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. 2013-000678

Op. No. 5072 (Ct. App. filed Jan. 16, 2013)
(withdrawn, substituted and refiled Feb. 27, 2013)

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

SUPPLEMENTAL APPENDIX

John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Brian P. Murphy
BRIAN MURPHY LAW FIRM, P.C.
514 Pettigru Street
Greenville, South Carolina 29601
(864) 370-9400

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
(843) 370-2211

Attorneys for Petitioner/Respondent

Attorneys for Respondent/Petitioner

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209
Op. No. 5072 (Ct. App. Refiled Feb. 27, 2013)

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

APPELLANT'S PETITION FOR REHEARING

John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Brian P. Murphy
BRIAN MURPHY LAW FIRM, PC
514 Pettigru Street
Greenville, South Carolina 29601
(864) 370-9400

Attorneys for Appellant

Pursuant to Rules 221 and 240, SCACR, Appellant Michael Cunningham files the following Petition for Rehearing regarding this Court's decision in *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. Refiled Feb. 27, 2013) (Not contained in any Shearouse Advance Sheet). Appellant contends that in reaffirming the decision as to Issue I (Breach of Contract) and Issue II (Payment of Wages Act), the Court overlooked or misapprehended the points set forth below.

Point 1. In affirming the circuit court's decision to hold the employment contract was void, the Court 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). In doing so, the Court overlooked that the case *sub judice* involves the actions of a county government, not a special purpose district.

The Court overlooked that 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 irrelevant to the entity and issues involved in the case *sub judice*.

The Court also relied upon cases from other jurisdictions in affirming the circuit court's ruling. (Slip op. at 6-9 and note 11). 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). 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 <u>not</u> 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.[1]

The Court 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). *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 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. This Court 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 cited to *Uintah Basin Med. Ctr. v. Hardy*, 54 P.3d 1165 (Utah 2002), (Slip op. at 6, n. 11), 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

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[1] This Court even 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.

the case under "Home Rule," nor were the actions authorized by a statute similar to Section 4-9-620.

The Court also 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). 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*, this Court 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 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).

Accordingly, the Court should grant this petition, permit rehearing, withdraw its prior decision, and issue a new opinion reversing the circuit court's holding that Appellant's contract with Anderson County was void.

Point 2. In affirming the circuit court's decision to hold the employment contract was void, the Court 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). 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). While it is true that Section 5-13-70 permits a municipality to employ a manager "for a definite term," the Court over-reads 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 the Supreme 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, permit rehearing, withdraw its prior decision, and issue a new opinion reversing the circuit court's holding that Appellant's contract with Anderson County was void.

Point 3. In affirming the circuit court's decision to hold the employment contract was void, the Court 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). In so holding, the Court overlooked or misapprehended several crucial aspects of *Cowart*.

While it is true, as the Court points 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 our Supreme 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 focused on a pre-Home Rule case, *Newman*, to support the Court's reliance upon *Cowart*. (Slip op. at 10-11). 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). 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 renders 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. 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) (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.

Accordingly, the Court should grant this petition, permit rehearing, withdraw its decision, and enter a new opinion reversing the circuit court's order declaring Appellant's agreement to be void.

Point 4. In affirming the circuit court's decision to hold the employment contract was void, the Court held 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). The Court overlooked or

misapprehended that the statute 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, this Court 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). This Court overlooked that its 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 overlooked that its 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 Court's holding creates uncertainty for council members, administrators, and candidates for open administrator positions.

The Court also overlooked that its holding 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 impinges 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 should grant this Petition, rehear this matter, withdraw its prior opinion, and issue a new opinion reversing the circuit court's order that declared Appellant's contract void.

Point 5. In affirming the circuit court's decision to hold the employment contract was void, the Court held that Section 4-9-25 of the South Carolina Code (Supp. 2011) did not "clearly" authorize the outgoing council to bind the successor council as to governmental functions. (Slip op. at 12-13). The Court 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 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). The Court overlooked and misapprehended that the law relates to the powers of an existing council, not powers of a potential future council. The Court's view illegally limits 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's 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). The Court overlooked or misapprehended Appellant's argument that Section 4-9-620 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.").

The Court should grant this Petition, rehear this matter, withdraw its prior opinion, and issue a new opinion reversing the circuit court's order that declared Appellant's contract void.

Point 6. In affirming the circuit court's decision to hold the employment contract was void, the Court 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).

The Court should grant this Petition, rehear this matter, and address this argument. The Court should also withdraw its prior opinion and issue a new opinion reversing the

circuit court's order that declared Appellant's contract void.

Point 7. The Court misapprehended or overlooked Appellant's argument that the payment of severance under the employment contract was a proprietary function rather than a governmental function. (Slip op. at 13). 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.*

The Court overlooked Appellant's arguments that the payment of the severance was a proprietary and not a governmental function. (App. Br. pp. 17-18; Reply Br., pp. 4-5). Appellant raises this point here only to preserve the argument for review by the Supreme Court. That is, Appellant has pointed out to this Court numerous places where its opinion declaring the contract void overlooks or misapprehends both arguments and the law. In the event the Supreme Court agrees, the Appellant desires to preserve this argument for the Supreme Court's review on the merits.

The Court should address this issue anew in the event the Court agrees with Appellant that it has overlooked or misapprehended arguments and the law with regard to the validity of the council's authority to enter into this agreement.

Point 8. In affirming the circuit court's decision on Appellant's claim under the Payment of Wages Act, the Court 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).

The Court overlooked Appellant's arguments that he was entitled to relief under the Payment of Wages Act. (App. Br. pp. 19-20; Reply Br. p. 9). Appellant raises this point here to preserve this argument for review by the Supreme Court.

The Court should address this issue anew in the event the Court agrees with Appellant that it has overlooked or misapprehended arguments and the law with regard to the validity of the council's authority to enter into this agreement.

Point 9. In affirming the circuit court's decision on Appellant's claim under the Payment of Wages Act, the Court 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).

The Court overlooked Appellant's argument that 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.

(R.pp.241242, ¶ 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.

Appellant raises this point here to preserve this argument for review by the Supreme Court. That is, Appellant has pointed out to this Court numerous places where its opinion declaring the contract void overlooks or misapprehends both arguments and the law.

The Court should address this issue anew in the event the Court agrees with Appellant that it has overlooked or misapprehended arguments and the law with regard to the validity of the council's authority to enter into this agreement.

Point 10. 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), the Court fails 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.

Appellant raises this point here to preserve this argument for review by the Supreme Court.

Point 11. With respect to this 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), this Court 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.

Appellant raises this point here to preserve this argument for review by the Supreme Court.

Point 12. In addressing Appellant's contention that he is considered "at will" despite the existence of an employment contract, the Court 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). The Court also states 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 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's holding in this case, and in fact the very holding of *Ludwick* stands in opposition to this Court's view that "at will" employment equals immunity from any and all liability.

The Court 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). 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 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 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). 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 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 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)(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 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). 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). Thus, the cite to *Angus* was in response to the County's contention that Appellant could not maintain a claim for wrongful termination even though 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 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), 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). 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, the Court overlooked or misapprehended that 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.

Point 13. While this Court was correct in stating that "the existence of an employment contract does not preclude a determination that the employment is terminable at will," (slip op. at 16), the Court rejected Appellant's contention that the contract he entered into with the County was "at will." (Slip op. at 17).

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 this Court's 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.

CONCLUSION

For the reasons stated, Appellant requests that the Court grant this Petition, withdraw its opinion, rehear the matter, and issue a new opinion reversing the circuit court's finding that the contract of employment was void. Appellant further requests that

the Court address the remaining issues raised, that is, Appellant's argument that payment of severance is a proprietary function and that Appellant is entitled to judgment under the Payment of Wages Act.

Respectfully submitted,

March 28, 2013

John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Brian P. Murphy, SC Bar # 6770
BRIAN MURPHY LAW FIRM, PC
514 Pettigru Street
Greenville, South Carolina 29601
(864) 370-9400

Attorneys for Appellant

The South Carolina Court of Appeals

Michael Cunningham, Appellant,

v.

Anderson County, Respondent.

Appellate Case No. 2011-194209

ORDER

On February 27, 2013, the court withdrew its original opinion in this case and substituted an amended opinion. Subsequently, Appellant filed a petition for rehearing. After careful consideration of the petition for rehearing, the court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul D. Thomas J.

John D. Geathers J.

Columbia, South Carolina
cc:
Kirsten E. Small
Tanya A. Gee
Brian P. Murphy
Ray E. Jones
William W. Wilkins
John S. Nichols
Michael E. Kozlarek

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