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(Withdrawn, Substituted, and Refiled Feb. 27, 2013)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

ANDERSON COUNTY'S BRIEF OF RESPONDENT

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I. CUNNINGHAM'S CROSS-PETITION IS NOT PROPERLY BEFORE THE COURT.

Cunningham's cross-petition for certiorari, filed on May 20, 2013, was untimely because it was not filed "within thirty (30) days after [Cunningham's] petition for rehearing ... [was] finally decided by the Court of Appeals." Rule 242(c), SCACR. The relevant sequence events is as follows:

- **January 16, 2013**: The Court of Appeals issues its decision affirming in part, reversing in part, and remanding.
- **January 31, 2013**: Cunningham files a petition for rehearing.
- **February 11, 2013**: Anderson County files its return to Cunningham's petition for rehearing.
- **February 19, 2013**: Cunningham files his reply in support of his petition for rehearing.
- **February 27, 2013**: The Court of Appeals ***denies*** Cunningham's petition for rehearing (as well as the County's), and issues a substituted opinion containing modified reasoning but not changing the holding or result in any way.

Under Rule 242(c), Cunningham's certiorari petition was due for filing by March 29, 2013, *i.e.*, within 30 days of the Court of Appeals' ***denial*** of Cunningham's petition for rehearing on February 27, 2013. Instead of filing a certiorari petition by March 29, however, Cunningham filed a petition seeking rehearing of the denial of his first rehearing petition:

- **February 27, 2013**: The Court of Appeals denies Cunningham's petition for rehearing.
- **March 28, 2013**: Cunningham files a petition for rehearing which seeks rehearing of the Court's February 27, 2013 order denying his first petition for rehearing.
- ***March 29, 2013**: Pursuant to Rule 242(c), SACR, Cunningham's petition for a writ of certiorari is due for filing with the South*

[1] Anderson County refers the Court to the Statement of Facts set forth in its Brief of Petitioner/Respondent, filed September 22, 2014.

Carolina Supreme Court.[2]

- **April 18, 2013**: The Court of Appeals denies Cunningham's petition for rehearing.
- **May 7, 2013**: This Court grants Cunningham an extension of time to file his petition for writ of certiorari.
- **May 20, 2013**: Cunningham files his petition for a writ of certiorari.

Cunningham asserts that his Cross-Petition was timely because it was filed within 30 days of April 18, 2013, the day the Court of Appeals denied his *second* petition for rehearing. Pet. Supp. App. 2. But Cunningham's second petition for rehearing should never have been filed, because the South Carolina Appellate Court Rules explicitly prohibited it. 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 it barred Cunningham from seeking rehearing of the Court of Appeals' February 27 order denying Cunningham's *first* petition for rehearing. Because the Court of Appeals' February 27 order *denied* rehearing, Pet. App. 1, Rule 221(c) barred a second rehearing petition unless the February 27 order had "the effect of dismissing or finally deciding a party's appeal." The February 27 order denying rehearing clearly had no such effect. The substituted opinion issued on February 27 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

[2] The County filed its certiorari petition on March 28, 2013.

appeal was decided by the court's original opinion, issued on January 16, 2013.[3] *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).

[3] *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).

II. THE COURT OF APPEALS CORRECTLY HELD THAT A COUNTY COUNCIL CANNOT BIND SUCCESSOR COUNCILS WITH RESPECT TO THE HIRING OF A COUNTY ADMINISTRATOR.

"The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Because an illegal contract is not enforceable, neither party to the contract may bring an action for its breach. *See Ward v. West Oil Co.*, 387 S.C. 268, 274-75, 692 S.E.2d 516, 519-20 (2010). Here, the Court of Appeals correctly determined that the Contract between Cunningham and the 2007 Council violated public policy, and thus was unenforceable, because it purported to bind successor councils in the exercise of governmental functions.

A. Neither the Home Rule Act nor Dillon's Rule has any bearing on this case.

The fundamental flaw in Cunningham's argument is his failure to distinguish between two different common law rules, only one of which applies to this case. The first rule—the one that applies and controls the outcome of Cunningham's claim for breach of the Master Employment Agreement—is that the legislative body of a local government (here, the Anderson County Council) may not restrict its successors' exercise of governmental (as opposed to proprietary) powers by entering into a contract that extends beyond that body's current term (the "Term Limits Rule"). That is precisely what the lame-duck 2007 Council sought to do when it entered into the Master Employment Agreement as its term was coming to a close: it wanted to force its choice of County Administrator upon future Councils. Because the appointment of a County Administrator is a core governmental function of the County Council, the Court of Appeals correctly held that the Master Employment Agreement violates the

Term Limits Rule and is invalid.

The second rule—the one that does not apply here—is that the powers of a local government should be strictly and narrowly construed ("Dillon's Rule"). Dillon's Rule, with its stringent limits on the ability of local governments to govern themselves, was abolished by the Home Rule Amendment to the South Carolina Constitution in 1973. *See* S.C. Const. Art. VIII § 17. This amendment, and the Home Rule Act which followed it, established a rule of liberal construction of the powers of cities and counties. *See* S.C. Code Ann. § 4-9-25 (Supp. 2013) ("The powers of a county must be liberally construed in favor of a county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.").

Both rules were at issue in *Piedmont Public Service District v. Cowart*, in which the Court of Appeals held that a 20-year employment contract between a special purpose district and its administrator violated the Term Limits Rule. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"). Recognizing that an elected body must be free to perform its governmental duties in the manner it determines is most beneficial to the public, the Court of Appeals held in *Cowart I* that "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils." *Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880. A county council has the power "to exercise legislative or governmental functions ... as often as may be found needful or politic," but "the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors." *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252, 255 (1948). For this reason, a municipal government may not restrict its successors' exercise of governmental (as opposed to

proprietary) powers by entering into a contract that extends beyond its current term:

> The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies .... However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.

Cowart I, 319 S.C. at 132, 459 S.E.2d at 880. "Last-minute contracts intended to bind a successor constitute a particularly egregious violation of public policy." *State Street Bank & Trust Co. v. Pennsylvania*, 712 A.2d 811, 815 (Pa. Commw. Ct. 1998).

Affirming the decision of the Court of Appeals, this Court recognized in *Cowart II* that "the appointment and removal of public officers is a governmental function." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837. The appointment of a county administrator "is precisely and unmistakably a governmental matter within the ... purview" of the rule that one county legislature cannot bind its successors. *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978). Under the council-administrator form of government, the administrator "shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control." S.C. Code Ann. § 4-9-620 (1986). The administrator's duties include "execut[ing] the policies, directives and legislative actions *of the council*" and "perform[ing] such other duties as may be required *by the council*." S.C. Code § 4-9-630 (1986) (emphasis added). In short, the county administrator's job is to administer county government *as directed by the elected members of the county council*.

Cunningham incorrectly asserts that the Term Limits Rule that controlled

the outcome in *Cowart I* and *II* did not survive the advent of home rule in South Carolina. Cunningham's argument ignores the distinction between Dillon's Rule—which home rule abolished—and the Term Limits Rule, on which the advent of home rule had no effect.

Under Dillon's Rule, the powers of local governments (including counties) were strictly construed:

> A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Williams v. Town of Hilton Head Island, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993).[4] Dillon's Rule was abolished in South Carolina by the 1973 adoption of the Home Rule Amendment to our Constitution, under which the "Constitution and all laws concerning local government shall be liberally construed in their favor." S.C. Const. Art. VIII § 17. Under home rule, the powers of local government are not limited to those expressly granted but rather "include those fairly implied and not prohibited by this Constitution." *Id.* The constitutional mandate is echoed by the Home Rule Act of 1975, which provides in part, "The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." S.C. Code Ann. § 4-9-25.

Cunningham reasons that because Dillon's Rule no longer applies to

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[4] Dillon's Rule is eponymously credited to Judge John F. Dillon, who first articulated it in his treatise on municipal corporations. *See id.* at 421 n.1, 429 S.E.2d at 804 n.1 (citing John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911)).

counties,[5] neither does the Term Limits Rule. But the two are apples and oranges. Dillon's Rule is a tenet of statutory construction. *See S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 399 n.7, 629 S.E.2d 624, 629 n.7 (2006). The Term Limits Rule is not a maxim of statutory construction, but rather is a core principle of representative democracy that protects the authority of democratically elected bodies to govern according to the mandate of the electorate. As the Court of Appeals recognized in *Cowart I*, the Term Limits Rule "is intended to ensure that governing bodies are free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882.

The outcome in *Cowart I* was controlled by the Term Limits Rule, not by Dillon's Rule. As the Court of Appeals correctly explained in rejecting Cunningham's argument in the case at hand, while "[t]he court in *Cowart I*, which post-dated the Home Rule Act, admittedly recited Dillon's rule at the beginning of its discussion of the contract's validity, ... the court did not ultimately rely on Dillon's rule in determining that Cowart's employment contract was void." App. 11. Accordingly, the Court of Appeals did not disregard the fact that *Cowart* involved a special district, as Cunningham contends, but rather recognized that the Term Limits Rule is distinct from Dillon's Rule. Pet. App. 11 (holding that while the court in *Cowart I* "admittedly recited Dillon's rule," the outcome of the case turned on "the *independent principle* that governmental bodies have no authority to impair the power and discretion

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[5] Dillon's Rule still applies to special purpose districts, such as the one at issue in *Cowart*. *See Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 19 n.7, 532 S.E.2d 876, 878 n.7 (2000) ("There is dicta in *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997), which applies Home Rule to special purpose districts. To the extent that *D.W. Flowe* can be read to apply Home Rule to special purpose districts, it is overruled.").

delegated to their successors by the public").

Cunningham further argues that the out-of-state cases cited by the Court of Appeals are inapplicable because those jurisdictions either do not have home rule or the cases involved entities not subject to home rule. This is irrelevant, however, because the Court of Appeals cited those cases for the common law Term Limits Rule, which is entirely distinct from home rule.

B. The Court of Appeals correctly held that the Master Employment Agreement is void under the Term Limits Rule.

In attempting to avoid the impact of the Term Limits Rule, Cunningham first argues generally that liberal construction of a county's powers, as mandated under home rule, requires a conclusion that a lame-duck county council has the power to bind its successor councils. Second, Cunningham argues specifically that the statutory grant of authority to employ a county administrator for a definite term must be construed as including the power to employ an administrator for a term exceeding that council's own term. Cunningham is wrong on both counts.

1. *Liberal construction of the Home Rule Act favors the County's position, not Cunningham's.*

The Home Rule Act requires liberal construction of "[t]he powers of a *county*." S.C. Stat. Ann. § 4-9-25 (emphasis added). This provision reflects the basic concept that home rule counties "possess the full power of self-government and look to the legislature not for grants of power, but only for limitations on their power." *Nelson v. City of Dallas*, 278 S.W.3d 90, 95 (Tex. Ct. App. 2009); *see* 1 McQuillin § 1:31 ("[U]nder home rule, counties have full power in the affairs of local self-government.").[6] Home rule concerns the relationship between a county

[6] Before home rule, county governments were largely controlled by the slow-moving and highly political state legislative delegations, which were ill-

and the state; it says ***nothing*** about the relationship between one county council and its successors.

If the liberal-construction rule applies to this case at all, it favors the County's position, not Cunningham's. In Cunningham's view, this Court must broadly construe the 2007 Council's power in a way that correspondingly *narrows* the power of succeeding Councils. This cannot be what the General Assembly intended in enacting § 4-9-25. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). It is one thing to liberally construe a local government's powers *vis-à-vis* the General Assembly, but quite another to expand the powers of one governing body in a way that diminishes the power of its successors. The 2009 Council's decision to exercise its common law authority to declare the Contract void is entitled to the same judicial deference as any other act of a county council.

2. *The statutory authority to employ an administrator for a "definite term" does not abrogate the common law rule against binding successor councils.*

Statutory language must be construed "in the light of common law rules"; such rules remain in full force and effect in South Carolina unless the legislature

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equipped to react to the rapid growth of unincorporated areas outside city lines. *See generally* James Lowell Underwood, *The Constitution of South Carolina, Volume II: The Journey Toward Local Self-Government* at 105-15 (1989). The Home Rule Amendment diminished the role of these delegations and gave county governments more policy-making flexibility, but it did not change the rule that local governments do not have inherent powers. *Id.* at 179.

Thus, the liberal construction of county powers under the Home Rule Act was intended to provide flexibility to local governments—not to permit outgoing county council members to force their own policy desires down the throats of their successors.

clearly indicates an intention to overrule them. *Coakley v. Tidewater Constr. Corp.*, 9 S.E.2d 724, 726 (S.C. 1940).

Section 4-9-620 does not unambiguously express the General Assembly's intent to abrogate the Term Limits Rule by employing a county administrator for a definite term exceeding two years. *Cf. Morin*, 380 N.E.2d at 220 (holding that county charter abrogated common law rule by "specifically provid[ing] for appointment of the manager to a four-year term"). To the contrary, the statute and the common law are readily harmonized: A county council may employ its chosen administrator for a definite term, so long as the administrator's contract term does not exceed the legislative term of that council. This harmonization of the statute and the common law comports with common sense; there is no reason why the Anderson County Administrator should be entitled to more job security than the members of the Anderson County Council, who must seek reelection every two years.

In contrast, Cunningham's interpretation of § 4-9-620 poses significant policy problems. Under his reading, § 4-9-620 gives a county council authority to employ a county administrator for a definite term of 5, 10, or even 20 years. In this case, Cunningham asserts the authority of the 2007 Council, "voted out of office and in its final hours," to establish him as the Anderson County Administrator for a minimum term encompassing the entirety of the newly-elected 2009 Council and the first year of the yet-to-be-elected 2011 Council. *Falls Twp. v. McManamon*, 537 A.2d 946, 947-48 (Pa. Commw. Ct. 1988) (declaring invalid as against public policy a three-year contract between lame-duck township supervisors and police chief). Because "the authority of our elected officials to make changes mandated by the electorate" is a critical component of democratic government, § 4-9-620 should not be construed to eliminate "[t]he ability of incoming officials to change policies, procedures, and even key

personnel of their predecessors." *Figuly v. City of Douglas*, 853 F. Supp. 381, 384 (D. Wyo. 1994), *affirmed*, 76 F.3d 1137 (10th Cir. 1996).

3. *The Court of Appeals correctly held that it is irrelevant whether payment of severance is a proprietary or a governmental function; further, this argument was not preserved for appellate review.*

Cunningham contends that the Court of Appeals "misapprehended or overlooked" his argument that the payment of severance is a proprietary function, not a governmental one. Cunningham cites *no* authority, however, for the proposition that an employment contract must be examined term-by-term to determine whether each item is governmental or proprietary. The 2007 Council did not vote to pay Cunningham severance; it voted to enter into the Master Employment Agreement, including all of its terms. Therefore, the Court of Appeals correctly focused on the 2007 Council's approval of the Master Employment Agreement as the relevant act. Further, the Court of Appeals correctly identified the relevant question as whether "the appointment of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." Pet. App. 14.

In any event, it was not necessary for the Court of Appeals to address this argument, because Cunningham failed to preserve it for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to *and ruled upon* by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added). Although Cunningham raised the proprietary-function argument to the circuit court, the court did ***not*** address this argument in its order. "When the issue was raised but not ruled upon, it became incumbent upon [Cunningham] to raise the issue in a Rule 59(e) motion." *Chastain v.*

Hiltabidle, 381 S.C. 508, 515, 673 S.E.2d 826, 830 (Ct. App. 2009); *see* Rule 59(e), SCRCP. Cunningham did not file a Rule 59(e) motion asking the court to rule upon the issue. Because Cunningham has failed "to give the trial court a fair opportunity to rule on the issues," he has not provided this Court with "a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Accordingly, the argument is not preserved.

III. CUNNINGHAM IS NOT ENTITLED TO PAYMENT OF SICK LEAVE UNDER THE PAYMENT OF WAGES ACT.

Cunningham asserts that the Court of Appeals overlooked his argument that he was entitled to payment of accrued sick leave under the Payment of Wages Act, S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2013) because "sick leave benefits are expressly included in the statutory definition of 'wages.'" Br. at 29. This argument is both unpreserved and without merit.

A. Cunningham failed to preserve his argument that the Master Employment Agreement's severability provision rescues his Wage Payment Claim.

Cunningham argues that the severability provision of the Master Employment Agreement preserves his claim to accrued sick leave. Br. at 28. Although Cunningham raised this argument to the circuit court, the court did not address severability in its order. Because Cunningham did not raise the issue in a Rule 59(e) motion, it is not preserved for appellate review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (emphasis added)); *Chastain*, 381 S.C. at 515, 673 S.E.2d at 830 ("When the issue was raised but not ruled upon, it became incumbent upon [Appellant] to raise the issue in a Rule 59(e) motion.").

B. The Court of Appeals properly declined to address Cunningham's Wage Payment Act claim in view of its holding that the Master Employment Agreement was void.

The Court of Appeals did not overlook this argument, but rather chose not to rule on it because its holding that the Master Employment Agreement was void necessarily precluded Cunningham's claim under the Payment of Wages Act. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court need not review remaining issues

when its determination of a prior issue is dispositive of the appeal). This is so because Act provides that the definition of "wages" is limited to amounts "which are due to an employee under any employer policy or employment contract." S.C. Code Ann. § 41-10-10(2). Cunningham admits that he is not entitled to sick leave as a matter of County policy. Pet. App. 516. Consequently, as Cunningham also admits, any entitlement to payment for accrued sick leave "would be based on the severance provisions" of the Master Employment Agreement. *Id.* Therefore, Cunningham's claim for accrued sick leave rises or falls with the Master Employment Agreement. In light of its holding that the Master Employment Agreement was void, the Court of Appeals properly declined to address Cunningham's claim under the Payment of Wages Act.

C. Cunningham's Wage Payment Act claim fails on the merits.

The South Carolina Payment of Wages Act requires an employer to "pay all wages due to the employee" no later than 30 days after separation. S.C. Code Ann. § 41-10-50. The Act defines wages as "all amounts at which labor is recompensed ... and includes vacation holiday and sick leave payments which are due to an employee under any employment policy or employment contract." S.C. Code Ann. § 41-10-10(2).

Cunningham's claim for accrued sick leave founders on the plain language of the Payment of Wages Act, which provides that payment for unused sick leave is part of "wages" only if an "employment policy or employment contract" makes it so. The Master Employment Agreement provides that the Administrator receives the same sick leave and vacation benefits as other county department heads, "including provisions governing payment therefore on termination of employment." Pet. App. 427. During discovery, Cunningham admitted that there is no "employment policy" entitling Anderson County

employees to payment for unused sick leave when they leave county employment. Pet. App. 516. Accordingly, as Cunningham also admitted, "any claim ... for sick leave would be based on the severance provisions" of the Master Employment Agreement. Pet. App. 517.

The Master Employment Agreement plainly provides that payment for accrued sick leave is part of severance for termination without cause. Pet. App. 423. However, in 1990 the Legislature amended the Act to remove "severance" from the definition of wages. *See* S.C. Code Ann. § 41-10-10 note ("Effect of Amendment"). Because Cunningham's entitlement to accrued sick leave exists, if at all, only as part of the severance provisions of the Master Employment Agreement, and because severance is not included in the definition of "wages" under the Act, Cunningham cannot be entitled to payment of accrued sick leave under the Payment of Wages Act.

IV. CUNNINGHAM WAS NOT AN "AT WILL" EMPLOYEE AND THEREFORE CANNOT AVAIL HIMSELF OF THE PUBLIC POLICY EXCEPTION.[7]

Cunningham asserts that the Court of Appeals erred in holding that the Master Employment Agreement did not establish an at-will employment relationship. Br. at 2. Cunningham asks this Court to "modify the Court of Appeals' analysis" by holding that he was an at-will employee ***under*** the Master Employment Agreement "and affirm as modified." Br. at 3. In other words, Cunningham wants to recover breach-of-contract damages according to the golden parachute contained in the Master Employment Agreement, *and* he wants to recover in tort for wrongful discharge based on the decision of the 2009 Council's decision to declare the Master Employment Agreement void. Cunningham cannot have it both ways; an employee cannot *both* be entitled to severance under an employment contract for a definite term *and* recover in tort on a wrongful discharge claim. As this Court has made clear, a wrongful discharge claim is available *only* to at-will employees who have no other statutory or contractual remedy.

A. The Court of Appeals correctly held that status as an "at will" employee is a necessary predicate of a wrongful discharge claim under South Carolina law.

South Carolina law distinguishes between employment at-will, which may be terminated at any time, and employment for a definite term, which may be terminated (prior to the end of the specified term) only for cause. *See Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 227, 516 S.E.2d 449, 451-52 (1999) (Toal, J., concurring). "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 (Ct. App. 2006). In an

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[7] Anderson County's Brief of Petitioner/Respondent, filed September 22, 2014, addresses the lack of merit in Cunningham's wrongful discharge claim.

at-will employment relationship, "an employer [can] discharge an employee without incurring liability for good reason, no reason, or bad reason." *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992).

South Carolina has recognized, as an exception to the at-will employment doctrine, that an employee who has been fired for a reason that violates public policy may bring a claim in tort for wrongful discharge. *See Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 224-25, 337 S.E.2d 213, 216 (1985) (recognizing exception). However, a wrongful discharge claim "is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists." *Stiles*, 335 S.C. at 228, 516 S.E.2d at 452 (Toal, J., concurring). This Court and the Court of Appeals have consistently recognized that the existence of a statutory or contractual remedy precludes a terminated employee from bringing a wrongful discharge claim. *See, e.g., Epps v. Clarendon Cnty.*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (holding that a wrongful discharge claim is not available to an employee who has an alternate remedy).

B. The Master Employment Agreement is a contract for a definite term, not an at-will contract with a notice provision.

Although employment in South Carolina is presumptively at-will, *see Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011), the parties to an employment relationship "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," *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281, 573 S.E.2d 830, 836 (Ct. App. 2002). "Employment for a definite term has two important characteristics: (1) it exists

for a fixed period of time; and (2) the employment may only be terminated before the end of that term by just cause." *Stiles*, 335 S.C. at 227, 516 S.E.2d at 451 (Toal, J., concurring). An employee under a definite-term contract, who is terminated without cause prior to the end of the term, is entitled to damages as "determined by the contract." *Id.*

Cunningham asserts that "[s]imply because a contract provides a severance payment if terminated without cause does not prevent the contract from being 'at will.'" Br. at 29.[8] Actually, that is *exactly* what it prevents. An employment contract that prohibits termination except for cause, backed up by a severance provision, restricts the employer's freedom "to terminate the employment relationship without incurring liability." *Baril*, 352 S.C. at 281-82, 573 at 836. *By definition*, such a contract establishes an employment relationship that is not at-will.

Cunningham maintains that the terms of the Master Employment Agreement are indistinguishable from the terms of the employment contract at issue in *Cape v. Greenville County School District*, 365 S.C. 316, 618 S.E.2d 881

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[8]As the County pointed out in its petition for rehearing, Pet. App. 41, Cunningham ***never*** maintained in the Circuit Court, in the alternative or otherwise, that he was an at-will employee. In his complaint, Cunningham alleged that "[o]n November 18, 2008, the Anderson County Council voted 5-2 to employ [Cunningham] as the Administrator ***for a term pursuant to a written agreement***." Pet. App. 15 (emphasis added). Cunningham further alleged that the 2009 Council sought to have him "relinquish his rights under the Master Employment Agreement" and instead enter into "a ***new*** 'at will' agreement." Pet. App. 16 (emphasis added).

The settled law in South Carolina is that "[t]he allegations, statements or admissions contained in a pleading are conclusive as against the pleader." *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964). Therefore, Cunningham should not be allowed to disavow on appeal the allegations he made in the circuit court.

(2005). Br. at 36. Cunningham is wrong—the Master Employment Agreement is nothing at all like the contract at issue in *Cape*.

The contract in *Cape* was for a defined term (the 2001-02 school year) but provided, in all capital letters:

> THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON .... EMPLOYEE AGREES THAT THERE EXISTS NO RIGHT TO CHALLENGE TERMINATION OF THIS CONTRACT BY EMPLOYER.

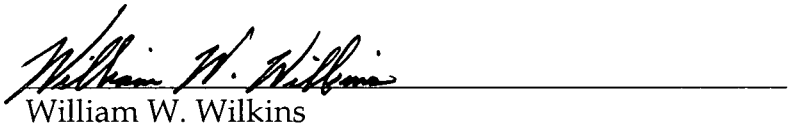
Id. at 317, 618 S.E.2d at 882. In contrast, the Master Employment Agreement contains no express provision for termination without cause. In fact, it plainly provides that Cunningham may be terminated only for cause. Cunningham quotes § 2(A) of the Master Employment Agreement, stating that "[t]he Administrator serves at the pleasure of Council," but he omits language *in the same sentence* that explicitly subjects the Council's authority to terminate Cunningham "to the provisions set forth in Section 3, Paragraphs A, B, and C." Pet. App. 500 (Master Employment Agreement § 2(A)). Section 3(A) sets forth "[g]rounds for termination with cause," and § 3(B) provides that termination for any other reason is without cause, entitling Cunningham to severance. Pet. App. 501-02 (Master Employment Agreement § 3(A), (B)). Additionally, the only notice provision in the Master Employment Agreement relates to its *nonrenewal* (in which case Cunningham would be entitled to serve the remaining two years of the employment term), not to termination. Pet. App. 500-01 (Master Employment Agreement § 2(D)).

Cunningham complains that it is improper for the County to challenge the validity of the Master Employment Agreement while simultaneously relying on its terms to oppose the wrongful discharge claim. If there is a problem, it is one of Cunningham's own making. Cunningham could have asserted his wrongful

discharge claim as an *alternative* to his breach of contract claim, *i.e.*, he could have alleged that if the Master Employment Agreement was void, then he was an at-will employee entitled to bring a wrongful discharge claim. Cunningham elected not to do so. Instead, he has always maintained that *the terms of the Master Employment Agreement* allow him to maintain both a breach of contract claim and a wrongful discharge tort claim. Pet. App. 333 (arguing to the circuit court, "[J]ust because you have a contract doesn't mean you give up the right to sue in court.... *It's not alternative causes of action.*" (emphasis added)). Since Cunningham has chosen to base his wrongful discharge claim on the language of the Master Employment Agreement, the County is entitled to establish that the Master Employment Agreement does not say what Cunningham claims it does.

CONCLUSION

This Court should reject Cunningham's challenges to the decision of the Court of Appeals. In the first place, Cunningham's cross-petition for certiorari was untimely filed, and thus his arguments are not properly before the Court.



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November 3, 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 November 3, 2014, addressed to his attorneys of record as follows:

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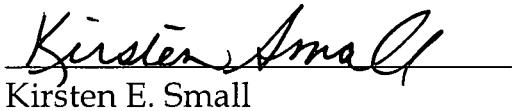

Kirsten E. Small

NEXSEN|PRUET

Kirsten E. Small
Member
Admitted in SC, NC, MD

November 3, 2014

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

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 16 copies of Petitioner/Respondent Anderson County's Brief of Respondent and Proof of Service. Kindly file the original and 15 copies and return one clocked copy in the provided pre-paid envelope.

By copy of this letter, I am serving Respondent/Petitioner's counsel with the same.

Also enclosed for filing please find nine additional copies of Petitioner Respondent Anderson County's Reply Brief, which was filed and served on Friday, October 31, 2014. My letter of that date enclosed an original and *six* copies, rather than the 15 copies required by Rule 242(i).

Thank you for your assistance.

Very truly yours,

Kirsten E. Small

KES/dkr
Enclosures
cc: Counsel of Record

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