THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No. 2013-000678

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(withdrawn, substituted and refiled Feb. 27, 2013) (*not filed in Shearouse Adv.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.

REPLY TO RESPONDENT'S RETURN TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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 Petitioner
Michael Cunningham

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Pursuant to Rule 242(g), SCACR, Appellant/Cross-Petitioner Michael Cunningham files the following reply in support of his Cross-Petition for Writ of Certiorari.

I. Mr. Cunningham's Cross-Petition is Timely

Anderson County contends that Mr. Cunningham's cross-petition is not timely because Mr. Cunningham sought rehearing from the amended opinion the Court of Appeals filed before seeking a writ of certiorari. (Return, pp. 1-2). The Court should not be persuaded by this argument.

The original decision of the Court of Appeals affirmed as to Counts I (breach of contract) and III (statutory wage claim), reversed as to Count II (Wrongful Discharge) and remanded. *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*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013) (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 extensive and different 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, asking among other things for the Court to reconsider the pages of new material it added to its prior opinion.[1] (Supp. Appx. pp. 1-28). On March 29, 2013, the County filed its Petition for Writ of Certiorari, seeking review based solely upon the County's Petition for Rehearing directed at the opinion that the Court of Appeals withdrew, and only as to its 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).

The County contends Mr. Cunningham's second Petition for Rehearing "was improper," but the County does not provide any authority for this statement. (Return, pp. 1-2). The County asserts that because the Court of Appeals denied the petition for rehearing from the first opinion (an opinion that the Court *withdrew* and which does not exist), any subsequent request for rehearing "was barred by Rule 221(c)" and did not toll the time to seek a Writ of Certiorari. (Return, p. 2). The Court should not accept this argument.

First, Rule 221(c) does not preclude a party from requesting rehearing following the denial of a petition for rehearing where that denial is accompanied by the withdrawal of the first opinion and the substitution of an opinion which adds new and different discussion to the opinion. Such a rule would place a party who seeks to challenge the new

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[1] Mr. Cunningham's 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, which *withdrew* the prior opinion from which the County filed its petition.

language in an untenable position of having to seek review by this Court without first challenging the new (and different) language. But Rule 242, SCACR, would preclude such a challenge unless first made to, and ruled upon by, the Court of Appeals. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

Second, the language of Rule 221(c) does not apply to the situation at hand. Rule 221(c) is entitled "Rehearing of Motions," and provides the Court will not entertain a rehearing on a motion or petition unless the court's action on the motion or petition has the effect of dismissing or finally deciding a party's appeal. Here, the petition was directed at a substitute ruling by the Court on the merits, not the Court's disposition of a petition or motion. And even if the rule applied, the Court's denial of rehearing "finally decid[ed]" Mr. Cunningham's appeal so as to fall within the exception to Rule 221(c)'s prohibition.

Third, the case the County cites in support of its argument is not controlling. In *Rhame v. Charleston County School Dist.*, the Court of Appeals dismissed an appeal on the ground that a petition for rehearing the Claimant filed with the Workers' Compensation Commission was not permitted under the South Carolina Workers' Compensation Act, and therefore did not stay the deadline for initiating an appeal. 399 S.C. 477, 732 S.E.2d 202 (Ct. App. 2012). That case tested the interaction of the South Carolina Administrative Procedures Act, which contemplates petitions for rehearing, and

the Workers' Compensation Act, which is silent.[3] *Rhame* does not stand for the proposition described in the County's Return: – "dismissing appeal as untimely because an improperly filed petition for rehearing does not toll the time for filing a notice of appeal." (Return, p. 2). The actual holding of *Rhame* is more narrow and involves the specific area of administrative appeals. A more appropriate analogy is a successive Rule 59, SCRCP, motion when a circuit court's amended order adds new matter that was not addressed in the original order. Settled law establishes that in those circumstances, a successive Rule 59 motion tolls the deadline for initiating an appeal. *E.g.*, *Robinson v. Robinson*, 365 S.C. 583, 619 S.E.2d 425 (2005) (second motion to alter or amend is appropriate if it challenges something that was altered from the original judgment as a result of the initial motion); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) (permitting successive motion for reconsideration where ruling on first Rule 59 motion results in a substantial alteration of the original judgment).

Where the Court of Appeals withdraws its prior opinion and files a new opinion, a party may challenge the additional material by way of another petition for rehearing pursuant to Rule 221, SCACR. Indeed, it is arguable that a party must do so, because the original opinion no longer exists.[4]

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[3] *Rhame* is also incorrectly decided, and a petition for a writ of certiorari to review the decision is currently pending. (2013 Shearouse Adv. Sh. No. 32 at 8).

[4] If this Court agrees with the County's argument, Mr. Cunningham respectfully requests that the Court permit him to move the Court to expand the time to file the Cross-Petition for Writ of Certiorari, and accept the Cross-Petition already filed. Rule 263(b), SCACR. In any event, the Court should clarify for the bench and bar the appropriate procedure to be followed in this situation.

II. 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

The County restates Mr. Cunningham's argument here in an incorrect fashion. (Return, pp. 2-7). What Mr. Cunningham contends is that Dillon's Rule, which the Court of Appeals used as a basis for its decision, does not apply to this case pursuant to the Home Rule Amendments and the Home Rule Act. Thus, the Court of Appeals' reliance 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*") is misplaced because *Cowart* involved a special purpose district, which is not covered by Home Rule. (Slip op. at 5-11; Appx. pp. 6-12). *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.").

The County accuses Mr. Cunningham of confusing apples and oranges. (Return, p. 6). This case is, in fact, a matter of the Court of Appeals using apples (*Cowart* which involved special purpose districts) to control the outcome of oranges (the actions of a county in this case).

The County also contends that Mr. Cunningham has the rules of construction backwards, and that liberal construction under Mr. Cunningham's view would narrow the power of the 2009 County Council. (Return, pp. 7-8). The short answer to this is that nothing prevented the 2009 Council from terminating Mr. Cunningham (as it did) and replacing him with whomever it wanted. But in order to honor the broad power that the

2007 Council had to enter into Mr. Cunningham's employment contract as expressly permitted by statute, the Court has add language to that statute (i.e., "but not exceeding the term of the current council"). What the County proposes would actually restrict the authority of a council to act in a manner not contemplated by Section 4-9-620 of the South Carolina Code, which 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).

As Mr. Cunningham pointed out in his Cross-Petition, recognizing a council's authority to enter into the contract in this case "for a definite term" is not a narrowing of the power – it is a liberal construction of those powers and it is one which favors the county's ability to act. S.C. Code Ann. § 4-9-25. (App. Br., p. 13; Amicus Br., pp. 5-8). 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.").

III. MR. CUNNINGHAM'S ARGUMENT REGARDING WHETHER PAYMENT OF SEVERANCE IS PROPRIETARY OR GOVERNMENTAL IS PRESERVED

The County asserts Mr. Cunningham's argument concerning the payment of severance is not preserved. (Return, pp. 9-10). The Court should reject this assertion.

The County concedes that Mr. Cunningham made this argument to the trial court, but the County contends that the court did not address the argument in its order. (Return,

p. 10). In fact, the trial court stated "[a]mong the most important responsibilities of a County Council is the appointment of the County Administrator." (App. p. 192). The trial court outlined what it perceived were the duties of an administrator and added, "[f]or all of these reasons, the appointment of a county administrator is undoubtedly a governmental function." (App. p. 193). In rejecting Mr. Cunningham's argument that even if Dillon's Rule applied, the *Newman*[5] exception validated the contract, the trial court pointed to the following language from that case:

> [N]o power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and 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. * * * <u>As a general rule, the appointment and removal of public officers is a governmental function,</u> and a municipal council cannot engage a public officer by contract for a term extending beyond that of its own members, so as to impair the right of their successors to remove such officer and to appoint another in his place.'
>
> *Newman*, 212 S.C. at 23, 46 S.E.2d at 255.

(underline added). (App. p. 194). Thus, contrary to the County's argument, the trial court did, in fact, expressly address and reject Mr. Cunningham's contention that what he sought was actually the proprietary function of paying his severance, not the governmental function of hiring an administrator.

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[5] *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948).

IV. Mr. Cunningham's Argument Regarding the Severability Clause Is Preserved for Review

The County contends Mr. Cunningham's argument regarding the severability provision is not preserved for this Court's review. (Return, p. 11). This argument should not be persuasive.

The County concedes that Mr. Cunningham raised this point to the circuit court, and the record shows that the circuit court addressed it. The circuit court first held that Mr. Cunningham could not recover under any portion of the severance owed "resulting from the termination of a void contract." (App. p. 198). Then, the circuit court held that the contract included payment for accrued leave as a portion of severance so that payment was not "wages" under the Payment of Wages Act. (App. pp. 198-199). There is no dispute that the circuit court viewed the Contract *in its entirety* as void and not enforceable. It was not incumbent upon Mr. Cunningham to parade this point back before the trial court when doing so would have been a futile act. *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000).

CONCLUSION

For the reasons stated here and in the Cross-Petition for Writ of Certiorari, Mr. Cunningham requests that the Court grant this Cross-Petition and issue a writ of certiorari to review the amended opinion of the Court of Appeals.

Respectfully submitted,

July 25, 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 Petitioner
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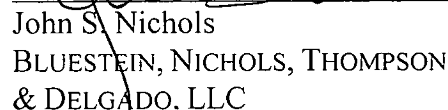
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Respondent Anderson County with a copy of *Appellant's Reply to Respondent's Return to Cross-Petition for a Writ of Certiorari* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

William W. Wilkins, Esquire
Kirsten E. Small, Esquire
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603



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John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC