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 REPLY BRIEF

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REGARDING DONEVANT'S FACTUAL BACKGROUND

The factual background of the Appellant and the Respondent are very similar. However, a few of the Respondent's factual assertions in the Respondent's brief warrant comment.

Respondent seems to assert (p. 9) that a reason for issuing the stop work order was that there were unsafe conditions, *e.g.*, holes, at the job site. However, it was actually uncontested that the reason was because the contractor was (allegedly) doing construction when he only had a demolition permit. The stop work order makes this plain. (Tr. P. Ex. 12). Donevant's contemporary notes also make this plain. (Tr. P. Ex. 13). Moreover, Donevant's Complaint (¶ 17) affirmatively states the permit was the reason for the stop work order. Finally, Donevant's testimony concedes this point as well. (Tr. I p. 100:13).

Also on page 9, Respondent asserts she would have been disciplined had she not issued a stop work order. There was no evidence that discipline was inevitable. Judge Jefferson herself concluded that Donevant was not required to issue a stop work order and any discipline was speculative. (Tr. II p. 246). Although Respondent cites its expert's testimony in support of this assertion, that expert, in fact, testified only that discipline was possible. (Tr. I pp. 308-313).

Respondent alleges (pp. 10-11) that issuance of a stop work order was "not a reportable matter." The testimony cited to support this proposition came from coworkers and was merely to the effect that stop work orders were not normally reported to the City Administrator. The Pier, however, as Donevant acknowledged, was a highly significant community issue. (Tr. I pp. 149-50). Furthermore, Donevant had been specifically instructed to report to the City Administrator. Finally, the Assistant Administrator had also specifically (and repeatedly) instructed Donevant to tell the Administrator that a stop work had been issued. (Tr. I pp. 164-166).

ARGUMENT

Donevant is trying to avoid the fact that she is asking the court to dramatically expand the public policy exception to at-will employment

Throughout this case, and again in her appeal brief, Donevant raises the straw-man argument that the Town wrongly argues that the public policy exception "is limited" to 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. This is simply incorrect. The Town tort has never argued that the exception was "limited" to these situations. This argument is a straw-man because Donevant thinks that by knocking it down, she proves that the tort has been applied and approved for fact situations beyond these two exceptions. It has not. There is a difference between "limited to" and "not applied beyond."

The Town has repeatedly stated to this court, and to the trial court, that:

(1) The tort is not limited to matters involving criminal penalties; but

(2) the tort has not been applied outside of matters involving criminal penalties.

As the Town has acknowledged, this court and the South Carolina Supreme Court has held, the public policy exception has not been expressly limited to the above two situations. However, these courts did not expand the exception. They only held that dismissal of unique public policy discharge arguments on 12(b)(6) motions was premature. *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. The appeal courts reversed dismissals based on S.C. R. Civ. P. 12(b)(6) only because the courts felt the issues were novel and required development through discovery. These courts specifically held that they were not expanding the tort of public policy discharge.

> 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., 456 S.E.2d 907, 910 (S.C. 1995).

> The Barron court found the public policy exception is not limited to these two situations; however, the exception has not yet been extended beyond them.

McNeil v. S. Carolina Dep't of Corr., 743 S.E.2d 843, 846 (S.C. Ct. App. 2013), reh'g denied (June 25, 2013)

So, although it is true that the tort has not been expressly limited to the above two exceptions, neither has it been applied beyond them. If this court affirms the verdict in this case, then the exception, for the first time, will be extended.

What Donevant seeks to avoid stating is that she is asking this court to expand the public policy exception to at-will employment far beyond how it has been applied to date. Unlike in *Garner* and *Keiger*, Donevant's public policy theory went to trial. There was no premature dismissal based on Rule 12(b)(6). To affirm, this court must, for the first time, expand the exception. In this case that means expanding it to give an exception to at-will employment to every bureaucrat in the state who has some statutory or regulatory authority. The court should decline this invitation.

This case cannot be distinguished from *Antley v. Shepherd*

In *Antley v. Shepherd*, this court held that the public policy exception does not apply to government employees just because they have a legal "right" to exercise some duty. *Antley v.*

Shepherd, 532 S.E.2d 294, 297 (S.C. 2000) (aff'd as modified 564 S.E.2d 116 (S.C. 2002)). Donevant is trying to distinguish herself from *Antley* by arguing that she had an "unfettered" right to issue a stop work order whereas Antley's right to pursue tax appeals was discretionary. A quick view of the sources of Antley's and Donevant's authority clearly shows this argument is untenable.

Antley's Authority to Pursue Tax Appeals

> 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 . . ..[1]

Donevant's Authority to Issue a Stop Work Order

> 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.[2]

Donevant had no greater leeway to issue a stop work order than Antley had to pursue appeals. In fact, the statutory expression of Antley's duty as a "right" is far stronger than the regulatory expression that Donevant "is authorized" to issue a stop work order.

Donevant cites testimony of some co-workers and her expert to support the argument that her authority was unfettered. Even if the testimony could be construed that way, the scope of her authority is a legal question—not a fact question. It is one for the court to decide. *See, e.g.,*

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[1] S.C. Code Ann. § 12-37-90. (emphasis added).
[2] From Section 115 of the International Building Code adopted by the Town of Surfside Beach. (emphasis added).

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 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 any event, the question, per *Antley*, is whether Donevant was required to issue a stop work order, not whether her authority was unfettered. Even Donevant admitted she did not always issue stop work orders for building code violations.

Q: So, yes or no, would you always issue a stop-work order for code violations?

A: For code violations of no permit, yes, sir.

Q: **For other violations not involving a permit**?

A: **No, sir.**

(Tr. I p. 198) (emphasis added).

Finally, even if the fact or expert witness's testimony was competent to testify as to Donevant's regulatory authority (which they were not) they did not testify that her power was unfettered and absolute. They merely testified that she was the only one licensed and authorized to issue stop work orders and they could not revoke a stop-work order.[3] (Tr. I pp. 74, 245-46, 337) (Tr. II pp. 79-80, 155). None of this testimony touched on the critical issue: was Donevant required by law to issue a stop work order. Judge Jefferson concluded Donevant was not

[3] Despite this testimony, in fact, nothing in the building code prevents an Administrator from directing a building official to revoke a permit or stop-work order.

required to issue a stop-work order but then erroneously determined that the jury could nevertheless determine that Donevant was fired in violation of public policy. (Tr. II pp. 246-247).

The public policy in favor of building codes and enforcement of those codes is not relevant to this case

Donevant argues at length that there is a strong public policy in favor of having, and enforcing, building codes. She refers to building codes being required of municipalities and of the strong "public policy" in favor of code implementation and enforcement.

The public policy in favor of building codes, and the enforcement of them, cannot be disputed. But the point is without purpose. The question is whether Donevant was required by law to issue a stop-work order. Even broadening the issue, would she be required to issue a stop-work order to effectively enforce the building codes? The answer to that question is clearly no. Even Donevant admitted she had discretion when to issue stop-work orders and did not do so in every circumstance.

The general public policy supporting the codes is simply not in question.

The Court should take this opportunity to definitively rule that public policy discharge is limited to situations where the termination is a violation of criminal law or the employee is terminated for refusing to violate a law carrying criminal penalties

As stated above, public policy discharge has not been applied outside 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. However, also as explained above, it has not been limited to these situations.

Although the court could reverse based solely on *Antley*, the Town urges the Court to expressly hold that public policy discharge is limited to the above two exceptions.

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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December 23, 2014

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PROOF OF SERVICE

I hereby certify that I have served the Respondent the Appellant's Initial Reply 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

December, 24 2014

Charles F. Thompson, Jr.