THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2014-000453

Antonio Hough

Appellant,

v.

Town of Pageland

Respondent,

INTIAL BRIEF OF APPELLANT

M.W. Cockrell, III
Sarah Campbell
William D. Curtis, Jr.
159 Main Street
Chesterfield, South Carolina 29709
(843) 623-5911
ATTORNEYS FOR APPELLANT

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3. **DID THE TRIAL COURT ERR IN EXCLUDING THE AFFIDAVIT OF BOBBY JOE ROLLINS WHEN MAKING THE DECISION FOR SUMMARY JUDGMENT?**

STATEMENT OF THE CASE

This is a wrongful termination case that arises out of the termination of Antonio Hough (Hough) by the Town of Pageland, South Carolina (the Town). The Town made a Motion for Summary Judgment. The trial court granted the Town's motion by Order signed December 13, 2013. Hough received written notice of the order on February 25, 2014. Hough appeals this order .

STATEMENT OF THE FACTS

This case concerns the termination of the Appellant from the Town of Pageland, South Carolina. In August 2009, Hough injured his knee while on the job by stepping in a hole. (Hough Deposition Testimony p. 9). He was out of work for several weeks and eventually put on light duty. (Hough p. 11). Hough was absent for periods of time throughout 2010 and continued to receive medical treatment for his on the job injury. (Hough p. 13). The first week of January

2011, Hough had surgery on his knee. (Hough pp. 14-5). On or about August 18, 2011, Hough's orthopedist initially wrote that Hough could return to work on August 15, 2011. (Hough Exhibit 6). Hough's orthopedist later rescinded this notice indicating that Hough had not yet reached maximum medical treatment for his on the job injury and would need to be out of work at least until his follow up appointment on August 30, 2011. (Hough Deposition Exhibit 13). Hough simultaneously submitted a notice to the Town from another medical provider indicating that he would need to be out of work until September 1, 2011. (Hough Deposition Exhibit 12). Hough was fired by the Town before achieving maximum medical improvement for his on the job injury. (Hough Deposition Exhibit 6).

Hough testified at his deposition that his supervisor told his coworker that Hough was faking his injury and that the supervisor was doing everything he could to have Hough terminated. (Hough pp. 33-35). Hough further stated in his deposition on September 30, 2011 before the South Carolina Workers' Compensation Commission that Respondent tends to fire employees that file for workers' compensation. (Hough Exhibit 1, p. 9). Hough further testified that his coworkers indicated that his supervisor has an aversion to African Americans and has a tendency to use racial slurs. (Hough p. 31).

The Town's leave of absence policy provides that employees may have up to six months of leave for medical reasons. If they are unable to return to work after exceeding this leave, they are administratively terminated. (Aff. Long). Hough would have exceeded this leave in June of 2011. (Hough pp. 14-15). The town did not terminate Hough when he exceeded the six month

period, but only terminated Hough's employment when he provided medical evidence of his on the job injury and required leave in August of 2011. (Hough Exhibit 6.)

It was eventually determined, after Hough's termination, that Hough would not medically be able to return to his regular work due to his on the job injury. During the weeks following the orthopedist's rescission of the original medical work excuse, the orthopedist opined that Hough had a permanent disability due to his injury, gave him an impairment rating, and rated him as permanently unable to lift more than 25 pounds or do any climbing. (Hough Exhibit 8).

The Town filed a Motion for Summary Judgment that was subsequently heard on November 5, 2013. Prior to the hearing, Appellant agreed to voluntarily dismiss the breach of employment contract cause of action. (Transcript of Summary Judgment Hearing p. 5) At the hearing, Respondent argued that there was no causal relationship with evidence of animus towards Hough and that Appellant's inability to return to work ultimately barred the claim. (Transcript of Summary Judgment Hearing p. 8)

Appellant countered this argument citing that Respondent had not pled the affirmative defense of impossibility to continue work in either Respondent's answer or amended answer and as such, the defense was waived. (Transcript of Summary Judgment Hearing p. 10) Appellant further provided evidence of a casual connection. Judge J. Michael Baxley granted Respondent's motion for summary judgment and dismissed Appellant's remaining cause of action, retaliation for filing a workers' compensation claim. (Order Granting Defendant's Summary Judgment

Motion 1) This decision was based upon three findings. (Transcript of Summary Judgment Hearing pp. 16-7).

First, the Court was persuaded by Respondent's argument of impossibility noting that Appellant could not return to a position of light duty as there were none with the Town of Pageland. Second, that an affidavit supplied by Hough from Bobby Joe Rollins, a co-worker, attesting to a conversation he had with Appellant's supervisor that contained racial slurs were, in the Court's opinion, highly inflammatory and prejudicial and would most likely be excluded at trial through South Carolina Rules of Evidence Rule 403 analysis. (Rollins Aff.) And last, that said affidavit did not establish a proximate link between the Appellant's termination and the supervisor's ability to fire the Appellant.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56, SCRCP. *See Boyd v Bellsouth Telephone Telegraph Co., Inc.*, 369 S.C. 410, 633 S.E.2d 136 (2006). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *City of Columbia vs. American Civil Liberties Union etc. et al.*, 323 S.C. 384, 475 S.E.2d 747 (S.C. 1996). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in light most favorable to the nonmoving party." *Id.*

Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be

drawn from them, summary judgment should be denied. *Redwend Limited Partnership v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A.*, 320 S.C. 470,465 S.E.2d 765 (Ct. App. 1995).

In cases in which the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E. 2d 801, 803 (2009). The scintilla of evidence standard is met "if there is **any evidence at all in a case** ... tending to support a material issue .... " Henry C. Black Black's Law Dictionary 1207 (5th ed. 1979) (emphasis added).

Summary judgment is a drastic remedy. Since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (S.C. 2003).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *Jamison v. Ford Motor Co.*, 644 S.E.2d 755, 766, 373 S.C. 248, 269 (S.C.App. 2007). An appellate court reviews a trial court ruling to exclude relevant evidence on the grounds of prejudice, confusion, or waste of time pursuant to an abuse of discretion standard and gives great deference to the trial court. *Lee v. Bunch*, 647 S.E.2d 197, 199, 373 S.C. 654, 658 (S.C. 2007)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE TOWN'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF AN AFFIRMATIVE DEFENSE THAT WAS NOT PROPERLY PLED AND THUS WAIVED

Rule 8(c), SCRCP states that a party shall affirmatively set forth his defenses when replying to a preceding pleading. Further, Rule 12(b), SCRCP sets forth that "Every defense, in law or fact, to a cause of action in any pleading... shall be asserted in the responsive pleading thereto..." It is well settled that affirmative defenses to a cause of action in any proceeding must be asserted in a responsive pleading. *Wright v. Craft*, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct. App. 2006). In fact, "the failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Finally, a party should not be able to benefit from an affirmative defense without being required to affirmatively plead it. *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct. App. 2008).

S.C. Code Ann. § 41-1-80 provides a number of affirmative defenses to a Worker's Compensation Retaliation claim. These affirmative defenses include failure to meet established employer work standards and violating specific written company policy for which the action is a stated remedy of the violation. Respondent sets forth in paragraph 25 of the amended answer, "Defendant's actions regarding Plaintiff's employment were based on legitimate non-discriminatory reasons, specifically plaintiff exceeding allowable leave for a non-work related

injury." This paragraph sufficiently states the affirmative defense of violation of written company policy. However, there is no mention in respondent's amended answer of the additional affirmative defense that Hough was unable to meet the established work standards as provided in S.C. Code Ann. § 41-1-80.

Despite the fact that the trial court was swayed by Respondent's assertion of this defense, Respondent failed to set forth the affirmative defense that Hough was unable to meet the established work standards as an employee of the Town of Pageland. As such, Respondent waived the opportunity to rely upon this defense at summary judgment. With this defense waived, the only remaining basis for summary judgment remaining is the causal connection with Hough's termination and the institution of worker's compensation proceedings. As such, the trial court erred in relying upon this affirmative defense as a basis of granting the Town's motion for summary judgment.

II. THE TRIAL COURT ERRED IN GRANTING THE TOWN'S MOTION FOR SUMMARY JUDGMENT BECAUSE HOUGH PRESENTED AT LEAST A SCINTLLA OF EVIDENCE SHOWING A GENUINE ISSUE OF MATERIAL FACT FOR THE ONLY DISPUTED ELEMENT OF THIS CLAIM.

The South Carolina Supreme Court lays out the basis of a Workers' Compensation Retaliation claim in *Hinton v. Designer Ensembles, Inc.*, 540 S.E.2d 94 (S.C. 2000). Accordingly, in order to prove a claim under S.C. Code Ann. § 41-1-80, "a plaintiff must establish three elements: 1) institution of workers' compensation proceedings, 2) discharge or demotion, and 3) a causal connection between the first two elements." *Id* at 97. The *Hinton* Court further asserts that, "the employer has the burden of proving its affirmative defense, but

not the burden of establishing the affirmative defense is causally related to the discharge- the ultimate burden is, throughout, upon the employee." *Id.* There are two ways in which an employee can prove that a reason given by the employer for termination is pretextual. The first is by showing the discharge was significantly motivated by retaliation, and the second, by showing the employer's proffered explanation is unworthy of credence.

Here, it is undisputed that Hough instituted a worker's compensation proceeding and that he was discharged after the proceeding was initiated. The only remaining element is the causal connection between the first two elements.

A. <u>There is a genuine issue of material fact on the question of whether or not Hough's termination was retaliatory in nature.</u>

The Town terminated Hough's employment before Hough reached maximum medical improvement (MMI). Hough's termination, purportedly because of his extended absence, came months after the requisite time allotment. Hough testified in his deposition that his supervisor, Wesley Miles made racial slurs towards African Americans in his presence. This testimony is corroborated by Hough's co-worker Bobby Joe Rollins. Rollins further testified that Miles asked him to lie to worker's compensation representatives and that Hough would be fired if he filed a claim.

The entirety of this evidence far surpasses the mere scintilla of evidence needed to survive summary judgment. In fact, the record of evidence, viewed in a light most favorable to the non-moving party, infers that Hough was fired as a retaliatory measure, and as such establishes genuine issues of material fact for the essential element of Hough's cause of action.

On this evidence, the trial court erred in granting the Town's motion for summary judgment.

III. THE TRIAL COURT ERRED IN GRANTING THE TOWN'S MOTION FOR SUMMARY BECAUSE THE COURT IMPROPERLY EXCLUDED THE AFFIDAVIT OF BOBBY JOE ROLLINS WHEN MAKING THE DECISION FOR SUMMARY JUDGMENT

It has been established that, "summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Froneberger v. Smith*, 748 S.E.2d 625, 629, 406 S.C. 37,46 (S.C.App. 2013). Rule 56(e), SCRP requires that affidavits, "[1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Dawkins v. Fields*, 580 S.E.2d 433, 438, 354 S.C. 58, 68 (S.C. 2003). Rule 402, SCRE states that "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 403, SCRE goes on to clarify that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Hearsay is generally not admissible evidence. Rule 802, SCRE. However, a statement made against the declarant's interest is an exception to this rule pursuant to Rule 804(3), SCRE.

In the present case, the affidavit of Bobby Joe Rollins should have been considered along with the remainder of the evidence in the summary judgment decision. The affidavit was

admissible pursuant to South Carolina Rule of Civil Procedure 56(e). The affidavit was made with personal knowledge. Mr. Rollins personally overheard the remarks made by Wesley Miles in regards to Hough. The evidence was admissible. While hearsay, the statement was one made against the Respondent's interest, which is an exception to hearsay pursuant to Rule 804(3), SCRE. Counsel for Appellant offered this argument when questioned about the affidavit being hearsay, quelling any suspicions as to the affidavit's admissibility (Transcript of Summary Judgment Hearing 12-3). Mr. Rollins is competent to testify as to the matters contained within the affidavit. At the time, he was an employee of the Town of Pageland and personally overheard the remarks made by Supervisor Miles. While the affidavit did contain a racially charged slur, the overall content of the affidavit was far more probative than prejudicial. The affidavit spoke to the very heart of the case, that Mr. Hough had been discharged because his supervisor had an aversion to African Americans. Further, the affidavit elaborated on how Miles had asked Mr. Rollins to lie to worker's compensation representatives and detailed how Hough would be fired if he filed a claim.

While the slurs Mr. Miles used to describe Mr. Hough may be considered inflammatory, the overall testimony of the affidavit is crucial to the call of the case and ultimately should have been considered during summary judgment. Had the case proceeded to trial, the delivery of such testimony could have been better tailored as to lessen whatever prejudicial effect the affidavit contained through motions in limine and possibly redacted statements. However, at the summary judgment stage, the affidavit should have been considered in its entirety by the trial court along with other compelling evidence. This affidavit, along with Hough's testimony as to Miles's

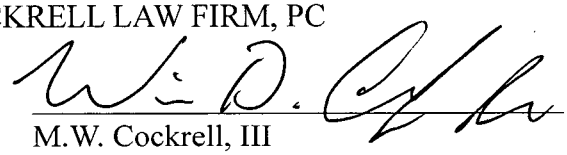
aversion to African Americans, and the fact that he was fired well after the requisite time allotment infers that Hough was fired as a retaliatory measure when viewed in a light most favorable to the non-moving party. This evidence viewed in it's entirety far surpasses the mere scintilla of evidence required to survive a motion for summary judgment. As such, the trial court erred in granting the Town's motion for summary judgment based on the exclusion of this affidavit.

CONCLUSION

Based upon the foregoing argument and citation of authority, the Appellant, Antonio Hough, respectfully requests that this Court reverse the trial court order granting summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

COCKRELL LAW FIRM, PC



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August 12 2014
Chesterfield, South Carolina

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J. Michael Baxley, Circuit Court Judge

Case No: 2014-000453

Antonio Hough, Appellant,

v.

Town of Pageland Respondent,

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief on Town of Pageland by depositing a copy of it in the United States Mail, postage prepaid on August 12, 2014, addressed to its attorney of record Charles F. Thompson, Jr., Malone, Thompson, Summers, & Ott, LLC, 339 Heyward St, Columbia, SC 29201

August, 12, 2014

[Signature on Following Page]

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August 12, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Antonio Hough v. Town of Pageland
Case No: 2014-000453

Dear Madam Clerk:

Enclosed herewith for filing in accordance with SCACR, Rule 208(a) and Rule 209(a) please find the original and one copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal for the above-captioned matter. I would appreciate your returning the same to my office marked "Received" in the included self-addressed envelope at your convenience.

Should you have any questions, please do not hesitate to call.

With Kindest Regards,
I remain

M.W.C.

M.W. Cockrell, III
MWC/wc
Enclosures

cc: Charles F. Thompson, Jr.
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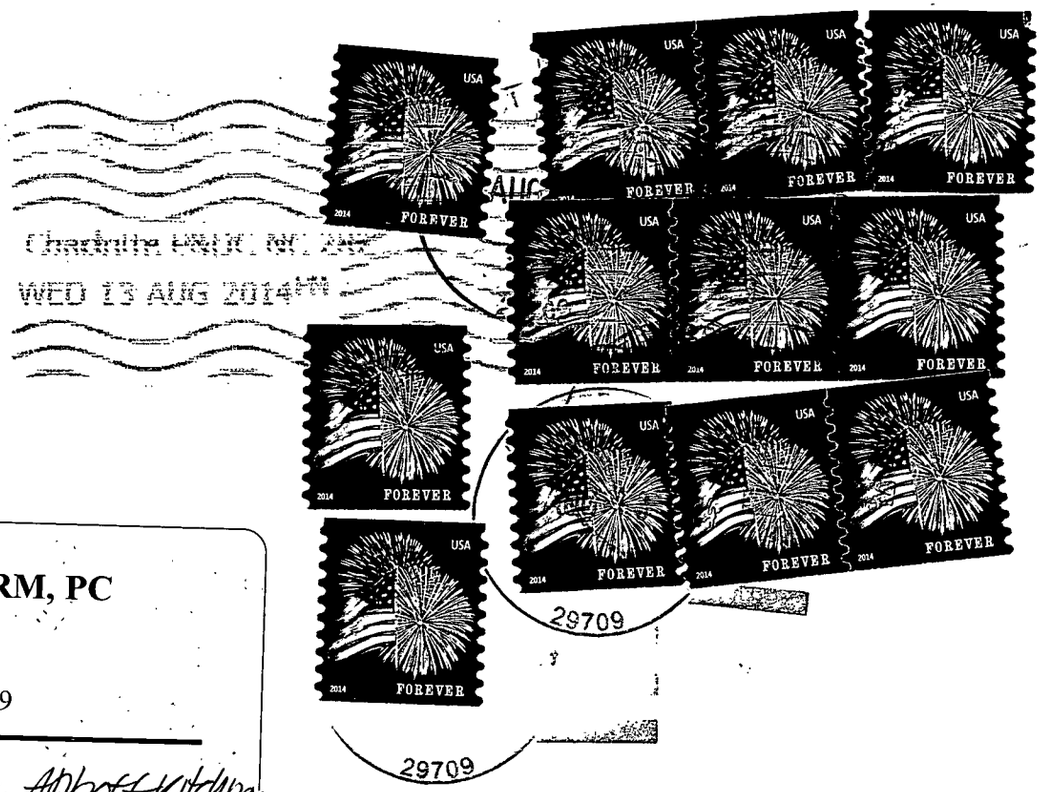

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