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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-3016

Angela Parsons, Appellant,
v.

Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System, Defendants,

Of whom QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System are the Respondents.

PETITION FOR REHEARING

Pheobe A. Clark
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504-3057
(843) 669-5634

Attorneys for Appellant

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Appellant, by and through undersigned counsel, filed the following petition for rehearing, pursuant to SCACR Rules 221 and 240. The Court of Appeals, by order filed August 12, 2-15, affirmed the order of the trial court granting summary judgment to the employer QHG of South Carolina ("Hospital") and Director Jane Smith, on appellant's negligent supervision and wrongful termination claims. Appellant, respectfully asserts that this Honorable Court has overlooked or misapprehended certain points of Appellant's argument; and, therefore, the Petitioner respectfully requests that this Honorable Court rehear and reconsider its Order on the following grounds, to-wit:

INTRODUCTION

This is an employment law case in which the Plaintiff/Appellant, Angela Parsons ("Parsons"), a nurse, alleges her boss Jane Smith ("Smith"), the Director of the Women's Center at Carolinas Hospital System, engaged in supervisor fraud in order to cause Parsons' termination. And despite Parsons' complaints to Carolinas about the conduct of the Director, Carolinas allowed Smith to continue her harassing and retaliatory conduct until Parsons was terminated for failing to work the minimum number of hours required for PRN employees to work. And after termination, Carolinas upheld the decision of Jane Smith, further supporting the Director's fraudulent conduct despite receiving evidence that the only reason Parsons did not have the required minimum hours was because Jane Smith deliberately refused to schedule Parsons to work.

The trial court granted Defendant's Motion to Dismiss on June 25, 2014, finding Parsons has not established a claim for wrongful termination in violation of public policy as a matter of law and finding Parsons was an at-will employee, and the hospital did not have a duty to supervise the employee or protect Parsons from the manner or priority in which Smith scheduled her PRN work shifts.

This Court determined, in a decision filed, August 12, 2015, that there was no clearly articulated public policy violation in the way Parsons's employment was terminated; and determined that no duty to supervise or investigate arose in this case.

In counsel's judgment, the panel's decision involves novel questions of exceptional importance:

1) Even in at-will employment, may a supervisor engage in fraudulent termination conduct in order to cause an employee's termination?

2) Even in at-will employment, does an employer have a duty to supervise and investigate claims of supervisor misconduct when an employee has presented proof of a supervisor's duplicitous conduct that results in adverse employment actions against an employee?

ARGUMENT

I. REHEARING SHOULD BE GRANTED TO DETERMINE WHETHER A SUPERVISOR'S FRAUDULENT TERMINATION CONDUCT, OF REFUSING TO SCHEDULE AN EMPLOYEE TO WORK AND THEN RECOMMENDING TERMINATION OF AN EMPLOYEE FOR FAILURE TO MEET REQUIRED MINIMUM HOURS, IS AGAINST PUBLIC POLICY.

"The determination of what constitutes public policy is a question of law for the courts to decide. *See* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("*The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.*"). And as noted also in Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 379 (Ariz.1985):

> Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.
> (*quoting* Egerton v. Earl Brownlow, 4 H.L.Cas. 1, 196 (1853).

Even in at-will employment, supervisors and directors, should not be given free reign to engage in conduct that forces employees to violate policy and then be allowed to recommend the very same employee's termination! This decision, in essence condones a supervisor's "behind the scenes" orchestration of the termination of an employee. The director Jane Smith was allowed to keep Appellant off the schedule and fraudulently claim to Parsons that there was "low census" or "no work", and then she was allowed to fraudulently claim to HR and administrators that Appellant needed to be terminated for policy violation while misrepresenting her role

in causing Appellant's policy violation. If an employer is not allowed to engage in illegal activity to cause an employee's termination, a director should not be allowed, as a matter of public policy, to engage in fraudulent misrepresentations to cause an employee's termination.

In Garner v. Morrison Knudsen Corp., 318 S.C. 223, 223, 456 S.E.2d 907, 908 (1995), the employee alleged his employer terminated him in retaliation for reporting to the United States Department of Energy and the news media his concerns about radioactive contamination and unsafe working conditions at the Savannah River Site and for voluntarily testifying about his concerns before the Defense Nuclear Facilities Safety Board. Our supreme court held the trial court's dismissal of the employee's wrongful discharge action based on the public policy exception to the employment at-will doctrine for failure to state a claim was inappropriate when the employee alleged his employment was terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at the nuclear facility. *Id.* at 226-27, 456 S.E.2d at 909-10. The court stated "[w]hether the [public policy] exception applies when an employee is terminated in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at a nuclear facility is a novel issue, and such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss." Id. at 226, 456 S.E.2d at 909.

Appellant claims she was harassed by Director Jane Smith after raising questions as to how Jane was allowed to return to work in a director role after committing HIPAA violations.

II. REHEARING SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYER HAS A DUTY TO SUPERVISE OR INVESTIGATE WHEN AN EMPLOYEE HAS COMPLAINED AND HAS PRESENTED PROOF OF A SUPERVISOR'S DUPLICITOUS CONDUCT.

The trial court in Sabb v. S.C. State Univ., 350 S.C. 416, 429-430(S.C.2002), recognized a duty to Plaintiff with respect to employment:

> In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. Steinke, supra. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict. Id. A duty arose on University's part once University was placed on notice of Chief White's behavior and actions. **After University received the grievances of Sabb and other employees, University had a duty to address the employees's concerns with due care**.
>
> A jury issue also existed as to whether University had breached that duty. University was on notice of Chief White's activities through conversations Sabb and other employees had with University officials, the petition circulated by members of the police department, the grievances of Sabb and other employees, and through the Committee's report detailing the findings of their investigation into Chief White's actions. Despite these numerous complaints and notifications of Chief White's actions and behavior, University allowed him to continue serving as chief of the department without any real effort to rectify the hostile conditions within the department. Viewing the evidence in the light most favorable to Sabb, the trial court

properly denied the directed verdict and JNOV motions because evidence existed to show University had possibly breached a duty owed to Sabb. Sabb v. S.C. State Univ.,350 S.C. 416, 429-430(S.C.2002)

The circumstances in Sabb are almost identical to those in the present case. And the Supreme Court determined that an employer had a duty to its employees and breached that duty by failing to rectify the hostile conditions within the workplace. Appellant had proof of duplicitous conduct on the part of the director that caused Appellant to violate the minimum hours work policy then recommended Appellant's termination. The employer owes its employees, at the very least, a duty of good faith and fair dealing.

A failure to properly investigate employee misconduct may be grounds for a wrongful discharge claim. *See* Crenshaw v. Bozeman Deaconess Hospital, 693 P.2d 487 (Montana 1984) (*recognizing tort of negligent investigation, affirming $150,000 award to employee terminated on the basis of an insufficient investigation, and holding that failure to properly investigate allegations against employee before termination supported punitive damages for wrongful discharge).*

CONCLUSION

For the reasons set forth, the Appellant respectfully petitions that this Court rehear this matter and reconsider its decision, in light of the Appellants' clarification of its argument herein, and based upon Appellants' Final Brief which it hereby reiterates in full as if recited herein verbatim.

WUKELA LAW FIRM

BY: _____

PHEOBE A. CLARK
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
P-843-669-5634
F-843-669-5150

August 25, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-3016
Appellate Case No. 2014-001636

Angela Parsons, Appellant,
v.

Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System, Defendants,

Of whom QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System are the Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondents, QHG of South Carolina d/b/a Carolinas Hospital System and Carolinas Hospital Systems, by deposition a copy of the said Petition for Rehearing in the United States Mail, postage prepaid, this 25 day of August, 2015, addressed to the attorneys of record, Elizabeth S. Corn, Esq., Hall Booth Smith, P.C., 40 Calhoun St., Suite 550, Charleston, SC 29401 and Richard Sheinis, Esq., Hall Booth Smith, P.C., 191 Peachtree St., NE, Suite 2900, Atlanta, GA 30303.

Pheobe A. Clark
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504-3057
T: (843) 669-5634
F: (843) 669-5150

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela Parsons, Appellant,

v.

Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System, Defendants,

Of whom QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System are the Respondents.

Appellate Case No. 2014-001636

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2015-UP-403
Submitted May 1, 2015 – Filed August 12, 2015

AFFIRMED

Pheobe Annette Clark, of Wukela Law Office, of Florence, for Appellant.

Elizabeth Schwartz Corn, of Hall Booth Smith, PC, of Charleston, and Richard Sheinis, of Hall Booth Smith, PC, of Atlanta, GA, for Respondents.

PER CURIAM: Angela Parsons appeals the trial court's grant of summary judgment to QHG of South Carolina, doing business as Carolinas Hospital Systems, Carolinas Hospital Systems (collectively, Hospital), and Jane Smith (collectively, Defendants) in her wrongful termination suit. On appeal, Parsons, an at-will employee of Hospital, asserts the trial court erred in granting summary judgment on her claim of wrongful termination in violation of public policy when her supervisor, Smith, engaged in fraudulent acts. She also asserts the trial court erred in granting summary judgment on her claim that Hospital was negligent in supervising Smith and in investigating Parsons's allegations of mistreatment by Smith.

1. Regarding Parsons's claim for wrongful termination in violation of public policy, we find the evidence viewed in the light most favorable to Parsons does not support the claim because Parsons has not enunciated, and the allegations do not demonstrate, any clear mandate of public policy that was violated in this case. *See Barron v. Labor Finders of S.C.*, 393 S.C. 609, 613, 713 S.E.2d 634, 636 (2011) ("When reviewing the grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."); Rule 56(c), SCRCP (stating summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *Barron*, 393 S.C. at 613, 713 S.E.2d at 636 ("In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party."); *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015) ("South Carolina has a strong policy favoring at-will employment. . . . Accordingly, absent a contractual provision to the contrary, an employee may be terminated at any time for any reason or no reason, with or without cause." (citations omitted)); *Barron*, 393 S.C. at 614, 713 S.E.2d at 636-37 (explaining that "[u]nder the 'public policy exception' to the at-will employment doctrine, . . . an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy"); *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (noting that South Carolina courts have thus far only "invoked the public policy exception in two instances: (1) where an employer requires an

employee, as a condition of continued employment, to break the law . . . and (2) where an employer's termination is itself illegal"; but noting also that the exception is not limited to these situations (citations omitted)); *id.* at 244, 768 S.E.2d at 387 (stating South Carolina courts should "exercise restraint when undertaking the amorphous inquiry of what constitutes public policy"). Parsons's asserts her supervisor's fraud in scheduling Parsons in a way that guaranteed she would not accumulate the required number of hours and in telling other nurses not to call Parsons as a substitute is against public policy. Assuming Smith acted as Parsons claims, Smith's actions, though arguably duplicitous, do not constitute fraud because her actions were not material misrepresentations upon which Parsons's relied to her detriment. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003) ("Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right."); *id.* at 672, 582 S.E.2d at 444-45 (listing the following elements of a fraud claim: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury"). Therefore, we find no clearly articulated public policy violation in the way Parsons's employment was terminated.

2. Regarding Parsons's claim for negligent supervision and failure to investigate Smith, we find the trial court correctly determined Hospital owed Parsons no duty to supervise Smith's scheduling and no duty to investigate Parsons's claims against Smith. *See Taghivand*, 411 S.C. at 243, 768 S.E.2d at 386 (stating that "absent a contractual provision to the contrary, an [at-will] employee may be terminated at any time for any reason or no reason, with or without cause"); *Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (Ct. App. 1994) (stating that to prove a negligence claim, a plaintiff must show (1) the defendant owed him a duty to do or not to do any of the things alleged, (2) the defendant breached this duty, (3) the plaintiff was injured, and (4) the defendant's breach of duty proximately caused this injury); *id.* ("A negligence claim is insufficient if one of these elements is absent."); *id.* at 42, 451 S.E.2d at 409 (finding a terminated employee could not prevail on his claim for negligence against his former employer on allegations that his former employer failed to investigate allegations of misconduct that led to his termination and failed to reevaluate his termination once the allegations of misconduct were not proven); *id.* (stating the employee "fail[ed] to meet the first element of a negligence claim because his complaint did not allege he was

anything other than an at-will employee who could be terminated at any time, for any reason, or for no reason at all, irrespective of any inadequate investigations, false assumptions, or failures to reevaluate on the part of the employer" (footnote omitted)). It is uncontested that Smith had complete discretion in setting the schedule for her employees, and therefore, Hospital had no duty to supervise or investigate the manner in which Smith scheduled her employees. Therefore, no duty to supervise or investigate arose in this case.

AFFIRMED.[1]

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
Frank C. Swaggard
Jason B. Turnblad
Katherine M. Gordon

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

August 25, 2015

The Honorable Jenny Abbott Kitchings
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Angela Parsons, Appellant, vs. Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System, Defendants - of whom QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital system are the Respondents.
Civil Action No.: 2012-CP-21-3016
Appellate Case No.: 2014-001636

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above matter:

1. Original and six (6) copies of Petition for Rehearing;
2. Decision issued by Appeals Court (Appendix);
3. Proof of Service of the Petition for Rehearing on the Respondent; and,
4. A filing fee of $25.00.

With kindest regards, I remain,

Yours truly,

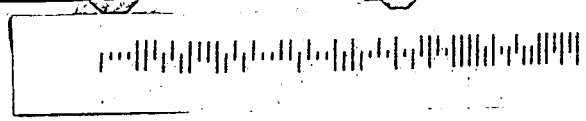
WUKELA LAW FIRM

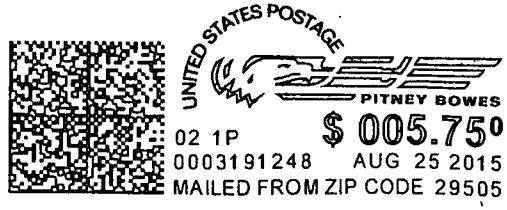
for

PHEOBE A. CLARK

PAC:nhs
Enclosures
cc: Elizabeth S. Corn, Esq.
Hall Booth Smith, P.C.
40 Calhoun St., Suite 550
Charleston, SC 29401

Richard Sheinis, Esq.
Hall Booth Smith, P.C.
191 Peachtree St., NE, Suite 2900
Atlanta, GA 30303





First Class Mail

WUKELA LAW FIRM
403 SECOND LOOP ROAD
P.O. BOX 13057
FLORENCE, SC 29504

To:
The Honorable Jenny Abbott Kitchings
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

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