

RECEIVED

NOV 03 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Alexander S. Macaulay, Circuit Court Judge

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(Withdrawn, Substituted, and Refiled Feb. 27, 2013)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.

ANDERSON COUNTY'S
REPLY BRIEF

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE: 864.370.2211
BWilkins@nexsenpruet.com

*Attorneys for Respondent
Anderson County*

Other counsel of record:

John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
803.779.7599

*Attorneys for Respondent
Michael Cunningham*

Brian P. Murphy
STEPHENSON & MURPHY, LLC
207 Whitsett Street
Greenville, South Carolina 29601
864.370.9400

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. Cunningham made the strategic decision not to plead his claims in the alternative, and the Court of Appeals erred in not holding him to that choice.....	2
A. Cunningham has consistently maintained that the wrongful discharge claim is not an alternative to the breach of contract claim.....	2
B. The Court of Appeals correctly determined that the Master Employment Agreement was not a contract for at-will employment.....	4
C. At-will employee status is an essential element of a wrongful discharge claim.....	5
II. The wrongful discharge claim should be dismissed without remanding for further discovery.....	7
III. The County has not waived its challenge to the Court of Appeals' February 27 opinion.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

Baril v. Aiken Reg'l Med. Ctrs.,
352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002)..... 4

Barron v. Labor Finders of S.C.,
393 S.C. 609, 713 S.E.2d 634 (2011)..... 6

Culler v. Blue Ridge Elect. Co-op., Inc.,
309 S.C. 243, 422 S.E.2d 91 (1992)..... 5

Ludwick v. This Minute of Carolina, Inc.,
287 S.C. 219, 337 S.E.2d 213 (1985)..... 6

Mazloom v. Mazloom,
392 S.C. 403, 709 S.E.2d 661 (2011)..... 8

McNeil v. S.C. Dep't of Corr.,
404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013)..... 7

State v. Tucker,
321 S.C. 552, 471 S.E.2d 145 (1996)..... 8

Stiles v. Am. Gen. Life Ins. Co.,
335 S.C. 222, 516 S.E.2d 449 (1999)..... 5, 6

ARGUMENT

Michael Cunningham's Respondent's Brief does not respond to the County's arguments. In its Brief, the County first argued that the Court of Appeals erred in allowing Cunningham's wrongful discharge claim to proceed because Cunningham specifically elected *not* to plead his wrongful discharge claim *as an alternative* cause of action. Instead of responding to this argument, Cunningham reiterates his position, properly rejected by the Court of Appeals, that his termination gave rise to two causes of action, which may be pursued simultaneously: a cause of action in contract (for breach of the Master Employment Agreement) and a cause of action in tort (for wrongful discharge). The County's second argument in support of certiorari was that even if a wrongful discharge claim were available to Cunningham, the claim failed as a matter of law and should not be remanded for further discovery. Cunningham ignores this argument as well, choosing instead to argue that further discovery may reveal additional evidence—evidence that is irrelevant if, as the County contends, Cunningham's wrongful discharge claim fails as a matter of law even if he proves every fact alleged in his complaint.

By failing to respond to the County's arguments, Cunningham has effectively conceded their merit.

I. CUNNINGHAM MADE THE STRATEGIC DECISION NOT TO PLEAD HIS CLAIMS IN THE ALTERNATIVE, AND THE COURT OF APPEALS ERRED IN NOT HOLDING HIM TO THAT CHOICE.

A. Cunningham has consistently maintained that the wrongful discharge claim is not an alternative to the breach of contract claim.

The Court of Appeals remanded the wrongful discharge claim on the basis that because the Master Employment Agreement was void, Cunningham was “relegated to an at-will status.” Pet. App. 20. This reasoning rests on the assumption that Cunningham asserted the wrongful discharge claim as an *alternative* to the breach of contract claim. Notably, Cunningham’s Respondent’s Brief makes *no* attempt to defend the Court of Appeals’ reasoning. Instead, Cunningham persists in his argument that the Master Employment Agreement created an at-will employment relationship. Resp. Br. at 10.

In the circuit court, Cunningham steadfastly maintained that he is entitled to assert both a claim for breach of contract and a claim for wrongful discharge, both causes of action arising from his termination. Cunningham has continued to make this same assertion on appeal. However, the theories articulated to support this core assertion have shifted around like so many sand dunes. During the course of appellate proceedings, Cunningham has variously maintained that the Master Employment Agreement is a contract for a definite term, *i.e.*, that he *was not* an at-will employee, Pet. App. 102 (Plaintiff’s supplemental summary judgment memorandum); that the Master Employment Agreement allowed termination for any reason or no reason, *i.e.*, that he *was* an at-will employee, Pet. App. 136 (Appellant’s Brief); that he should be *treated as* an at-will employee because the County argued that the Master Employment Agreement was void, Pet. App. 179 (Appellant’s Reply Brief); that he is entitled to assert a wrongful discharge claim *regardless* of whether his employment was at-will or for a definite term, Pet. App. 90 (Appellant’s Pet’n for Rehg.); that the Master Employment

Agreement does not negate the common-law presumption that all employment is at-will, Pet. App. 104-05 (Appellant's Reply in Support of Pet'n for Reh'g.); and, finally, that he was an at-will employee because he continued to work for the County while the County was attempting to get him to sign a new employment contract, Pet. App. 54 (Appellant's Return to Respondent's Pet'n for Reh'g.).

At all times, however, Cunningham has consistently maintained the position that his wrongful discharge claim *is not an alternative to his breach of contract claim*. Cunningham has always, from the very beginning of this litigation, taken the position that when the County terminated him, a cause of action in tort (wrongful discharge) was created simultaneously with a cause of action for breach of the Master Employment Agreement. Cunningham's position is *both/and*, not *either/or*.

Cunningham's complaint undisputedly alleges that his termination gave rise, simultaneously, to two independent causes of action—breach of contract and wrongful discharge. Cunningham deliberately chose, when drafting his complaint, *not* to plead these claims in the alternative. The Court of Appeals' determination that the Master Employment Agreement was null and void should not give Cunningham a "do over" to conform his pleadings to that decision. To allow him to do so would be especially unfair in this case, where Cunningham had the option of agreeing to be an at-will employee but specifically rejected that offer and chose to litigate instead.¹

¹ Cunningham testified in his sworn deposition that he *never* accepted, and would *not* have accepted, employment on an at-will basis. Pet. App. 73-74. Cunningham further testified that he considered at-will employment as "not really being a contract for employment." In fact, when asked if he would accept "an at-will contract," Cunningham testified, "I don't think so ... because I would not have seen a purpose behind it." Pet. App. 76.

B. The Court of Appeals correctly determined that the Master Employment Agreement was not a contract for at-will employment.

According to Cunningham, he was employed at-will because the County was free to terminate him at any time and for any reason, so long as the County paid him hundreds of thousands of dollars in severance (as provided in the Master Employment Agreement) if the termination was without cause. Resp. Br. at 10. As Cunningham explains it:

Under the Agreement, if the County Council terminated Mr. Cunningham without "cause," as defined in the Agreement, then the County agreed to pay severance. 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.

Resp. Br. at 11-12. This argument is nonsensical. If Cunningham's position is accepted, every employment contract would be at-will because every employer *always* possesses the authority to terminate any employee, so long as the employer is willing to accept the consequences, *i.e.*, satisfying the severance provision.

That is not the law. As the Court of Appeals correctly held, the Master Employment Agreement was not an at-will employment contract because it restricted the County's freedom to terminate Cunningham without incurring liability. *See Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281-82, 573 S.E.2d 830, 836 (Ct. App. 2002) ("[A]n 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.*" (emphasis added)).

An employment agreement that provides for severance pay in the event of termination without cause *by definition* is not an at-will employment contract. *See*

Culler v. Blue Ridge Elect. Co-op., Inc., 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992) (“The [employment-at-will] doctrine in its pure form allows an employer to discharge an employee *without incurring liability* for good reason, no reason, or bad reason.” (emphasis added)); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 227, 516 S.E.2d 449, 451 (1999) (Toal, J., concurring) (“Employment in South Carolina has been classified as *either* for a definite term or at-will.” (emphasis added)).

C. At-will employee status is an essential element of a wrongful discharge claim.

Cunningham asserts that whether he was employed at will or for a definite term is irrelevant, because the wrongful discharge remedy is available even to an employee for a definite term, if that employee is terminated for a reason that violates public policy. Resp. Br. at 16. This remarkable assertion rests on the decidedly *unremarkable* principle that the existence of an employment contract does not preclude employment from being at will. Of course it doesn’t, but that is irrelevant because the Master Employment Agreement entitled Cunningham to a substantial severance payment if he was terminated without cause.² This aspect of the Agreement established that Cunningham was an employee for a definite term, not an employee at-will.

In support of his argument that he should be able to seek and obtain two remedies for his termination—an action in contract for breach of the Master Employment Agreement and an action in tort for wrongful discharge—Cunningham asserts that these two remedies serve different purposes. Resp. Br.

² Cunningham mischaracterizes the County’s position throughout his Return. The County’s position is not, as Cunningham incorrectly claims, that “an employee must either have a contract or be employed at-will.” Resp. Br. at 9. Correctly stated, the County’s position is that an employee for a definite term, like Cunningham, is not employed at will. This position is fully consistent with South Carolina law, as explained in the text.

at 16. This is not so, however. Because an employee for a definite term may only be terminated for specifically identified reasons amounting to “just cause,” termination for any other reason—including a reason that violates public policy—violates the parties’ agreement and entitles the employee to a breach of contract remedy. The availability of a breach of contract remedy deters employers from terminating employees for reasons that violate public policy, and protects employees by providing a remedy for such terminations. These are precisely the purposes served by a wrongful discharge claim. See *Stiles*, 335 S.C. at 228, 516 S.E.2d at 452 (Toal, J., concurring) (“The *Ludwick* public policy exception is designed to serve two important policy goals: (1) the vindication of the state’s interest by prohibiting termination in violation of the clear mandate of public policy; and (2) the protection of at-will employees who are often without a remedy when terminated in violation of public policy.”). Therefore, there is no basis in law, and no reason in fact, why an employee for a definite term, like Cunningham, should be entitled to both remedies.

II. THE WRONGFUL DISCHARGE CLAIM SHOULD BE DISMISSED WITHOUT REMANDING FOR FURTHER DISCOVERY.

As the County explained in its Brief, the Court of Appeals erred in remanding for additional discovery.³ Br. at 13-14. A wrongful discharge claim is available to an at-will employee who is faced with a choice between violating the law or losing his job, or whose termination is itself a violation of criminal law. *See Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011); *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Cunningham's own deposition testimony establishes that neither circumstance exists here. Cunningham's sworn deposition testimony, which is consistent with the allegations of his complaint, establishes that he was never asked to violate any law. Cunningham claims that councilmember-elect Eddie Moore asked a hypothetical question: "If I were to give you a list of employees to fire, would you get rid of them?" Pet. App. 519. Cunningham replied that he would not, and that was the end of the matter. Pet. App. 519-20; *see* Pet. App. 202 (Complaint) ("Plaintiff rebuffed this request as improper."). Critically, Cunningham has never alleged that Moore or any other County Council member ever actually asked him to fire anyone.⁴ *See McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 193, 743 S.E.2d 843, 847 (Ct. App. 2013) (affirming dismissal of wrongful discharge claim when the plaintiff did not contend that her employer "demanded she violate a law or [that] her termination violated a law" and holding that "allegations that [plaintiff] was

³ Cunningham does not respond to the County's argument, but instead reiterates his position that the County agreed to further discovery if the wrongful discharge claim was not dismissed as a matter of law. Further discovery is not necessary, however, if Cunningham's wrongful discharge claim fails as a matter of law.

⁴ Indeed, Cunningham admitted that he has never even seen the supposed list. Pet. App. 521.

discharged for personal, pretextual, and scapegoating purposes” were insufficient to state a claim for wrongful discharge). Moreover, it is undisputed that the County terminated Cunningham’s employment only after Cunningham refused to accept the County’s offer of an at-will employment contract, not in retaliation for a refusal to violate the law. Pet. App. 451-52. In short, Cunningham’s own pleadings and testimony make clear that no amount of discovery would enable him to prove that his employment was conditioned on a violation of the law.

III. THE COUNTY HAS NOT WAIVED ITS CHALLENGE TO THE COURT OF APPEALS' FEBRUARY 27 OPINION.

Cunningham asserts that the County waived its challenge to the new reasoning in the Court of Appeals' February 27 opinion because the County did not file a petition for rehearing. Resp. Br. 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, Pet. 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

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).


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).

CONCLUSION

Cunningham made the strategic choice to argue that he could simultaneously assert *both* a claim in contract for breach of the Master Employment Agreement *and* a claim in tort for wrongful discharge. Certiorari review is proper because the February 27, 2013 Court of Appeals opinion disregarded Cunningham’s deliberate strategic choice, when he drafted his complaint, not to plead his claims in the alternative. Rather than hold Cunningham to the consequences of that decision, the Court of Appeals remanded the wrongful discharge claim for further proceedings. Certiorari review is appropriate to correct this error. Additionally, the Court of Appeals erred in concluding that the facts alleged by Cunningham support a wrongful discharge claim, when those facts (even if Cunningham can prove them) do not satisfy the public policy exception to the employment at will doctrine. Accordingly, Anderson County asks this Court to grant certiorari review.

Signature page follows.

Respectfully submitted,



William W. Wilkins

Kirsten E. Small

NEXSEN PRUET, LLC

55 East Camperdown Way (29601)

Post Office Drawer 10648

Greenville, South Carolina 29603-0648

PHONE: 864.370.2211

FACSIMILE: 864.282.1177

BWilkins@nexsenpruet.com

Attorneys for Respondent

Anderson County

October 31, 2014
Greenville, South Carolina

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

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.

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 October 31, 2014, addressed to his attorneys of record as follows:

John S. Nichols, Esq.
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202

Brian P. Murphy, Esq.
STEPHENSON & MURPHY, LLC
207 Whitsett Street
Greenville, South Carolina 29601



Kirsten E. Small

October 31, 2014

RECEIVED

NOV 03 2014

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

S.C. SUPREME COURT

Re: *Michael Cunningham, Respondent/Petitioner v.
Anderson County, Petitioner/Respondent*
Appellate Case No. 2013-000678

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven copies of Petitioner/Respondent Anderson County's Reply Brief and Proof of Service. Kindly file the original and six copies and return one clocked copy in the provided pre-paid envelope.

- Charleston
- Charlotte
- Columbia
- Greensboro
- Greenville**
- Hilton Head
- Myrtle Beach
- Raleigh

By copy of this letter, I am serving Respondent/Petitioner's counsel with the same. Thank you for your assistance.

Very truly yours,



Kirsten E. Small

KES/dkr
Enclosures
cc: Counsel of Record

x 1112