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March 25, 2014

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VIA US MAIL
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

MAR 27 2014

S.C. SUPREME COURT

RE: Behrooz Taghivand v. Rite Aid, et al. Certified Question from Judge Richard
M. Gergel, SC Federal District Court

Dear Mr. Shearouse:

Please find enclosed the original and 14 copies of the plaintiff's Brief on
Certified Question for filing with the Court.

Please let me know if anything more is needed.

With kind regards, I am

Respectfully yours,



Allan R. Holmes
Attorney for Plaintiff

cc: Ben Glass, Luci Nelson
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Charleston, SC 29401

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MAR 27 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

CERTIFIED QUESTION FROM THE FEDERAL DISTRICT OF SOUTH CAROLINA

Richard M. Gergel, Judge

2:13-cv-02497-RMG

BEHROOZ TAGHIVAND

Plaintiff,

v.

RITE AID CORPORATION, ECKERD CORPORATION AND STEVE SMITH,

Respondents.

BRIEF ON CERTIFIED QUESTION

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STATEMENT OF THE ISSUES

Under the public policy exception to the at-will employment doctrine in South Carolina, does an at-will employee have a cause of action in tort for wrongful termination where (1) the employee, a store manager, reasonably suspects that criminal activity, specifically shoplifting, has occurred on the employer's premises, (2) the employee, acting in good faith, reports the suspected criminal activity to law enforcement, and (3) the employee is terminated in retaliation for reporting the suspected activity to law enforcement?

Certified Question accepted by the February 21, 2014, Order of this Court, Appellate Case No. 2014-000073.

STATEMENT OF THE CASE

The underlying civil action was commenced by plaintiff Taghivand's filing of his summons and complaint in the Court of Common Pleas for Charleston County on August 1, 2013. The case was removed to the United States District Court for the District of South Carolina on September 13, 2013. On November 13, 2013, defendant Eckert Corporation d/b/a Rite Aid filed its motion for partial dismissal. This motion sought to dismiss the plaintiff's second cause of action for wrongful discharge in violation of public policy. After memoranda were filed by the parties addressing this motion, the Honorable Richard Mark Gergel, United States District Judge, by Certification Order filed January 9, 2014, certified the above-stated question to this Court, and by Order of February 21, 2014, this Court accepted the certified question.

The District Court summarized the relevant allegations in the plaintiff's amended complaint as follows:¹

Because the Court encounters this question on a motion to dismiss for failure to state a claim, the Court accepts as true the facts alleged in the Amended Complaint and all facts are viewed in a light most favorable to Plaintiff. Plaintiff began working for the Eckerd chain in 1983, which was purchased by Rite Aid in 2007. Since 2004, and all at times relevant to this action, Plaintiff was a Store Manager. On August 19, 2011, Plaintiff was the manager of the store located at 1934 Ashley River Road, Charleston, South Carolina ("Ashley River Road Store"). The area near the Ashley River Road store had a "significant crime rate" in August of 2011, and, immediately prior to August 19, 2011, there had been several robberies or attempted robberies near the Ashley River Road Store. The Ashley River Road Store itself had experienced inventory "shrinkage" issues.

On August 19, 2011, Plaintiff approached a suspicious looking patron at the Ashley River Road Store. The patron acted strangely and milled about the store with no evident purpose. The patron stopped briefly in the section directly in front of the cashier and purchased several items. In response to questioning by Plaintiff, the cashier told Plaintiff that when the patron entered the store, his bag appeared empty, but that the bag now appeared to have items in it. Plaintiff instructed the cashier to call the police, and the patron exited the store.

A police officer arrived at the Ashley River Road Store and first brought in the items that the patron had purchased from the store; Plaintiff confirmed that these items were in fact purchased. The officer then searched the patron's bag and informed Plaintiff that the bag only contained dirty clothes. The officer, without Plaintiff's knowledge, placed the patron on trespass notice.

Plaintiff had been trained to handle suspicious patrons and was instructed to call the police when "such an incident occurred." Plaintiff's actions on August 19, 2011, were taken in good faith, in the interest of protecting his employer from theft, and in the interest of ensuring the safety of himself and other store employees. Plaintiff was terminated effective August 19, 2011, and was told that the August 19, 2011 incident was the reason for his termination.

January 9, 2014, Certification Order (hereinafter "Certification Order"), pp. 2-3.

¹Footnotes and Citations to the record are omitted.

In fact, a clear public policy mandate exists in the State of South Carolina which protects employees from a termination based upon the good faith reporting of suspected criminal activities to the appropriate law enforcement authorities.

The parameters of the public policy wrongful discharge tort² were most recently discussed and clarified by this Court in *Barron v. Labor Finders of S.C.*:

While the public policy exception applies 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, the public policy exception is not limited to these situations. See *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 456 S.E.2d 907 (1995); *Keiger v. Citgo*, 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). In both of these cases, the courts declined to address whether the public policy exception applied because, in their procedural posture, it was not appropriate to decide the novel issue without further developing the facts of the case. *Garner*, 318 S.C. at 227, 456 S.E.2d at 910 n.3 (appeal from a grant of a 12(b)(6), SCRCPP, motion to dismiss); *Keiger*, 326 S.C. at 373, 482 S.E.2d at 794 (same). Both cases make clear, however, that an at-will employee may have a cause of action for wrongful termination even if the discharge itself did not violate criminal law or the employer did not require the employee to violate the law.

* * *

In this state, 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. *Ludwick, supra*. The determination of what constitutes public policy is a question of law for the courts to decide. See *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.")³.

Barron v. Labor Finders of S.C., 393 S.C. 609, 614-617, 713 S.E.2d 634 (2011).

² Established by *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985).

³ This language in *Barron* makes it obvious that a clear public policy does not require a specific statutory expression of intent by the legislature. Rather, there can be public policies that do not find their way into statutory provisions, but which are nonetheless recognized by the courts in the "absence of legislative declaration."

Prior to the decision of this Court to answer the certified question, no South Carolina appellate court has had occasion to decide it.

The Certification Order discusses two groups of cases from other jurisdictions which find a public policy wrongful discharge cause of action where an employee is retaliatorily terminated for providing information concerning suspected criminal activity to law enforcement. One group of cases derives the necessary public policy to support the cause of action from specific laws that the courts identify as expressions of public policy. The other group of cases derives the necessary public policy from the societal interest in its criminal justice system. In South Carolina, either approach would result in a finding that plaintiff Taghivand has been wrongfully terminated in violation of a clear mandate of public policy.

IN SOUTH CAROLINA THE SOCIETAL INTEREST IN OUR CRIMINAL JUSTICE SYSTEM PROVIDES A CLEAR MANDATE OF PUBLIC POLICY SUFFICIENT TO SUPPORT PLAINTIFF TAGHIVAND'S WRONGFUL DISCHARGE CLAIM

The rationale supportive of this public policy is apparent. As this Court noted many years ago, the successful administration of the criminal justice system requires citizens to report crimes. "It is the duty of a citizen having knowledge of the commission of a felony to make full disclosure to the public authorities, and to assist them in bringing the felon to justice." *Liberty Mutual Ins. Co. v. Gilreath*, 191 S.C. 244, 250, 4 S.E.2d 126 (1939). Indeed, this Court has held that the common law crime, misprison of felony, remains a part of the common law of South Carolina as inherited from England. *State v.*

Carson, 274 S.C. 316, 262 S.E.2d 918 (1980) (affirming defendant's conviction of common law misprison of felony). Surely, if failing to report criminal activity may, in some cases, be criminally prosecuted, one may safely infer that the reporting of criminal activity serves a clear mandate of public policy. There is an undeniable societal need for citizens to transmit information about the criminal activity they witness to law enforcement authorities. The success of our criminal justice system depends on the transmission of this information. Nothing more need be said to justify this Court's recognition of the clear mandate of public policy underlying plaintiff Taghivand's claim for wrongful discharge. No employer should be allowed to take away an employee's livelihood because that person has reported in good faith his reasonable suspicion of criminal activity to the police. That sort of employer retaliation punishes the employee for serving the interests of the criminal justice system, and the society that system protects. Such retaliation goes against the most important of societal needs.

This is the rationale underlying the decision of the Illinois Supreme Court recognizing the public policy wrongful discharge tort in precisely the same context as that presented here by plaintiff Taghivand. *Palmateer v. International Harvester Co*⁴, 85 Ill. 2d 124; 421 N.E.2d 876 (1981) (recognizing public policy wrongful discharge cause of action for plaintiff terminated in retaliation for supplying police with information regarding co-worker's involvement in criminal activity). The *Palmateer* opinion finds its clear mandate of public policy in societal need for an effective criminal justice system:

⁴ *Palmateer* is cited in *Ludwick* as representative of the "significant turning away from strict allegiance" to the at-will doctrine when employees are discharged in violation of a clear mandate of public policy. *Ludwick*, 287 S.C. at 222. *Palmateer* has been recognized as controlling and applied to similar facts by the United States Court of Appeals for the Seventh Circuit. *Brandon v. Anesthesia & Pain Management Associates*, 277 F.3d 936 (7th Cir. 2002).

There is no public policy more basic, nothing more implicit in the concept of ordered liberty (see *Palko v. Connecticut* (1937), 302 U.S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149, 152), than the enforcement of a State's criminal code. (See *Hewitt v. Hewitt* (1979), 77 Ill. 2d 49, 61-62; *Jarrett v. Jarrett* (1979), 78 Ill. 2d 337, 345.) There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens. See Ill. Const. 1970, Preamble; *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60, 69.

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.

Palmateer, 85 Ill. 2d at 132.

The Certification Order discusses numerous authorities, including *Palmateer*, which find a public policy inherent to the criminal justice system that protects an employee from discharge in retaliation for the employee's cooperation with law enforcement. Judge Gergel's Order states:

However, other states without such statutes have also found that public policy favors the reporting of crime and have allowed wrongful termination claims where employees allege that they were terminated for reporting criminal activity. See *Garrity v. Overland Sheepskin Co. of Taos*, 917 P.2d 1382, 1387 (N.M. 1996) ("In the present case, the public policy at issue is the reporting of suspected illegal activities, namely, the use of illegal drugs. Although our legislature has not provided any specific rights or remedies for employees who discover or suspect that a coworker or supervisor is committing a crime, it has clearly enunciated a strong public policy against condoning criminal activity and in favor of uncovering and eradicating it."); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) ("Public policy favors (Plaintiff's) conduct in volunteering information to the law-enforcement agency."); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 670 (Cal. 1988) (noting that "a tort action for discharge in violation of public policy" protects employees who "report criminal activity to proper authorities"); *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 758-59 (Neb. 1988) (reasoning that the enforcement of the criminal code is a basic public policy and that the enactment of the criminal statute was a declaration of public policy, but finding an action for wrongful discharge can only lie with the employee "acts in good faith

and upon reasonable cause"); *Shea v. Emmanuel College*, 682 N.E.2d 1348, 1350 (Mass. 1997) (allowing wrongful discharge claims where an employee reports criminal activity internally, even if not reported to public authorities); *Dunnigan v. City Of Lorain*, No. 02-CA-008010, 2002 WL 31313216 at * 5 (Ohio Ct. App. Oct. 16, 2002) ("Ohio has a clear public policy in favor of reporting crimes and that an employee's dismissal for reporting possible criminal conduct of another employee while at work would jeopardize that public policy.").

Certification Order, pp. 6-7.

The public policy of South Carolina is just as intent on the protection of its people from criminal misconduct as any of these jurisdictions. The Constitution of South Carolina specifically provides that "the health, welfare, and safety of the lives and property of the people of this State ... are matters of public concern." S.C. Const. art. XII, 1. This Court has held that the protection of the lives and property of the people of South Carolina is the *only* reason for our State's existence:

It has been frequently held that the State cannot, by contract or otherwise, divest itself of that undefined and undefinable power of sovereignty called the police power--the power to protect its citizens and itself, the only reason for the State's existence. This power extends to all the great public needs. *Camfield v. United States*, 167 U.S. 518, 17 S. Ct. 864, 42 L. Ed. 260.

* * *

That it may be exerted arbitrarily or tyrannically is denied. But that it may be reasonably exerted for the protection of society against all forms of evil, for the protection of men against the greed, avarice and other vices of each other, and even for the protection of men against themselves--against their own weaknesses and follies--is sustained by the highest reason and judicial authority.

Brennen v. Southern Express Co., 106 S.C. 102, 114, 90 S.E. 402 (1916).

On the basis of the foregoing, it is respectfully submitted that South Carolina's fundamental interest in the protection of the lives and property of the people establishes a

clear mandate of public policy sufficient to support plaintiff Taghivand's wrongful discharge claim.

However, apart from this overarching support for the public policy upon which plaintiff Taghivand relies, an explication of South Carolina statutory and common law authorities also establishes a clear mandate of public policy for the reporting of suspected crimes.

**IN SOUTH CAROLINA, SPECIFIC STATUTORY AND COMMON LAW
AUTHORITIES ESTABLISH A CLEAR MANDATE OF PUBLIC POLICY
SUFFICIENT TO SUPPORT PLAINTIFF TAGHIVAND'S WRONGFUL
DISCHARGE CLAIM**

Section 16-9-340 S.C. Code of Laws (1976), as amended, is titled "Intimidation of court officials, jurors or witnesses," and provides that:

(A) It is unlawful for a person by threat or force to:

(1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in discharge of his duty as such; or

(2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

(B) A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.

Section 16-9-340 is intended to protect witnesses, or potential witnesses -- including those who report suspected criminal activity to the police. Plaintiff was such a witness, or potential witness, and the defendants' termination of his employment

constituted intimidation and an obstruction of justice in violation of this criminal statute.

The District Court did not find that this statute was violated.

To the extent that a termination actually violates this statute, this Court believes that the public policy exception would apply; in such a case, "the reason for the employee's termination itself is a violation of criminal law." *Barron*, 713 S.E.2d at 637; *see also Culler*, 422 S.E.2d at 92-93 (holding that the public policy "extends at least to legislatively defined 'Crimes Against Public Policy,'" defined in Chapter 17 of Title 16 of the South Carolina code). However, in this case, Plaintiff alleges that his employer terminated in him in retaliation for reporting a crime, not to affect his future behavior. Thus, the termination is not in violation of § 16-9-30. *See Love v. Cherokee Cnty. Veterans Affairs Office*, No. 7:09-cv-194, 2009 WL 2394369 at *2 (D.S.C. July 31, 2009). The question remains whether South Carolina has a broader public policy favoring the reporting of a crime.

Certification Order, p. 4, n. 3.

In fact, "future behavior" is at issue in a case like *Love*. Punishing a witness for having served as a witness will undoubtedly chill his enthusiasm for ever serving as a witness again - in any proceeding. His punishment will also serve to deter others from cooperating with law enforcement.

Section 16-9-340(A)(1) makes it unlawful to "by threat or force to intimidate *or* impede a ... witness or potential ... witness." (emphasis added). In this context, "impede" means⁵ to "interfere with or slow the progress of." "Intimidate" can be read to have the same meaning or, alternatively, "intimidate" can be read simply as to "make timid or fearful." The statute must be read so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Thus, § 16-9-340(A)(1) must be read so that "intimidate" and "impede" have different meanings. Whenever a witness is punished, he is made "timid or

⁵ These definitions are taken from Miriam-Webster.com.

fearful" – even if his intimidator is only concerned with the witness's past behavior. Section 16–9–340(A)(1) should not be read narrowly so as to allow any witness to be punished. It is apparent that § 16–9–340 is intended as a statutory prohibition against conduct which would also constitute the crime of obstruction of justice at common law, as discussed below. Section 16–9–340(A)(1) should be read and construed in its context.

However, even if § 16–9–340 were to be construed narrowly, the common law crime of obstruction of justice establishes public policy prohibiting the retaliatory termination of plaintiff Taghivand. Common law obstruction of justice has not been abrogated by the passage of § 16-9-340. *State v. Lyles-Gray*, 328 S.C. 458, 464-465, 492 S.E.2d 802 (Ct. App. 1997). "Under common-law obstruction of justice, 'it is an offense to do *any act which* prevents, obstructs, impedes, or *hinders the administration of justice.*' *State v. Cogdell*, 273 S.C. 563, 567, 257 S.E.2d 748, 750 (1979) (emphasis added)." *Id.* at 328 S.C. 464. This common law crime focuses on the administration of justice, and well reasoned case law holds that regardless of when a witness is punished, his punishment hinders the administration of justice.

In North Carolina, as in South Carolina, the common law crime of obstruction of justice has not been abrogated by statute, and the definition of the offense in North and South Carolina is identical. "At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). In North Carolina, common law obstruction of justice is also a civil tort. *See, e.g., Burgess v. Busby*, 142 N.C. App. 393, 406, 544

S.E.2d 4, 11 (2001), *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785 (W.D.N.C. 2002).

Each of the cited North Carolina cases finds that obstruction of justice claims may be based on defendant misconduct *which occurs while no case is pending in court, and which is intended to punish the plaintiff*. In *Burgess*, the plaintiffs were former jurors who had returned a malpractice verdict against the defendant's physician partners. They alleged that the defendant published their names and addresses in a letter distributed to every medical practitioner with hospital admitting privileges in Rowan County, North Carolina, as "jurors who have found a doctor guilty." The North Carolina Court of Appeals found this sufficient. "Plaintiffs' complaint sufficiently alleges a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County." *Burgess*, 142 N.C. App. at 409.

In *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785 (W.D.N.C. 2002), the plaintiff alleged that the defendants attempted to force her to sign a false affidavit which would have been used in a civil suit later filed by one of the plaintiff's colleagues. *Id.* at 794. When the plaintiff refused to sign the affidavit, the defendants terminated her employment. *Id.* The Court held that the "[p]laintiff's allegations [were] sufficient to show that [the] [d]efendants attempted to impede the legal justice system through the false affidavit." *Id.* The defendants argued that the plaintiff did not have standing "because a suit involving her was not pending at the time of the alleged

obstruction of justice." *Id.* However, the Court held there was no requirement that a suit be pending for the plaintiff to have a valid claim for obstruction of justice. *Id.* at 794-95. In so holding, the Court relied on *Burgess v. Busby*, *supra*. The holding of *Jackson v. Blue Dolphin Communications of N.C.*, has been expressly approved by the North Carolina Court of Appeals. *Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 256, 645 S.E.2d 851 (2007), *disc. review improvidently allowed*, 362 N.C. 502, 666 S.E.2d 757 (2008).

Jackson is especially noteworthy because it holds that its plaintiff's termination not only furnished a claim for obstruction of justice, but *also* gave rise to a claim for wrongful discharge in violation of a clear mandate of public policy under the holding of *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818 (1985)⁶, *Jackson*, 226 F. Supp. 2d at 792-793.

South Carolina's statutory and common law prohibitions of obstruction of justice are indistinguishable from those of North Carolina, and counsel for the plaintiff has found no authority in South Carolina which would conflict with the North Carolina applications of these prohibitions. The South Carolina tort of wrongful discharge in violation of a clear mandate of public policy may be asserted on the basis of the public policy prohibiting obstruction of justice.

This mandate of public policy has been expressed in cases which do not use the term, "obstruction of justice." In *Ludwick*, the seminal South Carolina public policy wrongful discharge case, the plaintiff's employer engaged in an obstruction of justice. The *Ludwick* plaintiff alleged that her employment was terminated because she complied

⁶ *Sides* is discussed *infra*.

with a subpoena requiring her to appear as a witness in an administrative proceeding. *Ludwick*, 287 S.C. at 221. The *Ludwick* opinion holds that her termination was a violation of a clear mandate of public policy. *Ludwick* relies, in part, upon cases from other jurisdictions in which witnesses were terminated for providing truthful testimony in court proceedings. *Ludwick*, 287 S.C. at 222-224, citing, *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App.2d 184, 344 P.2d 25 (1959), *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378 (6th Cir. 1983) and *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818 (1985). As was the case in *Ludwick*, each of the defendants in those cases engaged in conduct which, though identified as a violation of public policy, could also have been described as an unlawful obstruction of justice. In fact, in the *Sides* case, the court described the defendant's conduct as a violation of "the public interest in preventing the obstruction of justice ..." *Sides*, 74 N.C. App. at 337.

In addition to the public policy prohibiting obstruction of justice, South Carolina public policy expressly favors the reporting of suspected criminal activity and cooperation with law enforcement agencies. Section 16-3-1505, S.C. Code of Laws (1976), as amended, is titled "Legislative intent." It states:

In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants; . . .

Section 16-3-1505 (emphasis added).

This expression of public policy is completely at odds with the termination of plaintiff Taghivand's employment because he reported suspected criminal activity to law enforcement officials.

The Certification Order cites cases which find their expression of public policy in a particular statutory scheme. *Wholey v. Sears, Roebuck & Co.*, 370 Md. 38, 43, 803 A.2d 482 (2002); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 250, 743 S.W.2d 380 (1988). As argued above, § 16-9-340(A)(1) is a particular South Carolina statute which expresses such a public policy. In addition, the common law crime, obstruction of justice, is a specific statement of South Carolina law which expresses such a public policy.

There are also cases which recognize a particular public policy goal served by a statute, and then extend public policy protection to an employee discharged contrary to that public policy goal. For example, in *Girgenti v. Cali-Con, Inc.*, 15 Conn. App. 130, 544 A.2d 655 (1988), the Court identified a Connecticut statute⁷ and accompanying

⁷ "[General Statutes] Sec. 29-109. REGULATIONS AS TO MOVING PICTURE PROJECTORS AND FILMS. FIRE-PROOF BOOTHS. No moving picture projector involving the use of a photographic film shall be operated in any public building or place of public assemblage or entertainment until such precautions as the commissioner of public safety specifies have been taken against fire, panic or other personal hazards and a certificate of approval for such premises obtained from the commissioner specifying the number of persons that may be admitted to such premises or place at any one time. No moving picture film made of nitrocellulose or highly combustible material shall be used or exhibited in any premises or place mentioned herein unless such film, together with the projector and necessary accessories, is housed in a fire-proof room or booth of such size, type and design as the commissioner specifies, and a certificate of approval has been obtained from the commissioner authorizing such use of such room or booth. No person shall sell, rent, lend or in any way transfer or convey nitrocellulose or similar highly combustible moving picture film to any person except the manager or agent of any

regulations which appear to have been created when nitrocellulose film was used in projection booths, and the threat of fire was a major safety concern for movie theaters. From the statute and regulations, the Court extrapolated a Connecticut public policy intended to assure the safety of public gatherings:

The defendant's fourth claim of error is that the trial court erred in concluding that the termination of the plaintiff was violative of public policy. The trial court determined that the principal issue in the case was whether the plaintiff's cause of action for wrongful discharge fell within the narrow public policy exception to the general proposition that contracts for an indefinite term of employment are terminable at will. It found that the plaintiff had proven a demonstrably improper reason for dismissal, the impropriety of which derived from an important violation of public policy. The public policy which the court found was violated was the concern expressed in General Statutes § 29-109 and the regulations promulgated thereunder. These require that theatres be run in a safe manner. *There can be little doubt that it is a public policy of the state that any place of public gathering be so controlled that the safety of the public is protected.* . . . We cannot find that the conclusion of the trial court was unreasonable.

The defendant's fifth claim is that the trial court erred in concluding that the plaintiff's termination constituted the tort of wrongful discharge. An employer may be responsible in damages if a discharged employee can establish a demonstrably improper reason for his dismissal, the impropriety of which stems from a violation of public policy. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 475, 427 A.2d 385 (1980). The line must be drawn between claims that genuinely involve the mandates of public policy and are actionable, and ordinary disputes between employee and employer that are not. *Id.*, 477. The employee has the burden of pleading and proving that his dismissal occurred for a reason violative of public policy. *Morris v. Hartford Courant Co.*, 200 Conn. 676, 679, 513 A.2d 66 (1986). The defendant's reason for discharging the plaintiff must contravene public policy. *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 497-98, 523 A.2d 1356 (1987).

As we have stated earlier, it is the public policy of this state to protect the safety of the public at moving picture theatres. Whether the plaintiff was

premises or place having a certificate of approval as required herein, or dispose of any scrap film except under regulations made by the commissioner." 15 Conn. App. at 137 n. 1.

discharged because he complained about being required to work alone in violation of this policy and for taking precautions for the safety of the public was an issue for the trial court to determine from the evidence. We will not disturb reasonable findings and conclusions of that court.

Girgenti v. Cali-Con, Inc., at 136-138 (emphasis added).

The *Girgenti* projectionist heard a noise in his projection booth, suspected a burglar, and called the police to investigate. When the police arrived, they refused to enter the darkened theater. The projectionist turned on the theater lights, and emptied the theater. Nonetheless, the police did not enter the theater, and it does not appear that any burglar was found. The projectionist's actions were found to have been in furtherance of the safety of the public, and the basis for the unlawful termination of his employment. *Id.* at 132-133.

This sort of analysis supports deriving a clear mandate of public policy from plaintiff Taghivand's actions in furtherance of the enforcement of the specific criminal laws at issue. These would include Section 16-13-30 Petit Larceny, S.C. Code of Laws (1976); Section 16-13-10 Shoplifting, S.C. Code of Laws (1976), and corresponding crimes against the common law.

In other words, as an alternative to deriving the clear mandate of public policy from the public interest in the criminal justice system, the Court would derive this public policy from the goal of the specific criminal statute(s) placed at issue by the claim. This is the approach that is taken in Connecticut. *See Van Kruiningen v. Plan B, LLC*, 485 F. Supp. 2d 92 (D. Conn. 2007) (applying Connecticut law). In *Van Kruiningen*, the plaintiff alleged that his employment was terminated because he had complained about a co-worker serving alcohol to a minor in violation of a Connecticut criminal statute -

Conn. Gen. Stat. § 30-86(b). *Id.*, 485 F. Supp. 2d at 94. After citing the relevant Connecticut authorities, the *Van Kruiningen* court rejected the defendant's argument that the plaintiff had not "alleged a sufficient nexus between defendant's conduct and a clear mandate of public policy."

[D]efendant's argument about the lack of nexus between its conduct and the public policy at issue fails because the violation plaintiffs allege is defendant's termination of them in retaliation for their efforts to ensure compliance with the public policy of not serving alcohol to minors, as articulated in Conn. Gen. Stat. § 30-86(b).

Id., 485 F. Supp.2d at 99.

In *Ludwick*, the essence of the plaintiff's complaint is that she was terminated because she complied with the criminal statute, S.C. Code Ann. Section 41-29-210 (1976), which forbade her from disobeying a subpoena. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. at 225. It is compliance with that criminal law that *Ludwick* found worthy of public policy protection, and the same should be true with the criminal laws placed at issue by plaintiff Taghivand's termination. No South Carolina employee should lose employment because that employee, in good faith, reports to the police his reasonable suspicion that criminal activity has occurred at his employer's premises.

THE CERTIFIED QUESTION PRESENTS ONLY A NARROW EXCEPTION TO THE AT-WILL EMPLOYMENT RULE

If the certified question is answered affirmatively, proof of each of the following elements would be a prerequisite to establishing a claim: (1) the employee would have to reasonably suspect that criminal activity has occurred on the employer's premises, (2) the employee would be required to act in good faith in reporting the suspected criminal

activity to law enforcement; and (3) the employee would have to be terminated in retaliation for reporting the suspected activity to law enforcement.

Each of these elements creates a substantial burden for any potential plaintiff. Their collective effect would be to limit this use of the public policy exception to the at-will employment rule to only those persons who have truly sought to serve the interests of the criminal justice system, and who have been punished by their employers for attempting to serve those interests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the certified question should be answered affirmatively.

All of which is respectfully submitted.

March 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I this day served the Brief on Certified Question in the matter of Behrooz Taghivand, Plaintiff, v. Rite Aid Corporation, et al., Defendants, S.C. Supreme Court, , by hand delivering a copy of the same to the following:

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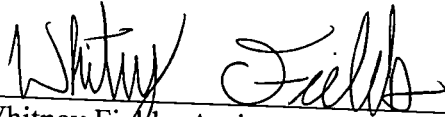
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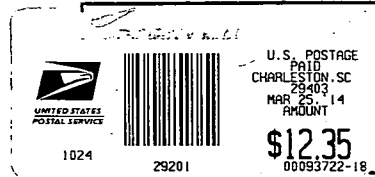
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