a manager "for a definite term," the Court of Appeals over-read the holdings of

Cowart I and *Cowart II*, as neither of them addressed Section 5-13-70 nor discussed the Home Rule Amendments. Neither opinion would have discussed Home Rule, because as this Court has made clear, Home Rule does not apply to special purpose districts, the entity involved in *Cowart*.

Accordingly, the Court should grant this Petition and issue writ of certiorari to review the Court of Appeals's decision. The Court should reverse that decision and hold that *Cowart* does not apply to this case. The Court should then find that under the HRA, Appellant's contract with Anderson County was not void, and Appellant may proceed on his claims arising from the County's breach of that agreement.

B. The Court of Appeals erroneously relied upon cases from other jurisdictions for its analysis because those cases are distinguishable in a meaningful way from this case

In affirming the circuit court's ruling, the Court of Appeals relied upon cases from other jurisdictions in affirming the circuit court's ruling. (Slip op. at 6-9 and note 11; Appx pp. 7-10). In doing so, the Court misapprehended the holdings of these cases and overlooked that each of these jurisdictions either do not have Home Rule, or the cases involved entities not subject to Home Rule.

For example, the Court cited to *Telford v. Clackamas Cnty. Hous. Auth.*, 710 F.2d 567 (9th Cir.1983) for the rule that "[a]n Oregon public body may not enter a contract for governmental functions extending beyond its own term of office." (Slip op. at 6, n. 11; Appx p. 7). The facts of *Telford*, however, distinguish it from this case in a meaningful way.

Mr. Telford was the Executive Director and Secretary-Treasurer of the County Housing Authority from July 1953 through July 1977. In December 1976, the Authority contracted to employ Mr. Telford in the same capacity until the last working day of February 1982 (5 years and 2 months). The date coincided with Mr. Telford's intended retirement, and this was the first written contract the parties had entered. The Authority's governing body was a 5-member housing board whose members sat for 5-year terms on a staggered basis (one new member each year). In July 1977, the County Board of Commissioners passed a resolution withdrawing all authority from the housing board and transferring the functions and powers to themselves. The new board then demoted Mr. Telford and lowered his salary. In December 1978, the new executive director of the Housing Authority fired Mr. Telford from his job. Mr. Telford then sued in federal court.

The Magistrate Judge granted the Authority's motion for summary judgment, concluding Mr. Telford had no property right under Oregon law because "under Oregon law a public body may not contract with a party to provide governmental functions for a term longer than the public body's term of office." *Telford* at 569. The Magistrate Judge found Mr. Telford performed governmental functions and that the contract exceeded the previous Board's authority to contract by two months, rendering the contract void *ab initio*. The Ninth Circuit reversed, however, finding Mr. Telford's contract was not for governmental functions in any substantial part and was, therefore, not void. Thus, the narrow holding of *Telford* does not control this case.

Furthermore, there is nothing in *Telford* to indicate the federal court analyzed the contract under Oregon's version of the Home Rule Amendments to its Constitution.

Instead, the Court relied upon *Jacobberger v. School Dist. No. 1*, 122 Or. 124, 256 P. 652 (1927), which involved an architect who sued a School District for breach of contract entered under a resolution of its board of directors. The trial court dismissed the matter but the Supreme Court of Oregon reversed. The Court stated:

> Municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond the terms of their office, and the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations.

Jacobberger, at 131, 256 P. at 655. The Court proceeded to analyze the matter through the "governmental" versus "proprietary" lens and found the contract was valid when entered under a statute that permitted the District to contract up to certain indebtedness. The Court reversed and remanded the matter to the trial court. Importantly, the Supreme Court of Oregon did not discuss Home Rule or analyze the decision under Oregon's Home Rule Amendments to its constitution. Thus, neither *Tellford* nor the case upon which it relies, *Jacobberger*, are relevant to the issues in this case.[3]

The Court of Appeals noted *Valvano v. Board of Chosen Freeholders of Union County*, 183 A.2d 450, 453 (N.J. Super. Ct. App. Div. 1962) in support of the assertion that other jurisdictions have recognized the applicability of the prohibition against binding successor governing bodies to counties and county agencies. (Slip op. at 6, n. 11; Appx. p. 7). *Valvano*, however, involved a county board's written annual agreement with an insurance advisor and consultant. The actions in that case (increasing the contract from

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[3] This Court of Appeals noted the contract in *Telford* involved a county housing authority, not a county administrator hired pursuant to a statute, yet the Court cited to the case anyway.

one to three years) were not authorized by a statute such as Section 4-9-620. Furthermore, the individual was not the administrator, but someone who looked after the county's insurance needs. The Court of Appeals overlooked that there is nothing about *Valvano* that is relevant to this case except for a general discussion of the effects of checks on local government power (*i.e.*, Dillon's Rule). *See* David J. Barron, *Reclaiming Home Rule*, 116 Harv. L.Rev.. 2255 (2003) (describing the origin of Dillon's Rule).

The Court of Appeals also cited to *Uintah Basin Med. Ctr. v. Hardy*, 54 P.3d 1165 (Utah 2002), (Slip op. at 6, n. 11; Appx p. 7), but *Hardy* is also not on point. The case involved a contract entered by a doctor with the board of a County-owned hospital and then terminated by a successor board. The Supreme Court of Utah analyzed the case under common law rules and applied the "governmental/proprietary" test. The narrow holding was that the doctor's contract was "a proprietary contract" and was thus enforceable against successor boards of trustees if it was of a reasonable duration. Importantly, the Utah Court did not analyze the case under "Home Rule," nor were the actions authorized by a statute similar to Section 4-9-620.

The Court of Appeals next cited to *Morin v. Foster*, 380 N.E.2d 217 (N.Y. 1978) for the rule that "but for a provision in a county's charter allowing for appointment of the county manager for a four-year term, the county's legislators would be unable to appoint the county manager for a term extending into the term of the legislator's successors." (Slip op. at 6, n. 11; Appx. p. 7). What actually happened in *Morin*, however, distinguishes it from this matter in a meaningful way. New York has Municipal Home Rule, and requires an amendment of the county charter which abolishes or curtails "any

power of an elective county officer" to provide for a permissive referendum; South Carolina does not use referenda to enact legislation. *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 643, 528 S.E.2d 647, 652 (1999) ("our constitution does not give the people the right of direct legislation by referendum").

Furthermore, the county charter in *Morin* permitted the employment of a manager for a four-year term, but the county legislature passed a local law that amended the charter by striking the provision for a four-year term and established, instead, that the manager would "serve at the pleasure of the county legislature." The *Morin* court noted that where the charter specifically grants the authority, one legislature may be empowered to bind its successors.

In relying upon *Morin*, the Court of Appeals overlooked that South Carolina's Home Rule Act specifically authorizes a county council to enter into a contract with its administrator "for a definite term," which is precisely what the council did in this case. Like the charter in *Morin* under New York's version of Home Rule (which is different from South Carolina's version of Home Rule), Section 4-9-620 gives unique authority for a council to enter into an agreement with its administrator beyond the terms of the council's members.

Likewise, each of the cases from other jurisdictions that the Court of Appeals cited in footnote 14 on page 9 of its opinion are meaningfully distinct from this case. *See Grassini v. DuPage Twp.*, 665 N.E.2d 860, 864 (Ill. App.1996) (case involved classic application of Dillon's Rule without discussion of Home Rule, and Illinois Court noted there was *no* statutory authority for the Township to enter into a contract for a specified

term); *City of Hazel Park v. Potter*, 426 N.W.2d 789, 793 (Mich. App.1988) (Michigan Court discussed *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948) and distinguished a Florida case which was decided under Florida's version of Home Rule; Michigan Court did not find statutory authority that allowed the local government to enter into contract apart from limitation on local government (which amounts to Dillon's Rule)); *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1289 (Pa.2000) (case involved whether a construction contract one school board entered at the expiration of the board's term was binding on a successor board; case involved school board, not county government, and Pennsylvania court discussed authority under rules that amount to Dillon's Rule without discussion of Home Rule or any statutory authority to enter into contracts); *Falls Twp. v. McManamon*, 537 A.2d 946, 948 (Pa. Cmmw. Ct.1988) (case involved a municipality's employment of a police chief beyond the terms of the "lame duck" council; court held these actions violated the principle that "a municipality has only those powers specifically granted and inherent powers needed to implement these powers," otherwise known as Dillon's Rule; there was no discussion of Home Rule or any statutory authority to enter into a contract for "a definite term"); *Morin* (discussed above). An examination of each of these cases demonstrates how none of them control, or even inform, the result the Court of Appeals reached in this case. Yet the Court relied upon these cases to hold that *Cowart* and not the HRA controls.

This Court should grant this Petition, issue a writ of certiorari to the Court of Appeals to review its decision, reverse the Court's affirmance of the trial court's dismissal of Appellant's claims, and should remand for further proceedings consistent to

that decision.

C & D. The Court erroneously rejected Appellant's argument that even if the holding of *Cowart* applied, this case was subject to the exception set forth in *Newman* through the language of Sections 4-9-25 and 4-9-620 of the South Carolina Code. The Court also erroneously concluded any discussion of Dillon's Rule and the HRA was irrelevant as this case, involving the actions of a county, are controlled by the HRA and not *Cowart* (a case involving a special purpose district and therefore not subject to the HRA).

In affirming the circuit court's decision to hold the employment contract was void, the Court of Appeals held that under *Cowart*, "Appellant's argument regarding the abolition of Dillon's Rule is irrelevant" to the Court's analysis. (Slip op. at 11; Appx p. 12). In so holding, the Court overlooked or misapprehended several crucial aspects of *Cowart*.

While it is true, as the Court of Appeals pointed out, that *Cowart* post-dated the Home Rule Act, as Appellant pointed out in his brief, at oral argument, and in his initial Petition for Rehearing, *Cowart* involved a special purpose district which this Court has held is not subject to Home Rule. *See Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts."). *Cowart* is meaningfully distinct from this case.

Secondly, the Court of Appeals focused on a pre-Home Rule case, *Newman*, to support the Court's reliance upon *Cowart*. (Slip op. at 10-11; Appx pp. 11-12). In doing so, the Court overlooked or misapprehended Appellant's argument that, even if this case

was subject to *Cowart* (and it is not), the Home Rule Act supplies the necessary authority to contract under the *Newman* exception. (Brief of App., pp. 15-17). *See Cowart*, 324 S.C. at 241, 478 S.E.2d at 838 ("*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms."). Here, Section 4-9-620 is legislation that authorizes the local governing body to make a contract "for a definite term" without limitation to its members' own terms of office. Thus, even under *Cowart*, the contract is valid under the exception to Dillon's Rule described in *Newman*.

In discounting Appellant's argument on this point, the Court pointed to the word "clearly" that appears in *Newman* and found Section 4-9-620 does not fall "clearly" within the *Newman* exception to Dillon's Rule. (Slip op. at 11-12; Appx pp. 12-13). The words of Section 4-9-620 are not ambiguous and therefore do not require rules of construction. They are plain, clear, and unambiguous. The County is permitted to enter into a contract "for a definite term" with its administrator. That is precisely what Anderson County did in this case. By holding that the statute does not "clearly authorize" the "definite term" to extend beyond the terms of outgoing council members, the Court of Appeals rendered the statute a nullity, because *that* state of affairs existed under Dillon's Rule. The Court's ruling essentially declares that the legislature did a futile act when it enacted Section 4-9-620. Our courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 661 S.E.2d 349 (2008) (in

construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing) (discussed more fully in Point 6, below).

Furthermore, this view of Section 4-9-620 creates havoc in county governments. Any time a member of council decides to resign or retire before his or her term is up, any contract the Council entered with its administrator would be voided. Any time a member of council is removed from office then any contract with the county's administrator would be voided. The lack of predictability and uncertainty in that state of affairs is untenable, and cannot possibly be what the General Assembly intended.

In affirming the circuit court's decision to hold the employment contract was void, the Court of Appeals stated that Section 4-9-620 of the South Carolina Code of Laws (1986) did not "clearly" permit a council to enter into a contract that extends beyond the terms of the outgoing council members. (Slip op. at 11-12; Appx pp. 12-13). The statute, however, does not contain any such limitation.

The express language of the statute provides: "The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. *The council may, in its discretion, employ the administrator for a definite term.*" (Emphasis added). Without citation to authority, the Court of Appeals added language to the statute. That is, the Court tacitly appended that a council may employ the administrator for a definite term "*but not to extend beyond the terms of any council members.*"

Had the legislature desired to add the limiting language this Court read into the statute, the legislature could easily have done so; it did not. *See, e.g., Taylor v. South*

Carolina Dept. of Motor Vehicles, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009) (if Legislature had intended certain result in a statute it would have said so); *Giannini v. SC Department of Transportation*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) (same); *accord State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004) (legislature, had it chosen to do so, could easily have specified certain result in statute). The goal of this statute was to permit a council the flexibility to recruit the best talent and enter into a contract that did not become void simply because all members of the council did not stand for re-election or were not re-elected. *See* (Brief of Amicus SC City and County Management Association, pp. 7-9). The Court of Appeals' holding improperly reads additional language into the statute by implication. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (rejecting implied additional requirements to annexation powers where statute did not contain words of limitation).

The Court's holding declares many administrators for cities and counties to be "free agents" because the court's holding voids all of their contracts *ab initio*. The decision creates uncertainty for council members, administrators, and candidates for open administrator positions.

The holding also results in the electorate determining the administrator's contract terms instead of allowing that decision to be made through our chosen form of representative government. The State Constitution provides for a representative form of government in this State. S.C. Const. art. III, § 1; *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). By adding this implied language to the statute, the Court impinged on the authority the General Assembly places in the

hands of council members, that is, to engage a county administrator under an at-will arrangement but for a definite term that the council deems, in its discretion, to be reasonable. Here, that term was three years, which is not uncommon, not excessive, and within reason.

The Court of appeals also stated Appellant's argument amounts to a "narrow view" of the council's powers, "which is contrary to the requirement that a county's powers must be given a liberal construction." *Id.* at 13. In reaching this conclusion, the Court overlooked or misapprehended the arguments Appellant made, which align with the discussion proffered by the *Amicus*. Recognizing a council's authority under the Home Rule Act to enter into the contract in this case "for a definite term" is not a narrowing of the power – it is, instead, a liberal construction of those powers in favor of the county's ability to act. S.C. Code Ann. § 4-9-25. (App. Br., p. 13; Amicus Br., pp. 5-8).

In rejecting Appellant's argument, the Court of Appeals explained its view that "quite to the contrary," Appellant's argument would be restrictive on county powers in that "it would be restrictive on the successor governing body." (Slip op. at 13; Appx p. 14). The law relates to the powers of an existing council, however, and not powers of a potential future council. The Court's view illegally limited the County's authority to enter into the very contract permitted by the statute - one for a definite term. Instead of being a liberal construction of power, the Court of Appeals' view is restrictive.

Further, the Court found its view "compatible with *Newman*'s policy of prohibiting local governing bodies from binding their successors as to governmental

functions unless clearly authorized by enabling legislation." (Slip op. at 13; Appx p. 14). Section 4-9-620, however, is a clear expression by the General Assembly authorizing the County to enter into an agreement for a "definite term" without the limitation the Court has appended to the section (i.e., "so long as the contract does not extend beyond the terms of all the members of the current governing body.").

Accordingly, the Court should grant this Petition and issue a writ of certiorari to the Court of Appeals. The Court should reverse the circuit court's order declaring Appellant's agreement to be void, and remand the matter for further proceedings.

E. The Court erroneously rejected Appellant's contention that the circuit court's construction of the HRA rendered provisions of the Act superfluous

In affirming the circuit court's decision to hold the employment contract was void, the Court of Appeals overlooked Appellant's argument that the circuit court's construction of the Home Rule Act rendered provisions to be superfluous.

The Court failed to discuss Appellant's contention that, although the HRA does not contain language providing that a contract can extend beyond the term of a particular council, such express language is not necessary in these circumstances. As Appellant pointed out in his brief, prior to Home Rule, there was no need for a legislative authority to hire someone only for the term of the members of the governing body. Thus, if Section 4-9-620 were read as limiting any appointment to the terms of the members of the governing body, then the language would be superfluous. The courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or

superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 661 S.E.2d 349 (2008) (in construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing). (App. Br. pp. 15-16; Appx. p. 132-133).

This Court should grant this Petition and issue a writ of certiorari to the Court of Appeals. The Court should reverse the Court of Appeals' decision, reverse the circuit court's ruling, and remand the matter for further proceedings.

F. The Court erroneously failed to address Appellant's argument that the payment of severance is a proprietary function rather than a governmental function

The Court of Appeals misapprehended or overlooked Appellant's argument (App. Br. pp. 17-18; Appx. pp. 134-135)(Reply Br., pp. 4-5; Appx. pp. 177-178) that the payment of severance under the employment contract was a proprietary function rather than a governmental function. (Slip op. at 13; Appx p. 14). Instead, the Court focused on "the appointment of a public officer" and found that activity was "a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." *Id.* The Court ruled that "all provisions of such a contract, including provisions for severance pay, are void." *Id.*

Even under the common-law principles (which do not apply), one council was permitted to enter into a contract beyond the terms of the members for proprietary matters. The agreement in this case involves the payment of a severance when Appellant

was terminated so long as the termination was not for "cause" as defined in the agreement.

The general rule is that if a contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 480 S.E.2d 728 (1997). However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils. *Id.*

For purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be "whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." *Id.* at 179-180, 480 S.E.2d at 731.

Here, the contract spelled out the payments due to Mr. Cunningham unless his termination was for cause. The provision did not require any discretion by a successor body, and insofar as it did, public policy should require the Council to abide by these terms.

Therefore, even if Dillon's Rule applied (which it does not), and even if the *Newman* exception did not apply (which it would, if Dillon's Rule applied), then the circuit court's order is still erroneous in light of the fact that Mr. Cunningham was

seeking enforcement of a proprietary act and not a governmental act.

With respect to the Court's determination that "[t]he provisions of such a contract, including provisions for severance pay, are void," (Slip op. at 14; Appx p. 15), the Court of Appeals failed to make the appropriate distinction between proprietary and governmental function as it applies to this case. By its express terms, the contract at issue permitted the "2009 Council" to fire Appellant and employ an administrator of its own choosing. The touchstone between government and proprietary function is not whether a successive council is bound, as successive councils are bound by many contracts entered into by their predecessors. All that is at issue here is the payment of money, and not the continued employment of Appellant an administrator.

This Court should grant this Petition and issue a writ of certiorari to the Court of Appeals. The Court should reverse the Court of Appeals' decision, reverse the circuit court's ruling, and remand the matter for further proceedings.

II. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR THE COUNTY ON APPELLANT'S CLAIM FOR PAYMENT FOR ACCRUED SICK LEAVE UNDER THE PAYMENT OF WAGES CLAIM (ISSUE II) BASED ON THE COURT'S FINDING THAT THE ACCRUED VACATION AND SICK LEAVE WERE NOT "WAGES" UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT

In affirming the circuit court's decision on Appellant's claim under the Payment of Wages Act, the Court of Appeals affirmed pursuant to Rule 220(c), SCACR, on the ground that because the Court agreed the contract was void, then any claim for sick leave fails. (Slip op. at 14; Appx p. 15). The Court overlooked Appellant's arguments that he was entitled to relief under the Payment of Wages Act. (App. Br. pp. 19-20; Appx. p. 19136-137) (Reply Br. p. 9; Appx. p. 182).

The circuit court held the County was entitled to summary judgment on Mr. Cunningham's claim for wrongful discharge because the public policy exception to termination of employment only applies to "at-will" employees, and Mr. Cunningham was never an at-will employee because he was employed under the Contract with the County. The court held Mr. Cunningham therefore cannot claim the protection of the public policy exception. This ruling was in error.

First, a retaliatory discharge claim based upon a violation of public policy is not limited to employment at-will situations. The doctrine also applies where an employee has a contract that provides for at-will status along with a notice provision, such as the agreement in this case. *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). As previously noted, Mr. Cunningham's Contract provided in part:

> The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of

> Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(R.p.235, Section 2(A)) (emphasis added). Therefore, although the contract was for a three-year term, the parties themselves contractually provided that the only limitation on the County's right to terminate Mr. Cunningham was the requirement that the County abide by the severance provisions. Mr. Cunningham still faced termination for any reason, including a reason that violates public policy.

Furthermore, even though the parties had a written employment contract, nothing in that agreement limited the reasons for which the County could fire Mr. Cunningham. He was still, therefore, employed "at-will." See *Cape v. Greenville County School Dist.*, 365 S.C. 316, 618 S.E.2d 881 (2005) (finding employment contract, while for definite term, was terminable at will). Rather than limiting the reasons for which Mr. Cunningham could be fired, the Contract provided a severance package only if the termination was not for cause as defined therein. Nothing precluded the County's ability to terminate the agreement at any time, for any reason, for no reason, or even for improper reason.

Finally, the County should not be permitted to argue on the one hand that the Contract was void and unenforceable, but then rely upon the existence of the written Contract to deflect tort liability for wrongful discharge in violation of public policy. The trial court's ruling permits the County to unilaterally void the agreement the County's Council entered while still using the agreement as a defense to tort liability. It is either a binding employment contract or it is not.

The agreement in this case also contains a severability provision that separates the

payment for accrued leave from any other issue under the Contract. The Contract provides:

> If any provision, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed severable, shall not be affected thereby, and shall remain in full force and effect. It is the intent of the parties to this Agreement that the Agreement be applied, executed, and enforced to the maximum extent possible, at any time, consistent with State law as then in effect, to the benefit of the Administrator. The Administrator shall receive the maximum benefit of each and every provision of this Agreement as may be permitted by law or the Constitution at any point in time.

(Appx. pp.427-428, ¶ 17(D)). Therefore the provision that the County compensate Mr. Cunningham for accrued sick leave stands on its own and is enforceable under the Payment of Wages Act even if any other part of the agreement is declared void.

With respect to the Court's determination that "Cunningham argues that the Act's exclusion of 'severance' from the definition of 'wages' does not bar his claim for sick leave because his contract's provision for payment of wages was not part of the severance package," (Slip op. at 14-15, note 20; Appx. pp. 15-16), the Court of Appeals misapprehended Appellant's argument and failed to rule upon it. Appellant's argument is that sick leave benefits are expressly included in the statutory definition of "wages," and any reference to "severance" is misleading.

This Court should grant this Petition and issue a writ of certiorari to the Court of Appeals. The Court should reverse the Court of Appeals's decision, reverse the circuit court's ruling, and remand this matter for further proceedings.

III. IN REVERSING THE CIRCUIT COURT'S RULING ON APPELLANT'S CLAIM FOR WRONGFUL DISCHARGE UNDER THE PUBLIC POLICY EXCEPTION TO EMPLOYMENT AT WILL, THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT APPELLANT'S EMPLOYMENT WAS NOT "AT WILL" DESPITE THE EXPRESS TERMS OF THE CONTRACT TO THE CONTRARY

In addressing Appellant's contention that he was considered "at will" despite the existence of an employment contract, the Court of Appeals ruled that Appellant misunderstands the holding of *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). (Slip op. at 16-17; Appx pp. 17-18). The Court also stated that Appellant's contention that his contract was "at will" is "curious" in light of Appellant's contention that he can seek recovery under the severance provision is terminated without "cause" as defined in the contract. This statement indicates that the Court overlooked or misapprehended the law of employment contracts in South Carolina, as well as the remedies Appellant seeks as alternative relief.

Simply because a contract provides a severance payment if terminated without cause does not prevent the contract from being "at will." Although the Court of Appeals cites to several cases for the general statement of the law that the presence of the severance clause prevents the contract from being "at will," those cases do not so hold.

For instance, the Court cited to *Culler v. Blue Ridge Elec. Co-op., Inc.* for the rule that "[t]he doctrine [of employment at will] in its pure form allows an employer to discharge an employee *without incurring liability* for good reason, no reason, or bad reason." 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992) (emphasis by this Court). In making this statement, the Court overlooked that the Court in *Culler* was citing to *Ludwick v.*

This Minute of Carolina, Inc., 287 S.C. 219, 221, 337 S.E.2d 213, 214 (1985) (citing H.G. Wood, Master and Servant (1877)) for the observation about employment at will. The Court in *Ludwick* actually stated, however:

> Employment at will, a court created doctrine, was first clearly articulated in an 1877 treatise, *Master and Servant*. Its author, Professor H.G. Wood, is credited with formulating the "American rule" that, where an employment contract is indefinite as to its duration, the employer may discharge employees for good cause, no cause or even cause morally wrong.

287 S.C. at 221, 337 S.E.2d at 214. The *Ludwick* Court did not say an employer could fire an at-will employee "without incurring liability."

The *Ludwick* Court added, however, "Within the past 25 years there has been a significant turning away from strict allegiance to the doctrine in courts throughout the United States. * * * Language in recent opinions of this Court and our Court of Appeals reflects both an awareness of this erosion and the likelihood that the doctrine will be reviewed in an appropriate South Carolina case." *Id.* at 222, 337 at 214-215. So the *Culler* Court's reference to the "pure form" of the doctrine as allowing discharge "without incurring liability" was not a holding in *Culler* – in fact, there is nothing in *Culler* that would support the notion that the doctrine of at-will employment grants blanket immunity to employers for any reason of discharge, but that under the classic expression of the doctrine, no tort or contract cause of action arises if the employer terminates the at-will employee for good reason, no reason or bad reason. It was an observation in *Culler*, and was certainly not the holding of that case.

Furthermore, the case upon which *Culler* relied for that statement, *Ludwick*, never

said that and, in fact, expressed the view that the doctrine has limits at common law. Thus, even in the "at will" cases of *Culler* and *Ludwick*, the employer could have incurred some form of liability under the public policy exception without converting the employment from "at will" to something else. The substance of *Culler* does not support the Court of Appeals' holding in this case, and in fact the very holding of *Ludwick* stands in opposition to the Court's view that "at will" employment equals immunity from any and all liability.

The Court of Appeals next cited to *Stiles* for the rule that "the measure of damages when an employee is wrongfully discharged under a contract for a definite term generally is the wages for the unexpired portion of the term" and the following from Justice Toal's concurrence:

> Employment in South Carolina has been classified as either for a definite term or at-will. Employment for a definite term has two important characteristics: (1) it exists for a fixed period of time; and (2) the employment may only be terminated before the end of that term by just cause. If an employee is wrongfully terminated under a definite contract, the measure of damages is determined by the contract and is generally the wages for the unexpired portion of the term.

(Slip op. at 17; App. p. 18). Of course, the narrow holding of the majority decision in *Stiles* was that "an employee under an at-will contract with a 30 day notice provision may maintain an action for wrongful discharge in violation of public policy under *Ludwick*."

Additionally, in quoting from Justice Toal's concurrence, the Court of Appeals overlooked the language appearing in the very next paragraph:

> At-will employment differs from employment for a definite term in two important respects: (1) there is no fixed period of time; and (2) employers can discharge employees for good cause, no cause, or even

> cause that is morally wrong. *Ludwick*, 287 S.C. at 221-222, 337 S.E.2d at 214. In employment at-will, the employee is also free to terminate the employment relationship at any time.

Stile, 335 S.C. at 227, 516 S.E.2d at 451-452. Here, the contract with Appellant permitted the County to terminate Appellant *at any time* for good cause, no cause, or even cause that is morally wrong. The County was *not* required to employ Appellant for any fixed period of time. The only consequence of exercising its right to terminate Appellant's at-will employment at any time and for any reason was the payment of severance if the termination was for a reason other than "cause" as defined in the agreement.

Next, the Court of Appeals cited to *Shivers v. John H. Harland Co., Inc.*, 310 S.C. 217, 423 S.E.2d 105 (1992) for the rule that "[t]his measure of damages allows an employee to receive the benefit of the bargain by putting him in as good a position as he would have been had the contract been performed." (Slip op. at 18; Appx p. 19). The Court, however, overlooked the following language immediately preceding that statement in *Shivers*:

> A person hired under an employment contract for a definite term may not be discharged before the completion of the term without just cause. When an employee[] is wrongfully discharged under a contract for a definite term, the measure of damages generally is the wages for the unexpired portion of the term.

Shivers, 310 S.C. at 220, 423 S.E.2d at 107. Hence, the statement the Court of Appeals referenced, placed back into context, dealt with a person employed under a contract for a definite term who was wrongfully discharged and whose measure of damages was the unexpired portion of the term. Here, Appellant was employed at will – the County could discharge him *at any time, for any reason, or for no reason at all.* The County only had to

pay the severance package if the reason for the termination did not rise to the level of "cause" as set forth in the agreement. *Shivers* is meaningfully distinct from this case and does not control.

Furthermore, as the Court of Appeals recognized, Appellant's agreement provided "[t]he Administrator *serves at the pleasure of Council*, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement." (Slip op. at 18; Appx p. 19)(Emphasis added). Appellant was thus an "at will" employee under his agreement with the County. *See, e.g., Johnson v. Jefferson Cnty. Bd. of Health*, 662 P.2d 463, 471 (Colo.1983) ("An employee who serves 'at the pleasure' of his employer generally may be discharged at any time without formal cause or procedure."); *Elmore v. Cleary*, 399 F.3d 279 (3rd Cir. 2005) (public employee generally serves at the pleasure of her employee; employee is considered at will and lacks a property interest in continued employment); *Saucedo-Falls v. Kunkle*, 299 Fed. Appx. 315, 322 n. 30 (5th Cir. 2008) (noting contract which provides employee "serves at the pleasure" of employer creates "at will" employment); *Lawson v. Umatilla County*, 139 F.3d 690, 692–693 (9th Cir.1998) (under Oregon law employees of an elected official who serve at the pleasure of that elected official are at-will employees, and personnel policies which contain a disclaimer that the policies do not constitute a contract do not change the at-will status of an employee); *Harris v. Eckersall*, 331 Ill. App.3d 930, 771 N.E.2d 1072 (2002) (under Illinois law, if a public employee serves at the pleasure of the appointing authority, the

employment relationship is at will); *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997) (public employee who serves at the pleasure of his employer is considered "at will"); *Youngblood v. City of Galveston, Tex.*, 920 F.Supp. 103 (S.D. Tex. 1996) (if a public employee serves at the pleasure of his superiors, the employment relationship is at-will); *Heinzman v. Hall County*, 213 Neb. 268, 328 N.W.2d 764 (1983) ("At pleasure" in employment contracts has been interpreted to mean that the hiring authority has absolute power to remove); *Paice v. Maryland Racing Com'n*, 539 F.Supp. 458 (D.C. Md. 1982) (employees who serve during the pleasure of their employers are at will employees); *Skaggs v. City of Kansas City*, 264 S.W.3d 694 (Mo.App. W.D. 2008) (employment agreement pursuant to city charter that provided employee "shall serve at the pleasure of the Mayor and Council" did not alter at will status).

The Court of Appeals rejected Appellant's cite to *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004) "in support of his position that his contract shows an intent to establish an at-will relationship." (Slip op. at 18; Appx p. 19). In fact, Appellant's discussion in his Return to the County's Petition for Rehearing was as follows:

> The existence of a written employment contract does not negate the fact that the employment may still be considered "at will." *See, e.g., Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) (noting county administrator was "at will" and that she "was paid her severance pursuant to her contract"); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), *rev'd on other grounds* 368 S.C. 167, 628 S.E.2d 261 (2006) (noting employment agreement stated on its face that plaintiff served "at the will" of county council so that county officials could fire plaintiff "for any reason"); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936) (written contract for employment for indefinite term "for so long as the employee gives satisfactory service" was revocable "at will"

> of either party); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (noting a written contract for employment "for an indefinite period can be terminated at will"); *Prescott v. Farmers Telephone Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999) (Court recognized parties may operate under an agreement that maintains "at will" status of employee and that agreement may be modified orally or in writing to alter at-will status).

(Return, p. 7; Appx. pp. 58-59). Thus, the cite to *Angus* was in response to the County's contention that Appellant could not maintain a claim for wrongful termination because he had a written contract. Appellant pointed out these authorities to demonstrate that the employees in *Angus*, *Cape*, and the cases cited all had written contracts and yet were all held to be "at will" employees. The Court overlooked or misapprehended Appellant's argument here. Even so, the Court's opinion acknowledges that the Record on Appeal in *Angus* belies the County's argument that the presence of an employment contract precludes an action for wrongful termination.

The Court of Appeals distinguishes the contract in *Cape* because it expressly states it is "an at-will employment contract" that "may be terminated at any time for any reason or for no reason by either employer or employee," (Slip op. at 18; Appx p. 19), but that Appellant's contract says he "serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with" the County's right "to terminate" Appellant's services "subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement." (Slip op. at 18; Appx. p. 19). This distinction, however, is one that is without a difference. The "subject to" language does not *prevent* termination for any reason or even no reason. Appellant's contract is precisely as terminable as the contract in *Cape*. Section 3, Paragraphs A, B, and C are the

severance provisions, but they do not stop the County from exercising its rights under the "at will" agreement.

As noted above, courts equate the language "serves at the pleasure" with "at will" employment, and this agreement is no different. In sum, there is nothing in the law that prevents this contract from being precisely what it says it was – an at-will contract under which Appellant "served at the pleasure" of counsel and could be fired at any time for any reason or even no reason at all. While the Court of appeals stated correctly that "the existence of an employment contract does not preclude a determination that the employment is terminable at will," (slip op. at 16; Appx. p. 17), the Court rejected Appellant's contention that the contract he entered into with the County was "at will." (Slip op. at 17; Appx. p. 18).

All employment is contractual in nature. *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999). This principle is an important underpinning in cases, for example, that recognize that even contracts terminable "at will" are subject to protection from third party interference claims because "at will" arrangements are just as "contractual," as a contract that limits termination during its term. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163-64, 321 S.E.2d 602, 607 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 16 (Ct. App. 1984). Put simply, whether one term of the contract permits for the termination of the agreement at the will of either party has nothing to do with the availability of the tort of wrongful discharge in violation of public policy as it does nothing to vindicate the public interest and such a limitation would

"violate[] the spirit of the public policy exception." *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999).

Under the Court of Appeals' interpretation, an employer could willingly terminate employment in violation of the public policy of this State without incurring liability as long as the employer had a clause that provided for five minutes of pay or "severance." Providing for severance simply does not address the public policy at issue in wrongful discharge situations.

Accordingly, while Appellant has repeatedly noted that the contract at issue in this case permits for his employment to be terminated at the will of council, Appellant never suggested that this was a predicate fact necessary to maintain a tort claim. Nor does Appellant see the tort claim as an alternative cause of action to the extent that suggests it is mutually exclusive with the existence of a contract claim.

This Court should grant this Petition and issue a writ of certiorari to the Court of Appeals. The Court should then reverse the rulings of both the Court of Appeals and the circuit court and should remand this matter for further proceedings consistent with this Court's ruling.

CONCLUSION

For the reasons stated, Appellant requests that the Court grant this Petition and issue a writ of certiorari to review the amended opinion of the Court of Appeals. Appellants requests that the Court reverse that decision as to Issues I and II, and modify the decision as to Issue III to reflect that the existence of the written agreement does not preclude Appellant from being "at will," and able to pursue his claim under Issue III for wrongful discharge.

Respectfully submitted,

May 20, 2013

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209

Op. No. 5072 (Ct. App. filed Jan. 16, 2013)(Shearouse Adv. Sh. No. 3 at 37)
(withdrawn, substituted and refiled Feb. 27, 2013) (*not filed in Shearouse Adv. Sh.*)

Michael Cunningham, ... Respondent. ~~Petitioner~~,

v.

Anderson County, ... Petitioner-Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Cross-Respondent with a copy of *Michael Cunningham's Cross-Petition for Writ of Certiorari and Supplemental Appendix* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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