

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

S.C. Supreme Court

Opinion No. 5072 (S.C. Ct. App. filed Jan. 16, 2013)
(Withdrawn, Substituted, and Refiled Feb. 27, 2013)

Michael Cunningham, Respondent/Petitioner,

v.

Anderson County, Petitioner/Respondent.

RETURN TO MICHAEL CUNNINGHAM'S
CROSS-PETITION FOR A WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ARGUMENT

“The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.” *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Because an illegal contract is not enforceable, neither party to the contract may bring an action for its breach. *See Ward v. West Oil Co.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010). Here, the Court of Appeals correctly determined that the Master Employment Agreement violated public policy, and thus was unenforceable. It was unenforceable because it purported to bind successor councils into the future in their exercise of governmental functions. This Court should deny Cunningham’s Cross-Petition for Writ of Certiorari.

I. CUNNINGHAM’S CROSS-PETITION IS UNTIMELY.

After the Court of Appeals issued its decision on January 16, 2013, both parties petitioned for rehearing. On February 27, 2013, the Court of Appeals *denied* both petitions, withdrew its opinion, and substituted an opinion that provided somewhat different reasoning as to the wrongful discharge claim. Pursuant to Rule 242(c), SCACR, the parties’ certiorari petitions were due within 30 days of February 27, *i.e.*, on March 29, 2013. Cunningham did not file his Cross-Petition until May 20, 2013, well beyond the 30 day time limit. *See* Cross-Pet. at 40 (signature date).

Cunningham asserts that his Cross-Petition is timely because it was filed within 30 days of April 18, 2013, which is the day the Court of Appeals denied his petition for rehearing directed at the February 27 opinion. Cross-Pet. at 1. That petition for rehearing was improper, however, and therefore did not toll the

time for Cunningham’s certiorari petition. The Rules of Appellate Procedure clearly state that “[t]he appellate court *will not entertain* petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party’s appeal.” Rule 221(c), SCACR (emphasis added). Because the Court of Appeals denied both parties’ petitions for rehearing from the January 16 decision, Cunningham’s subsequent petition was barred by Rule 221(c). Therefore, the filing of the petition for rehearing did not toll the time for filing a certiorari petition. *Accord Rhame v. Charleston Cnty. Sch. Dist.*, 399 S.C. 477, 483, 732 S.E.2d 202, 204 (Ct. App. 2012) (dismissing appeal as untimely because an improperly filed petition for rehearing does not toll the time for filing a notice of appeal).

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE MASTER EMPLOYMENT AGREEMENT WAS INVALID AS A MATTER OF LAW.

A. **The Home Rule Act does not permit a county council to force its choice of administrator upon a successor council.**

The fundamental flaw in Cunningham’s argument is his failure to distinguish between two different common law rules, one of which applies here, and one of which does not. The first rule – the one that applies and controls the outcome of Cunningham’s claim for breach of the Master Employment Agreement – is that the governing body of a municipality may not restrict its successors’ exercise of governmental (as opposed to proprietary) powers by entering into a contract that extends beyond that body’s current term (the “Term Limits Rule”). That is precisely what the 2007 Council sought to do when it entered into the Master Employment Agreement: it wanted to force its choice of County Administrator upon future Councils. Because the appointment of a County Administrator is a core governmental function of the County Council,

the Court of Appeals correctly held that the Master Employment Agreement violates the Term Limits Rule and is invalid.

The second rule – the one that does not apply here – is that the powers of a local government should be strictly construed (“Dillon’s Rule”). Dillon’s Rule, with its stringent limits on the ability of municipalities to government themselves, was abolished by the Home Rule Amendment to the South Carolina Constitution in 1973. *See* S.C. CONST. Art. VIII § 17. This amendment, and the Home Rule Act which followed it, established a rule of liberal construction of the powers of cities and counties. *See* S.C. Code Ann. § 4-9-25 (Supp. 2012) (“The powers of a county must be liberally construed in favor of a county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.”).

Both rules were at issue in *Piedmont Public Service District v. Cowart*, in which the Court of Appeals held that a 20-year employment contract between a special purpose district and its administrator violated the Term Limits Rule. 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*”). Recognizing that an elected body must be free to perform its governmental duties in the manner it determines is most beneficial to the public, the Court of Appeals held in *Cowart I* that “if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.” *Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880. A county council has the power “to exercise legislative or governmental functions ... as often as may be found needful or politic,” but “the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.” *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252, 255 (1948). For this reason, a municipal government may not restrict its successors’ exercise

of governmental (as opposed to proprietary) powers by entering into a contract that extends beyond the current term:

The general rule is that, if the 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 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.

Cowart I, 319 S.C. at 132, 459 S.E.2d at 880. "Last-minute contracts intended to bind a successor constitute a particularly egregious violation of public policy." *State Street Bank & Trust Co. v. Pennsylvania*, 712 A.2d 811, 815 (Pa. Commw. Ct. 1998).

Affirming the decision of the Court of Appeals, this Court recognized in *Cowart II* that "the appointment and removal of public officers is a governmental function." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837. The appointment of a county administrator "is precisely and unmistakably a governmental matter within the ... purview" of the rule that one county legislature cannot bind its successors. *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978). Under the council-administrator form of government, the administrator "shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control." S.C. Code Ann. § 4-9-620 (1986). The administrator's duties include "execut[ing] the policies, directives and legislative actions of the council" and "perform[ing] such other duties as may be required by the council." S.C. Code § 4-9-630 (1986) (emphasis added). In short, the county administrator's job is to administer county government *as directed by the elected members of the county council*.

Cunningham incorrectly asserts that the Term Limits Rule that controlled the outcome in *Cowart I* and *II* did not survive the advent of home rule in South Carolina. Cunningham's argument is fundamentally flawed, however, because it ignores the distinction between Dillon's Rule – which home rule abolished – and the Term Limits Rule, on which the advent of home rule had no effect.

Under Dillon's Rule, the powers of local governments (including counties) were strictly construed:

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Williams v. Town of Hilton Head Island, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993).¹ Dillon's Rule was abolished in South Carolina by the 1973 adoption of the Home Rule Amendment to our Constitution, under which the "Constitution and all laws concerning local government shall be liberally construed in their favor." S.C. Const. Art. VIII § 17. Under home rule, the powers of local government are not limited to those expressly granted but rather "include those fairly implied and not prohibited by this Constitution." *Id.* The constitutional mandate is echoed by the Home Rule Act of 1975, which provides in part, "The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." S.C. Code Ann. § 4-9-25 (Supp. 2012).

¹ Dillon's Rule is eponymously credited to Judge John F. Dillon, who first articulated it in his treatise on municipal corporations. *See id.* at 421 n.1, 429 S.E.2d at 804 n.1 (citing John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911)).

Cunningham reasons that because Dillon's Rule no longer applies to counties,² neither does the Term Limits Rule. Cross-Pet. at 12. But the two are apples and oranges. Dillon's Rule is a tenet of statutory construction. See *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 399 n.7, 629 S.E.2d 624, 629 n.7 (2006). The Term Limits Rule is not a maxim of statutory construction, but rather is a guiding principle that protects the authority of democratically elected bodies to govern according to the mandate of the electorate. As the Court of Appeals recognized in *Cowart I*, the Term Limits Rule "is intended to ensure that governing bodies are free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882.

The outcome in *Cowart I* was controlled by the Term Limits Rule, not by Dillon's Rule. As the Court of Appeals correctly explained in rejecting Cunningham's argument in the case at hand, while "[t]he court in *Cowart I*, which post-dated the Home Rule Act, admittedly recited Dillon's rule at the beginning of its discussion of the contract's validity, ... the court did not ultimately rely on Dillon's rule in determining that Cowart's employment contract was void." App. 11. Accordingly, the Court of Appeals did not disregard the fact that *Cowart* involved a special district, as Cunningham contends, but rather recognized that the Term Limits Rule is distinct from Dillon's Rule. App. 11 (holding that while the court in *Cowart I* "admittedly recited Dillon's rule," the outcome of the case turned on "the independent principle that

² Dillon's Rule still applies to special purpose districts, such as the one at issue in *Cowart*. See *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 19 n.7, 532 S.E.2d 876, 878 n.7 (2000) ("There is dicta in *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997), which applies Home Rule to special purpose districts. To the extent that *D.W. Flowe* can be read to apply Home Rule to special purpose districts, it is overruled.").

governmental bodies have no authority to impair the power and discretion of delegated to their successors by the public”).

Cunningham further argues that the out-of-state cases cited by the Court of Appeals are inapplicable because those jurisdictions either do not have home rule or the cases involved entities not subject to home rule. This is irrelevant, however, because the Court of Appeals cited those cases for the common law Term Limits Rule, which is entirely distinct from home rule.

B. The liberal construction standard applicable under home rule favors the County’s position, not Cunningham’s.

The Home Rule Act requires liberal construction of “[t]he powers of a county.” S.C. Code Ann. § 4-9-25. This provision reflects the basic concept that home rule counties “possess the full power of self government and look to the legislature not for grants of power, but only for limitations on their power.” *Nelson v. City of Dallas*, 278 S.W.3d 90, 95 (Tex. Ct. App. 2009).

Home rule addresses the relationship between a county and the state; it says *nothing at all* about the relationship between one county council and its successors. Before home rule, county governments were largely controlled by the slow-moving and highly political state legislative delegations, which were ill-equipped to react to the rapid growth of unincorporated areas outside city lines. *See generally* James Lowell Underwood, *The Constitution of South Carolina, Volume II: The Journey Toward Local Self-Government* at 105-15 (1989). The liberal construction of county powers under the Home Rule Act was intended to provide flexibility to local governments – not to permit outgoing county council members to force their own policy desires down the throats of their successors.

If the liberal-construction principle of home rule applies to this case at all, it favors the County’s position, not Cunningham’s. In Cunningham’s view, this Court must broadly construe the 2007 Council’s power in a way that corre-

spondingly *narrows* the power of the 2009 Council. This cannot be what the General Assembly intended in enacting § 4-9-25. See *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”). It is one thing to liberally construe a local government’s powers vis-à-vis the General Assembly, but quite another to expand the powers of one term of a county’s governing body by diminishing the powers of the next term. The 2009 Council’s decision to exercise its common law authority to declare the Master Employment Agreement void is entitled to the same judicial deference as any other act of a county council.

C. Section 4-9-620, which authorized the employment of a county administrator for a definite term, can be reconciled with the Term Limits Rule.

Statutory language must be construed “in the light of common law rules”; such rules remain in full force and effect in South Carolina unless the legislature clearly indicates an intention to overrule them. *Coakley v. Tidewater Constr. Corp.*, 194 S.C. 284, 9 S.E.2d 724, 726 (1940). It is presumed that the General Assembly did not intend to abrogate or modify a common law rule by the enactment of a statute upon the same subject. *Nuckolls v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 5 S.E.2d 862, 864 (1939). This presumption is overcome only by clear and unambiguous language expressing the General Assembly’s intent to abrogate common law. *Coakley*, 9 S.E.2d at 726.

Section 4-9-620 does not unambiguously express the General Assembly’s intent to abrogate the common law rule that one county council may not bind its successor in the performance of governmental functions. *Cf. Morin*, 380 N.E.2d at 220 (holding that county charter abrogated common law rule by “specifically

provid[ing] for appointment of the manager to a four-year term”). To the contrary, the statute and the common law are readily harmonized: *A county council may employ its chosen administrator for a definite term, so long as the term does not exceed that of the council.* This harmonization of the statute and the common law comports with common sense; there is no reason why the Anderson County Administrator should be entitled to more job security than the members of the Anderson County Council, who must seek reelection every two years. In short, the Court of Appeals did not add language to the statute, as Cunningham asserts. Cross-Pet. at 21. Rather, the court simply recognized that a county administrator can be hired for a definite term, provided that term does not extend “*beyond the terms of the outgoing council members.*” App. 12.

Cunningham further suggests that the Court of Appeals’ decision poses substantial public policy problems. Cross-Pet. at 21. To the contrary, it is *Cunningham’s* interpretation of § 4-9-620 that would create significant policy problems. Under Cunningham’s reading of the statute, an incoming county council (and, in this case, even future councils whose members are yet to be elected) would be hamstrung by contracts employing key personnel that were entered into by ousted officials. Such an outcome would essentially strip our elected officials of their ability to make changes mandated by the electorate.

D. The Court of Appeals correctly determined that whether payment of severance is a proprietary or governmental function is irrelevant; further, this argument was not preserved for appellate review.

Cunningham contends that the Court of Appeals “misapprehended or overlooked” his argument that the payment of severance is a proprietary function, not a governmental one. Cross-Pet. at 25. Cunningham cites *no* authority, however, for the proposition that an employment contract must be

examined term-by-term to determine whether each item is governmental or proprietary. The 2007 Council did not vote to pay Cunningham severance; it voted to enter into the Master Employment Agreement, including all of its terms. Therefore, the Court of Appeals correctly focused on the 2007 Council's approval of the Master Employment Agreement as the relevant act. Further, the Court of Appeals correctly identified the relevant question as whether "the appointment of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." App. 14.

In any event, it was not necessary for the Court of Appeals to address this argument, because Cunningham failed to preserve it for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to *and ruled upon* by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added). Although Cunningham raised the proprietary-function argument to the circuit court, the court did not address this argument in its order. "When the issue was raised but not ruled upon, it became incumbent upon [Cunningham] to raise the issue in a Rule 59(e) motion." *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 830 (Ct. App. 2009); *see* Rule 59(e), SCRPC. Cunningham did not file a Rule 59(e) motion asking the court to rule upon the issue. Because Cunningham has failed "to give the trial court a fair opportunity to rule on the issues," he has not provided this Court with "a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Accordingly, the argument is not preserved.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT DID NOT NEED TO ADDRESS CUNNINGHAM'S CLAIM UNDER THE PAYMENT OF WAGES ACT IN LIGHT OF ITS CONCLUSION THAT THE MASTER EMPLOYMENT AGREEMENT WAS VOID.

Cunningham asserts that the Court of Appeals overlooked his argument that he was entitled to payment of accrued sick leave under the Payment of Wages Act, S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2012) because "sick leave benefits are expressly included in the statutory definition of wages." Cross-Pet. at 30. This argument is both unpreserved and without merit.

A. Cunningham failed to preserve his argument that the Master Employment Agreement's severability provision rescues his Wage Payment claim.

Cunningham argues that the severability provision of the Master Employment Agreement preserves his claim to accrued sick leave. Cross-Pet. at 29-30. Although Cunningham raised this argument to the circuit court, the court did not address severability in its order. Because Cunningham did not raise the issue in a Rule 59(e) motion, it is not preserved for appellate review. See *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (emphasis added)); *Chastain*, 381 S.C. at 515, 673 S.E.2d at 830 ("When the issue was raised but not ruled upon, it became incumbent upon [Appellant] to raise the issue in a Rule 59(e) motion.").

B. The Court of Appeals properly declined to address this argument.

The Court of Appeals did not overlook this argument, but rather chose not to rule on it because its holding that the Master Employment Agreement was void necessarily precluded Cunningham's claim under the Payment of Wages Act. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court need not review remaining issues

when its determination of a prior issue is dispositive of the appeal). This is so because Act provides that the definition of “wages” is limited to amounts “which are due to an employee under any employer policy or employment contract.” S.C. Code Ann. § 41-10-10(2). Cunningham admits that he is not entitled to sick leave as a matter of County policy. App. 516. Consequently, as Cunningham also admits, any entitlement to payment for accrued sick leave “would be based on the severance provisions” of the Master Employment Agreement. *Id.* Therefore, Cunningham’s claim for accrued sick leave rises or falls with the Master Employment Agreement. In light of its holding that the Master Employment Agreement was void, the Court of Appeals properly declined to address Cunningham’s claim under the Payment of Wages Act.

Cunningham cannot enforce the severance provision of a contract that is void as against public policy. Additionally, and regardless of the invalidity of the Master Employment Agreement, payment for accrued sick leave benefits was unambiguously part of the Agreement’s severance provision. Because severance is not included in wages under the Wage Payment Act, the circuit court properly granted summary judgment to the County on Cunningham’s wage payment claim.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT CUNNINGHAM’S EMPLOYMENT UNDER THE MASTER EMPLOYMENT AGREEMENT WAS NOT “AT WILL.”

Cunningham asserts that the Court of Appeals erred in holding that the Master Employment Agreement did not establish an at-will employment relationship and asks this Court to “modify” the Court of Appeals’ decision to correct this error. Cross-Pet. at 2. However, Cunningham still wants the benefit of the Court of Appeals’ decision to remand for further proceedings on his wrongful discharge claim. In other words, Cunningham wants to receive breach-

of-contract damages according to the golden parachute contained in the Master Employment Agreement, *and* he wants to recover in tort for wrongful discharge based on the decision of the 2009 Council's decision to declare the Master Employment Agreement void. As explained in the County's previous filings, Cunningham cannot have it both ways. A wrongful discharge claim is available *only* to at-will employees, and Cunningham clearly was not employed at-will under the Master Employment Agreement.

A. The Master Employment Agreement is a contract for a definite term, not an at-will contract with a notice provision.

Cunningham now asserts on appeal that "[s]imply because a contract provides a severance payment if terminated without cause does not prevent the contract from being 'at will.'" Cross-Pet. at 31.³ Actually, that is *exactly* what it prevents. By definition, an employment contract that prohibits termination except for cause, backed up by a severance provision, is not one for at-will employment. *See, e.g., Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281-82, 573 S.E.2d 830, 836 (Ct. App. 2002) ("[A]n employer and employee may *contractually alter the general rule of employment at-will*, thereby restricting the freedom of either party to terminate the employment relationship without incurring liability." (emphasis added)).

Relying on *Stiles v. American General Life Insurance Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999), Cunningham asserts that he can bring a wrongful discharge claim even though the Master Employment Agreement provided for a definite term. Cross-Pet. at 28. *Stiles* involved a wrongful discharge claim by a former

³ As clearly set forth in the County's petition for rehearing, App. 41, Cunningham never maintained in the Circuit Court, in the alternative or otherwise, that he was an at-will employee.

employee whose contract “allowed either party to terminate ‘for any reason’ by giving 30 days written notice” but did not otherwise set a definite term of employment. *Stiles*, 335 S.C. at 223-24, 516 S.E.2d at 450 (internal quotation marks omitted). The question for this Court was whether the public policy exception to at-will employment applied to “at-will employment contract with a notice provision.” *Id.* at 223, 516 S.E.2d at 450 (internal quotation marks omitted). The Court answered this question affirmatively, reasoning that “[t]he employee with a notice provision is in the same position as an at-will employee with the only difference being that the employer is required to give the employee notice prior to terminating employment.” *Id.* at 226, 516 S.E.2d at 451. In her concurrence, then-Justice Toal articulated the critical difference between an at-will-with-notice employment contract and a definite-term employment contract:

[A]n employment agreement with a notice provision is basically an at-will agreement that, subject to a contingency, may become a contract for a definite term. Unlike the usual contract for a definite term, the worker is not guaranteed a specific term of employment, only that at a minimum he will have work for the term of the notice provision. ...

...

... Under a contract for a definite term the employee can only be fired for cause, whereas the at-will employee with a notice provision can quickly find himself jobless even if he is a model employee.

Stiles, 335 S.C. at 229, 516 S.E.2d at 452-53 (Toal, J., concurring).

Cunningham maintains that the terms of the Master Employment Agreement are indistinguishable from the terms of the employment contract at issue in *Cape v. Greenville County School District*, 365 S.C. 316, 618 S.E.2d 881 (2005). In *Cape*, this Court held that “while a contract for a definite term is presumptively terminable only upon just cause,” this presumption may be altered by the parties. *Id.* at 319, 618 S.E.2d at 883. According to Cunningham, the Master

Employment Agreement is no more than an employment for “at-will status along with a notice provision,” Cross-Pet. at 28, and thus it “is precisely as terminable as the contract in *Cape*,” *id.* at 37.

Cunningham is wrong – the Master Employment Agreement is nothing at all like the contract at issue in *Cape*. The contract in *Cape* was for a defined term (the 2001-02 school year) but provided, in all capital letters:

THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON EMPLOYEE AGREES THAT THERE EXISTS NO RIGHT TO CHALLENGE TERMINATION OF THIS CONTRACT BY EMPLOYER.

Id. at 317, 618 S.E.2d at 882. In contrast, the Master Employment Agreement contains no express provision for termination without cause. In fact, it plainly provides that Cunningham may be terminated only for cause. Cunningham quotes § 2(A) of the Master Employment Agreement, stating that “[t]he Administrator serves at the pleasure of Council,” but he omits language *in the same sentence* that explicitly subjects the Council’s authority to terminate Cunningham “to the provisions set forth in Section 3, Paragraphs A, B, and C.” App. 500 (Master Employment Agreement § 2(A)). Section 3(A) sets forth “[g]rounds for termination with cause,” and § 3(B) provides that termination for any other reason is without cause, entitling Cunningham to severance. App. 501-02 (Master Employment Agreement § 3(A), (B)). Additionally, the only notice provision in the Master Employment Agreement relates to its *nonrenewal* (in which case Cunningham would be entitled to serve the remaining two years of the employment term), not to termination. App. 500-01 (Master Employment Agreement § 2(D)).

Cunningham complains that it is improper for the County to challenge the validity of the Master Employment Agreement while simultaneously relying on

its terms to oppose the wrongful discharge claim. If there is a problem, it is one of Cunningham's own making. Cunningham could have asserted his wrongful discharge claim as an *alternative* to his breach of contract claim, *i.e.*, he could have alleged that if the Master Employment Agreement was void, then he was an at-will employee entitled to bring a wrongful discharge claim. Cunningham elected not to do so. Instead, he has always maintained that *the terms of the Master Employment Agreement* allow him to maintain both a breach of contract claim and a wrongful discharge tort claim. App. 333 ("[J]ust because you have a contract doesn't mean you give up the right to sue in court.... *It's not alternative causes of action.*" (emphasis added)). Since Cunningham has chosen to base his wrongful discharge claim on the language of the Master Employment Agreement, the County is entitled to establish that the Master Employment Agreement does not say what Cunningham claims it does.

B. The Court of Appeals correctly recognized that a wrongful discharge claim is available only to at-will employees.

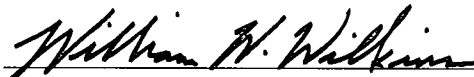
Cunningham also asserts that a wrongful discharge claim "is not limited to employment at-will situations." Cross-Pet. at 28. In support of this claim, Cunningham cites *Stiles*, which recognized that the public policy exception to at-will employment applies even when the employment contract includes a notice provision. *Stiles* does not help Cunningham, however. As discussed above, the Master Employment Agreement is not an at-will contract with a notice provision; it is a contract for a definite term under which Cunningham could only be terminated for cause.⁴

⁴ Of course, this assumes that the Master Employment Agreement was *not* void and thus enforceable.

CONCLUSION

This Court should deny Cunningham's Cross-Petition for Writ of Certiorari. The Cross-Petition was not timely filed, and thus is not properly before the Court. Additionally, the arguments made by Cunningham were properly rejected by the Court of Appeals. Accordingly, certiorari should be denied.

Respectfully submitted,



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July 19, 2013
Greenville, South Carolina

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

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S.C. Supreme Court

Opinion No. 5072 (S.C. Ct. App. filed Jan. 16, 2013)
(Withdrawn, Substituted, and Refiled Feb. 27, 2013)

Michael Cunningham, Respondent/Petitioner,

v.

Anderson County, Petitioner/Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing Return to Michael Cunningham's Cross-Petition for Writ of Certiorari via electronic mail and by depositing a copy of the same in the United States Mail, postage prepaid, on July 19th, 2013, addressed to his attorneys of record as follows:

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