THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209

Op. No. 5072 (Ct. App. filed Jan. 16, 2013)
(withdrawn, substituted and refiled Feb. 27, 2013)

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

MICHAEL CUNNINGHAM'S RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals correctly rule that the circuit court erred in granting summary judgment as to Mr. Cunningham's claim for wrongful termination of his employment where:

(A) the presence of a written employment agreement does not preclude Mr. Cunningham's claim;

(B) Mr. Cunningham in fact alleged and asserted his employment was "at-will"; and

(B) both parties agreed below that additional discovery on this claim was required if the claim was permitted under the law?

COUNTER-STATEMENT OF THE CASE

On April 22, 2009, Michael Cunningham brought an action against Anderson County for breach of contract (Count I), wrongful discharge in violation of public policy (Count II), and failure to pay wages due arising out of the County's termination of Mr. Cunningham from his position as Anderson County Administrator (Count III). (Appx. p. 200). Mr. Cunningham's claims arose out of the County's failure to abide by its employment agreement, including its failure to pay an agreed-upon severance package. Mr. Cunningham also alleged the County terminated him in violation of public policy.

The County filed an answer on May 27, 2009. (Appx. p. 209). The County denied liability, pled several affirmative defenses, and pled a counterclaim based upon civil conspiracy. On June 10, 2009, Mr. Cunningham filed an amended reply to the counterclaim. (Appx. p. 220). On June 25, 2009, the County filed a stipulation of dismissal of the counterclaim with prejudice. (Appx. p.224).

The parties engaged in limited discovery and in February and March 2010 the parties filed cross-motions for summary judgment. (Appx. pp. 226, 258). Following briefing of the issues and a hearing, the trial court entered an order on May 13, 2011, denying Mr. Cunningham's motion and granting the County's motion for summary judgment. (Appx. p. 187).

Mr. Cunningham filed and served his notice of appeal on June 10, 2011. (Appx. p. 294). Following briefing and oral argument the Court of Appeals issued its opinion affirming in part (as to Counts I (breach of contract) and III (statutory wage claim)), reversing in part (as to Count II, Wrongful Discharge) and remanding. *Cunningham v.*

Anderson County, Op. No. 5072 (Ct. App. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3 at 37). Both parties petitioned the Court for rehearing: The County sought rehearing as to Count II (wrongful discharge in violation of public policy) and Mr. Cunningham sought rehearing as to Counts I and III. Mr. Cunningham also sought clarification of the Court's ruling as to Count II.

On February 27, 2013, the Court of Appeals issued an order denying rehearing. (Appx. p. 1). However, the Court withdrew its prior opinion and filed a new opinion in this matter. *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. filed Feb. 27, 2013) (not filed in any Shearouse Advance Sheet) (Appx. p. 2). The new opinion corrected factual errors, included additional discussion on the resolution of Count I (Breach of Contract), made no changes to the discussion of Count III (Payment of Wages), and added significant discussion to the disposition of Count II (Wrongful Discharge). (Appx. pp. 17-20).

On March 28, 2013, Mr. Cunningham filed and served a Petition for Rehearing from the substituted opinion.[1] On March 29, 2013, the County filed a Petition for Writ of Certiorari, seeking review of the Court's disposition of Count II (Wrongful Discharge).[2]

The Court of Appeals denied Mr. Cunningham's Petition for Rehearing directed at the substituted opinion on April 18, 2013. On May 20, 2013, Mr. Cunningham filed a cross-petition for writ of certiorari from the second opinion.

On August 22, 2014, this Court granted both petitions.

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[1] This Petition was timely as the Court had extended the deadline to March 29, 2013.

[2] The County did not seek rehearing from the substitute opinion.

FACTS

On November 18, 2008, Anderson County Council voted 5-2 to enter into a Master Employment Agreement ("Contract") with Mr. Cunningham to serve as the County's Administrator. (Appx. p. 386, 390). Mr. Cunningham signed the Contract on November 19, 2008. (Appx. pp. 420, 428). Mr. Cunningham began serving as Administrator on December 1, 2008. (Appx. p. 421).

The Contract provides in part:

> The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(Appx. p. 421, Section 2(A)). The Contract term was for a period of three (3) years until November 30, 2011. (Appx. p. 421, Section 2(C)). The Contract also provided:

> In the event written notice of intent to not renew this Agreement is not given by either party to this Agreement to the other at least ninety (90) days prior to any annual anniversary of the date first above written, this agreement shall be extended on the same terms and conditions as herein provided, all for a new term consisting of the term then remaining at such annual anniversary date plus an additional period of one (1) year; such that the maximum effective term of this Agreement shall never exceed three (3) years and not be less than the respective term remaining when any notice of intent to not renew is given. Said agreement shall continue thereafter for a continuing, annually renewable term consisting of the respective term then remaining at such annual anniversary date unless written notice of intent to not renew is given by either party to this Agreement to the other at least ninety (90) days prior to any subsequent annual anniversary of the date first above written.

(Appx. pp. 421-422, Section 2(D)). The Contract provided for severance if Mr. Cunningham was terminated for reasons that do not constitute "cause," which the

Contract limits to serious matters such as criminal convictions and refusal to perform the duties of Administrator. (Appx. pp. 422-423, Sections 3(A) and 3(B)).

After a new term of Council commenced in January 2009, the Council continued to recognize and deal with Mr. Cunningham as its Administrator. At the first meeting of the new term, the Council passed a "Resolution" criticizing the manner in which it had hired Mr. Cunningham, but the Council did not attempt to declare the Contract invalid. (Appx. p. 435 (meeting transcript p. 6)). At a meeting on January 16, 2009, then Chair Eddie Moore stated publicly that there was no desire to terminate Mr. Cunningham's employment. (Appx. pp.439-440).

At the February 3, 2009 Council meeting, the personnel committee noted that Mr. Cunningham had rejected an "at will" agreement to replace the Contract. (Appx. p. 444, ll. 20-21). The committee claimed that the "old contract ... is null and void, unenforceable, and therefore he is presently an at-will employee." The committee chair, Bob Waldrep, then made a motion to approve a recommendation which was clarified as stating that "Mr. Cunningham would no longer be an employee of Anderson County," that "that would mean a termination," and "he's been terminated." (Appx. p. R.p.259, ll. 6-7, 12, 16).

Mr. Waldrep confirmed that the reason for the termination was Mr. Cunningham's unwillingness to sign a new "at will" contract. (Appx. p. 498). County Council then voted 5-2 to terminate Mr. Cunningham. (Appx. p. 449). Mr. Cunningham gave notice that he would be requesting a public hearing pursuant to Section 4-9-620 of the South Carolina Code (the Home Rule Act (the "HRA")).

On February 4, 2009, Chairman Moore provided Mr. Cunningham with written reasons for termination as required by the HRA. (Appx. pp. 451-452). Mr. Moore does not contend that Mr. Cunningham engaged in any misconduct, or that "cause" existed for termination under Section 3(A) of the Contract. (*Id.*).

On March 2, 2009, the Council convened a meeting and voted on a resolution, although the text of the resolution is unclear because of a tape change. (Appx. pp.457-458). The Council then voted 5-2 to terminate Mr. Cunningham. (Appx. p. 461). The County thereafter refused to pay the compensation provided by Section 3(B) of the Contract. (Appx. p.212, ¶¶ 17, 20, 22).

Following discovery, the parties made cross-motions for summary judgment as to each cause of action. Mr. Cunningham contended there was no genuine issue of material fact that the County Council had terminated him without cause as defined by the Contract and had refused to pay compensation due under Section 3(B). (Appx. pp. 226-245). Mr. Cunningham also moved for summary judgment as to his cause of action under the South Carolina Payment of Wages Act, asserting the Contract called for payment for accrued sick leave which the County failed to do. (Appx. pp. 275-276). The County defended on the ground that the three-year contract was void and unenforceable in violation of the "Term Limits Rule," as set forth in *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996). (Appx. pp. 277-283).

The County based its motion for summary judgment on the following grounds: (1) Mr. Cunningham's breach of contract claim fails because the contract was void under the

"Term Limits Rule"; (2) Mr. Cunningham's wrongful discharge claim fails under the South Carolina Tort Claims Act as well as the lack of any clear, unambiguous mandate to violate the law; and (3) Mr. Cunningham's claim for violation of the South Carolina Payment of Wages Act fails because the County paid him all he was due, and the amounts claimed under the severance package are not recoverable under the Act. (Appx. pp. 258-260). The County also argued that the tort of wrongful discharge only applies to "at-will employees," and because Mr. Cunningham alleged the existence of a valid contract with the County, he was not "at-will."

On March 10, 2011, the circuit court held a hearing on the cross-motions for summary judgment. On May 13, 2011, the circuit court entered an order finding:

(A) Mr. Cunningham's claim based upon breach of contract must fail because it was an attempt by a "lame duck" council to bind a successor council under the "term limit rules" set forth in *Cowart* and *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948). The Court rejected Mr. Cunningham's argument that the Contract was permissible under the Home Rule Act. The court concluded the Contract was invalid as a matter of law and Mr. Cunningham had no right of action to enforce it or to seek damages for its breach beyond the term of the old council.

(B) The County was entitled to summary judgment on Mr. Cunningham's claim for wrongful discharge because the public policy exception to termination of employment only applies to at-will employees, and Mr. Cunningham was never an at-will employee. Instead, he was employed

under the Contract.

(C) Mr. Cunningham's claim under the South Carolina Payment of Wages Act also fails because Mr. Cunningham was not entitled to the severance under the void contract. Further, because the payment of accrued sick leave was a portion of severance, and severance is not "wages" under the Act, there was no violation of the Act when the County refused to pay for accrued sick leave.

(Appx. pp. 187-199). The circuit court denied Mr. Cunningham's motion for summary judgment and granted summary judgment for the County as to all causes of action.

Mr. Cunningham appealed the circuit court's order. The Court of Appeals heard oral arguments and subsequently filed its opinion affirming in part (as to Counts I (Breach of Contract) and III (Payment of Wages)) and reversing in part (as to Count II (Wrongful Termination)), and remanding. On cross-petitions for Rehearing the Court of Appeals denied rehearing but withdrew its opinion and filed a new opinion. Mr. Cunningham sought rehearing from the substituted opinion, but the County proceeded with its petition for certiorari directed solely to Count II.

On August 22, 2014, this Court granted both petitions.

ARGUMENT

The upshot of the County's argument is that the Court of Appeals erroneously found Mr. Cunningham's allegations for "wrongful discharge" was a plea in the alternative to his assertion that the County was in breach of the employment contract. (County's Brief, pp. 9-12). The County continues its erroneous and misleading contention that an employee must either have a contract or be employed at-will, and that pleading breach of contract is inconsistent with the assertion of "at will" employment. The Court should reject this notion and affirm the Court of Appeals.

I. MR. CUNNINGHAM MAY MAINTAIN THE CLAIM FOR WRONGFUL TERMINATION EVEN THOUGH HE HAS A WRITTEN EMPLOYMENT CONTRACT

The County asserts that on appeal, Mr. Cunningham suggested " – for the first time – that he was an at-will employee, a position he steadfastly denied from the inception of this litigation." (County's Brief, p. 6). This assertion, however, demonstrates a fundamental misstatement of this case and Mr. Cunningham's arguments below and on appeal.

Mr. Cunningham did <u>not</u> take the position below that he was "not at will." Instead, Mr. Cunningham asserted that the County could terminate him for <u>any</u> reason at <u>any</u> time; however, it would owe him the severance and other benefits under the agreement. (Appx. p. 203, ¶ 17; p. 204, ¶ 22; p. 205, ¶ 26). The allegation in the complaint states:

> Under the Master Employment Agreement, The County maintained the right to terminate Plaintiff's employment subject to paying Plaintiff

> severance and benefits as provided for in Section 3(B) if the termination was without "cause."

(Appx. p. 205, ¶ 26).

This was also the basis of Mr. Cunningham's motion for summary judgment as to this claim. (Appx. pp. 226-227). In his Memorandum in Support of the Motion for Summary Judgment, Mr. Cunningham pointed out that he served "at the pleasure of Council," and nothing in the Agreement otherwise interfered with the County's right "to terminate his services at any time, subject only to the [severance provisions]." (Appx. pp. 228-229; see Master Employment Agreement, Appx. p. 421, ¶ 2(A)).

Mr. Cunningham thus pled that he was an "at will" employee under his agreement with the County. *See, e.g., Saucedo-Falls v. Kunkle*, 299 Fed. Appx. 315, 322 n. 30 (5th Cir. 2008) (noting contract which provides employee "serves at the pleasure" of employer creates "at will" employment); *Lawson v. Umatilla County*, 139 F.3d 690, 692–693 (9th Cir.1998) (under Oregon law employees of an elected official who "serve at the pleasure" of that elected official are at-will employees, and personnel policies which contain a disclaimer that the policies do not constitute a contract do not change the at-will status of an employee); *Harris v. Eckersall*, 331 Ill. App.3d 930, 771 N.E.2d 1072 (2002) (under Illinois law, if a public employee "serves at the pleasure" of the appointing authority, the employment relationship is at will); *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997) (public employee who "serves at the pleasure" of his employer is considered "at will"); *Youngblood v. City of Galveston, Tex.*, 920 F.Supp. 103 (S.D. Tex. 1996) (if a public employee "serves at the pleasure" of his superiors, the employment relationship is

at-will); *Heinzman v. Hall County*, 213 Neb. 268, 328 N.W.2d 764 (1983) ("at pleasure" in employment contracts has been interpreted to mean that the hiring authority has absolute power to remove); *Paice v. Maryland Racing Com'n*, 539 F.Supp. 458 (D.C. Md. 1982) (employees who serve "during the pleasure" of their employers are at will employees); *Skaggs v. City of Kansas City*, 264 S.W.3d 694 (Mo.App. W.D. 2008) (employment agreement pursuant to city charter that provided employee "shall serve at the pleasure of the Mayor and Council" did not alter at will status). These cases also demonstrate that he was, in fact, employed "at will."

As the Court of Appeals stated in *Baril v. Aiken Regional Medical Centers*:

> South Carolina recognizes the doctrine of employment at-will. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999). This doctrine provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. *Id.* "At-will employment is generally terminable by either party at any time, for any reason or no reason at all." *Prescott*, 335 S.C. at 334, 516 S.E.2d at 925.
>
> However, an employer and employee may contractually alter the general rule of employment at-will, thereby restricting the freedom of either party to terminate the employment relationship without incurring liability. *See Small v. Springs Indus., Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987). For example, an employee handbook may create a contract altering an at-will arrangement. *Id.*

352 S.C. 271, 281-282, 573 S.E.2d 830, 836 (Ct. App. 2002).

In this case, the County Council always retained the right to terminate Mr. Cunningham's employment *at any time* and *for any reason* that does not violate public policy. Under the Agreement, if the County Council exercised its right to terminate Mr.

Cunningham at will, but did so without "cause" as defined in the Agreement, then the County agreed to pay a severance to Mr. Cunningham. The Agreement, however, did *not* bind the Council to continue to employ Mr. Cunningham for the remainder of the 2009 Council, for the 2011 Council, or for any period at all.

In its Petition for Rehearing to the Court of Appeals from the first opinion, the County argued, "During the period of time when the Anderson County Council declared [Mr.] Cunningham's written contract null and void it offered him employment on an at-will basis, which [Mr.] Cunningham rejected." (County's Petition for Rehearing, p. 1, Footnote 1; p. 2, 4; Appx. pp. 39, 40, 42). The implication of this statement was that Mr. Cunningham rejected the "at-will" employment aspect of the new agreement, contending he was not employed "at will" under the Master Employment Agreement. This implication, however, was misleading.

The actual question and answer to which the County pointed is revealing. The exchange was as follows:

> Q. Do you remember a meeting with Mr. Waldrep?
>
> A. Yes, sir.
>
> Q. Is it true that he told you [that] you would need to agree to a <u>new</u> at-will agreement?
>
> A. Yes, sir.

(Appx. p. 527, ll. 19-23) (emphasis added). Thus, the exchange involved the County's attempt to enter into a "new" at-will agreement as opposed to the at-will agreement that already existed. The "new" agreement merely deleted the severance provision.

This view is buttressed by Mr. Waldrep's own testimony wherein he described a letter from Mr. Cunningham to council members in which Mr. Cunningham acknowledged the offer of the new contract and "as I construe this letter, he was saying, [']no, I don't think that's necessary.[']" (Appx. p. 479, ll. 4-12). What Mr. Cunningham was saying was that he did not expect Council to sign him to a "definite term" under a new contract (Appx. p. 475, ll. 16-22), but he was not asserting that his employment was not "at-will." The letter itself states, "it would appear that it is not necessary to sign the new contract formalizing an 'at will' employment contract." (Appx. p. 470) (emphasis added). The letter then goes on to reiterate the opinion of Judge Wilkins, who acted in an advisory capacity for the Council, that the November 2008 Agreement was not valid, and that the only time the severance would be an issue would be if Mr. Cunningham were terminated "without cause." Again, *nothing* states Mr. Cunningham could *not* be terminated "without cause," just that doing so would trigger the severance clause.

The County dropped this footnote in its Petition to this Court for review, but the implication from its Petition and Brief is the same: That by rejecting a new "at will" employment contract, Mr. Cunningham was conceding he was not "at will" prior to the Council's actions terminating him.

But this argument assumes that one cannot be "at will" if there exists a written agreement – the law is otherwise: The existence of a written employment contract does not negate the fact that the employment may still be considered "at will." *See, e.g., Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) (noting county administrator was "at will" and that she "was paid her severance pursuant to her

contract"); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), *rev'd on other grounds* 368 S.C. 167, 628 S.E.2d 261 (2006) (noting employment agreement stated on its face that plaintiff served "at the will" of county council so that county officials could fire plaintiff "for any reason"); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936) (written contract for employment for indefinite term "for so long as the employee gives satisfactory service" was revocable "at will" of either party); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (noting a written contract for employment "for an indefinite period can be terminated at will"); *Prescott v. Farmers Telephone Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999) (Court recognized parties may operate under an agreement that maintains "at will" status of employee and that agreement may be modified orally or in writing to alter at-will status).

Contrary to the County's assertions throughout its brief, Mr. Cunningham has repeatedly asserted his employment was "at will" and that the County could terminate him "at any time for any reason." (Appx. p. 300, ll. 1-5). As Mr. Cunningham's counsel pointed out:

> But this contract didn't require them to keep Michael Cunningham as the administrator. That's what the distinction in his contract is. It just merely said the County has taken on an obligation if the County doesn't retain him as the administrator. And that, that obligation they took on was taken on in the prior term of the last council.
>
> But this is a very different situation. Had the contract said, ["]Michael Cunningham is the administrator for three years and nobody can do anything about it. He cannot be terminated under any circumstances.["] Then if the common law applied, there would be an issue, okay?

(Appx. p. 311, l. 21 - p. 312, l. 7).

> Judge Wilkins also said that it's a fundamental principle that one body should not hamstring another with an administrator not of its choosing. He said that was the core principle of his argument.
>
> This contract doesn't do that, your honor. As I said in my opening, this contract does not require any subsequent council to keep Michael Cunningham in office. *It specifically says they may terminate him at any point in time.*

(Appx. p. 326, ll. 12-20) (emphasis added).

> It's not a violation of the contract to terminate his employment.

(Appx. p. 328, ll. 23-24).

> They can terminate his employment under the contract without violating the contract. * * * They just need to pay him.

(Appx. p. 328, ll. 3-7).

> [T]here is case law about just because you have a contract doesn't mean you give up the right to sue in court. They're not the same. It's not alternative causes of action.. They address very different things.

(Appx. p. 333, ll. 3-7).

The County also confuses the concepts of "at will" employment with the existence of an employment contract. (See argument at Appx. p. 324, ll. 24-25). The two concepts are not mutually exclusive, as the County contends.

Mr. Cunningham references here the point he made in his Petition for Rehearing. (Petition of Appellant, pp. 12-13; Appx. pp. 89-90). All employment is contractual in nature. *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999). This principle is an important underpinning in cases, for example, that recognize that even contracts terminable "at will" are subject to protection from third party interference claims because "at will" arrangements are just as "contractual" as a contract that limits

termination during its term. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163-64, 321 S.E.2d 602, 607 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 16 (Ct. App. 1984). The question whether a contract allows for termination at will should not impact the availability of a claim for wrongful discharge in violation of public policy – at will employment does nothing to vindicate the public's interest and such a limitation would accordingly "violate[] the spirit of the public policy exception." *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999).

As noted above, the existence of a written employment contract does not negate the fact that the employment may still be considered "at will." *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), *rev'd on other grounds* 368 S.C. 167, 628 S.E.2d 261 (2006); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000); *Prescott v. Farmers Telephone Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999).[3] The Court of Appeals correctly held that, as a matter of law, Mr. Cunningham may pursue his claim against the County for wrongful termination even though the parties had a written contract (which the County disavowed as void *ab initio*).

The Court of Appeals appropriately reversed the grant of summary judgment as to Mr. Cunningham's cause of action for wrongful termination as a matter of law. This Court should reject the County's arguments to the contrary and should affirm.

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[3] These cases are discussed at pages 13-14, above.

II. THE COURT OF APPEALS' OPINION CORRECTLY DESCRIBED THE PARTIES' AGREEMENT REGARDING THE NATURE OF THE COUNTY'S MOTION DIRECTED AT COUNT II, MR. CUNNINGHAM'S CLAIM FOR WRONGFUL TERMINATION

The County asserts it is entitled to affirmance as to Count II (Wrongful Termination) on the ground that the record does not support recovery even if the County's assertion as to the law is not correct. (County's Brief, pp. 13-14). Under the circumstances of this case, the Court should reject this argument out of hand.

The Court of Appeals's opinion correctly outlined what happened at the hearing below. As the Court noted:

> [D]uring the motions hearing, counsel for the County admitted that if the circuit court denied the County's summary judgment motion as to Cunningham's legal ability to assert the wrongful discharge cause of action, then the parties would have to engage in further discovery. Counsel for both parties represented to the circuit court that they had an agreement to allow discovery on this cause of action if the circuit court denied summary judgment on it. Both counsel further agreed to allow the County the option of submitting another summary judgment motion on the wrongful discharge claim after the completion of discovery. "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citations omitted).

(Appx. p. 21). The record supports the Court's holding.

The wrongful discharge count was described as "Count Two." (Appx. p. 324, ll. 10-11). At the hearing, the following exchanges took place:

> Mr. Wilkins: * * * Count two perhaps should be construed as motion to dismiss.

(Appx. p. 338, ll. 6-7).

> Mr. Murphy: * * * Count two, there are certain things we agreed to do more discovery on and they may renew that motion...

Mr. Wilkins: Well, Mr. Cunningham is. But if the court denies our motion for summary judgment dismissal on count two, then we'll have to engage in further discovery. Now, I'm not sure that's gonna change any facts and so forth, Judge. But, nevertheless, if we are entitled to dismissal as a matter of law, Mr. Murphy and I have agreed not to foreclose further discovery.

(Appx. p. 339, ll. 1-10).

Mr. Murphy: Count two I don't believe, the only argument you heard today was is if he is not at-will, then the tort doesn't cover him, and I agreed to cite, provide you a case on that.

We didn't get into factually a lot of that, and I appreciate that Judge Wilkins didn't do that because I have some more discovery on a count. They have not waived - - they can come back later and bring another motion after I've done my discovery on it, and we've agreed on that.

Mr. Wilkins: Well, that's correct, your honor. I do agree with Mr. Murphy.

(Appx. p. 341, ll. 2-13). The Court of Appeals' opinion therefore describes *precisely* what happened at the hearing. The Court of Appeals correctly rejected the County's reversal of its position on appeal.

In the substituted opinion, the Court of Appeals added the following language:

> Finally, Cunningham has demonstrated the likelihood of uncovering additional relevant evidence during discovery. *See Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 (holding that when the nonmoving party requests a delay in ruling on a summary judgment motion until further discovery may be completed, the party must demonstrate the likelihood that further discovery will uncover additional relevant evidence). Cunningham testified in his deposition that Eddie Moore, who had recently been elected but had not yet taken office, stated to him: "'[T]here are lots of employees that there's problems with . . . If I were to give you a list of employees to fire, would you get rid of them?" Cunningham responded by indicating that there would have to be a reason for a termination and "some demonstration of some attempt to remedy the situation in most cases . . . ." Although Mr. Moore was not yet seated on

> council, after he was sworn in he voted to terminate Cunningham's employment. Hence, Cunningham's testimony sufficiently demonstrates a likelihood that further discovery will uncover additional evidence relevant to an attempted violation of section 16-17-560.

(Appx. pp. 21-22). This paragraph was *new* to the substituted opinion and the County did not seek rehearing regarding this point.

In its Petition for Writ of Certiorari, however, the County – for the first time – took issue with the Court of Appeals's additional paragraph. This argument is, accordingly, not preserved for this Court's review. *See Mazloom v. Mazloom*, 392 S.C. 403, 709 S.E.2d 661 (2011) (holding portion of question presented on certiorari review not preserved for review because not raised in petition for rehearing to the Court of Appeals).[4]

Even so, the Record amply supports the Court of Appeals's opinion. Mr. Cunningham testified as follows in his deposition:

> A. Okay. Mr. Moore indicated that he wouldn't be supportive - - or he's not - - was not going to support my contract and that he also says that, "You know, there are lots of employees that there's problems with." And he says, "If I were to give you a list of employees to fire, would you get rid of them?" And I indicated to him that that was not the process that we follow with public employees, that there has to be a reason for the termination and there has to be some demonstration of some attempt to remedy the situation in most cases, that if you simply terminate an employee for no good reason, there's probably going to be some liability involved.
>
> Q. Did he show you a list?

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[4] The County argues to the contrary and attempts to distinguish *Mazloom* (County's Brief, p. 15). There is no question that the Court of Appeals issued an expanded, and different, opinion when it withdrew its first opinion. There is also no question that while the County petitioned for review of the first opinion, it did not seek review from the second. This Court should instruct the bench and bar regarding the appropriate way to seek review from an opinion when the Court of Appeals withdraws its first opinion and issues a second, expanded opinion.

A. He did not.

Q. Did you ever see a list?

A. I did not.

Q. Did he indicate he had a list?

A. He did.

Q. What did he say?

A. He simply said, "If I gave you a list of employees to fire, will you get rid of them?"

Q. And from that, you took it that there was a physical list that he could show you?

A. I couldn't understand why there would be that reference made if there was not a list.

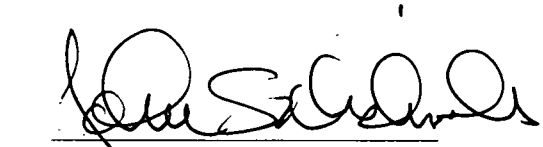
(Appx. p. 519, l. 16 - p. 520, l. 17). This testimony is sufficient to provide a scintilla of evidence to support Mr. Cunningham's assertion that he was fired in violation of public policy. And the testimony therefore precludes summary judgment for the County as to this claim. *See, e.g., Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence).

Accordingly, the Court should reject the County's argument regarding this aspect of the discussion of the wrongful termination claim. The Court should affirm the Court of Appeals' reversal as to Count II.

CONCLUSION

For the reasons stated, the Court should affirm the Court of Appeals' reversal of the circuit court's order as to Count II, and should remand the matter for further proceedings.

Respectfully submitted,



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October 21, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-000678
Lower Court Case No. 2009-CP-04-01693

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner/Respondent with a copy of *Michael Cunningham's Brief of Respondent* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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