

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Circuit Court Judge

Op. No.5122
(S.C. Ct. App. Filed May 1, 2013)

RECEIVED

JUL 25 2013

S.C. Supreme Court

Ammie McNeil,.....Petitioner,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities, ... Defendants,

Of whom South Carolina Department of
Correction is.....Respondent.

APPENDIX

J. LEWIS CROMER & ASSOCIATES, L.L.C.

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Petitioner

MCDONALD, PATRICK, POSTON,
HEMPHILL & ROPER, LLC

Steven M. Pruitt, Esquire
Post Office Box 1547
Greenwood, South Carolina 29648
Phone 864-388-1014

Attorneys for the Respondent

Index

Record on Appeal.....	Appendix 001
Final Brief of Appellant.....	Appendix 058
Final Brief of Respondent.....	Appendix 074
Final Reply Brief of Appellant.....	Appendix 088
Order Affirming Dismissal, Dated May 1, 2013.....	Appendix 097
Petition for Rehearing.....	Appendix 107
Response to Petition for Rehearing.....	Appendix 116
Order Denying Petition for Rehearing, Dated June 25, 2013.....	Appendix 124

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrects is

Respondent.

RECORD ON APPEAL

J. Lewis Cromer
Julius W. Babb, IV
J. Lewis Cromer & Associates, L.L.C.
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Counsel for Appellants

Steven M. Pruitt, Esquire
McDonald, Patrick, Poston,
Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, South Carolina 29648
Phone 864-388-1014

Counsel for Respondents

RECEIVED

APR 10 2012

SC Court of Appeals

Index

Order Denying Appellant's Motion for Reconsideration.....	1
Order Granting Respondent's Motion to Dismiss.....	2
Appellant's Complaint.....	6
Respondent's Motion to Dismiss.....	14
Respondent's Memorandum in Support of Respondent's Motion to Dismiss.....	17
Appellant's Memorandum in Opposition to Respondent's Motion to Dismiss.....	22
Appellant's Motion to Reconsider.....	32
Excerpt from Transcript of Hearing, July 27, 2011.....	35
Certificate of Counsel.....	54

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ammie McNeil,

Plaintiff,

v.

South Carolina Department of Corrections,
and Jon E. Ozmint, Robert Ward and
Bernard McKie, in their individual
Capacities,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A No. 2010-CP-40-8590

**ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER**

2011 OCT 10 AM 9:43
JEANETTE W. MCBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiff's Motion to Reconsider pursuant to Rules 59 SCRCP. Specifically, Plaintiff asks this Court to reconsider its Order of August 11, 2011, granting Defendant SCDC's Motion to Dismiss in this case.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered.¹ Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCP to reconsider this Court's Order filed August 11, 2011. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

Peroson 4, 2011
Columbia, South Carolina

G. Thomas Cooper, Jr.
G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

¹ Although not the basis for this Court's decision, the Court also notes that a copy of the Plaintiff's Motion to Reconsider was not provided to the Court and thus does not comply with Rule 59(g) SCRCP.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2010CP4008590

Ammie McNeil

vs.

South Carolina Department Of Correction

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):**
- SCRCP (Vol. Nonsuit); ☐ Rule 12(b), SCRCP; ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 15 August 2011, to attorneys of record or to parties (when appearing pro se) as follows:

J Lewis Cromer

ATTORNEY(S) FOR THE PLAINTIFF(S)

Nikole D. Boland

William H Davidson II

Steven Michael Pruitt

Stephanie Holmes Burt

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court

SCRCP APP-24/FORM 4

SCANNED

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Ammie McNeil,)

Plaintiff,)

v.)

South Carolina Department of Corrections,)
and Jon E. Ozmint, Robert Ward and)
Bernard McKie, in their individual)
Capacities,)

Defendant(s).)

IN THE COURT OF COMMON PLEAS

C/A No. 2010-CP-40-8590

**ORDER GRANTING DEFENDANT
SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS' MOTION TO DISMISS**

FILED
AUG 15 AM 9:42
JANETTE W. McBRIDE
C.C.P. & G.S.

This matter is before me on Defendant South Carolina Department of Corrections' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP. A hearing was held on this matter on July 27, 2011 at which time Steven M. Pruitt, Esquire, appeared on behalf of Defendant South Carolina Department of Corrections (hereinafter referred to as SCDC) and J. Lewis Cromer, Esquire, appeared on behalf of the Plaintiff. In addition, Stephanie H. Burton, Esquire, appeared on behalf of Bernard McKie, Damon C. Wlodarczyk, Esquire, appeared on behalf of Jon Ozmint, and Daniel C. Plyler, Esquire, appeared on behalf of Robert Ward. The Court grants Defendant SCDC's Motion on the grounds set forth below.

A defendant may move to dismiss a cause of action or a complaint based on a failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCPP, Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003), cert. denied (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). In considering a Motion to Dismiss pursuant to Rule 12(b)(6), the Court may only consider the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must

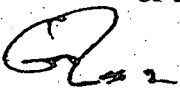
GR,

SCANNED

dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff). Based on a reading of the Complaint, Plaintiff fails to state facts sufficient to constitute a cause of action.

The Plaintiff alleges in her Complaint that she was improperly terminated by Defendant SCDC. The Plaintiff alleges that she was terminated for "personal, political, pretextual and scapegoating purposes" in violation of public policy. (§ 24 of Complaint). Even assuming that these facts are true, they fail to state a claim for wrongful termination. South Carolina has long recognized the doctrine of employment at-will, such that an employer may terminate an employee for good reason, no reason, or bad reason without liability. Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000); Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). The Plaintiff does not dispute that she was an at-will employee and even if she was terminated for personal reasons or as a scapegoat as she alleges, she still fails to state a claim and her action must be dismissed.

Though South Carolina recognizes the doctrine of employment at-will, a cause of action may arise for wrongful discharge when the discharge violates a clear mandate of public policy. Lawson, 340 S.C. at 350, 532 S.E.2d at 260. The Supreme Court stated that the public policy exception clearly applies when an employer requires an employee to violate a law or if the discharge itself violated a law. Barron v. Labor Finders of South Carolina, ___ S.C. ___, ___ S.E.2d ___ (Opinion No. 27018, Filed August 1, 2011). The Court further stated that the public policy exception is not limited to these situations. Id. The Supreme Court has previously stated that "[t]he primary source of the declaration of public policy of the state is the General Assembly" Citizens' Bank v.



Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925). The Court in Barron stated that the determination of what constitutes public policy is a question of law to be decided by the Court. The Plaintiff points to no violation of any statute or act by the General Assembly, but as stated above claims that her discharge was for "personal, political, pretextual and scapegoating purposes." The Plaintiff also points to no case in this state that has found a violation of public policy without a violation of a statute or act by the General Assembly. For these reasons, the Court finds that the Plaintiff fails to allege a violation of a clear mandate of public policy. There is no statute or law which states that an at-will employee cannot be terminated for personal or pre-textual reasons. To the contrary, the law says exactly the opposite that an at-will employee may be terminated for a good reason, bad reason, or no reason at all. The Plaintiff does not allege that SCDC required her to violate the law or that her discharge itself violated a law. The Plaintiff fails to allege a valid public policy exception and as she was an at-will employee, her action must be dismissed. As the Court finds that the Plaintiff fails to state a claim for wrongful termination, her remaining causes of action cannot go forward and are also dismissed.

IT IS SO ORDERED.

August 11, 2011
Columbia, South Carolina


G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Ammie McNeil,

Plaintiff,

vs.

South Carolina Department of
Corrections, and Jon E. Ozmint,
Robert Ward and Bernard McKie,
in their individual capacities,

Defendants.

COMPLAINT
Jury Trial Demanded

JEANETTE A. MORRIS
C.C.P. & C.S.

2010 DEC -8 AM 11:59

FILED

The plaintiff, complaining of the defendants herein, would respectfully allege as follows:

PARTIES AND JURISDICTION

1. The plaintiff is a citizen and resident of Richland County, South Carolina and currently resides at [REDACTED] and prior to her discharge on September 11, 2009, was a captain at Kirkland Reception and Evaluation Center ("Kirkland R&E").
2. The defendant South Carolina Department of Corrections ("SCDC") is a department, agency or governmental entity of the State of South Carolina. SCDC maintains custody, exercises control of and provides for the care of inmates and prisoners incarcerated by the state, including Kirkland R&E which is located in Richland County.
3. The defendant Jon E. Ozmint ("Ozmint") is a resident of Richland County, South Carolina and at all times mentioned herein was the Director of SCDC.
4. The defendant Robert Ward ("Ward") is a resident of Lexington County, South Carolina and at all times mentioned herein was the Director of Operations at SCDC and second

in command to the defendant Ozmint.

5. The defendant Bernard McKie ("McKie") is a resident of Greenwood County and at all times mentioned herein was the Warden of Kirkland, including Kirkland R&E.

FACTUAL ALLEGATIONS

6. In August of 2006, the plaintiff served as an officer at Kirkland R&E where she had served for several years and had never received any write-ups or discipline during her corrections career, with a good record of performance and awards.

7. Howard Melton was a resident of Spartanburg, South Carolina who had been arrested and convicted with second degree sexual conduct and sentenced to serve one year.

8. Melton was under hypertrophic medication and had threatened suicide immediately after his sentencing and was pronounced a "suicide risk" by the Spartanburg Detention Center where he was taken.

9. On the evening of Thursday, August 10, 2006, Melton was transported to Perry Correctional Institution in Greenville, South Carolina and sometime thereafter was further transported to Columbia and taken to Kirkland R&E somewhere in the early morning hours of August 11, 2006.

10. Apparently, in spite of the reception of Melton's fragile state of mind and his request for his prescribed medication, he did not receive them and was unable to utilize them. Whether or not those SCDC employees at Perry or Kirkland R&E were aware of the medication issues is unknown but the plaintiff was not made aware of any such issue at the time Melton arrived at Kirkland R&E.

11. Although Melton was a known suicide risk at the time he arrived at Kirkland R&E, he was not placed in a cell with a closed circuit camera as regulations require and was placed

instead in a regular cell like those housing approximately 200 other inmates at the time.

12. Further, although regulations and directions for Kirkland R&E mandate the presence of four to six corrections officers, due to the loss of positions that were not filled and the absence of one or more officer on the night in question, only the plaintiff and one other officer were available to make rounds and check on inmates throughout the evening.

13. Because of the size of the area where inmates were housed and the risks presented by man of the dangerous inmates, the plaintiff and others had repeatedly requested assistance but none was ever given.

14. Sometime between four a.m. and four forty-five a.m. on the morning of August 11, 2006, Melton was able to commit suicide by stuffing toilet paper in his mouth and nose and asphyxiating himself. When the plaintiff tried to rouse him for the four forty-five a.m. standing count, she discovered what Melton had done. Because Melton was in a prone position in his bunk with his face to the wall, his condition was not evident.

15. Following its practices and procedures, after the death of an inmate in custody, SCDC performed an internal investigation as to its cause and even called in SLED to perform its own investigation. The plaintiff cooperated fully with the investigation in their interviews and questions and was told by her superiors that she had done nothing wrong and was cleared of any responsibility for Melton's death.

16. The plaintiff continued to perform the same duties at Kirkland R&E without any write-ups of any kind and in fact received a promotion to the grade of sergeant in November of 2008.

17. The family of Howard Melton, in December of 2007, filed wrongful death lawsuits against Spartanburg County and SCDC alleging various acts of negligence but no acts on the part

of the plaintiff which contributed to his death. Both defendants denied any responsibility

18. As a part of the lawsuits, the plaintiff's deposition was taken at Kirkland where she was questioned by attorneys for the parties and was accompanied by a lawyer from SCDC but was never made aware that SCDC had any question about her conduct in August of 2006 or that her job was in any way at risk.

19. The case was scheduled for trial in July of 2009. The plaintiff was not subpoenaed as a witness for the trial. On July 31, 2009, the case was mediated and settled for \$140,000, upon information and belief, paid by the South Carolina Insurance Reserve Fund. Although most, if not all responsibility and liability was placed upon Spartanburg County, Ozmint and Ward were fully aware of the settlement and because of high scrutiny placed upon the two of them for other large settlements and lawsuits feared pressure from the media and certain legislators resulting in an agenda to find a scapegoat or to punish someone to take the pressure off of themselves. The defendant McKie also discussed these issues with Ozmint and Ward and joined in their agenda.

20. In spite of the fact that the investigation into the inmate's death had been concluded by both the internal and external investigations in early 2007 without any blame assessment on the plaintiff's part, who even received a subsequent promotion, immediately following the settlement of the civil case was notified that she faced a suspension and shortly thereafter her charge was upgraded to a terminal offense because of alleged "negligence" on her part at the time of Melton's death.

21. The plaintiff was subsequently terminated on September 11, 2009.

**FOR A FIRST CAUSE OF ACTION
AGAINST THE DEFENDANT SCDC
(Public Policy Discharge and Due Process Violation)**

22. The plaintiff realleges paragraphs 1 through 21 aforesaid.

23. In waiting three years to take action against the plaintiff, the defendant SCDC violated her rights to substantive and procedural due process of law guaranteed her by Article I, Section 3 of the Constitution of the State of South Carolina.

24. Further, to punish and discharge a valued and proven state employee for personal, political, pretextual and scapegoating purposes violates the public policy of the State of South Carolina and the requirement of good faith and fair dealing implied in the plaintiff's longstanding employment agreement with SCDC. The actions of the defendant SCDC violate a clear mandate of public policy, law and conduct.

25. As a direct and proximate result of the foregoing, the plaintiff has lost her job with SCDC, has sustained a loss of earning capacity, retirement and other benefits, all to the great damage of the plaintiff in the sum of \$1,000,000 actual damages.

FOR A SECOND CAUSE OF ACTION
AGAINST THE DEFENDANT SCDC
(Negligence and Gross Negligence)

26. The plaintiff realleges paragraphs 1 through 25 aforesaid.

27. The defendant SCDC was guilty of negligence and gross negligence in the following particulars, to wit:

- a) in failing to conclude its investigation into the inmate's death in a timely manner;
- b) in failing to give the plaintiff notice for three years that she may lose her job with the defendant when the same facts were known in 2006 that were used as a basis for her 2009 discharge;
- c) in making no charge against the plaintiff for the events in question, promoting her thereafter, in putting nothing adverse in her file and utilizing her testimony in the civil lawsuit and reassuring her that she was not to blame after the events in question;

d) in violating SCDC policies in the handling of the plaintiff's corrective action and termination procedures; and

e) in generally failing to use due care or ordinary care toward the plaintiff for three years after the incident in question.

28. As a direct and proximate result of the defendant SCDC's negligence and gross negligence, the plaintiff has sustained the loss of her job, a loss of earning capacity and retirement and other benefits, all to the damage of the plaintiff in the sum of \$1,000,000 actual damages.

FOR A THIRD CAUSE OF ACTION
AGAINST THE DEFENDANT SCDC
(Defamation)

29. The plaintiff realleges paragraphs 1 through 28 aforesaid.

30. The plaintiff's discharge from her position with SCDC was widely known as well as the reasons for her termination and has affected her professional character and standing within the SCDC community and the community at large.

31. By the process which she was made to undergo, the corrective action charged and the termination of the plaintiff for gross negligence were publications, re-publications, writings, words and actions charging incompetence or unsuitability for her business, job or profession which amounts to defamation *per se* and in which malice is presumed.

32. Such actions, writings, words and actions were false, published and known to be false at the time and proximately resulted in damages to the plaintiff not only in embarrassment, humiliation and mental anguish but also in the loss of her job and in reducing her earning capacity as special damages thereto.

33. The actions taken by the defendant in carrying out the foregoing amount to

defamation of the plaintiff and is actionable as a matter of law, all to the great damage of the plaintiff in the sum of \$1,000,000 actual damages.

FOR A FOURTH CAUSE OF ACTION
AGAINST THE DEFENDANTS OZMINT, WARD AND MCKIE,
IN THEIR INDIVIDUAL CAPACITIES
(Civil Conspiracy)

34. The plaintiff realleges paragraphs 1 through 28 aforesaid.

35. In the late summer and early fall of 2009, the defendants met, schemed, planned and conspired at the time it was decided to settle the lawsuit of the inmate's family and to fund the same through the South Carolina Insurance Reserve Fund, and in meeting representatives of the fund, other SCDC officials and perhaps others, determined to justify the same by terminating the plaintiff when it was the failure of SCDC to provide adequate facilities and hypertrophic information and medication which were at the heart of the allegations in the lawsuit.

36. The individual defendants knew at the time that the plaintiff's conduct on the night of the event in no way justified her termination three years after the fact yet pursued a ruthless and malicious agenda with a personal stake in the outcome of being called to account themselves for the deficiencies alleged in the lawsuit and putting their own jobs at risk, given their prior record of poor decisions and personnel management within SCDC.

37. The individual defendants acted outside the course and scope of their employment in plotting, scheming and taking action against the plaintiff.

38. The actions taken by the individual defendants amounts to an unlawful civil conspiracy, a combination of persons for the purpose of harming the plaintiff and to cause her special damages.

39. By virtue of their positions within SCDC and acting individually for their own

personal purposes, the defendants have proximately caused the plaintiff to sustain embarrassment, humiliation, stress and anxiety which will continue long into the future; the plaintiff has also sustained personal injuries, which have caused and will continue to cause medical expenses in the future; the plaintiff's reputation has also been damaged and the plaintiff is entitled to an award of punitive damages for the malicious and willful conduct of the individual defendants as alleged.

WHEREFORE, the plaintiff prays for judgment against the defendant SCDC in the sum of \$1,000,000 actual damages, an award against the individual defendants for \$1,000,000 actual damages, \$1,000,000 punitive damages and for the costs of this action.

CROMER & MABRY

BY: J. Lewis Cromer

J. Lewis Cromer (#1470)

Tandi D. Ross (#76623)

Julius W. Babb, IV (#77216)

1522 Lady Street

Post Office Box 11675

Columbia, South Carolina 29211

Phone 803-799-9530

Fax 803-799-9533

Attorneys for Plaintiff

November 22, 2010

) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO. 2010-CP-4-8590

)

)

)

11

5

)

,

14

MCDONALD PATRICK POSTON
HEMPHILL & ROPER, LLC

By: Steven M. Pruitt by Hannah K. Pratt

Steven M. Pruitt
414 Main Street (29646)
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 229-2511
Attorneys for Defendant
South Carolina Department of Corrections

March 25, 2011
Greenwood, South Carolina

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2010-CP-4-8590

Plaintiff,

VS.

**South Carolina Department of
Corrections, and Jon E. Ozmint, Robert
Ward and Bernard McKie, in their
individual capacities**

Defendants:

CERTIFICATE OF SERVICE

2011 MAR 28 AM 10:41
JEANETTE W. McBRIDE
SERVICE C.C.P. & G.S.

J. Lewis Cromer, Esq.
Cromer and Mabry
P.O. Box 11675
Columbia, SC 29211

**MCDONALD PATRICK POSTON HEMPHILL
& ROPER, LLC**

BY Laura Beth Brooks
Laura Beth Brooks
Paralegal to Steven M. Pruitt

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO. 2010-CP-40-8590
)

Ammie McNeil

Plaintiff,

vs.

South Carolina Department of
Corrections, and Jon E. Ozmint, Robert
Ward and Bernard McKie, in their
individual capacities

Defendants.

MEMORANDUM IN SUPPORT OF
DEFENDANT SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
MOTION TO DISMISS

To: J. Lewis Cromer, Attorney for Plaintiff

I. Introduction

The Plaintiff is a former employee of the South Carolina Department of Corrections (SCDC). SCDC terminated her employment on September 11, 2009 after concluding an investigation that indicated the Plaintiff was negligent in her duties and falsified documents after an inmate committed suicide during Plaintiff's shift. Plaintiff has sued SCDC for public policy discharge and due process violations in its termination of Plaintiff, negligence and gross negligence, and defamation.

II. Standard of Review

A defendant may move to dismiss a cause of action or a complaint based on a failure to state facts sufficient to constitute a cause of action. Rule 12(b) (6), SCRPC, Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003), cert. denied (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). In making its ruling, the court may only consider the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); see also

Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

III. The Plaintiff's complaint does not state that her termination violates a recognized public policy of South Carolina; therefore, her cause of action for wrongful discharge must be dismissed.

South Carolina recognizes the doctrine of employment at-will, such that an employer may terminate an employee for good reason, no reason, or bad reason without liability. Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000); Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). However, a cause of action arises for wrongful discharge when the discharge violates a clear mandate of public policy. Lawson, 340 S.C. at 350, 532 S.E.2d at 260. This public policy exception applies only when an employer requires an employee to violate a law or if the discharge itself violated a law. Id., Barron v. Labor Finders of South Carolina, 384 S.C. 21, 26, 682 S.E.2d 271, 274 (Ct. App. 2009).

In her Complaint, the Plaintiff only alleges that "[t]he actions of the defendant SCDC violate a clear mandate of public policy...." Paragraph 24 of Plaintiff's Complaint. Stating that the discharge violates public policy is not enough. The Complaint must state the discharge violated a law or that the employer demanded the employee violate a law. At no point in her Complaint does the Plaintiff state that SCDC demanded she violate a law or that her termination violated a law. Because there is no public policy exception recognized by South Carolina law that is stated in the Complaint, the cause of action for wrongful discharge must be dismissed.

IV. The Plaintiff's Complaint does not state that SCDC owed any duty the Plaintiff; therefore, the Plaintiff's cause of action for negligence and gross negligence must be dismissed.

To show negligence, the Plaintiff must allege there is a duty of due care that was breached and caused damages to the Plaintiff. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 520 S.E.2d 142 (1999). In her complaint, the Plaintiff does not allege that SCDC owed her a duty of due care. South Carolina law indicates there is only one duty owed by an employer to an employee. Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005). The only duty an employer owes an employee is to pay compensation in exchange for an employee's duty to perform a service or obligation for an employer. Id. Nowhere in the Complaint does the Plaintiff state that SCDC, the employer, failed to pay compensation to the employee. Therefore, there is no duty owed by SCDC to the Plaintiff. When no duty is owed by the Defendant in an action for negligence or gross negligence, the action must be dismissed. Id. ("The key inquiry is what duty, if any, is owed by the tort-feasor to the third party. It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tort-feasor.")

V. The Plaintiff's Complaint does not indicate that SCDC published false and defamatory statements that were unprivileged to a third party.

An action for defamation requires a plaintiff to show the defendant made and published a false or defamatory statement that was unprivileged, to a third person that injured the plaintiff's reputation. White v. Wilkerson, 328 S.C. 179, 493 S.E.2d 345 (1997). In paragraph 30 of the Plaintiff's Complaint, the plaintiff alleges that her "discharge from her position with SCDC was widely known." Paragraph 31 and 32 identifies there were "writings" and "publications."

However, the Plaintiff does not allege that these statements were unprivileged, that SCDC made the statements or that SCDC published the statements to a third party. The Plaintiff alleged in her Complaint that SCDC made a false statement, but fails to set forth what the false statement was with any specificity. The Complaint does not make allegations which are necessary to state a cause of action for defamation. This cause of action should be dismissed.

VI. Conclusion

For the foregoing reasons, the Defendant SCDC's Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure should be granted.

MCDONALD PATRICK POSTON
HEMPHILL & ROPER, LLC

By: Steven M. Pruitt by
Jane H. Menell
Steven M. Pruitt
414 Main Street (29646)
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 229-2511
Attorneys for Defendant
South Carolina Department of Corrections

July 20, 2011
Greenwood, South Carolina

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2010-CP-40-8590

CERTIFICATE OF SERVICE

VS.

Defendants.

**MCDONALD PATRICK POSTON
HEMPHILL & ROPER, LLC**

BY

Jane H. Merrill

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Ammie McNeil,)

Plaintiff,)

vs.)

South Carolina Department of)
Corrections, and Jon E. Ozmint,)
Robert Ward and Bernard McKie,)
in their individual capacities,)

Defendants.)

IN THE COURT OF COMMON PLEAS

10-CP-40-08590

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT SCDC'S
MOTION TO DISMISS**

The Plaintiff, by and through her undersigned counsel, responds to the Defendants's motion to dismiss as follows:

Statement of the Pleadings

In August of 2006, Plaintiff served as an officer at Kirkland R&E Correctional Institute where she had served for several years without any disciplinary record and with a good performance record. (Complaint ¶ 6.) Howard Melton, an inmate who had been convicted and sentenced to serve one year, committed suicide at Kirkland in August of that year while Plaintiff was on duty. (Complaint ¶ 7, 14.) He had earlier been pronounced a "suicide risk" at the Spartanburg Detention Center, where he was initially held following conviction. Despite this fact, when he was transferred to Kirkland in the early morning hours of August 11, 2006, he was not given the appropriate medication, even after requesting it, he was not placed in a cell for persons with a "suicide risk" designation with closed-circuit television, and he was not being monitored by four to six officers as designated by regulation. (Complaint ¶ 8, 10-12.) Plaintiff discovered that Melton had taken his

own life by asphyxiating himself using toilet paper to stuff his mouth and nose. (Complaint ¶ 14.) Because Melton was in a prone position in his bunk with his face to the wall, his condition was not immediately evident. *Id.* Plaintiff and other officers had previously requested additional officers and staff, in compliance with SCDC policies and procedures, due to the large size of the area to be monitored and the safety risk posed by dangerous inmates. (Complaint ¶ 13.)

SCDC followed its policies and procedures following the death of an inmate and performed an internal investigation as to cause. (Complaint ¶ 15.) SCDC additionally called in SLED to perform its own investigation. *Id.* The plaintiff cooperated fully with the investigation and was told by her superiors that she had done nothing wrong and had been cleared of any responsibility for Melton's death. *Id.* The family of Howard Melton filed wrongful death lawsuits in November 2007 against Spartanburg County and SCDC alleging various acts of negligence, but none of the claims alleged any particular wrongdoing on the part of Plaintiff. (Complaint ¶ 17.) Both defendants denied any responsibility. *Id.* Plaintiff's deposition was taken at Kirkland in connection to the lawsuits, where she was questioned by attorneys for both parties and was accompanied by a lawyer from SCDC. (Complaint ¶ 18.) The case was scheduled for trial in July of 2009, but the plaintiff was not subpoenaed as a witness for the trial. (Complaint ¶ 19.) On July 31, 2009, the case was mediated and settled for \$140,000, upon information and belief, paid by the South Carolina Insurance Reserve Fund. *Id.*

Following Melton's death, Plaintiff continued employment at Kirkland, even receiving a promotion to sergeant in November 2008. (Complaint ¶ 16.) Although the investigations into inmate Melton's death had been concluded by both the internal and external investigations in early 2007, immediately following the settlement of the civil case, Plaintiff was notified that she faced a

suspension. (Complaint ¶ 20.) Shortly thereafter, her charge was upgraded to a terminal offense because of alleged “negligence” on her part in connection to inmate Melton’s death. *Id.* In spite of her continued employment and promotion in the time between Melton’s death and September 2009, Plaintiff was terminated on September 11, 2009. (Complaint ¶ 21.)

Argument

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (“SCRCP”), a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116 (2006); *Baird v. Charleston County*, 333 S.C. 519, 527 (1999). “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” *Baird*, 333 S.C. at 527 (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). “[A] ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff.” *Williams*, 347 S.C. at 233. Viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the plaintiff and considering whether the pleadings articulate any valid claim for relief, the Rule 12(b)(6) motion to dismiss should be denied if such analysis would entitle the plaintiff to relief on any theory of the case. *Baird*, 333 S.C. at 511; *Gentry v. Yonce*, 337 S.C. 1, 5 (1999); and *Stiles*, 318 S.C. at 300.

A. Plaintiff pled facts sufficient to show a cause of action for

Public Policy Discharge against Defendant SCDC.

Plaintiff, in order to show wrongful discharge in violation of public policy, must show that she was discharged from at-will employment, that the discharge was retaliatory, and that the discharge violated a “clear mandate of public policy”. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Discharge in violation of public policy may be

shown in several ways. Although the criminal law of the state expresses a "clear mandate" of public policy, the South Carolina Supreme Court has "never held the exception is *limited* to these situations. *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995); *See also Novak v. Joyce, Locklair & Powers, P.C.*, 2010 S.C. App. Unpub. LEXIS 225 (2010) (attached herewith). The employee in *Garner* appealed the trial court's grant of a S.C. R. Civ. Pro. Rule 12(b)(6) motion to dismiss where employee claimed retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at a nuclear facility. *Garner* at 226, 456 S.E.2d at 909. In dicta, the *Garner* court noted that the case raised a novel issue of whether the public policy exception applied, and "such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss. *Id.*"

As in *Garner*, the case at hand presents novel issues of law and fact. Plaintiff repeatedly requested back-up at Kirkland because her supervisors were not staffing a sufficient number of officers or staff to handle the inmates or to comply with SCDC's own policies and procedures. (Complaint ¶ 13.) Plaintiff cooperated fully with both SCDC and SLED's investigations into the death of inmate Melton, as well as when requested to give deposition testimony in the suit against SCDC by Melton's family. (Complaint ¶ 15, 18.) However, once the case was settled between Melton's family and SCDC, Plaintiff was made to be the scapegoat to take the pressure off of SCDC generally and Defendants Ozmint, Ward & McKie specifically because inmate Melton's death might have been prevented had the proper number of staff been present to monitor the inmates. (Complaint ¶ 19-20.)

Plaintiff contends that regulations and laws concerning the treatment and safety of public employees who work in prisons and the prisoners themselves constitutes a mandate of public policy.

which should be included under the exception to at-will employment termination. SCDC policy regarding officer safety and proper supervision of prisoner's reflects a mandate from the state of South Carolina to incarcerate and provide prisoner supervision and care. For example, the state delegates that the "proper care, treatment, feeding, clothing and management" be given to prisoners by the Director of prisons, who then delegates to his employees down the chain of command. S.C. Code Ann. §24-1-130 (1993).

As such, Plaintiff respectfully requests that Defendant's Motion to Dismiss Plaintiff's cause of action for Public Policy discharge be denied. In the alternative, Plaintiff respectfully requests leave to amend her complaint should the Court find that Plaintiff failed to adequately state a cause of action for public policy discharge.

**B. Plaintiff pled facts sufficient to show a cause of action against
Defendant SCDC for violation of Plaintiff's Due Process Rights.**

Article 1, Section 3 of the South Carolina Constitution states that no person shall "be deprived of life, liberty, or property without due process of law." Where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, *notice* and an opportunity to be heard are essential." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (emphasis added). These two guarantees - notice and opportunity - exist even if the employee has no interest in continued employment. *Boston v. Webb*, 783 F.2d 1163 (4th Cir. 1986). In particular, procedural due process requires that an individual be given adequate notice to be heard in a *meaningful time in a meaningful way*. *Slaon v. S.C. Bd. Of Physical Therapy Examiners*, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006) (emphasis added). Although "procedural due process requirements are not technical and no particular form of procedure is necessary," *In re Vora*, 354

S.C. 590, 595, 582 S.E.2d 413, 416 (2003), in order to remain flexible "as the particular situation demands," the circumstances of the present case on the face of the complaint meet the pleading requirements for a Due Process cause of action.

Nearly three years transpired between the death of inmate Howard Melton and Plaintiff's termination from employment with SCDC. (Complaint ¶ 23.) During the time between these two events, Plaintiff cooperated fully with both Defendant SCDC and SLED, and Plaintiff's supervisor's told her that she had done nothing wrong, leading Plaintiff to believe that her position with Defendant was secure. (Complaint ¶ 15.) During these three years, Plaintiff continued employment as a corrections officer with SCDC and even received a promotion from officer to sergeant. (Complaint ¶ 20.) That three years elapsed between the time of the incident with inmate Melton and Plaintiff's termination, even though she was given grievance rights following termination, deprived Plaintiff of a meaningful appeal. Thus, Plaintiff respectfully requests that Defendant SCDC's motion to dismiss her cause of action for violation of Due Process Rights be denied. . In the alternative, Plaintiff respectfully requests leave to amend her complaint should the Court find that Plaintiff failed to adequately state a cause of action for a due process violation.

C. Plaintiff pled facts sufficient to show a cause of action against

Defendant SCDC for Negligence and Gross Negligence.

In order to show negligence, Plaintiff must demonstrate (1) a duty of care owed by the defendant to the Plaintiff, (2) that defendant's breached that duty by a negligent act or omission and (3) that damages caused to Plaintiff were the proximate result of that breach of duty. *South Carolina Ins. Co., v. James C. Greene & Co.*, 290 S.C. 171, 175, 348 S.E.2d 617, 620 (1986) (citing *Brown v. South Carolina Insurance Company*, 284 S.C. 47, 324 S.E.2d 641 (Ct. App. 1984). As limited

by the Tort Claims Act, Plaintiff must show that Defendant SCDC was grossly negligent in order to recover under a negligence cause of action. (S.C. Code Ann. §15-78-60.) Under part (25) of this provision, SCDC is not liable for the “supervision, protection, control, confinement, or custody of any...prisoner, inmate, or client of any governmental entity, *except when the responsibility or duty is exercised in a grossly negligent manner.*” *Id.* (emphasis added). Gross negligence occurs where defendants failed to “exercise slight care.” *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007) (citing *Steinke v. S.C. Dep’t of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999)).

Inmate Melton’s death was the foreseeable result of Defendant’s gross negligence in hiring and staffing each shift with an adequate number of employees. *See Moore v. Berkeley County Sch. Distr.*, 326 S.C. 584, 486 S.E.2d 9 (S.C. Ct. App. 1997). In order to show negligence and gross negligence, however, Plaintiff must show notice. *Id.*, at 591, 486 S.E.2d at 13. Plaintiff pled that Defendant SCDC had notice, via information provided by Plaintiff and other SCDC employees, to their supervisor’s, that the shifts at Plaintiff’s prison were understaffed. (Complaint ¶ 13). Defendants failure to complete its investigation in a timely manner, instead taking three years, and only reporting the findings of the investigation after the settlement with deceased inmate Howard Melton’s family, not only put the Plaintiff at risk but also all of her co-workers and inmates which she and her co-workers supervised. Defendant provided an inadequate number of guards, a situation of which they were aware, which led to the investigation of Plaintiff following inmate Melton’s death, and eventually her termination. Thus, as a result of Defendant’s negligent supervision of inmates, Plaintiff is being scapegoated as the sole individual responsible for inmate Melton’s death.

Further, it is unfair and inequitable to require stringent time lines for an employee to file a grievance through the grievance procedure with SCDC but allow Defendant an unlimited amount of time. Nor is it fair or equitable to terminate an employee on the basis of such an unnecessarily prolonged investigation where in intervening years the employee received a promotion, as did Plaintiff. (Complaint ¶ 27(c).) According to the Grievance Procedure Act, an employee must file his or her grievance within fourteen days of the incident giving rise to the grievance. S.C. Code Ann. §8-17-330. Upon filing of that grievance, the agency has forty-five days to issue a decision on the employment action. *Id.* These time limits reflect an underlying policy that employment grievance matters are best handled while the issue is recent in the minds of the grieving employee, the employer, and any witnesses to the employment action taken. By failing to conclude the internal investigation of Plaintiff for three years, Plaintiff asks this court to find that Defendant acted without due care or even slight care.

Thus, Plaintiff requests that Defendant SCDC's motion to dismiss Plaintiff's cause of action for negligence and gross negligence be denied. In the alternative, Plaintiff respectfully requests leave to amend her complaint should the Court find that Plaintiff failed to adequately state a cause of action for negligence and gross negligence.

D. Plaintiff pled facts sufficient to show a cause of action against

Defendant SCDC for Defamation.

To show defamation, Plaintiff must demonstrate that (1) a false and defamatory statement concerning another was made which (2) constituted an unprivileged publication to a third party (3) with fault on the part of the publisher and (4) special harm caused by the publication.

Holtzscheiter v. Thomson Newspaper, Inc., 332 S.C. 502, 530, 506 S.E.2d 497, 513 (1998) (Toal, J., concurring). A communication is defamatory if it harms the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him. *Id.* If it is obvious that the statement is defamatory, on its face alone, then the statement constitutes defamation per se. *Id.*, at 508-509, 506 S.E.2d at 513. "It is established that a defamatory insinuation may be made by actions or conduct as well as by words." *Tyler v. Mack Stores of S.C., Inc.*, 272 S.E.2d 633, 634 (S.C. 1980).

By terminating Plaintiff under these circumstances, and based on statements made by agents of SCDC, Defendants clearly offered and stated that Plaintiff was incompetent or unsuited for her business, job, or profession and was responsible for the suicide of inmate Melton. (Complaint ¶ 31.) Such words and actions were false, and known to Defendant to be false, at the time they were made and published. (Complaint ¶ 32.) Defendant's statements constitute defamation per se, and proximately resulted in damages to the Plaintiff, not only by causing embarrassment, humiliation and mental anguish, but also in the loss of her job and a reduction in earning capacity as special damages thereto. *Id.* Thus, Plaintiff respectfully requests that Defendant's motion to dismiss Plaintiff's cause of action for defamation be denied.

Conclusion

Plaintiff pled facts sufficient to demonstrate causes of action for wrongful termination in violation of public policy, violation of due process, negligence and gross negligence, and defamation. Therefore, Plaintiff respectfully requests that Defendant SCDC's Rule 12(b)(6) motion be denied.

[Signature on Following Page]

Respectfully Submitted,

J. Lewis Cromer & Associates

BY: J. Lewis Cromer

J. Lewis Cromer (#1470)

Tandi D. Ross (#76623)

Julius W. Babb, IV (#77216)

1522 Lady Street

Post Office Box 11675

Columbia, South Carolina 29211

Phone 803-799-9530

Fax 803-799-9533

Attorneys for Plaintiff

July 22 2011

Certificate of Service

I hereby certify that on the date indicated above, I
served on counsel of record a true and correct
copy of this document by mail.

Charlotte Kimsey
Charlotte Kimsey

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 10-CP-40-8590

Ammie McNeill

Plaintiff,

vs.

South Carolina Department of Corrections, et al

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

2011 AUG 22 PM 4:19
JEANETTE W. McBRIDE
C.C.P. & G.S.

Plaintiff's Attorney:
Julius W. Babb, IV, Bar No. 77216
Address:
1522 Lady Street, Columbia, S.C. 29201
Phone: 803-799-9530 Fax 803-799-9533
E-mail: cromermabry@cromermabry.com Other:

Defendant's Attorney:
Steve Pruitt, Bar No. _____
Address:
Post Office Drawer 1547, Greenwood, SC
Phone: _____ Fax: _____
E-mail: _____ Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Julius W. Babb
Signature of Attorney for ☒ Plaintiff / ☐ Defendant

August 22, 2011
Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: metts Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Ammie McNeil,)

Plaintiff,)

vs.)

South Carolina Department of)
Corrections, and Jon E. Ozmint,)
Robert Ward and Bernard McKie,)
in their individual capacities,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 10-CP-40-08590

MOTION TO RECONSIDER

JEANETTE W. HEBRIDE
C.C.P. & G.S.

2011 AUG 22 PM 4:19

RICHLAND COUNTY
FILED

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff respectfully moves this Court for reconsideration of its order of August 11, 2011 granting Defendant SCDC's motion to dismiss in this case.

This motion is based upon the Court's failure to consider the specific arguments made in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and in oral arguments during the motion hearing.

In support of this motion, a memorandum from Plaintiff is forthcoming.

[Signature Block On Following Page]

J. Lewis Cromer & Associates, L.L.C.

BY: Julius W. Babb

J. Lewis Cromer (#1470)

Julius W. Babb, IV (#77216)

1522 Lady Street

Post Office Box 11675

Columbia, South Carolina 29211

Phone 803-799-9530

Fax 803-799-9533

Attorneys for Plaintiff

August 22, 2011

Certificate of Service

I hereby certify that on the date indicated above, I served on counsel of record a true and correct copy of this document by mail.

Charlotte Kimsey
Charlotte Kimsey

STATE OF SOUTH CAROLINA)

County of Richland)

COURT OF COMMON PLEAS
2010-CP-40-08590

Ammie McNeil,

Plaintiff

vs.

TRANSCRIPT OF RECORD

South Carolina Department
Of Corrections, Jon Ozmint,
Robert Ward, and
Bernard McKie

Defendants

July 27, 2011
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

J. Lewis Cromer, Esq., Attorney for the Plaintiff
Jay Babb, Esq., Attorney for the Plaintiff

Nikole Boland, Esq., Attorney for the Defendant
Stephanie Burton, Esq., Attorney for the Defendant
William Davidson, Esq., Attorney for the Defendant
Steven M. Pruitt, Esq., Attorney for the Defendant
Damon Wlodarczyk, Esq., Attorney for the Defendant
Daniel Plyler, Esq., Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T SINDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

CERTIFICATE OF REPORTER

47

1 THE COURT: It seems as though I have three
2 motions to dismiss, that being the Department of
3 Corrections, Bernard McKie, and John Ozmint. Those
4 are the only three motions that I have; is that
5 correct?

6 MR. PLYLER: Well, Your Honor, I believe ---
7 Daniel Plyler, again, for defendant Robert Ward. We
8 made a motion to dismiss or in the alternative for
9 summary judgment.

10 MR. CROMER: It was our understanding that motion
11 would also be heard, Your Honor.

12 THE COURT: All right. All right. I see.

13 All right. Who wants to lead off? Mr. Pruitt, I
14 assume?

15 MR. PRUITT: That would be fine, Your Honor. May
16 it please the Court. Steven Pruitt, again, for the
17 Department of Corrections.

18 Your Honor, we submitted a memorandum and I ---

19 THE COURT: I've read it.

20 MR. PRUITT: And I apologize. There's a change
21 to some new issues. I received --- it's a little
22 messed up. I received the plaintiff's memorandum
23 yesterday. I've kind of gone through some additional
24 stuff.

25 As to the wrongful termination, Your Honor, the

1 --- South Carolina obviously recognizes the at-will
2 doctrine. The plaintiff alleges there is a public
3 policy exception.

4 In the complaint, they state that she was
5 terminated for personal, political, pre-textual and
6 scapegoating reasons --- purposes, I'm sorry.

7 The law is clear that an employee can be
8 terminated for any reason, no reason, an arbitrary
9 reason. It doesn't have to be anything rational.

10 The plaintiff --- also, the memorandum we
11 received kind of has some different issues or
12 different --- raises different matters set forth in
13 the complaint.

14 You know, we're here looking at the four corners
15 of the complaint. Looking at those, the statement was
16 that it was personal, political, pre-textual or
17 scapegoating purposes. We argue that does not
18 establish any type of public policy.

19 We would also address the issues in the
20 memorandum. The plaintiff cites the Garner case.
21 Basically, Your Honor, we cited law that the rule in
22 South Carolina on public policy is that there are two
23 exceptions, and that is asking an employee to violate
24 the criminal law or if the termination is actually a
25 violation of criminal law itself.

1 The plaintiff cited the Garner case for the fact
2 that the public policy exception is not limited, but
3 it can --- and they also cited the Novak case, which
4 is an unpublished opinion of the Court of Appeals.

5 The --- we would, obviously, argue there's no
6 precedential value in the Novak case. We have cited
7 in our memorandum, Your Honor, the Barron case,
8 B-A-R-R-O-N, and the cites are all in our memorandum.

9 The Barron case is a Court of Appeals case from
10 2009, which stated that it's interpreting Garner. It
11 stated that the public policy exception only applies
12 to the two situations as to where an employer requires
13 an employee to break the law or to violate the law,
14 and if the policy itself violates the law.

15 In the --- there is --- and we'll admit that
16 there is competing argument, I guess, competing
17 rulings by the same court, the Court of Appeals,
18 between the Barron case and the Novak case.

19 In this situation, the Barron case is published.
20 It is published law. The Novak case is not. It has
21 no precedential value. Therefore, the Barron case is
22 the controlling law at this time.

23 It sets that the only exceptions are violation,
24 you know, as we said, and therefore, there is no
25 public policy violation in this case. The matter

1 should be dismissed.

2 We have additional arguments. I can make those.
3 We can deal with those one at a time. How ever Your
4 Honor would like me to do that.

5 THE COURT: Just give me your --- both arguments.

6 MR. PRUITT: Yes, Your Honor.

7 Next there is an argument they have raised for
8 negligence.

9 In the complaint, there are five argument issues
10 of negligence they raised. In paragraph 27, which are
11 failing to conclude its investigation in the inmate's
12 death in a timely manner; failing to give the
13 plaintiff notice for three years that she may lose her
14 job with the defendant when the same facts were known
15 in 2006 and used as a basis of a discharge in 2009.

16 Making no charge against the plaintiff for the
17 events in question and promoting her until ---
18 utilizing her testimony in a civil lawsuit, and then
19 violating SCDC policies in the handling of the
20 plaintiff's corrective action and termination
21 procedures, and then I would call any type of catchall.
22 It says, "In failing to use due and ordinary care."

23 Your Honor, as we cited in our memorandum, the
24 law in South Carolina is that the employer owes only
25 one duty to an employee, and that being to pay

1 compensation for services.

2 There is no duty --- they have failed to
3 establish any type of duty based on the argument with
4 the matters set forth in the complaint.

5 Now, again, in the memorandum, there is a
6 different theory of negligence. We will address that,
7 and quite frankly, Your Honor, I had a difficult time
8 following that argument. But it basically says that
9 the --- there was inadequate staffing and negligent
10 supervision which put the plaintiff at risk.

11 That's not --- that's the --- that will be an
12 argument that could be made on behalf of an inmate,
13 such as Mr. Melton, who was --- they referenced in
14 this case, but it's not an argument that could be made
15 on behalf of the plaintiff in this case as an employee.

16 It would fail --- particularly, number one, she
17 doesn't have any damages as a result of that. She was
18 not --- they say she was at risk of some type of harm
19 or injury. She did not suffer any harm or injury.
20 It's not alleged that she did so.

21 THE COURT: That's the time and place?

22 MR. PRUITT: Correct. I mean, it's because of
23 the negligent supervision or inadequate staffing, she
24 did not suffer any harm from any inmate.

25 There could be no --- damages is an essential

1 element of negligence. They failed to state damages.
2 Also, to the extent that she had suffered some type of
3 personal injury from these factors, it would be ---
4 Workers' Comp. would be the exclusive remedy, as well.

5 They also go on and talk about the timelines for
6 an employee to file a grievance are unfair and
7 inequitable, but that's --- and to terminate her was
8 not fair and equitable. But unfairness does not
9 equate to negligence. It's separate things.

10 So, simply, we would argue that there is no claim
11 for negligence. As to the defamation, finally, Your
12 Honor, the defamation --- they have failed to show
13 either in the complaint or in the memorandum
14 specifically that a specific individual published a
15 false or defamatory statement that was unprivileged to
16 a third party.

17 The plaintiff fails to do that. They are arguing,
18 essentially, what appears to be that the mere fact of
19 the termination itself constitutes defamation.

20 They cite a case, which is Taylor vs. Maxx Stores
21 of South Carolina. That's cited in the plaintiff's
22 memorandum.

23 Reading that case carefully, it does not state
24 that the mere act of termination can set forth a claim
25 for defamation.

1 It must be looked at simply based on its facts.
2 The facts in that case were that this employee was
3 given a polygraph exam against his will and was
4 terminated shortly thereafter.

5 The facts are very, very limited in that case.
6 It gives very limited facts. My inference from the
7 case --- again, it's nothing more than my inference
8 was, Your Honor, that he passed the polygraph and was
9 subsequently terminated for other reasons.

10 It stated that because he was terminated after
11 taking the polygraph, it made it appear that he had
12 done some type of wrongful act. That case should be
13 limited to its facts.

14 To do otherwise would basically turn the at-will
15 doctrine on its ear. It would do away with it in
16 South Carolina. If every time an individual were
17 terminated, they filed ---

18 THE COURT: The complaint says published.

19 MR. PRUITT: Published by --- well, that's the
20 issue, too. What is published? That's the other
21 issue I was raising, Your Honor.

22 THE COURT: I don't know what this is, but he
23 alleges that --- I don't know if they were published
24 or they weren't, but he alleges they were published.

25 MR. PRUITT: But, Your Honor, he does not allege

1 who published or what was published, specifically. He
2 just says something was published.

3 I don't believe that's sufficient, Your Honor, to
4 get him past his complaint, because he does not allege
5 what was published, who published it.

6 THE COURT: Just reading the complaint.

7 MR. PRUITT: Yes, Your Honor. If the --- if he
8 is saying published is simply the act of the
9 termination itself, again ---

10 THE COURT: Well, I understand. Of course, he
11 goes on to say the action charged in the termination
12 --- she was made to undergo the corrective action
13 charged and determination of a complaint for gross
14 negligence...

15 I don't understand that, 31 paragraph the ---

16 MR. PRUITT: Yes, sir, Your Honor. I'm reading
17 that. I'm not sure I understand it. Again, I don't
18 know what was published or who published it.

19 THE COURT: Or republished the writings or words.

20 MR. PRUITT: Well, again, I just --- we would
21 state that there has to be something more, with some
22 more specificity as to what was published and who
23 published it even in a complaint.

24 THE COURT: Well, he might make it more definite
25 and certain as we used to say, but anyway, go ahead.

1 MR. PRUITT: Well, that's basically the
2 defendant's argument, Your Honor.

3 THE COURT: All right. Mr. Cromer?

4 MR. CROMER: Your Honor, it probably would make
5 more sense to have all of their arguments, so I can
6 respond at one time. I'll do whatever the Court wants.

7 THE COURT: Well, I assume your argument with
8 respect to the individuals is a little bit different,
9 I believe, I anticipate, than your argument as to the
10 Department.

11 MR. CROMER: They're all the same except for the
12 cause of action of civil conspiracy, and that one
13 we're prepared to argue.

14 We'll argue all of them along the lines of our
15 brief, but I'm prepared to go forward, if the Court
16 would want me to, right now, with that. Whatever is
17 the best way.

18 THE COURT: Well, you know, the question of the
19 individual liability that the defendants under the
20 Tort Claims Act is pretty clear, I think.

21 MR. CROMER: Yes, sir. The individuals are
22 liable --- are not liable for negligence, but they are
23 liable for ---

24 THE COURT: But you ---

25 MR. CROMER: --- intentional gross negligence ---

1 THE COURT: You pled gross negligence.

2 MR. CROMER: --- actions of malice ---

3 THE COURT: That's what you ---

4 MR. CROMER: That sort of thing; that's right.

5 THE COURT: I noticed that you ---

6 MR. CROMER: That's why I ---

7 THE COURT: --- managed to allege with
8 particularity ---

9 MR. CROMER: Yes, sir.

10 THE COURT: --- the words of the statute.

11 MR. CROMER: Yes, sir.

12 Now, do you want to proceed, Your Honor?

13 THE COURT: Yes.

14 MR. CROMER: All right. Well, let me just
15 briefly go ---

16 THE COURT: I'm going to --- the elements of this
17 public policy issue.

18 MR. CROMER: All right. I will.

19 Let me --- before --- as I address the public
20 policy and you get a good handle on it, I want to go
21 through the complaint and what's alleged in it because
22 this is a 12(b)(6) motion.

23 THE COURT: All right.

24 MR. CROMER: We're not challenging --- we've had
25 no discovery in it. It may well be at some point in

1 the future they filed a summary judgment motion saying,
2 "Do you have any evidence to support this?"

3 That is the way most of these cases that they
4 cite come up, but the complaint alleges, basically,
5 that --- these facts, Judge Cooper.

6 In August of 2006, a young guy up in Spartanburg
7 County was arrested for raping his nephew. The guy
8 was mentally unstable, a very definitely recognized
9 suicide risk.

10 He was taken to the Spartanburg Corrections
11 Institution and was from there transferred from
12 Spartanburg down here to Kershaw, which has a unit, a
13 C.I. unit for people that are a suicide risk, people
14 that are in danger.

15 They're better equipped in terms of having
16 facilities for those inmates and treatment of those
17 inmates than others. So they said in here that McNeil,
18 the plaintiff in this case, had been a good employee
19 of the Department of Corrections for several years, no
20 write-ups, no prior discipline.

21 In fact, she received awards. She was one of the
22 two people that were charged that night with going
23 around and checking the cells for all the people there.

24 There are a certain --- there are two things that
25 should have been at Kershaw, which were not. One of

1 them was that the law and the regulations the
2 Department of Corrections provided is that there be
3 between four and six employees at all times there to
4 watch over the suicide risk and these particular
5 matters.

6 Number two ---

7 THE COURT: Let me stop you a minute.

8 MR. CROMER: Sir? It's alleged ---

9 THE COURT: You haven't alleged anything about
10 Kershaw. You alleged ---

11 MR. CROMER: The Department of Corrections. Well,
12 that's where Kershaw operates under.

13 THE COURT: Well, it says Kirkland R&E.

14 MR. CROMER: Kirkland R&E, Your Honor. I'm sorry,
15 forgive my misuse of --- misidentity of the facility,
16 you and I have never been in either one. I just made
17 a mistake. I'm sorry.

18 THE COURT: That's all right, but that's the way
19 it was pled.

20 MR. CROMER: That's the way it's pled, and that's
21 the way it was. The second thing they're supposed to
22 have are suicide type cells where there are cameras
23 that carry on surveillance at all times.

24 The four to six employees should consist of
25 somebody who watches those cameras all the time so

1 that they can do something about it and two or more
2 people to go around in 15-minute intervals and check
3 on the inmates themselves.

4 THE COURT: I've read the facts.

5 MR. CROMER: All right. Well, coming to ---
6 coming to the public policy issue --- and I've got a
7 copy of the Novak case that I'll be glad to submit up
8 to you.

9 The Novak case is an unpublished opinion, but the
10 reason I think it's unpublished is because it goes
11 back and says that there's nothing in the Lawson case
12 to change the stated rule in the Garner case which
13 says that the Supreme Court never meant to define and
14 confine those cases for --- for public policy
15 discharge to where you were asked to commit a --- to
16 commit a crime or where the discharge itself was done
17 that way.

18 If you --- if you read the complaint --- I know
19 you have --- the facts clearly indicate that this is a
20 novel issue in this case.

21 Here is a lady who --- who did her job for ---
22 did it well, was totally --- on the night that this
23 happened, totally investigated, totally cooperated.

24 According to her, and it's alleged in the
25 complaint, she was told that her job was not at risk.

1 She was not at fault. Nothing pertained to her. She
2 was interviewed by SLED. As far as she knew, the
3 investigation was over.

4 She continued to work for three more years. At
5 the end of the first of those years, the inmate's
6 family filed a lawsuit. She still continued to work
7 and received a promotion to sergeant in 2008.

8 When the case came to trial in 2009, she was not
9 even summonsed as a witness to go to the trial, and
10 the case was mediated and settled. Of course, we
11 don't know what happened in the settlement. We don't
12 know what --- we do know that there was \$140,000 paid
13 by the State Insurance Reserve Fund.

14 As soon as that happened, immediately the
15 Department said, "We're going to open this
16 investigation. We're going to fire you because we
17 think you were negligent."

18 There was nothing at all that she had done that
19 she had been told about for that three-year period of
20 time that would indicate that she was negligent in any
21 way.

22 They were understaffed. She and the others had
23 reported that. He was not put in a suicide cell.
24 They knew about that, and she did everything she could
25 if she had gone around every five minutes and checked.

1 She would have never seen anything that would
2 indicate to her that he had committed suicide because
3 it was only when she went around at 4:45 to make them
4 stand up and come out for the count that he did not
5 stand up and come out.

6 His back was to her, and she --- they realized he
7 had stuffed toilet tissue and stuff down his throat
8 and asphyxiated himself.

9 If he had been in a camera cell, Your Honor, it
10 would have taken him some time to accomplish that, and
11 someone would have seen that and someone could have
12 acted on it.

13 He certainly wouldn't be doing it when the guards
14 were coming around checking. There were only two of
15 them when there should have been four of them, so we
16 think it is a novel issue.

17 THE COURT: Didn't he have ---

18 MR. CROMER: Your Honor, it's a clear mandate of
19 public policy that that should not happen to an
20 employee like that.

21 We think that --- and we also think if that's not
22 true, then we won't be able to prove that. By the
23 time that the evidence is in and we've had a chance to
24 present our discovery in this case, it will be
25 apparent as to why that case was settled.

1 It will be apparent that she is correct that she
2 was totally exonerated of any blame in it three years
3 before, promoted and then all of a sudden fired.

4 We'll get into the --- into the issue about due
5 process in a little while, I guess, because it wasn't
6 argued too much, but the due process of it is bad, as
7 well, and I've got copies of the --- I've got copies
8 of the Sloan case that say you've got to give ---
9 you've got to give people notice in a meaningful ---
10 in a meaningful amount of time and in a meaningful way.

11 She didn't file a grievance within 14 days of the
12 time this happened, because she wasn't charged with
13 anything.

14 Three years later at a time when witnesses would
15 go home and it was all over, but the shock, she said
16 now you've got to go get your witnesses and come in.

17 She could have gotten statements. She could have
18 done whatever she had to had she had any inkling back
19 in 2006 and 2007 that they intended to --- to let her
20 go, and we think under the --- under the due process
21 argument, which also applies indirectly to the public
22 policy issue in this case.

23 THE COURT: All right. Mr. Pruitt?

24 MR. PRUITT: Just briefly, Your Honor. The ---
25 again it's termination at will. Any reason, no reason.

1 It doesn't matter.

2 The purpose of a 12(b)(6) motion is to test the
3 sufficiency of the allegations and determine if they
4 are legally sufficient to go forward.

5 The controlling law in this case is the Barron
6 case that we cited. It closed the exception. I
7 understand the Novak case, but you have two opinions
8 from competing courts. I mean, from the same court,
9 I'm sorry.

10 Competing opinions from the exact same court.
11 One is published, one is unpublished because it has no
12 precedential value.

13 The Barron case is the published case. It states
14 that the exception, the public policy exception, is
15 limited to the two things we discussed. The violation
16 of --- the termination itself is a violation of law,
17 or absent violent criminal law, the public policy
18 exception does not apply and the case should be
19 dismissed, Your Honor.

20 THE COURT: All right.

21 MR. CROMER: I somewhat want to respond to the
22 defamation, but we'll wait because others may argue
23 that, as well.

24 THE COURT: Yes, they ---

25 MR. PRUITT: Your Honor, could I add one more

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrections is

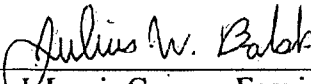
Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY:



J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Plaintiff

March 29, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrections is

Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on March 29, 2012, addressed to as follows: Steven M. Pruitt, Esq., McDonald Patrick Poston Hemphill & Roper, LLC, P.O. Box 1547 Greenwood, South Carolina, 29648.

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: Julius W. Babb
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrects is

Respondent.

FINAL BRIEF OF APPELLANT

RECEIVED
APR 10 2012
SC Court of Appeals

J. Lewis Cromer & Associates, L.L.C.
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire, (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Appellant

Table of Contents

Table of Cases, Statutes & Authorities.....	iii
Statement of the Issues on Appeal.....	1
Statement of the Case.....	2
Argument.....	3
Statement of the Facts.....	3
I. BECAUSE APPELLANT PLED THAT SHE REPORTED IMPROPER STAFFING TO HER SUPERVISORS AND TESTIFIED IN A CIVIL MATTER UNDER SUBPOENA CONCERNING THE DEATH OF AN INMATE AND WAS TERMINATED AS A RESULT, THE COURT ERRIED IN FINDING THAT PLAINTIFF FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.....	5
II. BECAUSE APPELLANT PLED THAT RESPONDENT MADE AND PUBLISHED STATEMENTS THAT INSINUATED APPELLANT WAS UNFIT TO PERFORM IN HER BUSINESS AND PROFESSION, THE COURT ERRED IN FINDING THAT PLAINTIFF'S DEFAMATION CLAIM AGAINST DEFENDANT SCDC CANNOT GO FORWARD.....	9
III. BECAUSE APPELLANT PLED THAT RESPONDENT INVESTIGATED THE DEATH OF INMATE MELTON THREE YEARS PRIOR TO TERMINATION AND DURING THOSE THREE YEARS GAVE APPELLANT NO INDICATION THAT HER JOB WAS IN JEOPARY, AND IN FACT PROMOTED HER DURING THAT TIME, THE COURT ERRED IN FINDING THAT PLAINTIFF'S CAUSE OF ACTION FOR VIOLATIONS OF DUE PROCESS CANNOT GO FORWARD.	10
Conclusion.....	12

Table of Cases, Statutes & Authorities

<i>Baird v. Charleston County</i> , 333 S.C. 519 (1999).....	5
<i>Board of Regents v. Roth</i> , 408 U.S. 564, 573 (1972).....	9
<i>Boston v. Webb</i> , 783 F.2d 1163 (4th Cir. 1986).....	10
<i>Garner v. Morrison Knudsen Corp.</i> , 318 S.C. 223, 456 S.E.2d 907 (1995).....	6
<i>Gentry v. Yonce</i> , 337 S.C. 1 (1999).....	5
<i>Holtzscheiter v. Thomson Newspaper, Inc.</i> , 332 S.C. 502, 506 S.E.2d 497 (1998).....	7
<i>Ludwick v. This Minute of Carolina, Inc.</i> , 287 S.C. 219, 337 S.E.2d 213 (1985).....	5
<i>Parrish v. Allison</i> , 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007).....	7
<i>Sloan v. S.C. Bd. Of Physical Therapy Examiners</i> , 370 S.C. 452, 636 S.E.2d 598 (2006).....	9
<i>Spence v. Spence</i> , 368 S.C. 106 (2006).....	5
<i>Stiles v. Onorato</i> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	5
<i>Tyler v. Mack Stores of S.C., Inc.</i> , 275 S.C. 456, 272 S.E.2d 633 (S.C. 1980).....	8
<i>In re Vora</i> , 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).....	9
<i>Williams v. Condon</i> , 347 S.C. 227 (Ct. App. 2001).....	5

Statutes & Rules

S.C. Const. Art. I, § 3.....	7
S.C. Code Ann. §24-1-130 (1993).....	6
S.C. Code Ann. §8-17-330 (1976).....	10
Rule 12(b)(6), SCRCF.....	5, 6

Statement of the Issues on Appeal

- I. Whether the Court erred in finding that Appellant failed to state a claim for public policy discharge on the face of the complaint where Appellant pled that she was terminated after complaining about institutional safety violations and testifying after being subpoenaed in a civil trial.
- II. Whether the Court erred in finding that Appellant's defamation claim against Respondent SCDC could not go forward where Appellant pled that Respondent made and published statements which insinuated that she was unfit in her business and profession.
- III. Whether the Court erred in finding that Appellant's cause of action for violations of due process against Respondent SCDC could not go forward where Respondent investigated the death of inmate Melton three years prior to termination and during those three years gave Appellant no indication that her job was in jeopardy, instead promoting her during those three years.

Statement of the Case

Appellant filed her complaint in this case on December 8, 2010 alleging causes of action for Due Process Violations, Public Policy Discharge, Defamation, and Negligence and Gross Negligence against Defendant SCDC. Additionally, Appellant's complaint alleged a cause of action for Civil Conspiracy against three individual Defendants, Jon E. Ozmint, Robert Ward, and Bernard McKie. Respondent SCDC filed a Motion to Dismiss on March 28, 2011. On or around July 20, 2011, Respondent SCDC filed a Memorandum in Support of Respondent SCDCs' Motion to Dismiss. Appellant filed her Memorandum in Opposition to Respondent SCDC's Motion to Dismiss on July 22, 2011.

A hearing was held on July 27, 2011 before the Honorable Judge G. Thomas Cooper on these four Motions to Dismiss. Judge Cooper issued his order on August 15, 2011, granting Defendant SCDCs' Motion to Dismiss. On August 22, 2011, Plaintiff filed a Motion to Reconsider. Judge Cooper denied Plaintiff's motion on October 10, 2011.

Appellant filed her Notice of Appeal on November 4, 2011; Appellant timely served a Notice of Appeal on Respondents. On November 29, 2011, Appellant received a copy of the transcript of record, as requested pursuant to Rule 207(a)(1). Appellant made a motion for, and was granted, an extension of thirty days in which to file her initial brief and designation of matter.

Argument

Statement of the Facts

In August of 2006, Appellant was an officer at Kirkland R&E Correctional Institute where she worked for several years without any disciplinary record and with a good performance record. (R. p. 2, lines 4-6). Howard Melton, an inmate who had been convicted and sentenced to serve one year, committed suicide at Kirkland in August of that year while Plaintiff was on duty. (R. p. 7, lines 7-8; p.8, lines 9-13). He had earlier been pronounced a “suicide risk” at the Spartanburg Detention Center, where he was initially held following conviction. Despite this fact, when he was transferred to Kirkland in the early morning hours of August 11, 2006, he was not given the appropriate medication, even after requesting it, he was not placed in a cell for persons with a “suicide risk” designation with closed-circuit television and other safeguards, and he was not monitored by four to six officers as required by regulation. (R. p. 7, lines 7-8, 16-22 & p. 8, lines 1-5). Appellant discovered that Melton took his own life by asphyxiating himself using toilet paper to stuff his mouth and nose. (R. p. 8, lines 9-13). Because Melton was in a prone position in his bunk with his face to the wall, his condition was not immediately evident. *Id.* Appellant and other officers had previously requested additional officers and staff, in compliance with SCDC policies and procedures, due to the large size of the area to be monitored and the safety risk posed by dangerous inmates. (R. p. 8, lines 6-8).

Pursuant to SCDC policies and procedures, Respondent conducted an investigation following inmate Melton’s death. (R. p. 8, lines 14-18). Respondent additionally called in SLED to perform its own investigation. *Id.* The plaintiff

cooperated fully with the investigation and was told by her superiors that she had done nothing wrong and was cleared of any responsibility for Melton's death. *Id.* The family of Howard Melton filed wrongful death lawsuits in November 2007 against Spartanburg County and SCDC alleging various acts of negligence, but none of the claims alleged any particular wrongdoing on the part of Appellant. (R. p. 8, lines 22-23-p.9, line 1). Both defendants denied any responsibility. *Id.* Appellant's deposition was taken at Kirkland in connection to the lawsuits, where she was questioned by attorneys for both parties and was accompanied by a lawyer from SCDC. (R. p. 9, lines 2-5). The case was scheduled for trial in July of 2009, but the Appellant was not subpoenaed as a witness for the trial. (R. p. 9, lines 6-13). On July 31, 2009, the case was mediated and settled for \$140,000 which was, upon information and belief, paid by the South Carolina Insurance Reserve Fund on behalf of both Respondent SCDC and Spartanburg County. *Id.*

After Melton's death, Appellant continued employment at Kirkland, even receiving a promotion to sergeant in November 2008. (R. p. 8, lines 19-21). Although the investigations into inmate Melton's death had been concluded by both the internal and external investigations in early 2007, immediately following the settlement of the civil case, Appellant was notified that she faced a suspension. (R. p. 9, lines 14-19). Shortly thereafter, her charge was upgraded to a terminal offense because of alleged "negligence" on her part in connection to inmate Melton's death. *Id.* In spite of her continued employment and promotion in the time between Melton's death and September 2009, Appellant was terminated on September 11, 2009. (R. p. 9, line 20).

- I. BECAUSE APPELLANT PLED THAT SHE REPORTED IMPROPER STAFFING TO HER SUPERVISORS AND TESTIFIED IN A CIVIL MATTER UNDER SUBPOENA CONCERNING THE DEATH OF AN INMATE AND WAS TERMINATED AS A RESULT, THE COURT ERRED IN FINDING THAT PLAINTIFF FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.

The order granting Respondent SCDC's motion to dismiss as to Plaintiff's cause of action for public policy discharge should be reversed. Appellant pled facts sufficient on the face of the complaint to overcome Respondent SCDC's motion to dismiss.

Pursuant to Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116 (2006); *Baird v. Charleston County*, 333 S.C. 519, 527 (1999). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird*, 333 S.C. at 527 (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). "[A] ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff." *Williams v. Condon*, 347 S.C. 227, 233 (Ct. App. 2001). Viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the plaintiff and considering whether the pleadings articulate any valid claim for relief, the Rule 12(b)(6) motion to dismiss should be denied if such analysis would entitle the plaintiff to relief on any theory of the case. *Baird*, 333 S.C. at 511; *Gentry v. Yonce*, 337 S.C. 1, 5 (1999); and *Stiles*, 318 S.C. at 300.

Appellant, in order to show wrongful discharge in violation of public policy, must show that she was discharged from at-will employment, that the discharge was

retaliatory, and that the discharge violated a “clear mandate of public policy”. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Discharge in violation of public policy may be shown in several ways. Although the criminal law of the state expresses a “clear mandate” of public policy, the South Carolina Supreme Court has “never held the exception is *limited* to these situations. *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995). The employee in *Garner* appealed the trial court’s grant of a Rule 12(b)(6), SCRCPP, motion to dismiss where employee claimed retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at a nuclear facility. *Garner* at 226, 456 S.E.2d at 909. In dicta, the *Garner* court noted that the case raised a novel issue of whether the public policy exception applied, and “such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss. *Id.*

As in *Garner*, this case presents novel issues of law and fact. The regulations and laws concerning the treatment and safety of public employees who work in prisons and the prisoners themselves constitutes a mandate of public policy which should be applicable in the case at hand. For example, the state requires that the “proper care, treatment, feeding, clothing and management” be given to prisoners by the Director of prisons, who then delegates to his employees by the chain of command. S.C. Code Ann. §24-1-130 (1993).

Appellant pled that she repeatedly requested back-up at Kirkland because her supervisors were not staffing a sufficient number of officers or staff to handle the inmates and comply with SCDC’s own policies and procedures. (R. p. 8, lines 6-8). Appellant cooperated fully with both SCDC and SLED’s investigations into the death of inmate

Melton, as well as when requested to give deposition testimony in the suit against SCDC by Melton's family. (R. p. 8, lines 15-19 & R. p. 9, lines 2-5). However, once the case was settled between Melton's family and Respondent, Appellant was made to be the scapegoat to take the pressure off of SCDC generally and Defendants Ozmint, Ward, and McKie specifically because inmate Melton's death might have been prevented had the proper number of staff been present to monitor the inmates. (R. p. 9, lines 6-19).

In light of the foregoing, Appellant respectfully requests that the lower court's order granting Respondent's motion to dismiss as to Appellant's cause of action for public policy discharge be reversed.

II. BECAUSE APPELLANT PLED THAT RESPONDENT MADE AND PUBLISHED STATEMENTS THAT INSINUATED APPELLANT WAS UNFIT TO PERFORM IN HER BUSINESS AND PROFESSION, THE COURT ERRIED IN FINDING THAT PLAINTIFF'S DEFAMATION CLAIM AGAINST DEFENDANT SCDC CANNOT GO FORWARD.

The order granting Respondent SCDC's motion to dismiss as to Plaintiff's cause of action for defamation should be reversed. Appellant pled facts sufficient on the face of the complaint to overcome Respondent SCDC's motion to dismiss Appellant's claim for defamation.

In order to show defamation, Appellant must demonstrate that (1) a false and defamatory statement concerning another was made which (2) constituted an unprivileged publication to a third party (3) with fault on the part of the publisher and (4) special harm caused by the publication. *Holtzscheiter v. Thomson Newspaper, Inc.*, 332 S.C. 502, 530, 506 S.E.2d 497, 513 (1998) (Toal, J., concurring). A communication is defamatory if it harms the reputation of another as to lower her in the estimation of the

community or to deter third persons from associating with her. *Id.* If it is obvious that the statement is defamatory, on its face alone, then the statement constitutes defamation *per se*. *Id.*, at 508-509, 506 S.E.2d at 513. Libel is actionable *per se* if the trial judge can assume, based on the nature of the statement, that the statement injured the plaintiff's reputation. *Parrish v. Allison*, 376 S.C. 308, 322, 656 S.E.2d 382, 389 (Ct. App. 2007). In contrast, slander is actionable *per se* only if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. *Id.* "It is established that a defamatory insinuation may be made by actions or conduct as well as by words." *Tyler v. Mack Stores of S.C., Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (S.C. 1980).

Considering the facts in the light most favorable to the Appellant, Appellant pled facts sufficient to overcome Respondent's motion to dismiss as to her defamation claim. Appellant pled that her discharge from SCDC was "widely known", including the reasons for her termination. (R. p. 11, lines 16-19). She pled that this publicity was the result of publications against her by Respondent concerning the events leading to and resulting in her termination. (R. p. 11, lines 20-23). Appellant further pled that these statements, as well as actions from which one could derive defamatory insinuation, amounted to defamation *per se* and in which malice is presumed. (R. p. 11, lines 16-19). Appellant pled that the Respondent's publications claimed and insinuated Appellant was incompetent or unsuitable for her business, job or profession. *Id.* Appellant pled special damages, proximately caused by Respondent's publications, and including

embarrassment humiliation, mental anguish, and reduced earning capacity. (R. p. 11. lines 20-23).

In light of the foregoing, Appellant respectfully requests that the lower court's order granting Respondent's motion to dismiss be reversed.

III. BECAUSE APPELLANT PLED THAT RESPONDENT INVESTIGATED THE DEATH OF INMATE MELTON THREE YEARS PRIOR TO TERMINATION AND DURING THOSE THREE YEARS GAVE APPELLANT NO INDICATION THAT HER JOB WAS IN JEOPARDY, AND IN FACT PROMOTED HER DURING THAT TIME, THE COURT ERRED IN FINDING THAT PLAINTIFF'S CAUSE OF ACTION FOR VIOLATIONS OF DUE PROCESS CANNOT GO FORWARD.

The order granting Respondent SCDC's motion to dismiss as to Appellant's cause of action for violations of due process should be reversed. Appellant pled facts sufficient on the face of the complaint to overcome Respondent SCDC's motion to dismiss as to Plaintiff's claim for due process. In its order granting SCDC's motion to dismiss, the Court found that because "the Plaintiff fails to state a claim for wrongful termination, *her remaining causes of action cannot go forward and are also dismissed.*" (R. p. 5) (*emphasis added*).

Article 1, Section 3 of the South Carolina Constitution states that no person shall "be deprived of life, liberty, or property without due process of law." Where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, *notice* and an opportunity to be heard are essential." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)(*emphasis added*). These two guarantees - notice and opportunity - exist even if the employee has no interest in continued employment. *Boston v. Webb*, 783 F.2d 1163 (4th Cir. 1986). In particular, procedural due process requires that an individual be given adequate notice to be heard in a *meaningful time in a meaningful*

way. *Sloan v. S.C. Bd. Of Physical Therapy Examiners*, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006) (emphasis added). Although “procedural due process requirements are not technical and no particular form of procedure is necessary,” *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003), in order to remain flexible “as the particular situation demands,” the circumstances of the present case on the face of the complaint meet the pleading requirements for a Due Process cause of action.

Nearly three years transpired between the death of inmate Howard Melton and Appellant’s termination from employment with SCDC. (R. p. 10, lines 1-3.) During the time between these two events, Appellant cooperated fully with both Defendant SCDC and SLED, and Plaintiff’s supervisor’s told her that she had done nothing wrong, leading Appellant to believe that her position with Respondent was secure. (R. p. 8, lines 14-18). During these three years, Appellant continued employment as a corrections officer with SCDC and even received a promotion from officer to sergeant. (R. p. 9, lines 14-19).

Further, it is unfair and inequitable to require stringent time lines for an employee to file a grievance through the grievance procedure with SCDC but allow Respondent an unlimited amount of time. Nor is it fair or equitable to terminate an employee on the basis of such an unnecessarily prolonged investigation where in intervening years the employee received a promotion, as did Appellant. (R. p. 10, lines 22-24) According to the Grievance Procedure Act, an employee must file his or her grievance within fourteen days of the incident giving rise to the grievance. S.C. Code Ann. §8-17-330 (1976). Upon filing of that grievance, the agency has forty-five days to issue a decision on the employment action. *Id.* These time limits reflect an underlying policy that employment grievance matters are best handled while the issue is recent in the minds of the grieving

employee, the employer, and any witnesses to the employment action taken. By failing to conclude the internal investigation of Appellant for three years, Appellant asks this court to find that Defendant acted without due care or even slight care.

That three years elapsed between the time of the incident with inmate Melton and Appellant's termination, even though she was given grievance rights following termination, deprived Appellant of a meaningful appeal. Thus, Appellant respectfully requests that Respondent SCDC's motion to dismiss her cause of action for violation of Due Process Rights be denied.

Conclusion

Based upon the foregoing, Appellant respectfully requests that the order of the lower court granting Respondent's motion to dismiss be reversed. In the alternative, Appellant respectfully requests the Court's Order granting Respondent's motion to dismiss be amended so as to allow Appellant to amend her complaint should the Court find that Appellant failed to adequately state a cause of action for a public policy discharge, defamation, or due process violation.

Respectfully Submitted,

J. Lewis Cromer & Associates, L.L.C.

BY: Julius W. Babb

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Plaintiff

Columbia, South Carolina
April 7, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

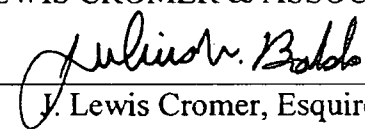
Of whom South Carolina Department of
Corrections is

Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Brief of Appellant complies with Rule 211(b).

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: 

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Plaintiff

April 9, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrects is

Respondent.

FINAL BRIEF OF RESPONDENT

Steven M. Pruitt
Hannah K. Metts
McDonald Patrick Poston Hemphill & Roper, LLC
PO Box 1547
Greenwood, SC 29648
(864) 229-2511
Attorneys for Respondents

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	2
Facts	3
Arguments	
I. THE LOWER COURT DID NOT ERR IN FINDING THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE	4
II. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM FOR DEFAMATION	7
III. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM FOR VIOLATION OF DUE PROCESS	8
Conclusion	9

TABLE OF AUTHORITIES

CASES

<u>Barron v. Labor Finders of S.C.</u> , 393 S.C. 609, 713 S.E.2d 634 (2011).....	4, 5
<u>Cameron & Barkley Co. v. S.C. Procurement Review Panel</u> , 317 S.C. 437, 454 S.E.2d 892 (1995).....	8
<u>Charleston Lumber Co. v. Miller Housing Corp.</u> , 338 S.C. 171, 525 S.E.2d 869 (2000)..	9
<u>Citizens' Bank v. Heyward</u> , 135 S.C. 190, 133 S.E. 709, 713 (1925).....	5
<u>Fleming v. Rose</u> , 350 S.C. 488, 567 S.E.2d 857 (2002).....	7
<u>Lawson v. S.C. Dep't of Corr.</u> , 340 S.C. 346, 532 S.E.2d 259 (2000).....	4
<u>Mathis v. Brown & Brown of S.C., Inc.</u> , 389 S.C. 299, 698 S.E.2d 773 (2010).....	4, 5, 6
<u>Morrissey v. Brewer</u> , 408 U.S. 47192 S.Ct. 2593, 33 L.Ed.2d 484 (1972).....	9
<u>S.C. Dep't of Soc. Servs. v. Wilson</u> , 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002).....	9
<u>Sloan Constr. Co., Inc., v. Southco Grassing, Inc.</u> , 377 S.C. 108, 659 S.E.2d 158 (2008).	4
<u>Stiles v. Onorato</u> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	4
<u>White v. Wilkerson</u> , 328 S.C. 179, 493 S.E.2d 345 (1997).....	7

STATUTES & RULES

South Carolina Constitution, Article 1, Section 3.....	8
S.C. Code Ann. § 24-1-130 (2007).....	5, 6
Rule 12(b)(6), SCRCF.....	4

STATEMENT OF ISSUES ON APPEAL

- I. THE LOWER COURT DID NOT ERR IN FINDING THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.
- II. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM FOR DEFAMATION.
- III. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM FOR VIOLATION OF DUE PROCESS.

STATEMENT OF THE CASE

On December 8, 2010, Ammie McNeil (hereinafter “Appellant”) filed a Complaint against South Carolina Department of Corrections (hereinafter “Respondent”) and Jon E. Ozmint, Robert Ward, and Bernard McKie, in their individual capacities. (R. p. 6). Appellant alleged causes of actions for public policy discharge, due process violation, negligence, gross negligence, and defamation against Respondent. (R. pp. 6-13). She also alleged a cause of action for civil conspiracy against Ozmint, Ward, and McKie. (R. pp. 12-13). On March 28, 2011, Respondent filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, and Respondent subsequently filed a Memorandum in Support of its Motion to Dismiss. (R. pp. 14-15, 17-20). On or about July 22, 2011, Appellant filed a Memorandum in Opposition to Respondent’s Motion to Dismiss. (R. pp. 22-31).

A hearing was held on Respondent’s Motion to Dismiss on July 27, 2011, before the Honorable Judge G. Thomas Cooper. Judge Cooper issued an Order granting Respondent’s Motion to Dismiss, which Order was filed on August 15, 2011. (R. pp. 2-5). Appellant filed a Motion for Reconsideration on August 22, 2011, and Judge Cooper denied the Motion for Reconsideration by Order filed October 11, 2011. (R. pp. 1, 32-34).

Appellant filed and served a Notice of Appeal on or about October 26, 2011.

FACTS

For purposes of this appeal on a motion to dismiss, Respondent is bound by the allegations of the Complaint, but Respondent reserves the right pending the resolution of this appeal to object to the facts as alleged in the Complaint. Appellant was an officer at Kirkland Reception and Evaluation Center ("Kirkland R&E"), which is a division of Respondent, in August of 2006. (R. p. 6 ¶¶ 1-2; p. 7 ¶ 6). On August 10, 2006, Howard Melton, an inmate being held by Spartanburg Detention Center, was transported to Perry Correctional Institution. Inmate Melton was thereafter transported to Kirkland R&E on August 11, 2006. (R. p. 7 ¶¶ 7-9). Appellant was on-duty and working at Kirkland R&E during the morning of August 11, 2006. Sometime between four a.m. and four forty-five a.m. on August 11, 2006, Melton committed suicide. When Appellant tried to rouse Melton for the four forty-five a.m. standing count, she discovered Melton was dead. (R. p. 8 ¶ 14). After the death of the inmate, Respondent as well as SLED conducted an investigation into the matter. (R. p. 8 ¶ 15). Inmate Melton's family also filed wrongful death lawsuits against Spartanburg County and Respondent. (R. pp. 8-9 ¶ 17). Appellant was deposed as part of those lawsuits. The wrongful death lawsuits were settled in or about July 2009. (R. p. 9 ¶ 18). Appellant's employment with Respondent continued through September 11, 2009, at which time she was terminated by Respondent. (R. p. 9 ¶ 21).

ARGUMENTS

I. THE LOWER COURT DID NOT ERR IN FINDING THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.

The lower court's order dismissing this case for failure to state a cause of action should be affirmed. When reviewing a dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Sloan Constr. Co., Inc., v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may only consider the facts of the complaint. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

South Carolina recognizes the doctrine of employment at-will, and in fact, employment is presumed at-will in South Carolina absent the creation of a specific contract of employment. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010). An at-will employee may be terminated at any time for good reason, no reason, or bad reason without liability to the employer. Id.; see also Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000). An at-will employee has a cause of action for wrongful termination "where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011). The public policy exception applies to situations where an employer requires an employee to violate the law and to situations where the reason for termination itself is a violation of the criminal law. Id. The Court in Barron found that the public policy exception is not limited to these two situations, but the exception has not yet been extended beyond these two situations. Id.

In her Complaint, Appellant does not plead that she was a contractual employee of Respondent. Therefore, it is presumed that Appellant was an at-will employee of Respondent. Mathis, 389 S.C. at 310, 698 S.E.2d at 778. As an at-will employee, Respondent could terminate Appellant for no reason or for any reason, good or bad, without liability. Id. In order for the discharge to be actionable it must be retaliatory and it must have violated a clear mandate of public policy. Barron, 393 S.C. at 614, 713 S.E.2d at 637. As the Supreme Court recently held in Barron, the determination of what constitutes public policy is a question of law for the Court to decide and is not a function of the jury. Id. at 617, 713 S.E.2d at 638.

Appellant does not allege that she was terminated because Respondent required her to violate a law, nor does she allege that her termination violated the law. Also, Appellant does not allege in her Complaint that her termination was retaliatory, but instead alleges that Respondent terminated her because of her alleged negligence at the time of inmate Melton's death and for "personal, political, pretextual or scapegoating reasons." None of these reasons are retaliatory or in violation of the clear public policy of this State, and thus Appellant has failed to allege sufficient facts to state a cause of action against Respondent for wrongful discharge.

The Supreme Court has held that "[t]he primary source of the declaration of the public policy of the state is the General Assembly. . . ." Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925). Appellant fails to mention any rules, regulations, or statutes that set forth a clear mandate of public policy in her Complaint. In her Brief, Appellant does not cite to any regulations and laws concerning the employment or treatment of employees in prisons. Appellant, however, cites to S.C. Code Ann. § 24-1-

130 (2007), which vests the Director of the Department of Corrections with the management and control of the prison system and specifically directs that the Director shall be responsible “for the proper care, treatment, feeding, clothing, and management of the prisoners confined therein.” Contrary to Appellant’s allegations, this statutory provision does not provide a clear public policy mandate concerning the employment or treatment of employees who work in prisons.

The only alleged statutory support for Appellant’s claim of wrongful discharge is Section 24-1-130. Although Section 24-1-130 may have been applicable to a wrongful death action by a prisoner’s family, it does not apply to the wrongful termination claim made by Appellant. Furthermore, Appellant fails to raise this allegation in her Complaint, and therefore it should not be considered on a motion to dismiss. There is no statute or law that states that an at-will employee cannot be terminated for “personal, political pretextual, or scapegoating reasons.” The Court has held exactly the opposite in repeatedly finding that an at-will employee may be terminated for good reason, bad reason, or no reason at all without liability. Mathis, 389 S.C. at 310, 698 S.E.2d at 778.

The determination of what constitutes public policy is a question of law for the Court to decide, and thus it was appropriate for the lower court to decide this matter on a motion to dismiss. Appellant has failed to allege that her termination as an at-will employee of Respondent was retaliatory or was in violation of a clear mandate of public policy. Appellant has failed to state a claim for wrongful discharged based on the public policy exception. To find otherwise based on the facts alleged in Appellant’s Complaint would have a chilling effect on at-will employment in this State. An employer can terminate an at-will employee, such as Appellant, for no reason, good reason, or bad

reason without liability, and Appellant does not allege sufficient facts in her Complaint to implicate the public policy exception to the at-will employment law. Accordingly, this Court must affirm the lower court's grant of Respondent's Motion to Dismiss the case.

II. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM FOR DEFAMATION.

Clearly Appellant was not wrongfully terminated by Respondent and because the lower court properly found Appellant failed to state a claim for wrongful termination, the lower court did not err in also dismissing Appellant's claim for defamation. Because Appellant was properly terminated by Respondent, Appellant cannot pursue a defamation action against Respondent based on her discharge. Appellant alleges that Respondent terminated her because of alleged negligence on her part at the time of inmate Melton's death. (R. p. 9 ¶ 20).

An action for defamation requires a plaintiff to show the defendant made and published a false or defamatory statement that was unprivileged to a third person that injured the plaintiff's reputation. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). First, Appellant's action must be dismissed because Appellant has failed to state a claim for wrongful discharge. If Appellant fails to state a claim for wrongful discharge, then her claim for defamation cannot proceed because Respondent did not act wrongfully. Second, in her Complaint, Appellant fails to allege that any statements made by Respondent were unprivileged and further fails to allege that any statements made by Respondent were published to a third party. The mere fact of termination does not equate to publication to a third party. Appellant does not allege in her Complaint how Respondent allegedly communicated her termination to third parties or specifically to

whom Respondent made these alleged communications. Although Appellant alleges that her termination was widely known in the community, Appellant does not allege that Respondent conveyed or publicized her termination to any third party. Furthermore, the Appellant alleged in her Complaint that Respondent made a false statement, but failed to set forth what the false statement was with any specificity and further failed to set forth with any specificity what were the alleged “publications, re-publications, writings, words, and actions” made by Respondent. Therefore, Appellant’s claim for defamation must be dismissed because Appellant has failed to allege facts sufficient to state a claim for defamation.

III. THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT’S CLAIM FOR VIOLATION OF DUE PROCESS.

The Appellant has failed to allege sufficient facts to state a claim for violation of due process because she was not wrongfully terminated by Respondent, and the lower court’s order dismissing her case must be affirmed. Article 1, Section 3 of the South Carolina Constitution requires that “no person shall be deprived of life, liberty, or property without due process of law.” Procedural due process requires notice and opportunity to be heard. Cameron & Barkley Co. v. S.C. Procurement Review Panel, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995). Appellant fails to allege that she was not given notice of her termination, and she fails to allege that she was not given an opportunity to be heard regarding her termination. (R. p. 10 ¶¶ 23-25). In fact, Appellant admits that “she was given her grievance rights following her termination.” (Appellant’s Final Brief, p. 11). Appellant argues in her Brief that it was unfair and inequitable for Respondent to terminate her three years after the death of inmate Melton and that Respondent acted without even slight care. Due process is not a negligence standard of

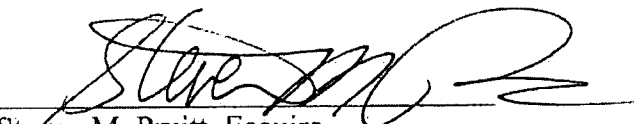
due care or slight care, nor is it an equitable standard as Appellant argues in her Brief. Due Process requires that an individual be given adequate notice to be heard and an opportunity to be heard. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” S.C. Dep’t of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). Regardless of the time lapse between the death of inmate Melton’s death and the termination of Appellant, at no point does Appellant claim that she did not receive notice or an opportunity to be heard. To the contrary, Appellant, by her own admission, was afforded her grievance rights and was given notice and an opportunity to be heard. Appellant’s due process rights were not violated, and the lower court properly dismissed Appellant’s claim for violation of due process.

CONCLUSION

For the reasons stated, the Court should affirm the lower court’s order granting Respondent’s Motion to Dismiss this case. Also, Appellant failed to appeal the dismissal of her claims for negligence and gross negligence, and therefore the lower court’s dismissal of those claims is the law of the case. Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 872 (2000) (finding that an unappealed ruling is the law of the case).

Respectfully submitted,

April 12 2012



Steven M. Pruitt, Esquire
Hannah K. Metts, Esquire
McDonald Patrick Poston Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 388-1014
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department
of Corrections and Jon E.
Ozmint, Robert Ward and
Bernard McKie in their
individual capacities,

Defendants,

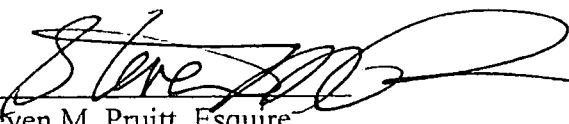
Of whom South Carolina
Department of Corrections is

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 12, 2012


Steven M. Pruitt, Esquire
Hannah K. Metts, Esquire
McDonald Patrick Poston Hemphill & Roper, LLC
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 388-1014
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants.

Of whom South Carolina Department of
Corrections is

Respondent.

FINAL REPLY BRIEF OF APPELLANT

J. Lewis Cromer & Associates, L.L.C.
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Appellant

RECEIVED
APR 10 2012
SC Court of Appeals

TABLE OF CONTENTS

Title Page	i
Table of Contents	ii
Table of Authorities	ii
Argument	i
I. APPELLANT’S CLAIM FOR PUBLIC POLICY DISCHARGE PRESENTS A NOVEL ISSUE OF LAW AND FACT AND AS SUCH, HER PUBLIC POLICY DISCHARGE CLAIM SHOULD BE RECOGNIZED BY THE COURT AND THE UNDERLYING FACTS SUBMITTED TO A JURY.....	1
II. THE LOWER COURT ERRED IN DISMISSING APPELLANT’S CLAIM FOR DEFAMATION.....	3
III. THE LOWER COURT ERRED IN DISMISSING APPELLANT’S CLAIM FOR VIOLATION OF DUE PROCESS.....	4
Conclusion	4

TABLE OF AUTHORITIES

Cases

<i>Citizens' Bank v. Heyward</i> , 135 S.C. 190, 133 S.E. 709 (1925)	1
<i>Barron v. Labor Finders of S.C.</i> , 393 S.C. 346, 532 S.E.2d 259 (2000)	2
<i>Garner v. Morrison Knudsen Corp.</i> , 318 S.C. 223, 456 S.E.2d 907 (1995)	2

Statutes

Rule 12(b)(6), SCRCF	3
S.C. Code Ann. § 24-1-130 (2007)	1, 2

ARGUMENT

- I. APPELLANT'S CLAIM FOR PUBLIC POLICY DISCHARGE PRESENTS A NOVEL ISSUE OF LAW AND FACT AND AS SUCH, HER PUBLIC POLICY DISCHARGE CLAIM SHOULD BE RECOGNIZED BY THE COURT AND THE UNDERLYING FACTS SUBMITTED TO A JURY.

Respondent correctly submits that the General Assembly is the primary source of the declaration of public policy in South Carolina. *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925). Appellant articulates such a declaration in support of her argument for public policy discharge. While S.C. Code Ann. § 24-1-130 (2007) does not speak directly to employees of the state's prisons, it does dictate that the Director of the Department of Corrections manage and control the prisons by providing the prisoners with "proper care" and "treatment". Explicit in this declaration is a charge to the Director to provide proper staffing and supervision to those incarcerated by the State. *Implicit* in this charge is to provide proper staffing for the safety of everyone incarcerated or working in one of Respondent's facilities. Without proper staffing and supervision, Respondent's employees cannot adequately perform their jobs, and, as a result, the prisoners are not properly treated or cared for.

As Appellant noted in her initial brief, prior to inmate Melton's death, the event giving rise to Appellant's eventual termination, Appellant and other members of the staff at Respondent's facility, Kirkland R & E, made requests for additional staff members on the basis that Appellant and her co-workers had inadequate resources to properly and safely perform their duties given the number of prisoners and the size of the area they were required to supervised. (R. p. 8, lines 6-8). Thus, prior to inmate Melton's death, Appellant and other members of Respondent's workforce put Respondent on notice that there were concerns regarding the proper care and treatment of prisoners. These staffing requests went unheeded. (R. p. 8, lines 6-8).

Respondent overlooks the facts giving rise to Appellant's termination in light of the legislatively articulated policy at issue here – the safety of prisoners – placed in the hands of Respondent's Director by the Assembly. Appellant, who pled that she reported understaffing prior to the incident with inmate Melton and cooperated fully with Respondent's investigation and in the civil suit with inmate Melton's family that followed, was promoted by Respondent in the time between inmate Melton's death and her termination nearly two years later. (R. p. 8, lines 6-8, 14-18, 22-23-p. 9, lines 1-5). No new facts or circumstances occurred or became known to Respondent during this intervening time. (R. p. 9, lines 2-5). While Respondent claims that S.C. Code Ann. § 24-1-130 provides Plaintiff no basis for an exception to at-will employment, Appellant contends that Respondent terminated Appellant for its own failure, and the resulting settlement following a lawsuit because of that failure, under this statute.

Respondent incorrectly contends that the statute cited above and in Appellant's initial brief, while providing relief for a wrongful death action, is inapposite here. Appellant contends that the situation presented by her case, while novel, is the type of case contemplated by the Court in *Barron v. Labor Finders of S.C.*, 393 S.C. 346, 532 S.E.2d 259 (2000). In *Barron*, as Respondent notes, the Court held that while the public policy exception applies where an employer requires an employee to violate the law and in situations where the reason for termination is itself a violation of criminal law, the exception is not limited to those two narrow scenarios. In support of this contention, the *Barron* court cited to *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 456 S.E.2d 907 (1995), a case given by Appellant in support of her argument. Respondent ignores the support lent to Appellant by the *Garner* decision, both in its general premise that the law is not the only articulation of public policy and also that novel issues of law and fact should not be summarily dismissed in

public policy discharge cases until the facts are further developed, or more specifically pursuant to a SCRCF Rule 12(b) (6) motion.

While Appellant, as Respondent states, did not plead specifically that the discharge was “retaliatory”, Appellant pled facts and utilized language synonymous with the term. Appellant pled that she was terminated for “personal, political, pretextual and scapegoating purposes”. (R. p. 10, lines 4-8).

II. THE LOWER COURT ERRED IN DISMISSING APPELLANT’S CLAIM FOR DEFAMATION.

Appellant’s claim for defamation is properly pled in the Complaint, thus the lower court erred in dismissing the defamation claim. The Respondent argues, in support of the lower court’s decision, that Appellant cannot pursue a defamation action based on her termination because the lower court found she failed to state a cause of action for wrongful termination. First, the Appellant argues that she did properly plead the wrongful termination claim and that the lower court erred in dismissing the same. Second, even if the lower court properly dismissed the wrongful termination claim, the defamation claim was still properly pled and is an independent cause of action. A finding that a wrongful termination claim should be dismissed does not automatically kill the defamation action nor factually establish that there was no wrongful conduct on behalf of Respondent as it relates to the defamation claim.

Appellant properly pled the defamation claim in her Complaint. Appellant alleges that the discharge and alleged reasons for the same were widely known in the community; which was published by Respondent through their actions relating to the termination as well as through their communications. (R. p. 11, lines 13-19). The referenced community includes non-employees and coworkers, who are third parties that have no reason to know the information nor privilege

protecting the publication. Accordingly, Appellant respectfully requests that the lower court's order granting Respondent's motion to dismiss be reversed.

III. THE LOWER COURT ERRED IN DISMISSING APPELLANT'S CLAIM FOR VIOLATION OF DUE PROCESS.

Appellant properly pled a cause of action for violation of due process in her Complaint. The Complaint alleges that the three year delay violates due process. (R. p. 10, lines 16-24-p. 11, lines 1-4). The Respondent failed to give notice for three years even though the facts were known in 2006 that were used as a basis for the discharge. *Id.* Moreover, the Respondent failed to conduct an investigation in a timely manner. Appellant respectfully requests that the lower court's order granting Respondent's motion to dismiss be reversed. *Id.*

CONCLUSION

Based upon the foregoing, as well as the Appellant's Brief submitted, Appellant respectfully requests that the Trial Court's order granting the Respondent's Motion to Dismiss be reversed. In the alternative, Appellant respectfully requests that she be permitted to amend the Complaint should the Court find that she failed to adequately plead her causes of action.

[Signature Block on Following Page]

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: Julius W. Babb
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Plaintiff

Columbia, South Carolina
April 7, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrections is

Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Brief of Appellant complies with Rule 211(b).

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: Julius W. Babb

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Plaintiff

April 9, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ammie McNeil, Appellant,

v.

South Carolina Department of Corrections and Jon E.
Ozmint, Robert Ward, and Bernard McKie in their
individual capacities, Defendants,

Of whom South Carolina Department of Corrections is
the Respondent.

Appellate Case No. 2011-202887

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5122
Heard October 30, 2012 – Filed May 1, 2013

AFFIRMED

J. Lewis Cromer and Julius Wistar Babb, IV, both of J.
Lewis Cromer & Associates, LLC, of Columbia, for
Appellant.

Steven Michael Pruitt and Hannah K. Metts, both of
McDonald Patrick Poston Hemphill & Roper, LLC, of
Greenwood, for Respondent.

SHORT, J.: Ammie McNeil appeals from the trial court's order granting the South Carolina Department of Corrections' (SCDC) motion to dismiss her claims for due process violations, public policy discharge, and defamation. We affirm.

FACTS

SCDC employed McNeil at Kirkland Reception and Evaluation Center (Kirkland) as a captain. SCDC maintains custody of, exercises control of, and provides for the care of inmates and prisoners incarcerated by the state, including Kirkland, which is located in Richland County. An inmate, who was prescribed hypertrophic medication for threatening suicide, was transported to Kirkland, and despite his request for his medication, he did not receive it. McNeil claimed she was not made aware of the inmate's prescribed medication when he arrived at Kirkland. Even though the inmate was a known suicide risk, he was not placed in a cell with a closed-circuit camera as required. On the night of the incident, only McNeil and one other officer were on duty in violation of Kirkland's regulations requiring four to six officers. Sometime between 4 and 4:45 a.m. on August 11, 2006, the inmate committed suicide by stuffing toilet paper in his mouth and nose, asphyxiating himself. McNeil made this discovery when she tried to rouse the inmate for the 4:45 a.m. standing count.

SCDC performed an internal investigation as to the inmate's death and asked SLED (State Law Enforcement Division) to perform its own investigation. Thereafter, McNeil was cleared of any responsibility for the inmate's death and was promoted to sergeant in November 2008. In December 2007, the inmate's family filed a wrongful death lawsuit against SCDC. The case was mediated and settled in July 2009. In September 2009, McNeil was terminated because of alleged negligence in her duties at the time of the inmate's death and falsification of documents after his suicide.

On December 8, 2010, McNeil filed a complaint against SCDC, and SCDC Director Jon Ozmint, SCDC Director of Operations Robert Ward, and Kirkland Warden Bernard McKie, in their individual capacities.¹ Her complaint alleged causes of action for due process violations, public policy discharge, negligence, gross negligence, defamation, and civil conspiracy. McNeil claimed that because of the large settlement and the high scrutiny placed on them, Ozmint, Ward, and McKie "feared pressure from the media and certain legislators resulting in an

¹ SCDC is the only respondent in this appeal.

agenda to find a scapegoat or to punish someone to take the pressure off of themselves."

SCDC filed a motion to dismiss McNeil's claims on March 28, 2011, alleging she failed to state a cause of action for which relief can be granted. After a hearing on the matter, on August 15, 2011, the trial court issued its order granting SCDC's motion to dismiss McNeil's claims. The order notes McNeil alleged in her complaint "she was terminated for 'personal, political, pretextual, and scapegoating purposes' in violation of public policy." However, the court explained, "South Carolina has long recognized the doctrine of employment at-will, such that an employer may terminate an employee for good reason, no reason, or bad reason without liability." Further, the court stated McNeil "does not dispute that she was an at-will employee and even if she was terminated for personal reasons or as a scapegoat as she alleges, she still fails to state a claim and her action must be dismissed." Additionally, the court noted McNeil neither alleged her discharge was in violation of any statute or act by the General Assembly, nor cited to a South Carolina case that has found a violation of public policy without a violation of a statute or act by the General Assembly. As a result of failing to state a claim for wrongful termination, the court found her remaining causes of action could not go forward and must be dismissed.² McNeil filed a Rule 59(e), SCRCF, motion, which the court denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF, this court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Id.* The court should not dismiss the complaint merely because it doubts the plaintiff will prevail in the action. *Id.*

² McNeil did not appeal the dismissal of her claims for negligence and gross negligence; therefore, the trial court's dismissal of these claims is the law of the case.

LAW/ANALYSIS

I. Public Policy Discharge

McNeil argues the trial court erred in finding she failed to state a claim for public policy discharge on the face of her complaint because she pled she was terminated after complaining about institutional safety violations and testifying after being subpoenaed in a civil trial. We disagree.

"An at-will employee may be terminated at any time for any reason or for no reason, with or without cause." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). "Under the 'public policy exception' to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *Id.* at 614, 713 S.E.2d at 637. "The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925); *see Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (stating the determination of what constitutes public policy for purposes of the public policy exception to the at-will employment doctrine is a question of law for the courts to decide). "The public policy exception clearly applies in cases where either (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law." *Barron*, 393 S.C. at 614, 713 S.E.2d at 637; *see Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (holding the public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law); *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 246, 422 S.E.2d 91, 93 (1992) (finding employee would have a cause of action for wrongful discharge if he was discharged because he refused to contribute to a political action fund). The *Barron* court found the public policy exception is not limited to these two situations; however, the exception has not yet been extended beyond them. 393 at 614, 713 S.E.2d at 637.

As the dissent notes, in two cases for wrongful termination based on the public policy exception, our courts have reversed the trial court's dismissal pursuant to a 12(b)(6) motion because the allegations were novel and deserved further development of the facts. We find these cases are distinguishable from this case.

In *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 223, 456 S.E.2d 907, 908 (1995), the employee alleged his employer terminated him in retaliation for reporting to the United States Department of Energy and the news media his concerns about radioactive contamination and unsafe working conditions at the Savannah River Site and for voluntarily testifying about his concerns before the Defense Nuclear Facilities Safety Board. Our supreme court held the trial court's dismissal of the employee's wrongful discharge action based on the public policy exception to the employment at-will doctrine for failure to state a claim was inappropriate when the employee alleged his employment was terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at the nuclear facility. *Id.* at 226-27, 456 S.E.2d at 909-10. The court stated "[w]hether the [public policy] exception applies when an employee is terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at a nuclear facility is a novel issue, and such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss." *Id.* at 226, 456 S.E.2d at 909. We find *Garner* to be distinguishable because the existence of radioactive contamination and unsafe working conditions is a matter of public interest and public policy, and the employee specifically alleged his termination was in retaliation for reporting his concerns to the proper authorities.

In *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 370, 482 S.E.2d 792, 793 (Ct. App. 1997), the employee alleged her employer terminated her employment in retaliation for reporting her concerns to the South Carolina Department of Labor about violations of state and federal labor laws for reducing her pay without prior notice. The employee told the manager she had contacted the state labor board and, based on the advice she had received, if the violations were not corrected immediately, she would file a formal complaint with the labor board. *Id.* This court held whether an employer's retaliatory discharge of an employee who threatened to invoke her rights under the Payment of Wages Act was a violation of a clear mandate of public policy and was a novel issue; therefore, the trial court erred in dismissing the employee's cause of action pursuant to a Rule 12(b)(6) motion. *Id.* at 373, 482 S.E.2d at 794. We find *Keiger* to be distinguishable because a violation of the Payment of Wages Act is a violation of a clear mandate of public policy, and the employee specifically alleged her termination was in retaliation for reporting her concerns to the proper authorities.

McNeil's complaint does not contend SCDC demanded she violate a law or her termination violated any law. Her complaint also does not state sufficient facts

from which a court could determine a violation of any public policy. McNeil merely alleges SCDC terminated her for personal, political, pretextual, and scapegoating purposes. She does not allege her termination was retaliatory. The dissent finds the trial court failed to consider whether this case poses a novel issue and whether the facts should have been developed further before the motion to dismiss was granted. On the contrary, the learned trial court found McNeil's allegations that she was discharged for personal, pretextual, and scapegoating purposes was insufficient to state a violation of the public policy of South Carolina because our law provides an at-will employee may be terminated for a good reason, bad reason, or no reason at all. Simply stated, a litigant must allege more than a general statement that her discharge violated public policy. The complaint must set forth specific allegations that would enable the court to determine what public policy was violated. By the dissent's interpretation of our law, any employee could circumvent the employment at-will doctrine by merely asserting a termination was retaliatory in violation of a clear mandate of public policy and contend it was a novel issue in this state. This would be contrary to the public policy exception recognized by our courts. Therefore, we find McNeil's general allegations do not support a wrongful discharge action, and the trial court did not err in dismissing her cause of action.

II. Due Process Violation

McNeil argues the trial court erred in finding her cause of action for violations of due process against SCDC could not proceed because SCDC investigated the inmate's death three years prior to her termination and during those three years did not give her any indication her job was in jeopardy. We disagree.

"Procedural due process requires notice and the opportunity to be heard." *Cameron & Barkley Co. v. S.C. Procurement Review Panel*, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995). "Ordinarily, a claimant is not entitled to substantive due process when her state employment is terminated unless she has a property interest in continued employment." *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 524-25, 319 S.E.2d 717, 721 (Ct. App. 1984). "[A] property interest in employment can be found in existing state law; in contracts, express or implied; or in mutually explicit understandings." *Id.* at 525, 319 S.E.2d at 721.

McNeil does not allege she was not given an opportunity to be heard regarding her termination. In fact, McNeil admits "she was given her grievance rights following her termination." McNeil also has not provided any state law or regulation that

would require her employment contract to be renewed, she does not claim her contract guarantees future employment, and she does not allege she and SCDC had a "mutually explicit understanding" that her contract would be renewed. The mere fact that McNeil's employment contract had been renewed twice in the past is not sufficient to create a protected property interest in her continued employment. *See Hamilton*, 282 S.C. at 526, 319 S.E.2d at 722. Therefore, we find McNeil's allegations do not support an action for violation of due process, and the trial court did not err in dismissing her cause of action.

III. Defamation

McNeil argues the trial court erred in finding her defamation claim against SCDC could not proceed because she pled SCDC made and published statements that insinuated she was unfit in her business and profession. We disagree.

"The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001).

McNeil did not allege any of SCDC's statements were unprivileged, and she did not set forth with any specificity what the alleged false statements were. She also did not allege any of the statements were published to a third party or that SCDC made the alleged statements. Additionally, she did not assert to whom SCDC made the alleged statements. Therefore, we find McNeil's allegations do not support an action for defamation, and the trial court did not err in dismissing her cause of action.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, J., concurring in part and dissenting in part.

I respectfully dissent only as to the majority's decision to affirm the trial court's dismissal as to McNeil's public policy discharge claim.

In South Carolina, an at-will employee may be terminated for any reason or no reason at all. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). Our supreme court recognized an exception to this doctrine in *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985). Under the "public policy exception" to the at-will employment doctrine, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216. Our supreme court has determined the public policy exception clearly applies in cases in which either: (1) the employer requires the employee to violate the law; or (2) the reason for the employee's termination itself is a violation of criminal law. *See id.*; *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 246, 422 S.E.2d 91, 92-93 (1992). These two situations seem to have been the sole focus of the trial court.

While the trial court and, to some extent, the majority, seem focused on only these two situations, our supreme court has made clear the public policy exception is not limited to only these situations. *See Barron*, 393 S.C. at 614, 713 S.E.2d at 637 (holding the public policy exception was not limited to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law). In fact, in at least two cases our courts have reversed trial court grants of Rule 12(b)(6), SCRCF motions on wrongful termination claims based on the public policy exception because the allegations were novel and deserved further development of the facts. *See Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995); *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 373, 482 S.E.2d 792, 794 (Ct. App. 1997). In addition, our supreme court has also held that when there is a statutory remedy for wrongful termination, the public policy exception does not apply. *See Barron*, 393 S.C. at 615, 713 S.E.2d at 637.

Consequently, the public policy exception has developed beyond just a consideration of whether the termination was due to an employee refusing to violate the law or the termination itself was a violation of the law. Here, however, it appears the trial court only considered these two situations when it granted SCDC's Rule 12(b)(6) motion. The trial court elucidated the basis for its decision in the following passage:

[McNeil] points to no violation of any statute or act by the General Assembly, but as stated above claims that her discharge was for "personal, pretextual and scapegoating purposes." [McNeil] also points to no case in this state that has found a violation of public policy without a violation of a statute or act by the General Assembly. For these reasons, the Court finds that [McNeil] fails to allege a violation of a clear mandate of public policy.

The trial court failed to consider whether this case posed a novel issue and whether the facts should have been developed further. In addition, the trial court did not consider whether a statutory remedy for wrongful discharge justifying the dismissal of McNeil's case existed. Although the trial court and the majority both mentioned the public policy exception is not limited to the two situations stated above, they noted no court has extended the public policy exception beyond them.

The majority relies heavily on *Barron* in affirming the trial court's decision. Respectfully, I read *Barron* as making clear the public policy exception is not limited to situations in which an employee was required to break the law or the termination itself was a violation of the law. Further, *Barron* declares solidly that the decision of whether there was a violation of a clear mandate of public policy is a question of law for the court and not a jury. It is interesting that *Barron* makes a strong effort to clarify that the public policy exception is not limited to the two stated situations, yet the majority cites it while affirming a decision limited to those situations.

To be clear, I do not interpret our law as holding mere allegations of a termination of an at-will employee in violation of a clear mandate of public policy are sufficient to avoid the grant of a Rule 12(b)(6) motion. The court should permit the facts to be developed only when there is an issue that, based on guidance from previous cases, is sufficiently novel to at least permit some discovery before summarily dismissing the action. In this case, McNeil intimates that her compliance with a subpoena and testimony at a deposition angered SCDC. In her complaint, McNeil asserts she was terminated as a scapegoat to relieve legislative pressure on SCDC officials. She alleges she was terminated although SCDC knew she had done nothing wrong and had promoted her subsequent to the incident in question. McNeil has alleged enough to at least raise the issue of a retaliatory termination. The trial court held that even if her allegations were true, she did not state a viable cause of action for a violation of a clear mandate of public policy.

The majority decision, in upholding the trial court, seems to be based on the conclusion that McNeil must allege that she was required to break the law, that her termination was a violation of law, or that the facts of this case are identical to previous cases in this area. I do not interpret the law to be so limited. The issues raised by McNeil are sufficiently novel, and she deserves at least an opportunity to develop the facts. Obviously, the facts here are not the same as in *Garner* or *Keiger*, but then again if they were then they would not meet the definition of novel. Indeed, both *Garner* and *Keiger* involved different fact situations.

I would reverse the trial court as to this issue only and remand for further proceedings. This in no way implies any evidence has been presented that would justify a cause of action for termination in clear violation of public policy. Further, it could very well be that McNeil's action is dismissed by summary judgment or some other action, but prior decisions by our courts hold she at least deserves an opportunity to develop the facts. Thereafter, the trial court, as is required, should make a ruling as a matter of law if the facts warrant the continuation of McNeil's cause of action.

For the above reasons, I respectfully concur in part and dissent in part.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant/Petitioner,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities,

Defendants,

Of whom South Carolina Department of
Corrections is

Respondent.

PETITION FOR REHEARING

J. Lewis Cromer & Associates, L.L.C.
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Appellant

TABLE OF CONTENTS

Title Page i

Table of Contents..... ii

Table of Authorities ii

Argument 1

 I. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT
 APPELLANT’S PUBLIC POLICY DISCHARGE CLAIM IS SUFFICIENTLY
 PLED AND ESTABLISHES A NOVEL ISSUE OF STATE LAW AND WAS
 IMPROPERLY DISMISSED. 1

 II. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT
 APPELLANT’S DEFAMATION CLAIM IS PROPERLY PLED AND SHOULD
 NOT HAVE BEEN DISMISSED. 4

Conclusion 6

TABLE OF AUTHORITIES

Cases

<u>Baird v. Charleston County</u> , 333 S.C. 519, 511 S.E.2d 69 (1999)	2
<u>Barron v. Labor Finders of S.C.</u> , 393 S.C. 609, 713 S.E.2d 637 (2000)	1
<u>Erickson v. Jones Street Publishers, L.L.C.</u> , 368 S.C. 444, 629 S.E.2d 653 (2006).	4
<u>Eubanks v. Smith</u> , 292 S.C. 57, 354 S.E.2d 898 (1987).....	5
<u>Garner v. Morrison Knudsen Corp.</u> , 318 S.C. 223, 456 S.E.2d 907 (1995).....	3
<u>Gentry v. Yonce</u> , 337 S.C. 1, 522 S.E.2d 137 (1999).....	2
<u>Holtzchieter v. Thomson Newspapers, Inc.</u> , 332 S.C. 502, 506 S.E.2d 497 (1998).....	5
<u>Jones v. Garner</u> , 250 S.C. 479, 158 S.E.2d 909 (1968)	6
<u>Keiger v. Citgo, Coastal Petroleum, Inc.</u> , 326 S.C. 369, 482 S.E.2d 792 (Ct.App. 1997)	3
<u>Manley v. Manley</u> , 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987)	5
<u>McNeil v. S.C. Department of Corrections</u> , Op. No. 5122 (S.C.Ct.App. filed May 1, 2013).....	1
<u>Murray v. Holnam, Inc.</u> , 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001)	5
<u>Padgett v. Sun News</u> , 278 S.C. 26, 292 S.E.2d 30 (1982).....	5
<u>Stiles v. Onorato</u> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	2
<u>Tyler v. Macks Stores of S.C., Inc.</u> , 275 S.C. 456, 272 S.E.2d 633 (1980)	5
<u>Wilhoit v. WCSC, Inc.</u> , 293 S.C. 34, 358 S.E.2d 397 (Ct.App. 1987).....	5

Statutes

Rule 12(b)(6), SCRCF	2
Rule 221, SCACR.....	1
S.C. Code Ann. § 24-1-130 (1993).....	3

Pursuant to Rule 221, SCACR, Appellant/Petitioner, Ammie McNeil, respectfully petitions the Court for rehearing on the Opinion filed on May 1, 2013, affirming the trial court's order to dismiss Appellant's claims against the South Carolina Department of Corrections ("Respondent" or "SCDC"). Appellant believes the subject Opinion overlooked or misapprehended points as to both the underlying public policy discharge claim and defamation claim.

ARGUMENT

I. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT APPELLANT'S PUBLIC POLICY DISCHARGE CLAIM IS SUFFICIENTLY PLED AND ESTABLISHES A NOVEL ISSUE OF STATE LAW AND WAS IMPROPERLY DISMISSED.

The Appellant's complaint is sufficiently pled in a manner that shows there is a novel issue worthy of factual development. The Appellant agrees with the dissent in subject Opinion which states, "While the trial court and, to some extent, the majority, seem focused on only these two situations, our supreme court has made clear the public policy exception is not limited to only these situations." McNeil v. S.C. Department of Corrections, Op. No. 5122 (S.C.Ct.App. filed May 1, 2013) (citing Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 637 (2000)). The South Carolina Supreme Court took the opportunity in *Barron* to not only address the case at hand, but to give the courts clear direction that public policy discharge is not limited to only the two recognized exceptions that have been determined to clearly apply. As the majority in the subject Opinion notes, the public policy exception has not yet been extended beyond the two recognized situations since the *Barron* decision. However, this should not deter the Court from allowing factual development of the novel issue. If anything, the instruction by our supreme court in *Barron* that public policy discharge is not so limited combined with the unexplored landscape of public policy discharge speaks to the heart of why this issue is truly novel and worthy of further factual development.

Upon review of a Rule 12(b)(6), SCRCF motion to dismiss, the facts and inferences reasonably drawn therefrom should be viewed in the light most favorable to the plaintiff and consider whether the pleadings articulate any valid claim for relief; and the Rule 12(b)(6) motion to dismiss should be denied if such analysis would entitle the plaintiff to relief on any theory of the case. See Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); and Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

The complaint alleges that Appellant did not receive appropriate notice of the inmate's suicidal condition and medication; that the inmate was not placed in an appropriate cell with closed circuit television as was required by regulation for suicidal inmates; that only Appellant and one other officer were in the unit despite regulations and directives mandating four to six officers; that Appellant and others have repeatedly requested assistance but none was given; that Appellant was interviewed and questioned by SLED and SCDC and initially cleared of any wrongdoing and even received a subsequent promotion; that the family of the deceased inmate then filed a wrongful death lawsuit to which Appellant testified in a deposition; that the case was scheduled for trial in July 2009; that the case settled prior to trial for a large sum of money; that SCDC and the upper management feared reprisal from the media and legislators because of the lawsuit and used Appellant as a scapegoat; and that the Appellant was suspended immediately after the lawsuit settled and shortly thereafter terminated in September 2009. (R. pp. 7-9). The complaint then alleges that the defendant punished and terminated the plaintiff for "personal, political, pretextual and scapegoating reasons" which violate the public policy of South Carolina. (R. pp. 9-10).

The pled allegations and reasonable inferences drawn therefrom are more than sufficient to survive a Rule 12(b)(6) motion to dismiss. The complaint describes how Appellant was initially

cleared of wrongdoing; that she then testified in compliance with a subpoena/deposition in the wrongful death suit; and that she was suspended immediately after the lawsuit settled on the eve of trial and soon thereafter terminated. It is clearly inferred that she was retaliated against for such compliance and testimony. Moreover, it is reasonable to infer that the failures by Respondent alleged in the complaint are in violation of S.C. Code Ann. § 24-1-130 (1993), which charges the director of SCDC with the responsibility “for the proper care, treatment, feeding, clothing, and management of the prisoners confined therein.” Retaliating against Appellant for testifying as to these matters and in an effort to scapegoat her to remove the spotlight from their own failures would indeed be in violation of this clearly mandated public policy as well as public policy relating to compliance with subpoenas, testifying under oath in a deposition, and compliance of individuals with investigations by SLED and internal investigations by a state agency. Based on the foregoing, these issues are clearly novel and worthy of further development of facts.

While both the *Garner* and *Keiger* cases each have their own unique set of facts, that assertion only strengthens the argument that this issue is novel. See generally, Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct.App. 1997). In both cases, the courts reversed trial court grants of motions to dismiss under Rule 12(b)(6), SCRCF because the courts found the allegations were indeed novel and that there should be additional development of the facts. *Id.* In the *Barron* case, the Supreme Court held that the Court of Appeals erred in its analysis limiting public policy discharge to the two clearly applicable situations, however they found the circuit court’s grant of summary judgment was properly affirmed for other reasons. Specifically, they found that upon review of the evidence in a light most favorable to the plaintiff there was no genuine issue of material fact. This decision was made at the summary judgment stage upon evidence the parties had

an opportunity to develop. In the present action, the Appellant should have the same opportunity to develop facts to support the public policy discharge claim and resolve the novel issue; rather than be dismissed upon a Rule 12(b)(6) motion. The majority's concern that the at-will doctrine would be circumvented by allowing further factual development on a novel issue is misconceived. The Appellant has shown above why the pleadings are sufficient to establish the novel issue; thus this is a case specific inquiry. Just as the *Barron* court did, the trial court should make the legal determination on public policy discharge at the summary judgment stage after the Appellant has an opportunity to develop the facts in a case with novel issues such as the present action.

II. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT APPELLANT'S DEFAMATION CLAIM IS PROPERLY PLED AND SHOULD NOT HAVE BEEN DISMISSED.

Appellant has properly pled a defamation cause of action under South Carolina defamation law and the applicable pleading standard. "To recover for defamation under South Carolina law, a plaintiff must show: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653, 664 (2006). Under Rule 12(b)(6), SCRPC, "if the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal . . . is improper." Baird, 333 S.C. 511.

Here, Appellant, a former state correctional employee, pled: (1) that she was discharged on the grounds of alleged negligence in association with an inmate's death; (2) that the grounds for her discharge were false; (3) that they have been published by the Respondent through both word and act within the South Carolina Department of Corrections and to the community at large; and (4) that

such publication was defamatory *per se*. (R. pp. 9 & 11) (Complaint ¶¶ 20, & 30-32). It is necessary to note that in South Carolina, defamation need not be accomplished in a direct manner. Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987); Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. *Id.* That is, in South Carolina, defamation can occur by word, act and insinuation. Tyler, 275 S.C. at 458, 272 S.E.2d at 634.¹ Furthermore, plaintiff's defamation claim is *per se* actionable as she was charged with unfitness in her trade or profession. Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d, 397, 399-400 (Ct.App. 1987). Here, Appellant has alleged and it is reasonably deductible from her allegations that she has been defamed by both word and act by the insinuation to her co-employees and to the public at large that she was negligent with regard to an inmate's suicide death.

Moreover, the allegations in plaintiff's complaint and reasonable inferences deduced therefrom demonstrate that the defamatory publications were not privileged. Communications are not privileged where they exceed the scope of their privilege or are made with express or actual malice. See Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) (scope); see also, Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982). Also, where a statement is *per se* defamatory malice is presumed. See Holtzchieter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998); see also, Manley v. Manley, 291 S.C. 325, 330, 353 S.E.2d 312, 315 (Ct. App. 1987) (holding "where words are actionable *per se*, malice will be implied", citing, Jones v. Garner,

¹ In Tyler, an employee was forced to take a polygraph examination along with his manager. Tyler, 275 S.C. at 456. After he and the manager took the examination, the manager was terminated. The employee was terminated soon thereafter. *Id.* The employee sued for defamation, arguing that his termination shortly after the polygraph examination and the manager's discharge created the impression and insinuation that the employee was terminated for some wrongful activity. *Id.* The Court agreed and held, in part, that words and actions can be defamatory and that "it is not necessary that the false charge be made in a direct, open and positive manner." *Id.* at 458.

250 S.C. 479, 158 S.E.2d 909 (1968)). Here since malice is presumed and since it is reasonably inferable from plaintiff's allegations that publications to her co-workers and to the community at large would be unprivileged; plaintiff has properly alleged a lack of privilege. Accordingly, the Appellant properly pled her defamation claim.

CONCLUSION

The Appellant respectfully requests a rehearing on the basis that the Court of Appeals overlooked or misapprehended the points addressed herein.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: Julius W. Babb
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Plaintiff

Columbia, South Carolina
May 16, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department
of Corrections and Jon E.
Ozmint, Robert Ward and
Bernard McKie in their
individual capacities,

Defendants,

Of whom South Carolina
Department of Corrections is

Respondent.

RESPONSE TO PETITION FOR REHEARING

Steven M. Pruitt
Hannah K. Metts
McDonald Patrick Poston Hemphill & Roper, LLC
P.O Box 1547
Greenwood, SC 29648
(864) 229-2511
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities	iii
Arguments	
I. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.....	1
II. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR DEFAMATION .	3
Conclusion	5

TABLE OF AUTHORITIES

CASES

<u>Barron v. Labor Finders of S.C.</u> , 393 S.C. 609, 713 S.E.2d 634 (2011).....	2
<u>Doe v. Marion</u> , 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).....	1
<u>Fleming v. Rose</u> , 350 S.C. 488, 567 S.E.2d 857 (2002).....	4
<u>Lawson v. S.C. Dep't of Corr.</u> , 340 S.C. 346, 532 S.E.2d 259 (2000).....	2
<u>Mathis v. Brown & Brown of S.C., Inc.</u> , 389 S.C. 299, 698 S.E.2d 773 (2010).....	1, 2
<u>McNeil v. S.C. Dep't of Corr.</u> , Op. No. 5122 (S.C. Ct.App. Filed May 1, 2013).....	1
<u>Sloan Constr. Co., Inc., v. Southco Grassing, Inc.</u> , 377 S.C. 108, 659 S.E.2d 158 (2008).1	
<u>Stiles v. Onorato</u> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	3
<u>White v. Wilkerson</u> , 328 S.C. 179, 493 S.E.2d 345 (1997).....	4

STATUTES & RULES

S.C. Code Ann. § 24-1-130 (2007).....	2, 3
Rule 12(b)(6), SCRCF.....	3

Respondent respectfully requests the Court to deny Appellant's Petition for Rehearing on the Order filed May 1, 2013, affirming the trial court's order to dismiss Appellant's claims against Respondent. See McNeil v. S.C. Dep't of Corr., Op. No. 5122 (S.C. Ct.App. Filed May 1, 2013).

ARGUMENTS

- I. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.

As the trial court and the majority of this Court have both ruled, Appellant failed to state a claim for public policy discharge because (1) Appellant does not allege her termination was retaliatory and (2) Appellant failed to set forth specific allegations that her termination was a violation of a mandate of clear public policy. Instead, Appellant alleges that Respondent terminated her for "personal, political, pretextual or scapegoating purposes". This general statement is insufficient to state a cause of action for wrongful discharge.

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). When reviewing a dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Sloan Constr. Co., Inc., v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008).

An at-will employee may be terminated at any time for good reason, no reason, or bad reason without liability to the employer. Mathis v. Brown & Brown of S.C., Inc.,

389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010); see also Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000). An at-will employee has a cause of action for wrongful termination "where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011). The public policy exception has been held to apply to situations where an employer requires an employee to violate the law and to situations where the reason for termination itself is a violation of the criminal law, but the Court has explicitly held that the public policy exception is not limited to these two situations. Id.

The trial court found, and the majority of this Court affirmed, that Appellant's allegations in her Complaint were insufficient to state a cause of action for wrongful discharge because the law of this State allows an at-will employee to be terminated for a good reason, bad reason, or no reason. The trial court and this Court considered whether Appellant's allegations that she was discharged for personal, political, pretextual, or scapegoating reasons were sufficient to state a claim for public policy discharge and found that they were not. As the Supreme Court recently held in Barron, the determination of what constitutes public policy is a question of law for the Court to decide and is not a function of the jury. Id. at 617, 713 S.E.2d at 638. The trial court considered the allegations in Appellant's Complaint, as did the majority of this Court in its Opinion, and determined that Appellant failed to allege a valid public policy exception.

In her Petition, Appellant asserts that the allegations in her Complaint are in violation of S.C. Code § 24-1-130 (2007). Appellant does not mention S.C. Code § 24-1-

130 in her Complaint, and thus that argument is outside the scope of the matters before the Court. Appellant also argues in her Petition that she was retaliated against for complying with a subpoena and testifying under oath. As the majority of this Court noted in its Opinion, Appellant failed to plead retaliation in her Complaint, and therefore, Appellant has failed to state a claim for public policy discharge. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (finding that in considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may only consider the facts of the complaint).

Also, the trial court and this Court expressly noted that the Court in Barron had ruled that the public policy exception was not limited to situations where an employer requires an employee to violate the law and to situations where the reason for termination itself is a violation of the criminal law. The trial court and a majority of this Court considered whether the allegations in Appellant's Complaint presented a novel issue that should not be dismissed upon a 12(b)(6) motion, and found that they did not. Appellant's mere allegation that public policy has been violated is insufficient to state claim for wrongful discharge, and to allow Appellant's claim to go forward would have a chilling effect on at-will employment in this State. The law of this State is clear that an employer can terminate an at-will employee, such as Appellant, for no reason, good reason, or bad reason without liability, and Appellant does not allege sufficient facts in her Complaint to implicate the public policy exception to the at-will employment law. This Court did not overlook or misapprehend Appellant's claim or the relevant law, and thus Appellant's Petition for Rehearing should be denied.

II. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR DEFAMATION.

Appellant has failed to state a claim for defamation. An action for defamation requires a plaintiff to show the defendant made and published a false or defamatory statement that was unprivileged to a third person that injured the plaintiff's reputation. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). First, Appellant's action must be dismissed because Appellant has failed to state a claim for wrongful discharge. If Appellant fails to state a claim for wrongful discharge, then her claim for defamation cannot proceed because Respondent did not act wrongfully.

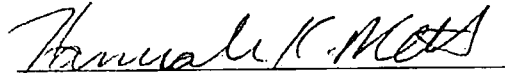
Second, in her Complaint, Appellant fails to allege that any statements made by Respondent were unprivileged and further fails to allege that any statements made by Respondent were published to a third party. The mere fact of termination does not equate to publication to a third party. Appellant does not allege in her Complaint how Respondent allegedly communicated her termination to third parties or specifically to whom Respondent made these alleged communications. Although Appellant alleges that her termination was widely known in the community, Appellant does not allege that Respondent conveyed or publicized her termination to any third party. Furthermore, the Appellant alleged in her Complaint that Respondent made a false statement, but failed to set forth what the false statement was with any specificity and further failed to set forth with any specificity what were the alleged "publications, re-publications, writings, words, and actions" made by Respondent. This Court did not overlook or misapprehend any of the elements of defamation, and Appellant's claim for defamation was properly dismissed because Appellant has failed to allege facts sufficient to state a claim for defamation.

CONCLUSION

For the reasons stated, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

May 24, 2013



Steven M. Pruitt, Esquire

Hannah K. Metts, Esquire

McDonald Patrick Poston Hemphill & Roper, LLC

Post Office Box 1547

Greenwood, South Carolina 29648

(864) 388-1014

Attorneys for Respondent

The South Carolina Court of Appeals

Ammie McNeil, Appellant,

v.

South Carolina Department of Corrections and Jon E.
Ozmint, Robert Ward and Bernard McKie in their
individual capacities, Defendants,

Of whom South Carolina Department of Corrections is
Respondent.

Appellate Case No. 2011-202887

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

U. Ke J.

I VOTE TO GRANT
REHEARING
Columbia, South Carolina

James E. Cobb J.

cc:

J. Lewis Cromer
Julius Wistar Babb, IV
Steven Michael Pruitt
Hannah Khristin Metts

RECEIVED

JUN 27 2013

J. LEWIS CROMER
& ASSOCIATES, LLC.

FILED

25 June 2013