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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

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SC Court of Appeals

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

Jacklyn J. Donevant . .....Respondent

v.

Town of Surfside Beach. ..... Appellant

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

The panel in this case has incorrectly, and greatly, expanded the tort of public policy discharge. Before this time, the tort has not expanded beyond situations in which the employer required the employee to violate the law or the termination was itself a violation of law carrying a penalty. The panel expanded the tort to include situations where the employee was not asked to violate the law and the panel has eliminated the requirement that the law in question impose a sanction on the employee for violation. Now, any employee with a duty or responsibility suggested by law is completely beyond the control of the employer. Every bureaucrat with some legal authority is a power unto himself and unanswerable to anyone.

Even if the tort can be expanded, this case should have been governed by the Supreme Court's decision in *Antley v. Shepherd* which established that an employee can be terminated for insisting on performing a discretionary duty. The building code only "authorizes" a Building Official to issue stop work orders for violations. The panel ignored the plain language of the law in finding the code "required" stop work orders for code violations. In any event, each of the three grounds of the panel's rationales for this conclusion are clearly incorrect.

Finally, the panel's conclusion that Building Officials must issue stop work orders for building code violations would create economic chaos in the construction industry in South Carolina.

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.

This court's decision was filed on August 26, 2015 and this petition for rehearing and suggestion of rehearing *en banc* is timely presented under S.C. Rule App. P. 221 and 219.

FACTUAL BACKGROUND

Donevant worked for the Town of Surfside Beach as its Building and Zoning Department Director. AT the time of her termination, Donevant was the only person in the Town's Building and Zoning Department who was licensed to review plans and conduct construction inspections. The Town utilized the City of Myrtle Beach in Donevant's absence, and has, at other times, employed a second licensed building official. (R. 70).

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. (R. 302) (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. (R. 285) (Tr. II p. 126). Duckett eventually required Donevant to be at work by 9:00 AM or to let him know where she was. (R. 304-305) (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. (R. 304-312) (Tr. II pp. 171-179). In her trial testimony, Donevant partially admitted she had attendance issues. (R. 82, 100-101) (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 she disregarded his instructions from time to time. In fact, toward the end of her employment, Donevant informed Duckett, in writing, that she would disregard his instructions. (R. 272, 286, 291, 294, 410) (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. (R. 47-48) (Tr. I pp. 93-94)

[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 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. (R. 313-315) (Tr. II pp. 185-187). Donevant admitted that she disregarded this instruction almost immediately upon return to work. (R. 98-100) (Tr. I pp. 152-154)

Duckett also reminded Donevant that she was to report to him and not to the Deputy Administrator Micki Fellner. (R. 92) (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." (R. 107-109) (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. (R. 230, 276-279) (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. (R. 100, 108) (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. (R. 52-55) (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. (R. 106-108) (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." (R. 108, 111) (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. (R. 318-319) (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. (R. 105) (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. (R. 121) (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. (R. 112) (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. (R. 406) (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) (R. 83, 84, 86, 116) (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. (R. 115-116) (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

(R. 410) (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. (R. 326-327) (Tr. II pp. 204-208).

ARGUMENT

The panel erred in greatly expanding the public policy exception and creating a class of employees unanswerable to anyone thereby making them a power unto themselves

In South Carolina, the 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. 2013) and *Taghivand v. Rite Aid Corporation*, 768 S.E.2d 385 (S.C. 2015). *McNeil* and *Taghivand* are also the most recent case dealing with the public policy exception to the at-will employment rule.

South Carolina courts do recognize a (previously very limited) exception for discharge in violation of public policy. However, as the *McNeil* court reaffirmed, it had 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.[2] *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*

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

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 criminal sanctions."). As no reason has been given for the variation in language, *Miller* controls and the first prong requires a criminal sanction. The panel's conclusion that a violation of "any law," is therefore plainly incorrect.

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.[3]

[3] "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)

Now, for the first time, the panel in this case is expanding the tort beyond situations in which the employee is required to violate the law.[4]

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, claims that she issued the stop–work order because the contractor at the pier only had a demolition permit but was doing some construction work. (R. 401) (P. Ex. 12) (R. 52-55, 147) (Tr. I pp. 98-101, 284). (The construction permit was pending and was, in fact, issued soon after Donevant issued the stop work order). (R. 408) (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.[5] (R. 58-59, 147) (Tr. I pp. 104-105, 284) (R. 269) (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.

(R. 423) (P. Ex. 26) (emphasis added).

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 order for construction work done without a permit. Donevant did not have to issue a stop

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[4] Although appellant contends the tort is limited to violations carrying criminal penalties, for purposes of simplicity, will, after this point, mainly refer to the exception as "violation of law."
[5] The Town, like most municipalities, adopts the International Uniform Building Code, as written by a national code commission.

work order that day and therefore, no one was requiring her to violate any law. The panel's decision in this case is that an employer cannot interfere, in any manner, with an employee exercising a statutory right or duty. This is an extremely broad grant of unfettered discretion to a wide range of employees. There are numerous examples of provisions in state laws 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.

Assessors 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

The panel, therefore, has created an unworkable situation. Any employee with an authority or duty granted by law becomes untouchable. No one can regulate or control their decision-making. The panel has erased the ability of administrators, mayors, councils, agency heads, and others, to control such employees and prevent them from running amok with their

authority. For governments to function and be answerable to the public, this decision must be corrected.

The panel reasoned that had Donevant 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. The panel improperly cited testimony by Gary Wiggins, who 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. (R. 151-156) (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. (R. 250-252) (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. (R. 122) (Tr. I pp. 198).

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 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 established definition of public policy discharge and the judgment should be reversed.

The Panel Ignored the Requirement that the Employee be Required to Violate a Law Carrying a Penalty

Appellant argues, as stated above, that the public policy exception covers only situations in which the employee is faced with criminal consequences to violating the law. However, if the exception is broader than that, it at least requires some penalty for violation of the law. As stated above, several wrongful discharge cases speak of requiring the employee 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). Other 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). 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 criminal sanctions.").

Regardless of the leeway that might exist, the law the employer wishes the employee to violate must carry some sanction. There is no reference in this case, in the building codes, or cited by the panel, of a criminal or civil sanction if Donevant decided not to issue a stop work order.

Because the panel has abandoned the requirement of a criminal or civil sanction, it has opened the public policy exception to situations where the employee alleges an amorphous public policy. This approach was, in fact, rejected by this court in *Taghivand v. Rite Aid Corp.*, 768 S.E.2d 385, 389 (S.C. 2015). This court expressly rejected expanding the public policy exception to circumstances in which the legislature identified a general public policy that the employee thought he was being required to violate.

> [W]e decline to create a tort cause of action based *solely* on transcendental notions of that which is in the public interest, particularly when our own legislature has declined to make individual citizens criminally responsible for failing to investigate or report criminal activity.

Taghivand v. Rite Aid Corp., 411 S.C. 240, 247, 768 S.E.2d 385, 389 (2015) (quoting *Wholey v. Sears Roebuck*, 803 A.2d 482, 498 (Md. Ct. App. 2002).

Therefore, the panel erred in expanding public policy discharge to include cases where the employee was not subject to a sanction for violating the law.

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 ruled that an employee fired for exercising an act which she had the right to perform, but was not required to perform, did not constitute wrongful discharge.

Exactly like Donevant, Antley claimed she was fired for exercising her legal duty as a public official. In *Antley v. Shepherd*, 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.*

> [The law] gave Antley . . **. the right** to file appeals to the ALJD and established her status as a real party in interest in such appeals . . . but [they] **did not require** Antley to appeal adverse board decisions.

Id. at 298.

Donevant's situation is indistinguishable from Antley's circumstances. 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. (R. 58-59, 147) (Tr. I pp. 104-105, 284) (R. 269) (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. Even Judge Jefferson agreed that the stop-work order was discretionary and Donevant "wasn't mandated to do it." (R. 366) (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. (R. 367) (Tr. II p. 247).

The Panel Improperly Disregarded the Plain Meaning of the Law: The panel went to great lengths to change a stop work order being "authorized" into a stop work order being "required" by law. The panel cited various other statutory provisions that require that the building codes be enforced and that violations be corrected. What the panel improperly ignored was the plain language of the provision regarding work orders that only provides they are "authorized." The code deliberately does not make stop work orders the only, and mandatory, way to address building code violations. In morphing "is authorized" into "is required," the panel disregarded the plain meaning of the law.

Section 115 plainly states that stop work orders "are authorized." This meaning is clear. In completely flipping this phrase into a commandment to issue stop work orders, the panel violated the well-established rule to apply the plain meaning of the law. That rule requires the court to "apply the plain meaning of regulations without resort to subtle or forced construction to limit or expand the regulation's operation." *Doe v. S. Carolina Dep't of Health & Human Servs.*, 727 S.E.2d 605, 612 (S.C. 2011) (quoting *Byerly v. Connor*, 415 S.E.2d 796, 799 (S.C. 1992)).

> a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. *Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197, 200 (S.C. 2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and **the court has no right to impose another meaning**." Hodges, 533 S.E.2d at 581.

State v. Jacobs, 713 S.E.2d 621, 622 (S.C. 2011) (emphasis added).

In reaching to other parts of the code and underlying statute, the panel violated this rule. Furthermore, the other law cited by the panel is not inconsistent with the plain meaning. The panel cited S.C. Code 6-9-10(A) which requires that municipalities "shall enforce" building codes and building code 104.1 which "direct[s]" building officials to enforce the code and 104.3

which states building officials "shall" issue "all necessary notices or orders to ensure compliance." None of the provisions is inconsistent with the idea that a building official could enforce the code by using lesser means than a stop work order. In fact, Donevant herself admitted she did not always issue stop work orders for violations (R. 122) and her replacement, Kevin Otte, testified he did so only if he could not get a contractor to comply voluntarily. (R. 250-252). As Otte explained, it is very disruptive and expensive to stop entire construction jobs for most code issues. Building officials try to give the contractor a chance to solve the problem without stopping the job. *Id.* The point is, a stop work order is simply not required to enforce the code most of the time. That is likely why the code does not make a stop work order mandatory.

The Panel Was Clearly Incorrect in Each of the Three Ways it Sought to Distinguish *Antley:* The panel concluded that this case is different from the situation in *Antley* in three ways: (1) Antley had the right to file appeals whereas Donvant was required to issue a stop-work order; (2) Antley did not have sole discretion to pick which cases to appeal, and (3) Antley's right to appeal was not unfettered. Each of these distinctions is clearly wrong.

Regarding the first question of whether Donevant was required to issue a stop work order, for the reasons previously discussed, she did not. The relevant code clearly is discretionary and the panel should not have resorted to ambiguous language elsewhere to change the plain meaning. Furthermore, the other language cited by the panel in no way constituted a command that stop work orders always be issued. In any event, the building official clearly did have discretion and even Donevant admitted she had discretion.

Regarding the second and third factors, the panel reasoned that Antley, unlike Donevant, did not have sole discretion because either Antley, or an aggrieved taxpayer, could appeal a tax assessment. First, this is a distinction without merit. Antley was the sole official who could appeal a tax assessment unfavorable to the county. Likewise, Donevant is the sole official with power to issue stop work orders. It really is irrelevant, in evaluating an official's discretion, to examine whether an aggrieved citizen may or may not challenge that action. In any event, an aggrieved contractor or property owner, just like an aggrieved taxpayer in a tax case, also can appeal a stop work order. Section 113.1 of the building code provides:

> In order to hear and decide appeals of orders, decisions or determinations made by the *building official* relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals. The board of appeals shall be appointed by the applicable governing authority and shall hold office at its pleasure. The board shall adopt rules of procedure for conducting its business.[6]

The appeal panel could decide that Donevant was simply wrong in issuing a stop work order and overturn that decision. Therefore, by the panel's own reasoning, Donevant did not have sole discretion and her right to issue stop work orders was not unfettered and this case is indistinguishable from *Antley*.

The Panel's Ruling that Stop Work Orders are always Required for Building Code Violations Will Create Economic Chaos in South Carolina

As stated above, an essential conclusion of the panel was that Donevant "issued a stop-work order as she was required to do by law." Slip op. at 13. The panel clearly has not considered the effect of eliminating a building official's discretion regarding stop work orders. If the decision is allowed to stand as written, the court has directed building official that they are required by law to issue stop work orders on construction projects when code violations are

[6] http://publicecodes.cyberregs.com/icod/ibc/2012/icod_ibc_2012_1_sec015.htm

found. There is no discretion. The effect of this decision disregards the tremendous economic impact that stopping an entire construction project might have. A stop work order requires all work to stop. Even on a single-home project, the relative cost to a contractor who is paying workers, leasing equipment, and potentially spoiling materials, could be relatively devastating for a small contractor. The effect could be multiplied by tens of thousands of dollars for a large commercial project. A number of multi-billion construction projects necessary for the economic development of the state are underway at any given time. The panel clearly has not considered the potential chaos to this development that would ensue by eliminating the building officials' discretion to deal with violations in a way that does not force a project to a grinding halt. The court should reconsider this decision and hold that the building official does have discretion on how to deal with violations. If it does so, as it must, then *Antley* is indistinguishable from this case and the trial court judgment must be reversed.

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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September 9, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

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

Town of Surfside Beach. ..... Appellant

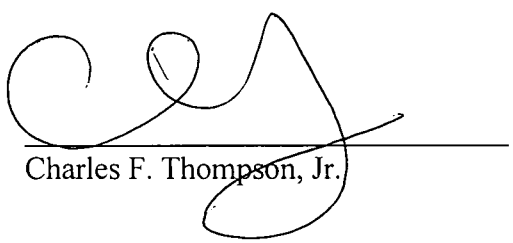
v.

Jacklyn J. Donevant . .....Respondent

PROOF OF SERVICE

I hereby certify that I have served one copy of the Petition for Rehearing and Suggestion of Rehearing En Banc 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

September 9, 2015



Charles F. Thompson, Jr.