THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Deadra Jeffferson
Circuit Court Judge

Case No.: 2012-CP-26-004852

Jacklyn J. Donevant, ...Respondent,

vs.

Town of Surfside Beach, ...Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

This Court should deny the Town of Surfside Beach's (hereafter "the Town") Petition for Rehearing and Suggestion for Rehearing *en banc* (hereafter collectively referred to as "Petition") because the Petition raises no issues that the Court either misapprehended or overlooked, and sufficient grounds do not exist to justify a rehearing *en banc*.

PROCEDURAL HISTORY

This case arises out of the Town' employment termination of Jacklyn J. Donevant ("Donevant"), who held the positions of Director of Planning, Building, and Zoning and building official. **(R. pp. 1-5; R. pp. 25-26; R. p. 301; R. pp. 292-93)**. Following her termination, Donevant filed suit against the Town in the Horry County Court of Common Pleas on June 19, 2012, asserting a single cause of action for wrongful termination, alleging the Town terminated

her in violation of a clear mandate of public policy. (**R. pp. 1-5**). This case was tried before a jury on February 10, 11, 13, and 14, 2014.[1] The Honorable Deadra Jefferson presided over the trial.

At the conclusion of Donevant's case, the Town moved for directed verdict, arguing the Town's termination of Donevant did not constitute a violation of a clear mandate of public policy. The trial court denied the Town's motion and, after the Town presented its case, the trial court submitted the case to the jury, which returned a verdict in favor of Donevant in the amount of Five Hundred Thousand and 00/100 ($500,000.00) Dollars. The verdict was reduced to Three Hundred Thousand and 00/100 ($300,000.00) Dollars pursuant to the relevant provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (2005 & Supp. 2014). Following the jury's verdict, the Town moved for a judgment notwithstanding the verdict (hereafter "JNOV") on the same grounds as argued in its motion for directed verdict. The trial court denied the Town's JNOV motion, and the Town filed a notice of appeal on March 10, 2014.

On appeal, the Town alleged the trial court erred in denying its motion for directed verdict. On August 26, 2015, the Court of Appeals issued an opinion, affirming the trial court's ruling. This Petition followed.

STANDARD OF REVIEW

The purpose of a petition for rehearing is not to try the case for a second time or to argue a party's appeal to the Court again. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Arnold v. Carolina Power & Light

[1] By order of Chief Justice Toal, all courts in South Carolina were closed on February 12, 2014 due to inclement weather.

Co., 168 S.C. 163, 173, 167 S.E. 234, 238 (1933). The purpose of a petition for rehearing is to bring those matters to the Court's attention that it "overlooked or misapprehended." Rule 221(a), SCACR. Petitions for rehearing are usually "dismissed with a simple order ... for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." Arnold, 168 S.C. at 173, 167 S.E. at 238.

ANALYSIS

I. THE "FACTS" OF THIS CASE

In its Petition, the Town dedicates much time to the retelling and rearguing of its version of the facts. However, the Town does not argue that the Court misstated the facts in its opinion. Therefore, the Town's version of the facts are immaterial for purposes of the matter currently before the Court. The Town is merely attempting to retry this case before the appellate court by retelling and rearguing its version of the facts, which is an improper purpose for a petition for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 (stating the purpose of a petition for rehearing is not to try the case for a second time or to argue a party's appeal to the Court again).

It is also worth pointing out the obvious as it relates to the facts of this case—the jury clearly did not believe the Town, and it did believe Ms. Donevant. By continuing to argue its version of the facts in its Petition, the Town is ignoring the reality of trial. After all, the purpose of trial is to allow a jury to decide issues of fact. The jury believed the facts as presented by Ms. Donevant and returned a verdict in her favor. Additionally, there are no factual issues presented on appeal. As the Court stated in its opinion, "At oral argument, the Town conceded that the reason Donevant was fired is not an issue on appeal. **Consequently, the Town's arguments are all questions of law**." Donevant v. Town of Surfside Beach, Appellate Case No. 2014-00457, pp. 9-10 (August 26, 2015) (emphasis added).

Accordingly, this Court should disregard the version of the facts as argued by the Town in its Petition, as the facts are of no consequence in ruling on the Town's Petition.

II. COURT DID NOT OVERLOOK OR MISAPPREHEND ANY ISSUE

This Court should deny the Town's Petition because it raises no issue the Court of Appeals either overlooked or misapprehended. The Petition merely rehashes the same arguments the Town made in its brief.

In its Petition, the Town first argues the wrongful termination doctrine is limited to situations where the employer requires the employee to violate a provision of "**criminal** law." (emphasis added). This is the exact argument the Town made on pages twelve (12) through thirteen (13) of its brief. The Court of Appeals properly rejected the Town's argument because it was contrary to the Supreme Court's decision in Barron v. Labor Finders of South Carolina, 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011). In Barron, the Court observed that a cause of action for wrongful termination exists when "the employer requires the employee to violate **the law** ...." 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011) (emphasis added). The Supreme Court in Barron did not limit the wrongful termination doctrine to violations of the criminal law as argued by the Town.

Next, the Town argues the Court of Appeals erred in expanding the scope of the wrongful termination doctrine by applying it beyond the situations where either: (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law. The Town made this argument on pages twelve (12) through fifteen (15) of its brief. The Court considered the Town's argument but rejected it because the Supreme Court in Barron clearly stated that the wrongful termination doctrine was not limited to these situations. In Barron, the Court held, "[W]e overrule the Court of Appeals' opinion to the extent it holds the

public policy exception applies only in situations where the employer asks the employee to violate the law or the reason for the termination itself is a violation of criminal law." Id., at 615-16, 713 S.E.2d at 637. Furthermore, in affirming the trial court's decision in this case, the Court of Appeals did not find it necessary to "expand" the wrongful termination doctrine beyond the two (2) reasons set forth above. The Court of Appeals found "that Donevant's claim comes clearly within what our courts have already articulated what the law is—that she was required by her employer to violate the law." Donevant v. Town of Surfside Beach, Appellate Case No. 2014-00457 (August 26, 2015), p. 14 (internal quotations omitted).

The Town also argues that the Court of Appeals improperly relied on the testimony of Donevant's expert witness, Garry Wiggins. The Town did not appeal from any alleged error as it relates to the testimony of Mr. Wiggins. Therefore, any alleged defects with respect to Mr. Wiggins' testimony is unappealed, and therefore, it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is the law of the case); see also Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."). Even without applying error preservation principles, the Town made this argument about Mr. Wiggins' testimony in passing on page fourteen (14) of its brief.

The Town further contends the Court of Appeals erred in expanding the wrongful termination doctrine to include situations where the employee was not subject to a sanction for violating the law. The Town presented this argument to the Court on pages twelve (12) through fifteen (15) of its brief. The Court of Appeals considered this argument and properly rejected it, finding that if Donevant did not issue the stop work order, she could have been charged with misconduct in office for failing to discharge her legal duty. Donevant v. Town of Surfside Beach,

Appellate Case No. 2014-00457, p. 14 (August 26, 2015); see State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547, 550 (1983).

The Town additionally argues that this case is controlled by Antley v. Sheperd, 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000), *affirmed as modified*, 349 S.C. 600, 564 S.E.2d 116 (2002). The Town made this argument at length on pages sixteen (16) through twenty (20) of its brief. The Court of Appeals considered the Town's argument and correctly distinguished this case from Antley.

The Town further contends that Donevant was not required to issue a stop work order for unpermitted construction at the Pier Restaurant. This is an argument the Town made on pages sixteen (16) through twenty (20) of its brief. The Court of Appeals engaged in an extensive analysis of Title 6 of the South Carolina Code of Laws and the building codes. The Court correctly found that Donevant was required to issue a stop work order for unpermitted construction.

Lastly, the Town argues that "economic chaos" will ensue following the Court of Appeals' decision in this case. The Town contends this "economic chaos" will occur in the construction industry. This is arguably a new position, even though the Town made similar "snowball" arguments in its brief on pages eighteen (18) through twenty (20). In making this argument, the Town fails to cite to any reason in which the Court misapprehended or overlooked an issue. Instead, the Town merely forecasts, without any citation of authority, that the Court's decision will result in "economic chaos." Certainly, the Court of Appeals considered this case carefully, and contrary to the Town's position, the Court simply found that there was nothing unique about this case and that it fell within the already established contours of the wrongful termination doctrine. Donevant v. Town of Surfside Beach, Appellate Case No. 2014-00457, p. 14 (August 26, 2015).

This Court should deny the Town's Petition because the Town raises no issues the Court of Appeals either overlooked or misapprehended. Instead, in its Petition, the Town merely rehashes the same arguments it made in its brief.

III. NO GROUNDS PRESENT JUSTIFYING REHEARING *EN BANC*

A rehearing *en banc* is only appropriate in order to maintain uniformity of the Court's decisions or where there is an issue of exceptional importance. See Rule 219, SCACR. Here, the Court's decision is in line with previous wrongful termination decisions. The Court of Appeals stated as much, noting, "Donevant's claim comes clearly within what our courts have already articulated what the law is—that she was required by her employer to violate the law." Donevant v. Town of Surfside Beach, Appellate Case No. 2014-00457, p. 14 (August 26, 2015) (internal quotations omitted). There is no exceptional issue presented by this case. It fits within well-established jurisprudence, which recognizes that an employee can have a cause of action for wrongful termination where his employer requires him to violate the law. See Culler v. Blue Ridge Elec. Co-op., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (The wrongful termination doctrine clearly applies in cases where either: (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law.). Because this case fits within established jurisprudence and presents no issue of exceptional importance, *en banc* review is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the Town's Petition.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

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PROOF OF SERVICE

I, Carole Koerner, an employee of McNair Law Firm, P.A., attorneys for Respondent Jacklyn J. Donevant, in the above-entitled action, certify that I have served Respondent's Return to Appellant's petition for Rehearing and Suggestion for Rehearing En Banc and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 23rd day of September, 2015 as follows:

Other Counsel of Record:

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September 23, 2015

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Via Federal Express

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

Re: Jacklyn Donevant v. Town of Surfside Beach
Appellate Case No.: 2014-000457

Dear Ms. Kitchings:

Enclosed for filing with the Court, please find original and seven copies of Respondent's Return to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc in the above captioned matter. Please return a clocked-in copy of the Reply to me in the enclosed self-addressed stamped envelope.

Sincerely,

McNAIR LAW FIRM, P.A.

James K. Gilliam

JKG:ck
Enclosures
cc: Charles F. Thompson, Jr., Esquire
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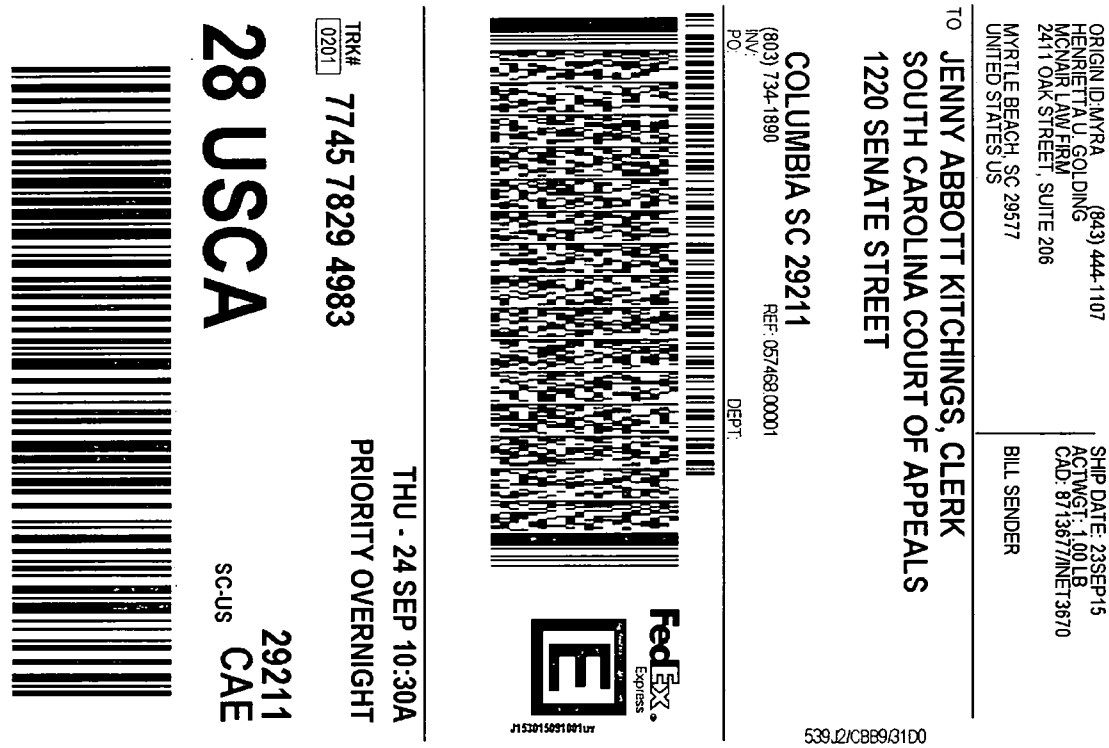

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