

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2013-000678

Opinion No. 5072 (S.C. Ct. App. filed Jan. 16, 2013)
(Withdrawn, Substituted, and Refiled Feb. 27, 2013)

Michael Cunningham, Respondent/Petitioner,

v.

Anderson County, Petitioner/Respondent.

BRIEF OF PETITIONER/RESPONDENT
ANDERSON COUNTY

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QUESTION PRESENTED

Did the Court of Appeals err in remanding Cunningham's wrongful discharge claim for further discovery, when it is plain that the claim fails as a matter of law?

STATEMENT OF THE CASE

Respondent Michael Cunningham filed this action on April 22, 2009, alleging three causes of action against Petitioner Anderson County. Pet. App. 200.¹ Cunningham alleged the County breached his employment agreement (Count I); wrongfully discharged him in violation of public policy (Count II); and violated the Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* (Supp. 2013) (Count III).

The parties engaged in discovery, following which Cunningham moved for summary judgment as to liability on Count I. Pet. App. 226. The County opposed this motion and filed its own motion seeking summary judgment on all claims. Pet. App. 245, 258. Cunningham then filed a second summary judgment motion, seeking summary judgment as to liability on Count III. Pet. App. 275. The parties thoroughly briefed all motions. The circuit court conducted a hearing on March 20, 2011, Pet. App. 296, and ruled in Anderson County's favor on May 13, 2011. Pet. App. 187.

Cunningham timely filed his notice of appeal on June 10, 2011. Pet. App. 294. After briefing and oral argument, the Court of Appeals entered an order affirming in part and reversing and remanding in part. Pet. App. 23. Both parties petitioned for rehearing. Pet. App. 39, 77. On February 27, 2013, the Court of Appeals denied both petitions for rehearing. Pet. App. 1. The Court also withdrew its prior opinion and substituted a new one. Pet. App. 2.

¹ References to "Pet. App." refer to the Appendix filed by Petitioner/Respondent Anderson County.

STATEMENT OF FACTS

Anderson County operates under the Council-Administrator form of government. The seven members of the County Council are elected for two-year, non-staggered terms. The general election is held in November of every even-numbered year, and the term of the newly elected County Council begins in January of every odd-numbered year. This litigation concerns the actions of the lame-duck Council that served from 2007-2008 ("the 2007 Council") and the response to that action by the succeeding Council ("the 2009 Council").

Five of the seven members of the 2007 Council comprised an informal voting bloc. Three of these members were voted out of office during the 2008 election cycle. At that time, the County Administrator was Joey Preston and Cunningham was the Deputy County Administrator. Preston had become a controversial figure but was supported by the voting bloc.

After the November 2008 general election, the lame-duck County Council held its regular business meeting on November 18, 2008. The agenda for the meeting was published in advance, as required by state law and county ordinance. Pet. App. 346-47. At the mid-point of the meeting, a member of the voting bloc moved to amend the published agenda to add a discussion of "personnel issues."² In short order, and over the vociferous protests of two recently re-elected members of the Council, the voting bloc (1) approved a severance package for Preston worth over \$1 million, based upon what was labeled the County's "anticipatory breach" of Preston's employment contract, and (2) entered into a "Master Employment Agreement" with Cunningham naming him as the new County Administrator. Pet. App. 400-18. The meeting

² A video of the November 18 County Council meeting is included in the record before this Court. Anderson County urges the Court to review the DVD and see for itself the astonishing actions of the pro-Preston bloc.

was adjourned immediately following these actions, without reaching the remaining ten items on the agenda. Pet. App. 418.

The Master Employment Agreement set forth an initial term of employment of three years, beginning December 1, 2008 and ending November 30, 2011. Pet. App. 421. It automatically renewed each year beginning December 1, 2009, for "a new term consisting of the term then remaining ... plus an additional period of one (1) year," creating a perpetual, rolling three-year term. Id. Either party could elect not to renew the Master Employment Agreement by providing written notice at least 90 days before the next renewal date, in which case Cunningham would still be employed for the remaining two years of his term. Id.

The Master Employment Agreement further provided that the County could terminate Cunningham only for cause, defined as "the conviction of the Administrator of any crime involving personal gain to himself, any crime involving moral turpitude (as defined in South Carolina state law) or the refusal of the Administrator to perform the duties of this office." Pet. App. 422. Termination in any other manner was deemed to be "without cause," entitling Cunningham to severance pay as follows:

- "[A]ll pay and financial benefits remaining on his contract for the balance of the contract period";
- "[A]ll earned sick leave, vacation, holidays, compensatory time and other accrued benefits to date, calculated at the rate of pay in effect upon termination";
- "[A]dditional severance pay ... computed at the rate of one month aggregate compensation for every two years of service [from] 1998";
- "[A]ll life, health, dental, and disability insurance and all other County provided benefits ... for a period of six (6) months or until similar coverage is provided ... by a subsequent employer."

Pet. App. 423. Total severance was capped at 36 months "aggregate

compensation," which included at least Cunningham's salary (\$125,000 in 2008, plus an annual increase of at least two percent), 401k matching (\$5,000 per year), and a vehicle allowance (\$700 per month)—a total of more than \$400,000. Pet. App. 424.

In sum, the Master Employment Agreement between Cunningham and the lame-duck 2007 Council established Cunningham as the County Administrator for the *entirety* of the newly elected 2009 Council's two-year term and for at least half of the 2011 Council's term, a Council that would not even be elected until November 2010, taking office in January 2011. This was so even if the 2009 Council gave notice of non-renewal at the earliest opportunity (90 days before December 1, 2009), because the Master Employment Agreement provided that Cunningham would be entitled to complete the remaining two years of the employment term. Thus, assuming for the sake of argument the Agreement's validity, the only way for the 2009 Council to select an administrator of its own choosing would be to terminate Cunningham without cause, thereby incurring a huge liability for the severance payment.

The term of newly elected County Council began on January 4, 2009. At its first business meeting on January 6, 2009, the Council passed a resolution condemning the manner in which Cunningham was hired as the County Administrator by the previous, lame-duck County Council. Pet. App. 434-35. Thereafter, the Personnel Committee met with Cunningham and offered him an at-will employment agreement, which Cunningham rejected. Pet. App. 451. Cunningham also rejected a subsequent offer of at-will employment as Deputy County Administrator at the same salary he would have earned as County Administrator. Pet. App. 452. At the County Council meeting of February 3, 2009, the Personnel Committee recommended that Cunningham be terminated and an interim County Administrator appointed. As was his right under state

law, Cunningham requested a hearing on his termination. See S.C. Code Ann. § 4-9-620 (1986). That hearing was conducted on March 2, 2009, and at its conclusion the Council passed a resolution finalizing Cunningham's termination on the basis that the Master Employment Agreement was invalid. Pet. App. 458-61.

Cunningham thereafter filed this action, claiming the County breached the Master Employment Agreement (Count I); wrongfully discharged him in violation of public policy (Count II); and violated the Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* (Supp. 2013) (Count III).

The parties engaged in discovery, following which Cunningham moved for summary judgment as to liability on Count I. The County opposed this motion and filed its own motion seeking summary judgment on all counts of the Complaint. Cunningham then filed a second summary judgment motion, seeking summary judgment as to liability on Count III. The parties thoroughly briefed both motions. The Court conducted a hearing on March 10, 2011, and ruled in Anderson County's favor on all counts on May 13, 2011. With respect to Cunningham's tort claim for wrongful discharge, the circuit court ruled that the County was entitled to summary judgment because Cunningham chose *not* to allege that he was an at-will employee, a necessary element for a party seeking to assert the public policy exception to the at-will employment doctrine.

Cunningham appealed, suggesting—for the first time—that he was an at-will employee, a position he had steadfastly denied from the inception of this litigation. On January 16, 2013, the Court of Appeals issued a decision affirming summary judgment on Counts I and III, but reversing and remanding on Count II, the wrongful discharge claim. Pet. App. 23-38. As to Count II, the court concluded that Cunningham had pleaded his wrongful discharge claim as an alternative theory of relief. Pet. App. 36.

Both parties petitioned for rehearing. Pet. App. 39, 77. In its petition for rehearing, the County pointed out that Cunningham had not pleaded claims in the alternative, but rather had purposely and deliberately elected *not* to allege that he was an at-will employee. The County also noted that it had argued to the circuit court even if Cunningham had pleaded that he was an at-will employee, the facts alleged in the Complaint would not entitle him to relief on a wrongful discharge claim.

On February 27, 2013, the Court of Appeals issued an order denying both parties' petitions for rehearing. Pet. App. 1. On the same day, the court withdrew its January 16 opinion and substituted an opinion that provided somewhat different reasoning regarding the wrongful discharge claim. In its February 27 opinion, the court concluded that Cunningham had preserved his wrongful discharge claim by arguing that the Master Employment Agreement should be treated like the one in *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). Pet. App. 17-18. The court went on, however, to conclude that *Stiles* did not apply because that case involved an at-will employment contract with a notice provision, while the Master Employment Agreement was indisputably for a term of years.

Nevertheless, the Court of Appeals incorrectly held that Cunningham was entitled to pursue a wrongful discharge claim because "the illegality of [the Master Employment Agreement] ... relegated Cunningham to an at-will status." Pet. App. 20. The court also rejected the County's argument that the facts alleged by Cunningham, even if taken as true, did not establish a claim for wrongful discharge. The court held that Cunningham had "clearly invoke[d] the public policy exception" and that Cunningham had "demonstrated the likelihood of uncovering additional relevant evidence during discovery." Pet. App. 21. On this basis, the court remanded for further proceedings on the wrongful discharge

claim.

Anderson County now asks this Court to reverse in part the decision of the Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONSTRUING CUNNINGHAM'S COMPLAINT TO INCLUDE AN ALTERNATIVE CLAIM FOR WRONGFUL DISCHARGE THAT CUNNINGHAM NEVER MADE, BASED UPON FACTS CUNNINGHAM NEVER PLEADED.

In the absence of an employment contract, employment in South Carolina is presumptively at-will. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (S.C. 2011). "The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace." *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 19 (S.C. Ct. App. 2006). The doctrine applies broadly, entitling an employer to terminate an employee "for arbitrary, irrational or no reason," or even a reason that is "morally wrong." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 221, 223-24, 337 S.E.2d 213, 214-15 (1985). South Carolina has recognized a narrow exception to the at-will employment doctrine: "[A]n at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *Barron*, 393 S.C. at 614, 713 S.E.2d at 637; see *Grant*, 370 S.C. at 146, 634 S.E.2d at 19 (describing exceptions to at-will employment doctrine as "narrow").

Count II of Cunningham's complaint alleged that his termination violated public policy. However, Cunningham deliberately chose not to plead that he was an at-will employee. Instead, Cunningham's theory was that he had a cause of action in tort for wrongful discharge *as an employee with a written contract for a term of years*. This is clear from Cunningham's complaint, which throughout alleges that Cunningham could only be terminated for "cause" under the Master Employment Agreement.

Adopting a position never advocated by Cunningham, the Court of Appeals reasoned that because the Master Employment Agreement was void,

Cunningham necessarily was “relegated to an at-will status.” Pet. App. 20. As such, the court further reasoned, Cunningham was entitled to bring a claim for wrongful discharge. The problem with this reasoning is that it rests on a theory that Cunningham specifically elected *not* to plead, *i.e.*, Cunningham did *not* plead that the wrongful discharge claim was an alternative to the breach of contract claim. Indeed, during the summary judgment hearing Cunningham’s counsel adamantly argued that Cunningham’s cause of action for wrongful discharge was *not* dependent upon a finding that the employment contract was unenforceable:

Let me address Count Two, your honor. [Anderson County] makes one argument, and that is, if you have a contract, you are not at-will, then, of course, wrongful discharge doesn’t apply. ... But ... just because you have a contract doesn’t mean you give up the right to sue in court. ... *It’s not alternative causes of action.*

Pet. App. 329-30 (emphasis added). Cunningham reiterated this argument in his post-hearing supplemental filing—the very filing the Court of Appeals relied on in its February 27 opinion. There, Cunningham clearly argued, contrary to the law of this State, that an employee with a written employment contract for a definite term can bring a cause of action for wrongful discharge in order to “redress[] ... the tortious reasons for a termination in violation of the public policy of South Carolina” and to obtain “the specific measure of damages that results from a wrongful discharge.” Pet. App. 288.

Cunningham certainly could have pleaded his wrongful discharge claim as an alternative to his claim for breach of contract, *i.e.*, he could have alleged that if the Master Employment Agreement was unenforceable, then he was an at-will employee entitled to bring a wrongful discharge action. Cunningham deliberately chose not to make such an allegation, and in fact his Complaint squarely precludes the reading adopted by the Court of Appeals. Paragraph 30

of the Complaint, under the heading "Count II ... Wrongful Discharge," specifically incorporates the previous allegations in his Complaint "as if set forth here in full." Pet. App. 206. One of these "previous allegations" is Paragraph 25 (found in "Count I ... Breach of Contract"), which states, "Plaintiff and Defendant were parties to the Master Employment Agreement, which constitutes a valid and binding contract." Pet. App. 205. In other words, Cunningham's litigation strategy was not merely based on omission (failing to include the terms "at will" or "in the alternative" when he asserted his cause of action for wrongful discharge), but one of commission, boldly proclaiming that in addition to a breach of contract claim, he also had a cause of action for wrongful discharge based on his written employment contract for a definite term.

Under such circumstances, the law does not (and a court should not) infer that an alternative argument has been made. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. Any allegations, statements or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position." *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) (internal quotation marks & and citation omitted).

Throughout this litigation, Cunningham has consistently maintained that he is entitled to receive his severance under the Master Employment Agreement *as well as* lost wages under a wrongful discharge theory. Pet. App. 333 ("We're not seeking lost wages under Count One [breach of contract], so Count One and Count Two [wrongful discharge] are very different."). Cunningham did not inadvertently fail to use the words "at will" or "in the alternative" in his Complaint. He purposely and deliberately elected not to allege, in the alternative or otherwise, that he was an at-will employee. This strategic decision was abun-

dantly clear in all of his pleadings, motions, memoranda, and oral arguments before the circuit court. Indeed, Cunningham's petition for rehearing argued that the Court of Appeals' January 16 opinion, finding that Cunningham alleged the wrongful discharge claim in the alternative, rested on a misunderstanding of his claim. Indeed, to the Court of Appeals Cunningham stated, "Nor does Appellant see the tort claim as *an alternative* cause of action to the extent that suggests it is mutually exclusive with the existence of a contract claim." Pet. App. 90.

Rule 8(f), SCRCR provides that "pleadings should be so construed as to do substantial justice to *all* parties." (emphasis added). By construing the Complaint and subsequent filings as alleging an alternative claim based on at-will employment status, the Court of Appeals ignored an allegation Cunningham did make (that both Count I and Count II were based on a written contract for a definite term) and inserted an argument he deliberately chose not to make (that, if the Master Employment Agreement was void, in the alternative he was an at-will employee). It is manifestly unfair to Anderson County for the Court of Appeals to rewrite Cunningham's Complaint and to ignore issue-preservation rules in order to make for Cunningham an argument he deliberately chose not to make for himself.

II. CUNNINGHAM NEVER ALLEGED AN ALTERNATIVE CLAIM FOR WRONGFUL DISCHARGE, BUT EVEN IF HE HAD DONE SO THE CLAIM WOULD FAIL AS A MATTER OF LAW. THE COURT OF APPEALS THEREFORE ERRED IN REMANDING THE WRONGFUL DISCHARGE CLAIM FOR FURTHER DISCOVERY.

To establish a wrongful discharge claim, Cunningham must prove that his discharge was a retaliatory act that violated a "clear mandate of public policy." *Barron*, 393 S.C. at 614, 713 S.E.2d at 637. Termination of an at-will employee violates public policy when "the employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law," but the exception is not limited to these situations. *Id.* The question of what constitutes public policy is one of law for the court to decide. *Id.* at 638. "The primary source of the declaration of the public policy of the state is the General Assembly." *Citizens' Bank v. Heyward*, 133 S.E. 709, 713 (S.C. 1925).

In remanding Cunningham's wrongful discharge claim for additional discovery, the Court of Appeals pointed to Cunningham's allegation, which was that council member-elect Eddie Moore privately told Cunningham that there were "employees that there's problems with" and allegedly asked Cunningham, "If I were to give you a list of employees to fire, would you get rid of them?"³ Pet. App. 519. The Court of Appeals found that Cunningham's allegations regarding this exchange set forth a claim "that the County conditioned his continued employment on his agreement to engage in acts that would violate S.C. Code Ann. § 16-17-560, which prohibits discharging a citizen from employment because of political opinions or the exercise of political rights and privileges." Pet. App. 21.

³ Notably, according to Cunningham's own testimony Moore was speaking only for himself, not on behalf of any other present or future County Council member. And, of course, Moore *could not* speak for the County Council as a whole.

The Court of Appeals' analysis is incorrect. First, Cunningham's Complaint nowhere alleges that the employees Moore allegedly sought to terminate were problems *because of their political views or activities*.⁴ Second, and even more importantly, Moore never asked or instructed Cunningham to fire anyone. Cunningham cannot have been fired for refusing to commit an act that he was never actually asked to commit.

Second, the Court of Appeals was incorrect in its speculation that more discovery might produce relevant evidence supporting Cunningham's claim. Cunningham has already been deposed in this action. His deposition testimony provides no factual support whatsoever for his wrongful discharge claim. According to Cunningham's own testimony, Moore never asked or instructed Cunningham to fire anyone. Cunningham testified that Moore—who, as a mere council member-*elect*, could not and did not speak for the County Council—asked Cunningham *if* he would terminate certain employees *if* a list of names were presented to him. Pet. App. 519. Cunningham never saw any such list and, indeed, did not even know whether a list existed. Pet. App. 520-21. Cunningham responded to Moore that “there has to be a reason for the termination and there has to be some demonstration of some attempt to remedy the situation [with the problem employee] ... that if you terminate an employee for no good reason, there's probably going to be some liability involved.” Pet. App. at 519-20. As far as the record shows, that was the end of the matter. Thus, Cunningham's own deposition testimony dooms his wrongful discharge claim.

⁴ Cunningham does not allege that he was terminated because of *his own* political views or activities.

III. THE COUNTY'S CHALLENGE TO THE COURT OF APPEALS' FEBRUARY 27 OPINION IS PROPERLY BEFORE THIS COURT.

In opposing the County's petition for a writ of certiorari, Cunningham argued that the County waived its challenge to the Court of Appeals' February 27 opinion because the County did not file a petition for rehearing. Return at 18. However, the South Carolina Appellate Court Rules *precluded* the County from filing a petition for rehearing because the Court of Appeals *denied* the County's petition for rehearing. Therefore, the County's arguments are preserved.

Rule 221(c), SCACR provides as follows:

(c) Rehearing of Motions. The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.

Rule 221(c) applies here, and barred the County from filing a petition for rehearing regarding the February 27 opinion. Because the Court of Appeals *denied* rehearing, App. 1, the County could only have petitioned for rehearing if the court's order had "the effect of dismissing or finally deciding a party's appeal." The order denying rehearing clearly had no such effect. The Court of Appeals' February 27 opinion did not change the result in the case; the court merely modified its reasoning. Therefore, the February 27 opinion did not have the "effect" of finally deciding Cunningham's appeal, because Cunningham's appeal was decided by the court's original opinion, issued on January 16, 2013.⁵ *Accord State v. Tucker*, 321 S.C. 552, 471 S.E.2d 145 (1996) (holding that under Rule 221(c), "[t]he denial of a petition for a writ of certiorari does not dismiss or decide the underlying appeal" but is merely an indication that the Court, in its discretion, does not desire to review the decision).

⁵ *Mazloom v. Mazloom*, 392 S.C. 403, 709 S.E.2d 661 (2011) (per curiam), cited by Cunningham, is not to the contrary because that case did not address Rule 221(c).

CONCLUSION

The Court of Appeals' strained construction of Cunningham's pleadings could be viewed as an effort to provide Cunningham some remote possibility of relief. But it is not the role of the courts to plead the plaintiff's claims for him. It is abundantly clear in all of Cunningham's pleadings, motions, memoranda, and arguments that he had deliberately elected not to allege that he was an at-will employee. It is manifestly unfair to the County for the Court of Appeals to rewrite Cunningham's complaint, to ignore preservation requirements, and to allow Cunningham to pursue a claim he knowingly decided not to plead. Moreover, Cunningham's wrongful discharge claim fails as a matter of law. Accordingly, Anderson County asks this Court to reverse in part the decision of the Court of Appeals.

Signature page follows.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing document on Respondent/Petitioner Michael Cunningham by depositing a copy of same in the United States Mail, postage prepaid, on September 22, 2014, addressed to his attorneys of record as follows:

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