THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

MICHAEL CUNNINGHAM'S REPLY BRIEF

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I. MR. CUNNINGHAM'S CROSS-PETITION IS PROPERLY BEFORE THIS COURT

Anderson County contends that Mr. Cunningham's cross-petition is not timely because Mr. Cunningham sought rehearing from the amended opinion the Court of Appeals filed before seeking a writ of certiorari. (Count Resp. Br. p. 1). The Court should not be persuaded by this argument.

The original decision of the Court of Appeals affirmed as to Counts I (breach of contract) and III (statutory wage claim), reversed as to Count II (Wrongful Discharge) and remanded. *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*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013) (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 extensive and different 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, asking among other things for the Court to reconsider the

pages of new material it added to its prior opinion.[1] (Supp. Appx. pp. 1-28). On March 29, 2013, the County filed its Petition for Writ of Certiorari, seeking review based *solely* upon the County's Petition for Rehearing directed at the *original* opinion that the Court of Appeals withdrew, and *only* as to its original disposition of Count II (Wrongful Discharge).[2] The Court of Appeals summarily denied Mr. Cunningham's Petition for Rehearing directed at the substituted opinion on April 18, 2013. (Supp. Appx. p. 29).

The County contends Mr. Cunningham's second Petition for Rehearing "was improper," but the County does not provide any authority for this statement. (County Resp. Brief, pp. 1-2). The County asserts that because the Court of Appeals denied the petition for rehearing from the first opinion (an opinion that the Court *withdrew* and which no longer exists), any subsequent request for rehearing "was barred by Rule 221(c)" and did not toll the time to seek a Writ of Certiorari from this Court. (County Resp. Br. p. 2). The Court should not accept this argument.

First, Rule 221(c) does not preclude a party from requesting rehearing following the denial of a petition for rehearing where that denial is accompanied by the withdrawal of the first opinion and the substitution of a *new* opinion which adds new and different discussion to the opinion. Such a rule would place a party who seeks to challenge the new

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[1] Mr. Cunningham's Petition was timely as the Court had extended the deadline to March 29, 2013.

[2] The County did not seek rehearing from extensive additional language in the substitute opinion as to Count II. The Court of Appeals *withdrew* the prior opinion from which the County filed its petition. Arguably, then, it is the County whose Petition suffers the defect of seeking review from an opinion that has been withdrawn, and of failing to challenge the substituted opinion which added significant and different discussion as to Count II.

language in an untenable position of having to seek review by this Court without first challenging the new (and different) language in the substituted opinion. But Rule 242, SCACR, would preclude such a challenge unless first made to, and ruled upon by, the Court of Appeals. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). *Cf. Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 781 (2004) (this Court noted "we strive to avoid an interpretation of procedural rules which routinely would place a party between a proverbial rock and a hard place.").

Second, the language of Rule 221(c) does not apply to the situation at hand. Rule 221(c) is entitled "Rehearing of Motions," and provides the Court will not entertain a rehearing on a motion or petition unless the court's action on the motion or petition has the effect of dismissing or finally deciding a party's appeal. Here, the petition was directed at a substitute ruling by the Court of Appeals on the merits, not the Court's disposition of a petition or motion. And even if the Rule applied, the Court's denial of rehearing "finally decid[ed]" Mr. Cunningham's appeal so as to fall within the exception to Rule 221(c)'s prohibition.

Third, the case the County cites in support of its argument is not controlling. The County cites to *State v. Rucker*, 321 S.C. 552, 471 S.E.2d 145 (1996) for the rule that "'[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." (County Resp. Br. p. 3). *Rucker* is distinct from the

situation in this case is very meaningful ways.

In *Rucker*, this Court denied Ms. Rucker's petition for a writ of certiorari to the Court of Appeals to review that Court's opinion in the case. Ms. Rucker then petitioned this Court to rehear the decision to deny the writ of certiorari. This Court held that then-Rule 226 (now Rule 242) does not contain any provision authorizing a petition for rehearing following the denial of a petition for a writ of certiorari by this Court. The Court added, "Indeed, the South Carolina Appellate Court Rules recognize the conclusiveness of the denial of a writ of certiorari by allowing the Court of Appeals to immediately send the remittitur to the lower court when the petition is denied. Rule 221(b), SCACR." *State v. Rucker*, 321 S.C. at 553, 471 S.E.2d at 145. The narrow holding of *Rucker* is that "a petition for rehearing following the denial of a petition for writ of certiorari to the Court of Appeals is not authorized by the South Carolina Appellate Court Rules." *Id.* The order in *Rucker* stands for nothing more and nothing less.

In this case, however, the Court of Appeals filed a lengthy decision and Mr. Cunningham asked the Court to reconsider portions of that opinion. Although the Court denied rehearing, it withdrew its original opinion and filed a new opinion containing new and expanded discussion (material that was *not* the subject of the original petition for rehearing, nor could it have been since it did not exist in the first version of the opinion). Had Mr. Cunningham not then challenged the new material, the County undoubtedly would have contended that any argument aimed at the new material would be improper since the original petition never challenged the new material. The more prudent course for Mr. Cunningham to pursue was the course he took - a petition aimed at the new

material in the substituted opinion.

A more appropriate analogy to this scenario is a successive Rule 59, SCRCP, motion when a circuit court's amended order adds new matter that was not addressed in the original order. Settled law establishes that in those circumstances, a successive Rule 59 motion tolls the deadline for initiating an appeal. *E.g.*, *Robinson v. Robinson*, 365 S.C. 583, 619 S.E.2d 425 (2005) (second motion to alter or amend is appropriate if it challenges something that was altered from the original judgment as a result of the initial motion); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) (permitting successive motion for reconsideration where ruling on first Rule 59 motion results in a substantial alteration of the original judgment). That same analysis should apply in the situation Mr. Cunningham faced in this case.

Lastly, the County asserts in a footnote that "*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)." (County Resp. Br. p. 3 n. 3). Mr. Cunningham did not cite *Mazloom* in his Brief of Petitioner. Instead, Mr. Cunningham cited *Mazloom* in his Brief of Respondent to the Brief of Petitioner the County filed, pointing out that the County *never* sought rehearing regarding the additional material in the Court of Appeals' substituted opinion but argued against the same new material in its brief to this Court. (Cunningham Resp. Br. p. 19). *Mazloom* held that a portion of a question presented on certiorari review was not preserved for review because it was not raised in the petition for rehearing to the Court of Appeals. Whether *Mazloom* cited to Rule 221(c) or not is irrelevant to the argument Mr. Cunningham made – that the County has waived any

challenge to anything new in the substituted opinion because the County did not seek rehearing regarding that new material.

This Court should decline the County's request that the Court find Mr. Cunningham's petition to this Court was untimely. The Court should also explain that where the Court of Appeals withdraws its prior opinion and files a new opinion that contains additional and extensive material, a party may challenge the additional material by way of another petition for rehearing pursuant to Rule 221, SCACR. Indeed, it is arguable that a party must do so, because the original opinion no longer exists.[3]

II. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR THE COUNTY ON APPELLANT'S CLAIM FOR BREACH OF CONTRACT (ISSUE I) ON THE GROUND THAT THE CONTRACT WAS INVALID AS A MATTER OF LAW

The County restates Mr. Cunningham's argument here in an incorrect fashion. (County Resp. Br. pp. 4-9). What Mr. Cunningham contends is that Dillon's Rule, which the Court of Appeals used as a basis for its decision, does not apply to this case pursuant to the Home Rule Amendments and the Home Rule Act. Thus, the Court of Appeals' reliance upon *Piedmont Public Service 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*") is

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[3] If this Court agrees with the County's argument, Mr. Cunningham respectfully requests that the Court permit him to move the Court to expand the time to file the Cross-Petition for Writ of Certiorari, and accept the Cross-Petition already filed and already granted. Rule 263(b), SCACR. Alternatively, Mr. Cunningham requests that the Court review his arguments by issuance of a common law writ of review in light of the unique circumstances of this case and the lack of prior clear guidance on how to address the situation in this case. In any event, the Court should clarify for the bench and bar the appropriate procedure to be followed in this extraordinary situation.

misplaced because *Cowart* involved a special purpose district, which is not covered by Home Rule. (Slip op. at 5-11; Appx. pp. 6-12). *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts.").

The County accuses Mr. Cunningham of confusing apples and oranges. (County Resp. Br. p. 8). This case is, in fact, a matter of the Court of Appeals using apples (*Cowart* which involved special purpose districts) to control the outcome of oranges (the actions of a county in this case).

The County also contends that Mr. Cunningham has the rules of construction backwards, and that liberal construction under Mr. Cunningham's view would *narrow* the power of the 2009 County Council. (County Resp. Br. pp. 9-10). The short answer to this is that nothing prevented the 2009 Council from terminating Mr. Cunningham (as it did) and replacing him with whomever it wanted. But contrary to the broad power that the 2007 Council had to enter into Mr. Cunningham's employment contract as expressly permitted by statute, the Court has added language to that statute (*i.e.*, "but not exceeding the term of the current council"). What the County proposes would actually restrict the authority of a council to act in a manner not contemplated by Section 4-9-620 of the South Carolina Code, which provides: "The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. *The council may, in its discretion, employ the administrator for a definite term.*" (Emphasis added).

As Mr. Cunningham pointed out in his Cross-Petition, recognizing a council's

authority to enter into the contract in this case "for a definite term" is not a narrowing of the power – it is a liberal construction of those powers and it is one which favors the county's ability to act. S.C. Code Ann. § 4-9-25. (App. Br., p. 13; Amicus Br., pp. 5-8). Section 4-9-620, however, is a clear expression by the General Assembly authorizing the County to enter into an agreement for a "definite term" without the limitation the Court has appended to the section (i.e., "so long as the contract does not extend beyond the terms of all the members of the current governing body.").

III. MR. CUNNINGHAM'S ARGUMENT REGARDING WHETHER PAYMENT OF SEVERANCE IS PROPRIETARY OR GOVERNMENTAL IS PRESERVED

The County asserts Mr. Cunningham's argument concerning the payment of severance is not preserved. (County Resp. Br. pp. 12-13). The Court should reject this assertion.

The County concedes that Mr. Cunningham made this argument to the trial court, but the County contends that the court did not address the argument in its order. (County Resp. Br. pp. 12-13). In fact, the trial court stated "[a]mong the most important responsibilities of a County Council is the appointment of the County Administrator." (App. p. 192). The trial court outlined what it perceived were the duties of an administrator and added, "[f]or all of these reasons, the appointment of a county administrator is undoubtedly a governmental function." (App. p. 193). In rejecting Mr. Cunningham's argument that even if Dillon's Rule applied, the *Newman*[4] exception validated the contract, the trial court pointed to the following language from that case:

[4] *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948).

> [N]o power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and 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. * * * As a general rule, the appointment and removal of public officers is a governmental function, and a municipal council cannot engage a public officer by contract for a term extending beyond that of its own members, so as to impair the right of their successors to remove such officer and to appoint another in his place.'
>
> *Newman*, 212 S.C. at 23, 46 S.E.2d at 255.

(underline added). (App. p. 194). Thus, contrary to the County's argument, the trial court did, in fact, expressly address and reject Mr. Cunningham's contention that what he sought was actually the proprietary function of paying his severance, not the governmental function of hiring an administrator.

IV. MR. CUNNINGHAM'S WAGE PAYMENT ACT CLAIM DOES NOT FAIL ON THE MERITS

The County asserts that Mr. Cunningham's claim under the Payment of Wages Act "founders on the plain language of the ... Act..." (County Resp. Br. pp. 15-16). The specific argument the County makes goes like this.

1. The Act provides payment for unused sick leave is part of "wages" only if an "employment policy or employment contract" makes it so.
2. The Master Employment Agreement provides the administrator receives the same sick leave and vacation benefits as other county department heads, "including provisions governing payment therefore on termination

of employment."

3. Mr. Cunningham admitted there is no "employment policy" entitling the County's employees to payment for unused sick leave when they leave county employment.

4. Any claim for sick leave must therefore be based on the severance provision of the Agreement.

5. The Master Agreement plainly provides that payment for accrued sick leave is part of severance for termination without cause.

6. In 1990, the Legislature amended the Act to remove "severance" from the definition of wages.

7. Because Mr. Cunningham's entitlement to accrued sick leave exists, if at all, only as part of the severance provision of the Master Employment Agreement, and because severance is not included in the definition of "wages" under the Act, Mr. Cunningham cannot be entitled to payment of accrued sick leave under the Payment of Wages Act.

(County Resp. Br. pp. 15-16).

This argument tracks the circuit court's order. The circuit court ruled that Mr. Cunningham could not bring a claim under the South Carolina Payment of Wages Act for the County's refusal to compensate him for accrued sick leave upon his termination. The circuit court found that the payments were part of "severance," and severance was specifically deleted from the definition of wages under the Act in 1990. The Court of Appeals avoided addressing this issue under Rule 220(c), SCACR, holding that since the

Master Agreement was void, the severance provision was unenforceable. The Court should not adopt the circuit court's reasoning or the County's argument along these lines.

The South Carolina Payment of Wages Act defines "wages" as follows:

> "Wages" means all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10 (2) (Supp. 2013).

The sick leave payments were due to Mr. Cunningham under the Agreement so long as it was "earned sick leave...." (App. p. 237, Section 3, ¶ (B)). It was a benefit that was already earned and was *in addition to* the severance package payable upon termination. The Agreement states Mr. Cunningham would be paid for benefits accrued as well as "additional severance pay" based upon a formula set forth in the Agreement. Section 41-10-10(2) expressly includes this benefit under "wages" for purposes of the Act. The trial court's holding to the contrary is erroneous as a matter of law. And the County's argument here fails for the same reason.

The County also assumed the obligation to compensate Mr. Cunningham for his sick leave under the Agreement during the term of Council in which the parties entered the Agreement. Assuming Mr. Cunningham is correct in argument that the Agreement is not void as violative of Dillon's Rule, then the trial court's ruling that he "is not entitled to any payment of severance resulting from the termination of a void contract" (App. p. 198) is legally incorrect.

Furthermore, payment for the accrued sick leave does not in any way "hamstring" a subsequent council with an administrator who is not of its choosing. The Council is free to terminate the administrator's employment, but the Council must uphold the obligation it assumed when it entered into the Agreement. There is no requirement that a subsequent council employ Mr. Cunningham, and there is nothing that prevents a subsequent council from hiring the administrator of its choice.

The agreement also contains a severability provision that separates the payment for accrued leave from any other issue under the Agreement. The Agreement provides:

> If any provision, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed severable, shall not be affected thereby, and shall remain in full force and effect. It is the intent of the parties to this Agreement that the Agreement be applied, executed, and enforced to the maximum extent possible, at any time, consistent with State law as then in effect, to the benefit of the Administrator. The Administrator shall receive the maximum benefit of each and every provision of this Agreement as may be permitted by law or the Constitution at any point in time.

(App. pp. 427-428, ¶ 17(D)). Therefore the provision that the County compensate Mr. Cunningham for accrued sick leave stands on its own and is enforceable under the Payment of Wages Act even if any other part of the Agreement is declared void.

This Court should reject the County's argument on this point. The Court should also reverse the circuit court's order granting the County summary judgment as to Mr. Cunningham's claim under the Payment of Wages Act, and should remand the matter for further proceedings consistent with this Court's ruling.

V. MR. CUNNINGHAM'S ARGUMENT REGARDING THE SEVERABILITY CLAUSE IS PRESERVED FOR REVIEW

The County contends Mr. Cunningham's argument regarding the severability provision is not preserved for this Court's review. (County Resp. Br. p. 14). This argument should not be persuasive.

The County concedes that Mr. Cunningham raised this point to the circuit court, and the record shows that the circuit court addressed it. The circuit court first held that Mr. Cunningham could not recover under any portion of the severance owed "resulting from the termination of a void contract." (App. p. 198). Then, the circuit court held that the contract included payment for accrued leave as a portion of severance so that payment was not "wages" under the Payment of Wages Act. (App. pp. 198-199). There is no dispute that the circuit court viewed the Contract *in its entirety* as void and not enforceable. It was not incumbent upon Mr. Cunningham to parade this point back before the trial court when doing so would have been a futile act. *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000).

CONCLUSION

For the reasons stated here and in the Brief of Respondent/Petitioner, Mr. Cunningham requests that the Court reverse the decision of the Court of Appeals as to Counts I and II and amend its decision as to Count III.

Respectfully submitted,

November 13, 2014

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THE STATE OF SOUTH CAROLINA
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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 Reply Brief* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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November 13, 2014

VIA HAND DELIVERY
Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Michael Cunningham v. Anderson County
Case Tracking No: 2013-000678

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of Mr. Cunningham's Reply Brief in reference to the above matter. I have also enclosed a proof of service of the Reply Brief on counsel for the Petitioner/Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
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cc: Brian P. Murphy, Esquire
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