STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

C. A. NO. 12-CP-26-4852

Town of Surfside Beach. ..... Appellant

v.

Jacklyn J. Donevant . .....Respondent

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in expanding the public policy exception to at-will employment beyond situations in which (1) the employer requires the employee to violate a law carrying a criminal penalty, or (2) the reason for the employee's termination itself is a violation of criminal law.

2. Assuming the public policy exception to at-will employment is to be expanded, did the trial court err in disregarding the rule laid down in *Antley v. Shepherd*, that the public policy exception does not apply to terminations of employees who insist on performing an act that is discretionary, *i.e.*, that the law does not require them to perform.

STATEMENT OF THE CASE

This case arises from the employment termination of Jacklyn Donevant. Donevant was the building official for the Town of Surfside Beach (the Town). The only legal issue tried was whether or not the Town fired Donevant, in violation of public policy, because Donevant issued a discretionary "stop work" order on a construction project on the Town pier.

The Town contended at summary judgment, directed verdict, and judgment notwithstanding the verdict, that Donevant's allegations did not meet the requirements of the public policy exception to the at-will employment rule. These contentions were overruled. The case was tried before a Horry County jury from February 10, 2014 through February 14, 2014. The jury returned a verdict of $500,000 which was reduced by Judge Deadre Jefferson to $300,000 pursuant to the South Carolina Tort Claims Act. Judgment was dated February 18, 2014 and received by the Town on March 3, 2014. The Town filed a notice of appeal on March 10, 2014.

FACTUAL BACKGROUND

Donevant worked for the Town of Surfside Beach as its Building and Zoning Department Director. Donevant was the only person in the Town's Building and Zoning Department who was licensed to review plans and conduct construction inpections.

In 2010, the Town hired Jim Duckett as its new Town Administrator. He was Donevant's immediate superior. Mr. Duckett heard complaints about Donevant when he began his duties, but he resolved to start with a blank slate with all of the Town's employees. (Tr. II, p.169).[1]

The main problem Mr. Duckett had with Donevant was that she was frequently absent from, or late to, work. Donevant's own co-workers testified she was missing from work approximately 40% of the time. (Tr. II p. 126). Duckett eventually required Donevant to be at work by 9:00 AM or to let him know where she was. (Tr. II pp. 171-172). Donevant continued to absent herself from work and Duckett escalated pressure to bring her attendance under control by issuing warnings, giving her a negative performance review, and requiring Donevant to report, via email, when she was not going to be in the office during normal operating hours. (Tr. II pp. 171-179). In her trial testimony, Donevant partially admitted she had attendance issues. (Tr. I pp. 132, 154-155).

Donevant freely admitted that she did not get along with Duckett, whom she regarded as an "idiot" who was constantly "picking on me," and "trying to do my job." She further admitted that disregarded his instructions from time to time. In fact, toward the end of her employment,

[1] A snow/ice storm prevented the court reporter who began the trial from returning and a second reporter finished the trial. Therefore, because page numbering was restarted with the second court reporter, there is a reference to Volume I and II of the transcript).

Donevant informed Duckett, in writing, that she would disregard his instructions. (Tr. II pp. 106, 136, 143, 154) (Tr. P. Ex. 19).

In December 2012, Donevant took an extended leave due to a medical condition. Sabrina Morris took over as the Interim Director during her absence. Because Morris lacked the necessary building official licensure, she could not approve building plans, so the Town made arrangements with the City of Myrtle Beach for it to perform this function. (Tr. I pp. 93-94)

Donevant came back to work on March 13, 2012. On her first day back at work, Duckett informed Donevant that she was not to interfere with any decisions made during her absence. He informed her of this in writing and specifically warned her that termination might result if she did interfere with any decisions made during her leave. Duckett gave this instruction because he wanted her to focus on issues going forward. (Tr. II pp. 185-187). Donevant admitted that she disregarded this instruction almost immediately upon return to work. (Tr. I pp. 152-154)

Duckett also reminded Donevant that she was to report to him and not to the Deputy Administrator Micki Fellner. (Tr. I. p. 146). Duckett felt that Donevant had been avoiding him—preferring to report to Ms. Fellner. Ms. Fellner also testified that she told Donevant that she needed to report to Duckett, and not to her. In her testimony, Donevant admitted she understood she was to report Duckett and not Fellner but admitted that she defied this instruction because she did not feel she "had to report anything to Jim [to do] with my job." (Tr. I pp. 165-167)

The last straw for Donevant had to do with her actions regarding the Town pier. In 2012, the most prominent public issue in the Town of Surfside Beach was the Town's pier. (Tr. II pp. 48, 111-114). The Town was attempting, with difficulty, to get space on the pier leased. Various stories had been in the local media about the pier. Shortly before Donevant went on

medical leave, the restaurant space on the pier had been leased and the new tenant had received a permit to start demolition in the space. (Id.).

On March 20, 2012, without telling anyone what she was doing, Donevant went to the pier and looked in a window at the jobsite. (Tr. I pp. 154, 158). Donevant alleges that she saw new flooring, new plumbing, and new openings for windows. She regarded this as new construction not authorized by a demolition permit and therefore issued a "stop work" order and posted it on the door to the job worksite. (Tr. I pp. 98-101). Sometime later, she told Fellner that she had issued the stop work order. Fellner asked her if she had informed Duckett and Donevant responded that she had not. (Tr. I pp. 164-166).

When Donevant eventually came back to the office, Fellner saw her and again reminded her that she needed to tell Duckett what was going on. (Id.). Donevant admitted she disregarded Duckett's and Fellner's instructions because she felt "why would I have to report anything to Jim with my job?" and "I was doing my job, I had nothing to report." (Tr. I pp. 166, 169). Duckett first learned of the stop work order when one of the Town Councilmen called him asking what was going on at the pier. (Tr. II p. 190-191). About the same time, Fellner called Duckett to report her conversation with Donevant. (Id.). Duckett immediately went to the pier and, to his surprise, was greeted by a television crew and members of council. (Id.). Donevant denied tipping off the media that something had happened at the pier. (Tr. I p. 161).

Duckett concluded that Donevant had exercised extremely poor judgment by not telling him what was going on and not reporting to him as instructed. He told Donevant to meet him at the office the next workday. (Tr. I p. 193). They met, and Duckett first presented Donevant with a written warning. Donevant admits that Duckett told her that the problem was she should have told him what she had done. (Tr. I p. 170). The warning explicitly stated it was based on

Donevant's failure to communicate and that Duckett did not question her authority to issue the stop work order. (P. Ex. 16). Donevant, however, refused to sign the warning in acknowledgment that she received it. (Despite the fact that she admitted she had signed prior counseling's with no objections) (Tr. I pp. 137, 138, 140, 174). Duckett therefore informed her that he was suspending her for three days. He presented her with a suspension notice. (Tr. I pp. 173-174). This time, Donevant signed the notice. (Id.). The whole matter could have ended there. Duckett thought that Donevant understood the reason for the discipline and that they could go forward constructively from there. However, upon her return from suspension, Donevant gave Duckett a written note that stated:

> My suspension was not right . All I did was follow the law, which you didn't want me to follow. Like I told you the other day, I will follow the law even if that means not following your instructions. You have been picking on me and treating me badly, for a long time, even though I do my work by the book and I am dedicated to the Town

(Tr. Ex. P. 19). Duckett was very surprised by this note as he had thought they had reached an understanding. The note started with the false assertion that he had directed Donevant to violate the law. It continued with the insubordinate statement that she would not follow his instructions. It ended with a clear disavowal that she had done anything wrong regarding any of the disciplinary actions taken against her.

Even after this note, Duckett still did not fire Donevant. Several weeks later, however, a Town election was held and a new Mayor was elected. Duckett did not want to continue in his position with the changes and decided he would resign. He also decided that, although he was willing to continue to work with Donevant, that he did not think it right to pass along such a problem employee to the next Town Administrator. He therefore decided to terminate

Donevant's employment. (Tr. II pp. 204-208).

ARGUMENT

Letting the verdict stand will improperly, and greatly, expand the public policy exception to at-will beyond situations in which "(1) the employer requires the employee to violate criminal law, or (2) the reason for the employee's termination itself is a violation of criminal law."

Donevant alleges that she was terminated in retaliation for issuing the stop-work order at the pier and this is in violation of public policy. Donevant, and her attorneys, alleged that Donevant issued the stop–work order because the contractor at the pier only had a demolition permit but was doing some construction work. (P. Ex. 12) (Tr. I pp. 98-101, 284). (The construction permit was pending and was, in fact, issued soon after Donevant issued the stop work order). (P. Ex. 18).

The basis of Donevant's authority to issue a stop-work order on the pier restaurant project came from the Town's building code.[2] (Tr. I pp. 104-105, 284) (Tr. II pp. 103). The code section applicable to this case reads:

> Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.

(P. Ex. 26) (emphasis added).

In South Carolina, the general rule remains that all employment is "at-will" and employees may be terminated, or may quit, for any reason or no reason at all. This was reaffirmed most recently in *McNeil v. S. Carolina Dep't of Corr.*, 743 S.E.2d 843 (S.C. Ct. App.

[2] The Town, like most municipalities, adopts the Uniform Building Code, as written by a national code commission.

2013). *McNeil* is also the most recent case dealing with the public policy exception to the at-will employment rule.

South Carolina courts do recognize a cause of action for discharge in violation of public policy. However, as the *McNeil* court reaffirmed, it has been applied only to situations in which an employee was forced to choose between his job and committing a criminal act or to cases in which the termination itself was a violation of law containing criminal penalties.[3] *Garner v. Morrison Knudsen Corp.*, 456 S.E.2d 907 (S.C. 1995); *Antley v. Shepherd*, 532 S.E.2d 294, 297 (S.C. 2000) (aff'd as modified 564 S.E.2d 116 (S.C. 2002)).

It is for the courts to decide what constitutes public policy and "it is a question of law." It is not a question for the trier of fact. *McNeil*, 743 S.E.2d at 846.

As the exception was originally decided, and in some subsequent cases, the first prong was worded to include only situations in which the employee was required to commit a "criminal act." *Garner v. Morrison Knudsen Corp.*, 456 S.E.2d 907 (S.C. 1995) ; *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 214 (S.C. 1985). However, several cases, when describing the first prong, speak of requiring the employee to "violate a law." *Barron v. Labor Finders of South Carolina,* 682 S.E.2d 271 (S.C. Ct. App. 2009); *Lawson v. South Carolina Dept. of Corrections*, 532 S.E.2d 259, 260 (S.C. 2000); *Moshtaghi v. The Citadel*, 443 S.E.2d 915, 919 (S.C. Ct. App. 1994). This difference in language has never been identified as an intent to change the exception. In fact, in *Miller v. Fairfield Communities*, 382 S.E.2d 16 (S.C. Ct. App. 1989) the court ruled that public policy discharge required a criminal sanction and a "civil penalt[y] or sanction" was insufficient. *Miller v. Fairfield Communities, Inc.*, 382 S.E.2d 16, 19 (Ct. App. 1989) ("the Supreme Court did not consider public policy outside the sphere of

[3] The second prong was first made explicit in *Culler v. Blue Ridge Co-op.*, 422 S.E.2d 91 (S.C. 1992).

criminal sanctions."). As no reason has been given for the variation in language, *Miller* controls and the first prong requires a criminal sanction.

The *McNeil* court did note that the public policy exception had not been expressly limited to the two situations above but had not been applied beyond them. On this point, the court cited *Garner v. Morrison Knudsen Corp.* 456 S.E.2d 907 (S.C. 1995) and *Keiger v. Citgo Coastal Petroleum*, 482 S.E.2d 792 (S.C. Ct. App. 1997). In *Garner*, the plaintiff alleged termination in retaliation for reporting radioactive contamination and, in *Keiger*, the employee alleged termination in retaliation for reporting wage payment concerns to the South Carolina Department of Labor. Neither of these situations fit within the two prongs identified in *Ludwick* and other cases. However, in *Garner* and *Keiger*, the appeal courts reversed dismissals based on S.C. R. Civ. P. 12(b)(6) because the courts felt the issues were novel and required development through discovery. These courts specifically held, however, that they were not expanding the tort of public policy discharge.[4]

The Building Code authorizing stop-work orders contains no criminal penalty for failing to issue a stop-work order. It does not contain a civil penalty either. In fact, as discussed more fully below, according to the plain language of section 115, a building official is not required to issue a stop-work order at all. They are merely "authorized" to do so. This is far from a requirement, subject to a criminal or civil sanction, that a building official issue a stop-work

[4] "Because the facts of this case have not been fully developed, we do not address the ultimate question whether the public policy exception to the employment at-will doctrine is applicable in this case." *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 227, 456 S.E.2d 907, 910 (1995)

order for construction work done without a permit. As such, the court should have granted summary judgment, directed verdict, or judgment as a matter of law.[5]

Donevant will certainly argue that, had she not issued a stop-work order, she would have been failing to enforce the building codes and could have been subject to discipline by the South Carolina Building Codes Council. Gary Wiggins, a former official of the Council, testified as an expert for Donevant and opined that Donevant was required to issue to order and "could" or would be subject to "possible ramifications" of discipline if she had not done so. (Tr. I pp. 308-313). In contrast, Donevant's replacement at the Town testified that he uses his discretion in issuing stop work orders and seldom requires the builder to stop all work on a project if they promptly address the issue. (Tr. II pp. 84-86). Donevant testified that she issued stop-work orders for work done without a permit but did not always do so for other violations. (Tr. I pp. 198).

In any event, neither Wiggins, nor any other witness or other evidence, pointed to a criminal penalty. Second, neither Wiggins nor any other evidence identified a civil sanction—only the possibility of discipline. Finally, and most importantly, an expert's opinion about what a law might require is of no consequence to this court. The court has the obligation to apply the plain meaning of the law which, in this case, gives the building official discretion. *See, e.g., Rauton v. Pullman Co.*, 191 S.E. 416, 420 (S.C. 1937) ("any evidence by an expert as to the meaning of these statutes would be incompetent."); *Kirkland v. Peoples Gas Co.*, 237 S.E.2d 772 (S.C. 1977) (an expert is not allowed to interpret regulations of the Department of Transportation) ; *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 93 (S.C. 2013) ("court is

[5] This issue was properly preserved in the Town's Motion for Summary Judgment and again at the directed verdict and JNOV stages. (Motion for Summary Judgment) (Tr. II pp. 92-98, 105-106, 235-237, 314-316).

obligated to follow and to enforce the stated meaning [of the statute]"); *Barth v. Barth*, 360 S.E.2d 309, 311 (S.C. 1987) (It is the right and duty of this court to interpret statutes . . .."); *Benat v. State Farm Mut. Ins. Co.*, 333 S.E.2d 57, 58 (S.C. Ct. App. 1985) ("It is the duty of this court to interpret the [statutory] law.").

In summary, there was no evidence presented to the court that Donevant was subject to a criminal penalty for failing to issue a stop-work order. There was not even evidence she could properly be subject to a civil sanction (even if a civil sanction were sufficient—which it is not). This is because the building code, as a matter of law, gave her discretion to issue, or not issue, a stop work order. Therefore, Donevant's allegations simply do not meet the accepted definition of public policy discharge and the judgment should be reversed.

Assuming the public policy exception to at-will employment is to be expanded, the trial court erred in disregarding the rule laid down in *Antley v. Shepherd*, that the public policy exception does not apply to terminations of employees who insist on performing an act that is discretionary, *i.e.*, that the law does not require them to perform.

This case should have been controlled by this court's decision in *Antley v. Shepherd*, 532 S.E.2d 294 (S.C. 2000). The *Antley* court did not consider the question of whether public policy discharge encompassed violation of a law carrying criminal penalties or whether requiring the employee to violate any law was sufficient. The court assumed, without deciding, that violation of any law was sufficient and determined whether Antley was retaliated against for performing a duty she was required by law to perform.

Exactly like Donevant, Antley claimed she was fired for exercising her legal duty as a public official. That duty was Antley's statutory right to appeal tax rulings. Antley was the Aiken County Tax Assessor. As Tax Assessor, she had the "right," under South Carolina law, to appeal rulings made by the assessment appeal board. On this point, South Carolina law states: "The assessor is responsible for the operations of his office and shall . . . have the right of appeal from a disapproval of or modification of an appraisal made by him . . .." S.C. Code Ann. § 12-37-90. The Aiken County Administrator, however, decided that these appeals were a waste of effort and directed Antley not to do them. Much like Donevant, Antley responded:

> As a public servant for almost 18 years, I have always taken my legal duties and responsibilities very seriously. I have never relinquished them and I can do no less now.

Given this clear refusal to comply with his directive, the Administrator terminated Antley. Antley sued, claiming her firing was a discharge in violation of public policy to terminate her for exercising her clear statutory "right" to pursue appeals. The South Carolina Supreme Court disagreed and adopted the ruling of the Court of Appeals. The Court of Appeals held that,

although Antley had a statutory right to file appeals, and was the only County employee with the power to do so, the statute did not "require" her to file appeals. The statute's description of her power as a right, the court held, did not give Antley "unfettered" authority. *Id.*

Donevant's situation is indistinguishable from Antleys. Indeed, Donevant's authority to issue stop work orders is even less established than Antley's clear statutory "right" to pursue appeals.

An official's authority to issue stop work orders flows from statute, to ordinance, to adopted building codes. South Carolina statutory law requires municipalities to utilize a licensed building official to enforce building codes. It further requires municipalities to establish building codes which they may do so by adopting codes. As allowed by state law, most municipalities adopt the standard "International Building Codes." S.C. Code Ann. § 6-9-60. By Ordinance, the Town of Surfside Beach utilizes the International Building Code. Section 115 of that code covers stop work orders and provides:

> Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.

Donevant agreed that this was the provision from which she derived authority to issue a stop work order. (Tr. I pp. 104-105, 284) (Tr. II pp. 103).

Like the law in *Antley*, this provision does not require the issuance of a stop work order and does not say the building official's authority regarding such orders is unfettered. In fact, it is less emphatic than the grant of the "right" of appeal in section 12-37-90. Donevant agreed that the provision did not require a stop work order for every violation and she agreed that she did not issue one for every violation she found. Even Judge Jefferson agreed that the stop-work order was discretionary and Donevant "wasn't mandated to do it." (Tr. II p. 246). Judge Jefferson

nevertheless (and incorrectly) felt that it was for the jury to decide if the Town required Donevant to violate the law. (Tr. II p. 247).

The practical effect of the decision in *Antley* is plain to see. A contrary ruling in that case, or this one, would give countless bureaucrats in countless governmental agencies the ability to presume unfettered discretion to exercise any duty that is prescribed by state law. There are numerous examples of provisions in state law that give officials various authority, rights, duties, and responsibilities. **Some** of these include:

> Department of Health Agents and Inspectors have "authority to . . . arrest ... investigate . . . seize . . . " S.C. Code Ann. 44-53-480
>
> Solicitor has : "authority to . . . [prosecute]"
>
> County Administrator "has authority to suspend employees [and interpret Home Rule Act." S.C. Code Ann. 4-9-650.
>
> Parole Officers have "the authority to enforce the criminal laws of the State." S.C. Code Ann. 24-21-280.
>
> Assesors have "the authority to reassess property . . . to appeal . . . to enter and examine all new nonresidential buildings . . ." S.C. Code Ann. 12-37-90
>
> Jail Employees "have the authority to make arrests . . . " S.C. Code Ann. 23-1-145.
>
> Election managers have: "authority to maintain good order at the polls and enforce obedience . . ." S.C. Code Ann. 7-13-140
>
> Livestock Inspector "shall have authority to enter premises . . . inspect . . ." S.C. Code Ann. 47-13-620.
>
> Marine Resource Officer "has authority to enter and inspect . . . stop and search . . .arrest . . ." S.C. Code Ann. 50-5-90.
>
> Airport Police "have authority to issue summonses . . . arrest . . . " S.C. Code Ann. 55-11-350.
>
> Adult School Crossing Guard has "authority to . . . direct, control or regulate traffic . . ." S.C. Code Ann. 56-5-740.

Fire Marshall (including local designees) "has authority to confiscate . . ." and authority to enforce code. S.C. Code Ann. 23-26-110; 23-9-30.

Noxious Weed Inspector "shall have authority to stop and inspect . . ." S.C. Code Ann. 46-23-60.

Park Ranger has "the authority to issue summonses [and arrest] . . ." S.C. Code Ann. 51-3-147.

Deputy Sheriff has "authority to perform [duties pertaining to office of his principle.]" S.C. Code Ann. 23-13-50.

Highway Patrolman has "authority to arrest. . ." S.C. Code Ann. 23-5-40

Hospital Designee has "sole authority to detain a child . . ." S.C. Code Ann. 63-7-750

Health Authority has "authority to quarantine . . ." S.C. Code Reg. 61-120

Gas Meter Reader has "authority to visit meters and appurtenances . . .." S.C. Code Reg. 103-425

DHEC Hospital Inspector has "authority [to] inspect . . . investigate . . .." S.C. Code Reg. 61-91.202

DHEC Emergency Coordinator has "authority to commit . . . resources . . .." S.C. Code Reg. 61-79.265.55

DHEC Controlled Substance Inspector has "authority to make inspections . . .." S.C. Code Reg. 61-4-1601.

South Carolina Law Enforcement Division has [various authority involving investigation, arrest, operations of statewide facilities and systems]. S.C. Code Ann. 23-3-15 et. seq.

State Fire Marshall S.C. Code Ann. 23-9-20

State Constables S.C. Code Ann. 23-7-50.

Licensed Engineers "shall hold paramount the safety, health, and welfare of the public in the performance of his professional duties." S.C. Code Reg. 49-301

Departing from *Antley* would convert many public employees from at-will employees to ones that could not be terminated if the reason touched on some duty defined by law. Such a situation is obviously untenable and the South Carolina Supreme Court has precluded it.

The court should therefore, apply *Antley* to this case and reverse the judgment.

CONCLUSION

For the foregoing reasons, the judgment on Donevant's claim that she was terminated in violation of public policy should be reversed.

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November 11, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

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v.

Jacklyn J. Donevant . .....Respondent

PROOF OF SERVICE

I hereby certify that I have served the Respondent the Appellant's Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, and addressed to her attorney of record: Henrietta Golding, Esquire McNair Law Firm 2411 N. Oak Street, Suite 206 Myrtle Beach S.C. 29577

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PO Box 11629
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Re: Donevant v. Town of Surfside Beach Appeal Case 2014-000457

Ms. Gee:

Enclosed please find Appellant's Initial Brief and Designation of Matter to be Included in the Record.

Very truly yours,

Charles F. Thompson

CFT/mmi
cc: Henrietta Golding