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April 24, 2014

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APR 25 2014

**VIA FEDERAL EXPRESS**

**S.C. Supreme Court**

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

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 bound copies of the Brief of Respondent on Certified Question for filing with the Court.

Please let me know if you require anything further.

Sincerely,

Luci L. Nelson

LLN:atj

Enclosure – As Stated

cc: Allan R. Holmes, Esq.  
Timothy O. Lewis, Esq.

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APR 25 2014

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ON CERTIFICATION PURSUANT TO RULE 244, SCACR  
United States District Court for the District of South Carolina  
Richard Mark Gergel, District Court Judge

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Appellate Case No. 2014-000073

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Behrooz Taghivand,

Plaintiff,

v.

Eckerd Corporation  
d/b/a Rite Aid,

Respondent.

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BRIEF OF RESPONDENT ON CERTIFIED QUESTION

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## STATEMENT OF THE CASE

Plaintiff Behrooz Taghivand was terminated from his employment as a store manager with Respondent Eckerd Corporation d/b/a Rite Aid<sup>1</sup> in August of 2011 after instructing a cashier to report a suspected, African American shoplifter to the police. (Am. Compl. ¶¶ 11, 14.) By reporting the suspected shoplifter, Plaintiff was taking steps to protect Respondent's *private* interest in its goods. (Am. Compl. ¶ 15.) The suspected shoplifter later contacted Respondent's customer complaint hotline, alleging Plaintiff's actions amounted to racial discrimination. Respondent investigated the incident and found Plaintiff's actions violated its Shoplifting Apprehension Policy, which required Plaintiff to take certain steps prior to contacting law enforcement. Therefore, Respondent terminated Plaintiff's employment, for violation of Company policy, and informed him that the incident with the suspected shoplifter was the basis for his termination. (Am. Compl. ¶ 14.)

Plaintiff filed suit on August 1, 2013, alleging, among other things, that he was wrongfully terminated in violation of the public policy of South Carolina. Respondent removed the case to the United States District Court for the District of South Carolina. Respondent then filed a partial motion to dismiss Plaintiff's claim for wrongful termination in violation of public policy pursuant to FED. R. CIV. P. 12(b)(6), on the grounds that Plaintiff had failed to identify any clear mandate of the public policy of the State of South Carolina that was implicated by his termination.

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<sup>1</sup> On April 7, 2014, the District Court dismissed Defendants Steve Smith and Rite Aid Corporation pursuant to FED. R. CIV. P. 4(m). (ECF No. 31.) Accordingly, the only remaining defendant is Eckerd Corporation d/b/a Rite Aid, which is referred to herein as "Respondent."

## ARGUMENT

In the underlying District Court case, Respondent moved to dismiss Plaintiff's public policy discharge claim because Plaintiff failed, in his Complaint, to identify any clear mandate of public policy that was implicated by his termination. In response, Plaintiff identified S.C. Code §§ 16-9-340 and 16-3-1505, and the common law crime of obstruction of justice, as potential statutory or judicial sources for a clear mandate of public policy which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities. Apparently disagreeing that the sources cited by Plaintiff sufficiently supported Plaintiff's claims to deny the Partial Motion to Dismiss, but unsure of the contours of the public policy exception to the employment at will doctrine in South Carolina, the District Court certified this question to the South Carolina Supreme Court.

Plaintiff and the District Court agree that no court in South Carolina has ever directly identified any clear mandate of public policy in South Carolina that would prohibit Plaintiff's termination in this matter. Both also seemingly concede that they can identify no constitutional provision, statute or judicial decision that directly creates any such clear mandate of public policy. Instead, Plaintiff seeks to have this Court create such a mandate of public policy where none has previously existed. In fact, Plaintiff cannot identify any constitutional, statutory or judicial basis for such a clear mandate of public policy in South Carolina, because no such mandate exists in this state. Accordingly, this Honorable Court should answer the certified question in the negative.

**I. PLAINTIFF SEEKS TO HAVE THE COURT CREATE A PREVIOUSLY UNRECOGNIZED PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT THAT IS NOT CONTEMPLATED BY THE CONSTITUTION, LAWS OR PRIOR JUDICIAL DECISIONS OF THIS STATE.**

Under South Carolina law, employment relationships are generally at will. *Prescott v. Farmers Tel. Coop.*, 516 S.E.2d 923, 925 (S.C. 1999); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 221-22 (S.C. 1985). An employer may terminate an at-will employee “at any time for any reason or for no reason, with or without cause[,]” without incurring liability for wrongful discharge. *Hessenthaler v. Tri-County Sister Help, Inc.*, 616 S.E.2d 694, 697 (S.C. 2005); *Culler v. Blue Ridge Elec. Co-op., Inc.*, 422 S.E.2d 91, 92 (S.C. 1992).

One of the few exceptions to this general rule exists where the circumstances of the termination would violate a clear mandate of public policy. *See Barron v. Labor Finders of S.C.*, 713 S.E.2d 634, 636-37 (S.C. 2011) (citing *Ludwick*, 337 S.E.2d at 225). To be actionable, “the termination must always violate a *clear mandate* of public policy.” *Greene v. Quest Diagnostics Clinical Labs., Inc.*, 455 F. Supp. 2d 483, 490 (D.S.C. 2006) (emphasis in original). The public policy exception certainly applies to situations where an employer requires an employee to violate the law, or the reason for the termination itself is a violation of law. *Id.*

The Fourth Circuit has recognized that the public policy exception “is to be very narrowly applied.” *Merck v. Advanced Drainage Sys., Inc.*, 921 F.2d 549, 554 (4th Cir. 1990) (applying South Carolina law); *see also Greene*, 455 F. Supp. 2d at 489. Indeed, although the Court in *Barron* expressly found that the exception is not limited to the circumstances listed above, both federal and state courts in South Carolina have recently noted that no court in South Carolina has actually extended the exception beyond those two situations. *See Cervantes v. Wells Fargo Bank, N.A.*, No. 12-2966, 2013 WL 120697, at \*3 (D.S.C. Jan. 9, 2013) (“Finally, Plaintiff has cited no case law in which courts have recognized a claim for wrongful termination

in violation of public policy beyond the situations described above.”); *McNeil v. South Carolina Dept. of Corrections*, 743 S.E.2d 843, 846 (S.C. Ct. App. 2013) (“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.”)

Unable to point to any constitutional or statutory provision – or even any existing judicial opinions – that would provide a source for a clear mandate of public policy in this case, Plaintiff urges this Court to radically expand the scope of the exception in a fashion that would swallow the general rule of at-will employment in South Carolina. In essence, Plaintiff argues that, because the criminal justice system is important, there is somehow a clear mandate in South Carolina to protect anyone who reports criminal activity.

Although Plaintiff then attempts to place restrictions on what such a public policy exception would entail, once such a broad, generalized mandate of public policy based upon the importance of the criminal justice system is recognized, it will be impossible to clearly articulate what types of activity such a Mandate protects. Because of the dangers of entering into such amorphous territory, this Court should decline to extend the very narrow public policy exception to employment at will and answer the certified question in the negative.

**A. Plaintiff cannot identify any constitutional or statutory source for a clear mandate of public policy regarding the reporting of suspected criminal activity.**

In his Complaint, Plaintiff identified no statutory or other source for the clear mandate of public policy that Respondent allegedly violated by terminating him. In fact, he was not particularly clear about what the clear mandate of public policy even was upon which he based his claim. The sum total of Plaintiff’s allegations about what clear mandate of public policy was violated were as follows:

15. At all times, plaintiff was acting reasonably and in good faith and in furtherance of the safety of the employees and patrons of the defendant's store, in the interest of protecting the property of the defendants from theft, and in furtherance of the public safety, as well as his own safety and the safety of his co-employees.

16. In seeking to protect the safety of the public, of himself, his co-employees, and of the patrons of the defendant's store, the plaintiff furthered a clear mandate of public policy.

17. In calling the police when faced with the reasonable suspicion of criminal activity, the plaintiff furthered a clear mandate of public policy.

18. In protecting the security of the defendants' property against theft, the plaintiff furthered a clear mandate of public policy.

19. The actions of the plaintiff furthered the clear mandates of public policy served by the common law and statutory prohibitions of criminal behavior.

(Am. Compl. ¶¶ 15-19.)

Only when faced with Respondent's Partial Motion to Dismiss did Plaintiff identify §16-9-340 of the S.C. Code of Laws as a potential basis for a clear mandate of public policy. This statute, as amended, states that "[i]t 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 the discharge of his duty as such**[" (emphasis added).

1. *The District Court correctly concluded that Plaintiff's termination was not a violation of § 16-9-340.*

Until now, Plaintiff has not really even argued that his termination was a violation of §16-9-340, nor could he credibly do so. The plain language of the statute only prohibits, in relevant part, intimidating or impeding a witness in the discharge of his duty. This statute is devoid of any provision prohibiting retaliation against a witness for reporting suspected criminal activities and, therefore, does not support Plaintiff's wrongful discharge claim. Faced with a

situation in which an employee had been terminated after appearing before a legislative delegation and offering sworn testimony about her employer and later offering information to the Governor's Office and the State Law Enforcement Division, a District of South Carolina court found that no violation of §16-9-340 or public policy had occurred. *See Love v. Cherokee Cnty. Veterans Affairs Office*, No. 7:09-194-HMH, 2009 WL 2394369, at \*2 (D.S.C. July 31, 2009).

The court there found as follows:

Love, however, has not alleged that she is or expects to be a witness in any type of judicial or administrative hearing. Moreover, there has been no evidence presented that Love's termination was an attempt to prevent her from any further activity. For example, Love does not allege that she was threatened with termination if she continued to speak to various agencies. Accordingly, Love has not demonstrated that her termination was in violation of § 16-9-340.

*Id.*

The District Court here similarly concluded that Plaintiff's "termination is not in violation of § 16-9-3[4]0." Certification Order, p. 4 n.3. The Court highlighted the fact that Plaintiff is not alleging his termination actually violated § 16-9-340, but is instead alleging "that his employer terminated him *in retaliation* for reporting a crime, not to affect his future behavior." *Id.* (emphasis in original). In fact, Plaintiff concedes in his Complaint that the police found no evidence of any wrongdoing, and the alleged shoplifter was not charged. As a result, there was never going to be any criminal proceeding in which Plaintiff could possibly ever serve as a witness. Accordingly, this Court should rely on the sound wisdom of the District Court and similarly find that § 16-9-340 fails to establish a clear mandate of public policy sufficient to support Plaintiff's wrongful discharge claim.

2. *Section 16-9-340 of the S.C. Code of Laws does not provide any broader mandate of public policy to protect people who report crimes.*

Both the Certification Order and Plaintiff's Brief identify statutes and court decisions in Maryland and Arkansas that have served as a basis for a clear mandate of public policy to protect those who report criminal activity. In *Wholey v. Sears Roebuck*, 803 A.2d 482 (Md. 2002), the court "adopt[ed] a public policy mandate for employees who report criminal activity to the appropriate law enforcement authorities[.]" *Id.* at 498. However, an examination of the legislative history of the Maryland statute upon which the *Wholey* court relied underscores exactly why § 16-9-340 does not express a public policy that is at odds with Plaintiff's termination.

The *Wholey* decision "[was] grounded in, and supported by, a legislative enactment from which a public policy mandate clearly emanates." *Id.* at 499. Specifically, the *Wholey* decision was based on the following statute:

(a) *Prohibited acts*.—A person may not intentionally harm or injure any person or damage or destroy any property with the intent of retaliating against a victim or witness for giving testimony in an official proceeding or for reporting a crime or delinquent act.

(b) *Penalty*.—A person who violates this section is guilty of a misdemeanor and upon conviction shall be sentenced to imprisonment for not more than 5 years.

*Id.* at 493 (quoting MD. CODE ANN., ART. 27 § 762) (emphasis added).<sup>2</sup> "From these statutory provisions, a clearly definable public policy goal is derived[.]" from which the *Wholey* court was "able to adopt a civil cause of action in wrongful discharge for employees who are discharged for

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<sup>2</sup> The statutory provision relied upon by the *Wholey* court, MD. CODE ANN., ART. 27 § 762, was repealed on October 1, 2002 and replaced by MD. CODE ANN., CRIM. LAW § 9-303, without substantive change.

reporting suspected criminal activity to the appropriate authorities.” *Id.* at 494 (emphasis removed).

By enacting MD. CODE ANN., ART. 27 § 762, the Maryland legislature “created a clear and unmistakable prohibition against retaliating against a person who reports criminal activity, externally, to the appropriate law enforcement authorities.” *Id.* at 497. This statute, therefore, evidenced the Maryland legislature’s “[clear intent] . . . to preclude retaliation for the reporting of criminal activity by creating a criminal cause [of action] against those who violate the mandate.” *Id.* at 500 (emphasis removed).

In its prior decision in *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. 1981), the Maryland court did not find a cause of action for wrongful discharge in violation of public policy. *Id.* at 500. “The critical distinguishing factor between *Adler* and [*Wholey*] is at the time *Adler* was decided, the [Maryland] Legislature had not [yet] enacted the provision prohibiting retaliation against a witness for reporting a crime.” *Id.* (emphasis added). The Maryland statute at the time of the *Adler* decision “only prohibited intimidating, influencing or corrupting jurors or witnesses in the ‘discharge of his duty,’ i.e. as a juror deciding the outcome of a case or a witness giving testimony[.]” *Id.* (citing MD. CODE ANN., ART. 27 § 27) (emphasis added). Therefore, the *Adler* court concluded that “no public policy mandate regarding the reporting of criminal activity was discernible.” *Id.* (emphasis added).

Notably, the Maryland statute at the time of the *Adler* decision is nearly identical to the South Carolina statute Plaintiff asks this Court to rely upon to answer the certified question in the affirmative, rather than the later statute the *Wholey* court found to be a source of a clear mandate of public policy protecting those who report crimes. To date, the South Carolina legislature has not created protections for reporters of crimes similar to what exists in Maryland, even though it

has created protections for witnesses, court officers and others. It is not as though South Carolina's legislature has not considered this issue. It has considered the issue and passed legislation that protects individuals actually involved in the administration of justice, but does not extend those protections earlier to the person who reports the crime.

Given the clearly expressed intention of the legislature, it would be inappropriate for the courts to disregard that intention and expand the protections created by the legislature. See *Citizens' Bank v. Heyward*, 133 S.E.2d 709, 713 (S.C. 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.**") (emphasis added). If the protections are to be expanded, such a decision should come from the General Assembly.

3. *South Carolina Code § 16-3-1505 also does not serve as a source of a clear mandate of public policy that generally protects the reporting of criminal activity.*

Plaintiff also halfheartedly points to the introductory section of the Victim and Witness Service Act as a source of general protection for those who report crime. This reliance, however, is clearly misplaced. The Victim and Witness Service Act is legislation enacted to implement the rights guaranteed in the South Carolina Constitution's Victims' Bill of Rights. See S.C. Const. Art. I, § 24. These provisions were enacted in response to "a victims' rights movement . . . focused on integrating the crime victims' concerns into the criminal justice process." *Ex parte Littlefield*, 540 S.E.2d 81, 84 (S.C. 2000). It "gave the victim a voice at the critical stages of the criminal justice proceedings." *Id.*

The section relied upon by Plaintiff, titled "Legislative intent," recognizes the civic "duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies . . . [and] the General Assembly[']s intent to ensure that

all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity. . . .” S.C. CODE ANN. § 16-3-1505 (2013). The purpose behind the statute is to protect those engaged in a criminal justice proceeding from being taken advantage of or treated improperly. The statute defines a witness as “a person who has been or is expected to be summoned to testify for either the prosecution or the defense or who by reason of having relevant information is subject to be called or likely to be called as a witness for the prosecution or defense for criminal offenses defined in this section, whether or not any action or proceeding has been commenced.” S.C. CODE ANN. § 16-3-1510(4) (2013). Plaintiff, by his own admission, never met this definition, since no crime ever actually occurred and there was therefore never any possibility that there would be any criminal proceeding.

Plaintiff does not discuss in depth exactly how the public policy expressed in § 16-3-1505 is at odds with Plaintiff’s termination. *See* Pl.’s Brief at 16. This is not surprising, as the statute does not make it a crime to retaliate against an employee who reports a crime, nor does it express a clear mandate of public policy that generally offers any particular protection to those who report crimes. Accordingly, this Court cannot rely on § 16-3-1505 to answer the certified question in the affirmative.

**B. The common law crime of obstruction of justice also does not serve as a source of a clear mandate of public policy to prohibit retaliation against an employee who allegedly witnesses criminal activities and reports those activities to law enforcement.**

Having failed to identify any statutory basis for a clear mandate of public policy that would prohibit his termination, Plaintiff alternatively argues that the source of the protection lies in the common law crime of obstruction of justice. This argument also must fail. The common law crime of obstruction of justice is committed when a person intentionally performs “any act which prevents, obstructs, impedes, or hinders the administration of justice.” *State v. Cogdell*,

257 S.E.2d 748, 750 (S.C. 1979). “There must be an intentional failure to perform a duty which would constitute obstruction of justice.” *Id.* Respondent’s business decision to terminate Plaintiff is not conduct constituting an unlawful obstruction of justice, and a closer examination of the cases relied upon by Plaintiff support such a finding by this Court.

1. *The North Carolina cases cited by Plaintiff are factually distinguishable from the case at hand and, therefore, unpersuasive.*

Plaintiff relies on two North Carolina cases, *Burgess v. Busby*, 544 S.E.2d 4 (N.C. Ct. App. 1983) and *Jackson v. Blue Dolphin Communication of N.C., LLC*, 226 F. Supp. 2d 785 (W.D.N.C. 2002), to support his position. Upon close examination, however, neither case lends the support for Plaintiff’s position necessary to answer the certified question in the affirmative.

In *Burgess*, the plaintiffs were jurors who, after actively participating in the justice system, returned a verdict against the defendant’s physician partners. *Burgess*, 544 S.E.2d at 4. Thereafter, defendant published plaintiffs’ names and addresses in a letter, which was distributed to every medical practitioner with hospital admitting privileges in Rowan County, North Carolina, and stated, in relevant part: “Jurors who have found a doctor guilty.” *Id.* at 6. The plaintiffs brought suit and the North Carolina Court of Appeals found “[p]laintiffs’ complaint sufficiently alleged a cause of action for common law obstruction of justice in that it alleges . . . retaliation for their verdict . . . [that was] designed to harass plaintiffs . . . [and] defendant’s conduct was meant to obstruct the administration of justice in Rowan County.” *Id.* at 13. The Court’s holding was also supported by a North Carolina criminal statute, titled “Harassment of and communication with jurors.” *Id.* (“The complaint also alleges all the necessary elements of obstructing justice through harassment of and communication with jurors.”) (citing N.C. GEN. STAT. § 14-225.2 (1999)).

It is evident in *Burgess* that defendants punished plaintiffs for engaging in one of the most important civic duties a person can perform in our legal system. In contrast, Plaintiff was not *at any time* engaged in the justice system as either a juror or a witness, nor was he retaliated against based on his conduct in discharge of his duties as such. Instead, Plaintiff was at work, just like every other day, was engaged in his duties and responsibilities as an employee of Respondent, and was charged with following his employer's policies, including its Shoplifting Apprehension Policy. Respondent also did not engage in any conduct designed to harass Plaintiff. Rather, Respondent simply enforced its policy and terminated Plaintiff's employment when he violated it.

Significantly, in arriving at its holding, the *Burgess* court also looked to and relied upon a criminal statute defining obstruction of justice through harassment of and communication with jurors. *See id.* Plaintiff, however, fails to cite any South Carolina criminal statute defining obstruction of justice through termination of an employee for reporting suspected criminal activities to the appropriate authorities. Even if this Court were to rely solely on the common law definition, Respondent did not act in a manner that obstructs, impedes, or hinders public or legal justice. *Burgess*, therefore, does not support Plaintiff's position that the common law crime of obstruction of justice establishes a public policy prohibiting Plaintiff's termination.

The *Jackson* case provides an even better example of why this Court should decline to rely on the common law crime of obstruction of justice in answering the certified question in the affirmative. The plaintiff in *Jackson* brought a claim for obstruction of justice, alleging that "she was terminated from her employment because she refused to sign a false affidavit" to be used in a future court proceeding. *Jackson*, 226 F. Supp. 2d at 792-93. The *Jackson* defendants argued plaintiff lacked "standing because a suit involving her was not pending at the time of the alleged

obstruction of justice.” *Id.* at 794. The court found it immaterial whether a suit was pending against plaintiff because under the circumstances as alleged “[d]efendants attempted to impede the legal justice system” by “repeatedly encourag[ing] [plaintiff] to sign a false affidavit, thereby asking her to testify untruthfully.” *Id.* at 793-94.

Even acknowledging Plaintiff’s argument that pursuant to *Jackson* an obstruction of justice claim may be based on conduct that occurs even if no case is pending in court, the fact of the matter remains that the conduct or misconduct as alleged in *Jackson* directly interfered with the sanctity of our legal system. The defendants were repeatedly insisting that one of its employees provide false testimony that would “impede” a future court proceeding and terminated her employment when she refused to sign a false affidavit. *Id.* at 791, 794. As this Court is aware, an affidavit is a legal instrument commonly used to properly carry out justice in our legal system. The defendants in *Jackson* acted in such a manner as to hinder the proper use of this instrument and to impede or obstruct legal justice in a later court proceeding.

Based upon the facts alleged in the instant case, it is difficult to draw any comparison to those alleged in *Jackson*. Not only was there no case pending in court at the time of the alleged obstruction of justice, there was also no future court proceeding that Respondent was allegedly obstructing by its conduct. By its very definition, Respondent must have engaged in “any act which prevents, obstructs, impedes or hinders public or legal justice.” *In re Kivett*, 309 S.E.2d 442, 462 (N.C. 1983) (the definition of the offense in North and South Carolina is identical). Plaintiff has failed to point to any conduct by Respondent that would fall within this definition.

Moreover, although Plaintiff found *Jackson* “especially noteworthy” to his position because it “also gave rise to a claim for wrongful discharge in violation of a clear mandate of public policy,” a closer look at the court’s reasoning behind its decision further illustrates why

this Court should answer the certified question in the negative. Pl.’s Brief at 14 (emphasis in original). In *Jackson*, plaintiff’s allegation fell into the public policy exception of employment at-will because the court determined that defendants’ actions violated a criminal statute, N. C. GEN. STAT. § 14-209,<sup>3</sup> which prohibits perjury. *Jackson*, 226 F. Supp. 2d at 793. As such, the court had no problem concluding that “[t]his statute is a public policy of North Carolina on which Plaintiff properly relies” to support her wrongful termination in violation of public policy claim. *Id.*

As discussed above, Plaintiff’s termination did not violate any South Carolina statute. Unlike in *Jackson*, this Court cannot conclude that Plaintiff’s termination gives rise to a claim for wrongful discharge in violation of a clear mandate of public policy because there is no statute providing a clear mandate from which this Court could base such a holding. In fact, *Jackson* supports Respondent’s argument that its conduct did not violate a clear mandate of public policy because it stands for the proposition that in making such a determination, a court’s decision should be “grounded in, and supported by, a legislative enactment from which a public policy mandate clearly emanates.” *Adler*, 432 A.2d at 499. As such, neither of these North Carolina cases supports a finding in Plaintiff’s favor.

**C. The general societal interest in the criminal justice system does not support Plaintiff’s Public Policy Discharge Claim.**

Plaintiff argues that the general societal interest in our criminal justice system provides a clear mandate of public policy sufficient to support Plaintiff’s wrongful discharge claim. *See*

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<sup>3</sup> This statute provides: If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be punished as a Class F felon.

Pl.'s Brief at 6. Thus, according to Plaintiff, because the world would be a better, safer place if citizens transmit information about criminal activity to law enforcement authorities, the Court is justified in recognizing a mandate of public policy from this abstract notion to support his claim. *See id.* at 7. In support of this argument, Plaintiff points to cases from various jurisdictions identified by the District Court as recognizing a cause of action for termination in violation for public policy, and relies in particular upon the decision in *Palmateer v. International Harvester, Inc.*, 421 N.E.2d 876 (Ill. 1981). *See* Pl.'s Brief at 7-9.

In fact, of the cases identified by the District Court and relied upon by Plaintiff, *Palmateer* is the **only** case in which the court did not grant summary judgment for the employer. In addition, to the extent that a clear mandate of public policy was recognized, the courts emphasized the fact that the particular criminal activity in question had a significant impact on the public interest, not just the private interests of the employer. *See Garrity v. Overland Sheepskin Co.*, 917 P.2d 1382 (N.M. 1996) (involving report of drug use); *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755 (Neb. 1988) (involving odometer fraud by employer car dealer); *Shea v. Emmanuel Coll.*, 682 N.E.2d 1348 (Mass. 1997) (involving theft of public funds); *Dunnigan v. City of Lorain*, No. 02-ca-008010, 2002 WL 31313216 (Ohio Ct. App. Oct. 16, 2002) (citing an earlier case that involved tampering with evidence and possession of marijuana).

The *Palmateer* decision is the only case that squarely supports Plaintiff's position, and it represents an extension of the public policy discharge exception that simply has not occurred in South Carolina. The case that is actually most analogous to what has occurred in this case is *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995). In *Hayes*, the plaintiff employee claimed his discharge was motivated by his reporting of criminal conduct of a co-employee perpetrated against the interest of the employer. *Id.* at 785. The plaintiff argued that his discharge "should

be protected because in doing so he [was] performing an act consistent with a clear and compelling public policy, to wit: acting as a good citizen and loyal employee in reporting said crime . . . .” *Id.* The Supreme Court of Oklahoma concluded, in relevant part:

Initially we note that an employee, in reporting a crime by a co-employee against the interest of his employer (such as the crime of embezzlement involved here) to outside law enforcement officials is not exercising any legal right or interest of his own. Thus, we start with the proposition the present situation must be distinguished from cases where the employee is terminated for seeking to vindicate his own legal rights or interests . . . .

Further, an employee, in reporting such a crime committed by a co-employee against the interest of his employer to outside law enforcement officials is not seeking to vindicate a public wrong where the victim of the crime could in any real or direct sense be said to be the general public, as where crimes or violations of health or safety laws are involved. Thus, the situation here must also be distinguished from those where sister jurisdictions have protected “whistleblowing” activity geared toward the good faith reporting of infractions by the employer or co-employees of rules, regulations or the law pertaining to the public health, safety or general welfare . . . . **We believe here the situation involves only the private or proprietary interests of the employer-employee relationship, not the direct interests of the general public . . . .**

. . . Although the public in a very general way might be said to be the indirect victim of all crimes we are not aware of a general consensus sufficient to base a *Burk*<sup>4</sup> tort claim upon that there is a public policy so thoroughly established in the public consciousness that would forbid an employer from making an informed business decision that its employees are prohibited from reporting crimes against the interest of the employer . . . to law enforcement officials and if they do so termination is the result. After all it is the employer . . . whose money or property was stolen, not [plaintiff’s] money or the money of a relative or friend.

*Id.* at 786-87.

The situation presented by the certified question is nearly identical to that dealt with in *Hayes*. Plaintiff was an employee of Respondent who reported criminal activity being perpetrated against the employer to law enforcement. (Am. Compl. ¶ 11.) There is no

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<sup>4</sup> Oklahoma adopted a public policy exception to the employment at-will doctrine in “cases in which the discharge is contrary to a clear mandate of public policy.” *Burk v. K-Mart Corp.*, 770 P.2d 23, 28 (Okla. 1989).

overriding public interest presented by the facts as alleged by Plaintiff. *Contra Vannerson v. Bd. of Regents Univ. of Oklahoma*, 784 P.2d 1053, 1055 (Okla. 1989) (concluding that if plaintiff was discharged for reporting an illegal transfer of public property, then he has a viable claim); *see also Hayes*, 905 P.2d at 787 (discussing *Vannerson* and concluding that “protecting the public’s interest in seeing to it that the peoples’ tax dollars are not fraudulently stolen by State employees or officials” is a clear public policy). To the contrary, Respondent merely engaged in a “private business decision,” and its conduct in terminating Plaintiff, whether poor business judgment or not, did not violate a clear mandate of public policy. *Hayes*, 905 P.2d at 788.

It is established in South Carolina that the public policy exception is “to be very narrowly applied” and “[t]he ‘public policy’ violation requirement . . . is *not an open-ended concept*. . . .” *Merck v. Advanced Drainage Sys., Inc.*, 921 F.2d 549, 555 (4th Cir. 1990) (emphasis added). Abstract notions of that which constitutes the public good are simply not clear mandates of public policy from which courts should expand this very narrow exception. *See Wholey*, 803 A.2d at 499 (criticizing the holding in [*Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981)] because the “policy mandate was unsupported by any legislative enactment and was grounded only in the obscure belief that public policy insists that all citizens become crime-fighters”). Even if the Court were to disagree and find notions of “public good” sufficient to provide a clear mandate of public policy for this type of claim, the *Hayes* case illustrates why the certified question presents a situation that is merely private or proprietary, rather than public. *See Hayes*, 905 P.2d at 786 (“[T]o support a viable tort claim the public policy must truly be public, rather than merely private or proprietary.”).

**D. The expansion of the Public Policy Exception urged by Plaintiff is unwarranted and inappropriate.**

Controlling precedent of the South Carolina Supreme Court dictates that for a cause of action for wrongful discharge in violation of public policy to lie, the alleged discharge must violate a clear mandate of public policy. *Ludwick*, 337 S.E.2d at 215; *Barron*, 713 S.E.2d at 636-37. Therefore, precedent, although admittedly scant on this subject, does establish that this cause of action must be grounded in and supported by a clear declaration of public policy. It is also established that such a declaration of public policy is most often made by the legislature, explicitly via a statutory provision, or is recognized and declared by the courts based on their interpretation of statutory or common law. *See Citizens' Bank v. Heyward*, 133 S.E.2d 709, 713 (S.C. 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."); *Culler*, 422 S.E.2d at 92-93 ("We believe that *Ludwick's* prohibition of retaliatory discharge in violation of clear mandate of public policy of this State extends at least to legislatively defined 'Crimes Against Public Policy.'").

As stated in *Wholey*:

A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. And society's interests are served through a more stable job market, in which its most important policies are safeguarded.

803 A.2d at 501 (emphasis in original) (quoting *Gantt v. Sentry Ins.*, 824 P.2d 680, 687-88 (Cal. 1992) (overruled on other grounds by *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1992))).

Plaintiff has failed to present any South Carolina statute, legislative history, case law or common law to support his position. Moreover, the statutes and case law cited by the District Court, Plaintiff and Respondent supports a finding that Plaintiff's claim does not fit within the recognized bounds of wrongful termination in violation of public policy. Contrary to the observation of the District Court and the arguments of Plaintiff, this is not an area that the General Assembly in South Carolina simply has not addressed. The General Assembly has passed legislation dealing with the protection of individuals involved in the criminal justice system. It has crafted statutes that extend certain protections to various categories of individuals engaged in specific activities. Despite having passed legislation in this area and making certain judgments about what type of activity deserves special protection, the General Assembly has not extended any protection to every person who reports criminal activity. Until it does, it would be inappropriate for the courts of this state to substitute their judgment for that of the General Assembly by further extending the protections already created through the legislative process. Therefore, the certified question should be answered in the negative, and this Court should leave such a potentially significant change in our law to the South Carolina Legislature. *See Wholey*, 803 A.2d at 501 (declining petitioner's invitation to adopt a broader public policy mandate, "being of the opinion that such a significant change in our law is best left to the Legislature").

## CONCLUSION


For the reasons noted above, Respondent urges this Court to continue to limit the wrongful discharge in violation of public policy exception to the at-will employment rule to situations where the employer has violated a clear mandate of public policy. In response to the certified question, the Court should hold that an at-will employee does not have a cause of action in tort for wrongful termination where (1) the employee suspects that criminal activity has

occurred on the employer's premises, (2) reports the suspected criminal activity to law enforcement, and (3) is terminated for reporting the suspected criminal activity to law enforcement.

Respectfully submitted,

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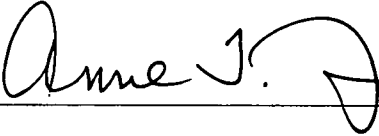
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**CERTIFICATE OF SERVICE**

I hereby certify that I have, on this the 24<sup>th</sup> day April, 2014, served the BRIEF OF RESPONDENT 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 same to the following:

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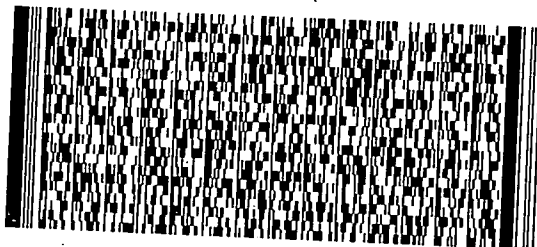
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