LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

May 5, 2014

VIA US MAIL
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 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 copies of the plaintiff's Reply 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 (via Hand Delivery)
211 King Street, Suite 200
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF ON CERTIFIED QUESTION

Allan R. Holmes, Sr.
Timothy O. Lewis
GIBBS & HOLMES
Suite 110, 171 Church Street
Charleston, South Carolina 29401
Telephone: 843-722-0033

ATTORNEYS FOR PLAINTIFF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

THE DEFENDANTS SEEK TO OBFUSCATE THE CERTIFIED QUESTION

It is apparent from the Defendants' brief that they would have preferred the United States District Court to have certified some other question arising under materially different facts.

The question before this Court is set out by the February 14, 2014, Order of this Court. The material facts under which it has arisen are set out by the January 9, 2014, Order of the United States District Court. The certified question and the relevant portions of the underlying Order are set out *verbatim* in the plaintiff's Brief at pp. 3-4.

There is nothing in the certified question, or in the Order, referencing any "Company policy", or any contention that a "violation" of such a policy served as a basis for the termination of plaintiff's employment. In fact, the Order from the District Court notes that "Plaintiff had been trained to handle suspicious patrons and was instructed to call the police when 'such an incident occurred.'" Nor is there any reference in the Order to any "complaint of race discrimination." Indeed, there's nothing to indicate that the suspected shoplifter was "African American." Nonetheless, the defendants have attempted to distort the record by including these manufactured "facts" in their Statement of the Case. Respondent's Brief, p. 2.

The certified question assumes that the Plaintiff was "*terminated in retaliation for reporting the suspected activity to law enforcement.*" See

Plaintiff's Brief, p. 3, (emphasis added). It does not assume that he was terminated for any other reason - in whole, or in part.

The Defendants have also mischaracterized the Plaintiff's underlying motives for calling the police - in material contradiction of the District Court's statement of those motives. According to the Defendants, "[b]y reporting the suspected shoplifter, the Plaintiff was taking steps to protect Respondent's *private* interest in its goods." Respondent's Brief, p. 2. (emphasis in Respondent's Brief). However, the District Court asks this Court to make the following factual assumption:

> 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 protecting his employer from theft, *and in the interest of ensuring the safety of himself and other store employees.*

January 9, 2014, Certification Order (hereinafter "Certification Order"), p. 3, (*emphasis added*).

The factual scenario presented by the District Court also states that "[t]he area near the [Plaintiff's 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 [Plaintiff's store]. The [Plaintiff's store] itself had experienced inventory 'shrinkage' issues." *Id.*

In addition to serving the public interest in safety, the reporting of apparent shoplifting serves the public interest. This Court need only take judicial note of publicly available reports which measure the frequency and effects of shoplifting. According to the Federal Bureau of Investigation's "Crime in

America" statistics for 2010, there 925,107 incidents of shoplifting reported to law enforcement that year, and these accounted for 17.2% of all such crime in the "larceny-theft" classification. *See,* www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl23.xls. The website for the National Association for the Prevention of Shoplifting states that more than $13 billion worth of goods are stolen from retailers each year - more than $35 million per day. *See,* www.shopliftingprevention.org/whatnaspoffers/NRC/PublicEducStats.htm.

The shrinkage in inventory which is caused by shoplifting is typically passed along by retailers to consumers in the form of higher prices. Communities lose the sales tax revenue from stolen goods. Shoplifting is a serious criminal activity which has serious adverse consequences for the interests of the public.

This Court should reject the defendants' attempts to obfuscate and distort the certified question.[1] It does not involve a termination of employment for any reason other than the employer's retaliation. It does not involve some sort of private property dispute between the plaintiff and his former employer. The plaintiff's report to the police of what he reasonably suspected to be criminal activity (shoplifting) was in furtherance of significant public interests and a clear mandate of public policy.

[1] This Court should also reject the defendant's speculation as to why the District Court was motivated to certify the question. See Respondents' Brief, p. 2, contending that the District Court disagreed with the plaintiff that the sources he cited "sufficiently supported plaintiff's claims." If one were to speculate, one might guess that the District Court decided that the South Carolina Supreme Court is the proper authority to decide a question that is exclusively controlled by South Carolina law.

SECTION 16-9-340 S.C. CODE OF LAWS (1976), AS AMENDED, IS INTENDED TO PROTECT THE PLAINTIFF IN HIS CAPACITY AS WITNESS

Insofar as it addresses a question of South Carolina law, an opinion of the United States District Court for the District of South Carolina, or of the United States Court of Appeals, or of the United States Supreme Court is not binding on this Court. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 473, 674 S.E.2d 154, 161 (2009).

Consequently, the District Court's view of Section 16-9-340 is not controlling.[2] That view - and the view taken by the defendants - would permit the punishment of a "witness" or "potential witness" (or, for that matter, a "juror" or "potential juror") for participating in the legal process. Defendants contend that the modifier, "in discharge of his duty as such," requires that the witness or potential witness be intimidated at the time of his or her service as a witness or potential witness. In other words, the Defendants argue, after the service is completed, the witness or potential witness is fair game for abuse. The alternative - and less nonsensical - intent of the modifier, "in discharge of his duty as such", is to simply require a showing that the intimidation of a witness or potential witness - whenever it occurs - is related to his or her service as a witness or potential witness. This reading is more logical because Section 16-9-340 is

[2] For the same reason, the Defendants' are mistaken when they contend that any part of South Carolina law "is established" by *Merck v. Advanced Drainage Sys., Inc.*, 921 F.2d 549, 554 (4th Cir. 1990). Respondents' Brief, p. 17. Indeed, this portion of the *Merck* opinion, though cited by the Defendants, lacks prescience. It holds - erroneously - that "[t]he 'public policy' violation requirement by the doctrine is not an open-ended concept but *is restricted to violations* which contravene the clear mandate of public policy *'within the penal sphere.*'"(emphasis added).

intended to address obstruction of the "administration of justice"[3] , and a broader reading is in keeping with the broad interpretation courts have given that concept at common law. "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)." *State v. Lyles-Gray*, 328 S.C. 458, 464, 492 S.E.2d 802, 805 (Ct. App. 1997). Thus, punishing jurors after their service ends constitutes an abuse of process, *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001), as does punishing an potential witness by terminating her employment because she refused to provide a false affidavit to be used in an as yet non-existent proceeding. Contrary to Defendants' assertion, Plaintiff *did engage* the criminal justice system as both a witness to the conduct he reported, and as a potential witness to any future proceedings. He witnessed what he reasonably believed to be criminal misconduct, and when he reported this fact in good faith to the police - a key component of the criminal justice system - he engaged that system, and he earned the protection of the public policy which furthers the administration of justice. Retaliation against him violates that public policy.[4]

PLAINTIFF'S CONDUCT IS PROTECTED BY PUBLIC POLICY EXPRESSED WITHIN SECTION 16-3-1505, S.C. CODE OF LAWS (1976), AS AMENDED

[3] Section 16-9-340(A)(2) makes it unlawful "for a person by threat or force to: (2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court."

[4] In their discussion of their termination of the Plaintiff's employment, the Defendants again make improper reference to an alleged "Shoplifting Apprehension Policy" and Plaintiff's alleged violation of that policy. None of these is of record in this proceeding.

It is difficult to imagine a stronger expression of public policy than that contained in Section 16-3-1505. It explicitly recognizes the "civic and moral duty of . . . witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies" and recognizes "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 justice systems of this State ..." The Defendants' response to this statement of public policy is their contention that the Plaintiff was not a "witness" as defined by the statute: "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." Respondents' Brief, p. 10. A substantial number of criminal cases end in acquittals. Do the "witnesses" in those cases fail to meet the statutory definition because it was later determined that no crime was committed? How about "witnesses" in cases in which no true bill issued from the grand jury, or in which warrants either did not issue or were dismissed for want or probable cause? If charges are denoted *nolle prosequi* by the solicitor, do the witnesses to those facts underlying charges fail to meet statutory definition? In fact, the definition of "witness" includes a person "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 ... whether or not any action or proceeding has been commenced." The Plaintiff was a "witness" when he was cooperating with local law enforcement and conveying to them his reasonably perceived observations of

criminal misconduct. At that time, he possessed relevant information, and if a proceeding had commenced, he would likely have been called as a witness.

Regardless, Section 16-3-1505 is an unequivocal expression of the public policy of South Carolina. Witnesses to a crime have a "civic and moral duty ... to cooperate fully and voluntarily with law enforcement agencies." The statute recognizes the "importance of this citizen cooperation to state and local law enforcement efforts." This clear expression of public policy is completely at odds with the Defendants' contention that no such policy exists.

THE OKLAHOMA OPINION CITED BY THE DEFENDANTS IS UNPERSUASIVE

Defendants cite *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995), as the case "most analogous" to the case at bar. In *Hayes*, a "co-employee" engaged in the *reported* criminal misconduct, and the crime at issue was "embezzlement." *Hayes* holds that the reporting of embezzlement to law enforcement officials is not protected by Oklahoma public policy because the plaintiff's report neither asserted a right or interest of his own nor asserted a right or interest of the public:

> [A]n 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 ... In the present case Hayes' reporting of a crime against the interest of his employer cannot be said to have been seeking to vindicate his own legal rights, but only those of the employer he says wrongfully terminated him.
>
> 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. ... 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 as where the reporting involves the criminal wrongdoing of the employer or a co-employee perpetrated against the interests of the general public.

Hayes, 905 P.2d at 786-87 (*emphasis in opinion*).

Understandably, *Hayes'* marginalization of the public's interest in the prosecution of a serious criminal offense - embezzlement - has not been adopted by any other United States jurisdiction. Criminal prosecutions are prosecuted in the name of, and for the benefit of, the public. They never involve only "private or proprietary interests." This Court has so held:

> Black's Law Dictionary defines "criminal law" as "[t]he body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders." Black's Law Dictionary 403 (8th ed. 2004) (*emphasis added*). As the Supreme Court of the United States has noted, "'The purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Standefer v. United States*, 447 U.S. 10, 25, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689, 701 (1980), citing *United States v. Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (*emphasis added*).
>
> * * *
>
> If a private party is permitted to prosecute a criminal action, we can no longer be assured that the powers of the State are employed only for the interest of the community at large. In fact, we can be absolutely certain that the interests of the private party will influence the prosecution, whether the self-interest lies in encouraging payment of a corporation's debt, influencing settlement in a civil suit, or merely seeking vengeance. Petitioner candidly acknowledges in its brief that the non-lawyers are authorized by the companies "to represent their interests" in the criminal proceedings.

> We find that allowing prosecution decisions to be made by, or even influenced by, private interests would do irreparable harm to our criminal justice system. At the very least, there is "too much opportunity for abuse and too little motivation for detachment." *See State v. Martineau*, 148 N.H. 259, 808 A.2d 51, 55 (N.H. 2002), Nadeau, J., concurring.
>
> * * *
>
> [W]e rest our decision on centuries-old principles of law. See 1 W. Blackstone, Commentaries on the Laws of England, 200 (1851) (The king is "the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eye of the law."); 1 F. Wharton, Criminal Law § 10, p.11 (11th ed. 1912) ("Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service and in the satisfaction of the duty of the State . . . ."); J. Locke, Second Treatise of Civil Government, § 88, p. 55 (1905) ("[E]very man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature in prosecution of his own private judgment[.] . . . [H]e has given a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth . . . ."); *Huntington v. Attrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L.Ed. 1123, 1128 (1892) ("Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State.").

In re Richland County Magistrate's Court, 389 S.C. 408, 410-12, 699 S.E.2d 161, 162-64 (2010).

In re Richland County Magistrate's Court arises in the context of private businesses seeking to use a representative to prosecute worthless checks. 389 S.C. at 408. It's possible that the *Hayes* court would find such a matter nothing more than a collection action involving the private and proprietary interests of the business – even though such a case, like that at Bar, involves the criminal act of a third party rather than an employee of the business. Regardless, *In re Richland County Magistrate's Court* eliminates the possibility of such a holding in South Carolina.

In addition, the Plaintiff's circumstances in this case are easily distinguished from those in *Hayes.* Here, the Plaintiff sought to ensure his safety and the safety of his co-employees. Thus, Plaintiff sought to vindicate the rights of himself and his co-employees. Similarly, as noted earlier, the crime of shoplifting has an enormous adverse effect on the public. Prices are raised. Taxes go unpaid. The public is victimized. Plaintiff's good faith report of suspected criminal activity was in keeping with the protection of important public interests.

CONCLUSION

South Carolina's public policy exception to the at-will employment rule *only* applies to circumstances in which the General Assembly (or some other legislative body) *has not* fashioned a statutory remedy for the affected employee. *Baron v. Labor Finders of S.C.,* 393 S.C. 609, 615, 713 S.E.2d 634, 637 (2011) ("The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination."). Defendants misunderstand the nature of this tort insofar as they counsel this Court to wait for the General Assembly to create a statutory remedy for those whose employment is terminated because they make good faith reports of criminal activity to the police. Respondent's Brief, p. 19.

Plaintiff asserts a simple proposition: It is the clear public policy of South Carolina to protect its citizens from criminal misconduct. Criminal misconduct is defined by the criminal law. When an employee reasonably suspects that the criminal law has been violated, he serves the clear public policy of South Carolina

by making a good faith report to law enforcement. Without such citizen cooperation, our criminal justice system would be - at the least - severely compromised. Retaliatory terminating an employee's employment because he made such a report violates the clear public policy of our State. No amount of obfuscation will serve to hide these facts, and they are established by our South Carolina Constitution, our common and statutory law, and the pronouncements of public policy set out therein. Nothing more is needed.

It is respectfully submitted that this Court should answer the Certified Question as follows. Under the public policy exception to the at-will employment doctrine in South Carolina, an at-will employee has 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.

All of which is respectfully submitted.

GIBBS & HOLMES

May 5, 2014

Allan R. Holmes (S.C. Bar #2576)
Timothy O. Lewis (S.C. Bar #74024)
171 Church Street, Suite 110
Charleston, S.C. 29402
Phone: (803) 722-0033

ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I this day served the Reply 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:

Benjamin P. Glass

Luci L. Nelson

OGLETREE, DEAKINS, NASH,

SMOAK & STEWART, P.C.

211 King Street, Suite 200

Charleston, SC 29401

Telephone: 843-853-1300

DONE this 5th day of May, 2014.

Whitney Fields, Assistant to Allan Holmes

PRIORITY® ★ MAIL ★

MEDIUM FLAT RATE BOX
ONE RATE ★ ANY WEIGHT*

1024 29201

U.S. POSTAGE PAID CHARLESTON, SC 29401 MAY 05 14 AMOUNT $12.35 00094495-07

DATE OF DELIVERY SPECIFIED^

USPS TRACKING™ INCLUDED*

$ INSURANCE INCLUDED+

PICKUP AVAILABLE

UNITED STATES POSTAL SERVICE®

USPS TRACKING #

9114 9012 3080 3282 1901 86

Label 400, Jan. 2013 7690-16-000-7948

FROM: Allan R. Holmes, Esq.
171 Church St., Ste. 110
Charleston, SC 29401

TO: The Honorable Daniel E. Shea
Clerk, SC Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

USPS.COM/AMAZINGPACKAGE
#AmazingUSPS

This package is made from post-consumer waste.
Please recycle - again.

^ Domestic only.

* Tracking outside the U.S. available to many major international destinations.

+ Limited International Indemnity.

× For Domestic shipments, the maximum weight is 70 lbs. For International shipments, the maximum weight is 20 lbs.

UNITED STATES POSTAL SERVICE®

PS00011035501

FRB2SM March 2014
ID: 11.875 x 3.375 x 13.625
OD: 12 x 3.5 x 14.125
ODCUFT: 0.343