THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-000678

Opinion No. 5072 (S.C. Ct. App. filed Jan. 16, 2013)
(Withdrawn, Substituted, and Refiled Feb. 27, 2013)

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

ANDERSON COUNTY'S RETURN TO MICHAEL CUNNINGHAM'S PETITION FOR REHEARING

On September 2, 2015, this Court issued an opinion ("Opinion") reversing the Court of Appeals' remand of the case for further proceedings on Respondent/Petitioner Michael Cunningham's claim for wrongful discharge, and affirming summary judgment in favor of Petitioner/Respondent Anderson County on all other counts. On September 17, Cunningham petitioned for rehearing of this Court's decision. For the reasons set forth herein, Cunningham's petition should be denied.

FACTS AND PROCEDURAL HISTORY

The Court will recall that in late 2007, the lame-duck County Council entered into a Master Employment Agreement hiring Cunningham as the Anderson County Administrator. The Master Employment Agreement set forth

an initial employment term of three years,[1] which automatically renewed each year. It further provided that Cunningham could only be terminated for cause, which was narrowly defined as conviction for certain crimes or refusal to perform the duties of the position. (Pet. App. 422.)[2] Termination for any other reason was defined as being "without cause," entitling Cunningham to more than $400,000 in severance payments.[3]

During its first business meeting in January 2009, the newly elected County Council passed a resolution condemning the process by which Cunningham had been hired by the lame-duck Council. (Pet. App. 434-35.) The matter was then referred to the personnel committee. The personnel committee offered Cunningham a contract for at-will employment, ***which Cunningham rejected***. (Pet. App. 451-52.) On March 2, 2009, after Cunningham was provided a hearing as required by state law, the County Council declared the Master Employment Agreement void and terminated Cunningham's employment. (Pet. App. 458-61.)

Cunningham thereafter filed this action, claiming the County breached the Master Employment Agreement by terminating him without cause (Count I); wrongfully discharged him in violation of public policy (Count II); and violated the Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* (Supp. 2013) (Count III). On March 10, 2011, the circuit court granted summary judgment in favor of the County on all claims. With respect to Cunningham's tort claim for wrongful

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[1] The Anderson County Council operates on two-year terms.

[2] "Pet. App." refers to the Appendix filed by Petitioner/Respondent Anderson County.

[3] The severance payments included Cunningham's salary for the unexpired portion of his employment term, plus a payment equal to one month of salary for every two years of service from 1998 on.

discharge, the circuit court ruled that the County was entitled to summary judgment because Cunningham chose not to allege that he was an at-will employee, a necessary element for a party seeking to assert the public policy exception to the at-will employment doctrine. [4]

Cunningham then appealed. On January 16, 2013, the Court of Appeals affirmed summary judgment on the breach of contract and payment-of-wages claims.[5] However, the court remanded the wrongful discharge claim for further proceedings on the basis that Cunningham had pleaded his wrongful discharge claim as an alternative to his breach of contract claim. (Pet. App. 36-37.) Cunningham petitioned for rehearing, stating that "Appellant is concerned that this Court's conclusion that 'Cunningham set forth alternative theories of relief,' ... indicates that the Court ***does not fully understand Appellant's claim.***" (Pet. App. 89 (emphasis added).) Specifically, Cunningham continued, the Court of Appeals failed to understand his argument that he was not required to plead his

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[4] Cunningham's wrongful discharge claim was based on three alleged incidents: (1) In November or December 2008, a Council member-elect asked Cunningham, "If I were to give you a list of employees to fire, would you get rid of them," to which Cunningham (who never saw any such list) responded that it would be improper to terminate any employee without following certain procedures; (2) in December 2008, Cunningham was given conflicting instructions by one member-elect and two sitting members regarding a demolition project; and (3) in January 2009, a Council member asked Cunningham to "help him find a crook." (Pet. App. 519-26.) Only the first instance could possibly support a claim for wrongful discharge, and, as explained in the County's previous filings, the facts alleged by Cunningham are insufficient as a matter of law to constitute a wrongful discharge. (Pet. App. 162-64.)

[5] The Court of Appeals correctly found that the Master Employment Agreement was unenforceable because it violated the common law rule against governmental entities binding successor bodies. This Court initially granted Cunningham's petition for a writ of certiorari on this issue but subsequently dismissed the writ as improvidently granted. (Opinion at 2 n.1.)

wrongful discharge claim in the alternative, because ***even an employee for a definite term is entitled to bring a claim for wrongful discharge.*** (Pet. App. 90.)

The Court of Appeals denied rehearing, withdrew its January 16 opinion, and issued a revised opinion on February 27, 2013. The revised opinion remanded the wrongful discharge claim for further proceedings on the basis of a position never advocated by Cunningham: that because the Master Employment Agreement was void, Cunningham necessarily was "relegated to an at-will status." (Pet. App. 20.) As such, the court further reasoned, Cunningham was entitled to bring a claim for wrongful discharge. The problem with this reasoning is that it rests on a theory that Cunningham specifically elected ***not*** to plead, *i.e.*, Cunningham did ***not*** plead that the wrongful discharge claim was an alternative to the breach of contract claim. The Court of Appeals dealt with this inconvenient reality by pointing to Cunningham's post-summary judgment brief, in which Cunningham relied on *Stiles v. American General Life Insurance Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999), to argue that he, ***as an employee under a contract for a definite term***, was entitled to bring a tort claim for wrongful discharge ***in addition to*** his contract claim under the Master Settlement Agreement. The Court of Appeals construed Cunningham's specific and emphatic ***denial*** of at-will status to be the complete opposite: a claim ("albeit [made] incorrectly," as the court conceded) that he was an at-will employee.

This Court granted the County's petition for a writ of certiorari and reversed, holding that the Court of Appeals erred in finding that "Cunningham had preserved the argument he was an at-will employee because he submitted a supplemental filing likening his case to *Stiles*." (Opinion at 4.) After reviewing Cunningham's circuit court filings, including the post-summary judgment filing relied upon by the Court of Appeals, a majority of this Court correctly concluded, "Nothing precluded Cunningham from making alternative

arguments based on whether he was deemed a contractual or at-will employee; ***however, he did not do so***. ... Cunningham's assertion that he has always argued he is an at-will employee is belied by his pleadings and significantly, by the trial court's clear finding to the contrary." (Opinion at 5.)

Cunningham has now petitioned for rehearing, arguing that this Court erred in concluding that he "had not properly raised or preserved the issue." (Petition at 1.) This Court's ruling is entirely correct, and the Court should deny Cunningham's petition for rehearing.

ARGUMENT

In reversing the Court of Appeals, this Court correctly focused its analysis on Cunningham's circuit court arguments and filings. *See Charleston County Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) ("Any allegations, statements or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position."). Further, this Court recognized that

> any suggestion that Cunningham is claiming at-will status is in direct contravention to the primary thrust of his argument before the trial court: that he was a contract employee and that the County had breached that contract. ***Cunningham has consistently declined to plead alternatives that might limit his remedy***, instead requesting damages for both breach of contract and wrongful discharge ***under the [Master Employment Agreement***].

(Opinion at 5-6.)

The Court's analysis is entirely correct. Cunningham's theory before the circuit court was that he had a cause of action for wrongful discharge *as an employee with a written contract for a term of years*. Cunningham maintained that when the County declared the Master Employment Agreement void and unenforceable, two causes of action arose simultaneously: a breach of contract

claim to obtain severance payments under the Master Employment Agreement, and a tort claim for wrongful discharge in violation of public policy, entitling him to an additional award of damages for lost wages. Cunningham's trial-court position is clear from his complaint, which throughout alleges that he was employed for a definite term and could only be terminated for "cause" under the Master Employment Agreement. (Pet. App. 201-205 (Complaint ¶¶ 7, 8, 17, 20, 26, 27).) The circuit court granted summary judgment to the County on the basis of Cunningham' ***deliberate choice*** not to allege in the alternative that he was an at-will employee, a necessary element for a party seeking to assert a wrongful discharge claim.

Cunningham enumerates 12 arguments, many of which are repetitive, in his petition for rehearing. As explained below, all of these arguments lack merit.

> **Cunningham's 1st, 4th, and 5th arguments:** The Court erred in concluding that Cunningham did not allege that he was an at-will employee in his circuit court filings.

Contrary to Cunningham's repeated assertions, the Court did not "overlook" anything. To the contrary, the Court carefully examined Cunningham's complaint and his other trial court statements (in filings and during the summary judgment hearing) and correctly concluded that he deliberately elected not to allege, in the alternative or otherwise, that he was an at-will employee. This strategic decision is abundantly clear in all of Cunningham's pleadings, motions, memoranda, and oral arguments before the circuit court.

It has often been said that the plaintiff is the master of his own claim. In this case, Cunningham consciously chose not to plead his wrongful discharge claim in the alternative and, further, refused at every turn to acknowledge any possibility that he might be an at-will employee. The ultimate proof of

Cunningham's deliberate strategic choice is in his post-summary judgment filing, in which he plainly stated that the Master Employment Agreement "is, by statute, defined as one for a definite term" and, in the very same paragraph, asserted his entitlement to bring a wrongful discharge claim. (Pet. App. 288.)

As this Court recognized in its Opinion, the existence of an employment contract for a definite term does not necessarily mean the employee is not at-will. Opinion at 5 n.2 (citing *Cape v. Greenville County Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005)). Cunningham argues that this Court's decision effectively overrules *Cape*, but that is not so.

In *Cape*, this Court held that employment for a definite term "is presumptively terminable only upon just cause" but that the parties to an employment contract could alter that presumption through "express contract provisions." *Id.* at 319, 618 S.E.2d at 883. The Court determined that the parties had altered the presumption by including in all capital letters:

> THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON .... EMPLOYEE AGREES THAT THERE EXISTS NO RIGHT TO CHALLENGE TERMINATION OF THIS CONTRACT BY EMPLOYER.

Id. at 317, 618 S.E.2d at 882.

In contrast to the employment contract in *Cape*, which clearly and explicitly established that it was for at-will employment, the words "at will" do not appear anywhere in the Master Employment Agreement. Although Cunningham repeatedly points to § 2(A) of the Master Employment Agreement, which provides that "[t]he Administrator serves at the pleasure of Council," other language *in the same sentence* makes clear that the Council's authority to terminate Cunningham is "subject ... to the provisions set forth in Section 3, Paragraphs A, B, and C." (Pet. App. 421.) Sections 3(A), (B), and (C), respectively,

set forth "[g]rounds for termination with cause"; provide that termination for any other reason is "without cause"; entitling Cunningham to severance payments, and allow Cunningham to deem himself "terminated without cause" if his salary is reduced or his position altered. (Pet. App. 422-23.)

The Master Employment Agreement is clearly nothing like the contract in *Cape*. The Master Employment Agreement plainly established a relationship of employment for a definite term, because it set a term of employment and explicitly restricted provided that termination without cause prior to the end of the term would result in substantial liability for the County. *See Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281-82, 573 S.E.2d 830, 836 (Ct. App. 2002) ("[A]n employer and employee may contractually alter the general rule of employment at-will, thereby restricting the freedom of either party to terminate the employment relationship *without incurring liability*." (emphasis added)).

> **Cunningham's second argument:** "The Court's finding that Mr. Cunningham did not preserve the issue of his employment status because he made only a 'mere reference' to *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999) 'in a document' inaccurately depicts the nature of the proceedings."

This argument refers to the Court's discussion of Cunningham's post-summary judgment filing. (Pet. App. 284-90.) This Court correctly rejected the Court of Appeals' conclusion that Cunningham's reference to *Stiles* in his post-summary judgment filing was sufficient to allege an alternative claim that he was an at-will employee.

During the summary judgment hearing, the County argued that it was entitled to judgment on Cunningham's wrongful discharge claim because he had not alleged in his complaint that he was an at will employee. (Pet. App. at 324.) Cunningham responded (erroneously) that under South Carolina case law, he could pursue a wrongful discharge claim without being an at-will employee:

> **Mr. Murphy:** Let me address Count Two, your Honor. Judge Wilkins makes one argument, and that is, if you have a contract, you are not at-will, then, of course, wrongful discharge doesn't apply. It wasn't an argument raised before, but there is a Supreme Court case ... that is contrary to that. ... But there is case law about just because you have a contract doesn't mean you give up the right to sue in court. They're not the same. It's ***not alternative causes of action.*** They address very different things.
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> ...
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> ... ***We're not seeking lost wages under Count One,[6] so Count One and Count Two are very different. They exist independently of each other.***

(Pet. App. 332-33 (emphasis added).)

Thereafter, Cunningham filed the pleading discussed by this Court on pages 4-5 of its opinion, and on which the Court of Appeals relied. In that filing, Cunningham wrote:

> At the hearing, Defendant [argued that] the existence of contract damages obviates any tort remedy for wrongful discharge. Defendant's argument was rejected in *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). There, the plaintiff was employed pursuant to a contract with a notice period for termination. The majority construed this agreement as a contract for a definite term .... There, like here, the defendant argued that the tort of wrongful discharge is limited only to situations where the plaintiff had no other remedy. Our Supreme Court rightly noted the anomaly that would result in permitting an employer to unilaterally insulate itself from liability for violating the public policy of South Carolina simply by creating a written contract for a definite term.

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[6] This statement is not entirely correct. Cunningham's breach of contract claim sought the severance payments specified in the Master Employment Agreement, which included Cunningham's salary for the unexpired portion of his term of employment. *Cf. Stiles*, 335 S.C. at 227, 516 S.E.2d at 451 (Toal, J., concurring) ("If an employee is wrongfully terminated under a definite [term] contract, the measure of damages is determined by the contract and is generally ***the wages for the unexpired portion of the term.***" (emphasis added)).

> Plaintiff's contract is, by statute, ***defined as one for a definite term*** and it therefore falls within the rule recognized by the majority in *Stiles*.

(Pet. App. 287-88 (citations omitted; emphasis added).)

Cunningham argues that his supplemental filing "not only identified *Stiles* but also discussed the principle raised at the hearing" on summary judgment. (Petition at 3.) But, the "principle raised at the hearing" was ***not*** whether Cunningham was an at-will employee. Rather, during the summary judgment hearing Cunningham argued—as he has throughout this litigation—that he is entitled to bring a contract action to recover the golden parachute severance payment in the Master Employment Agreement ***and at the same time*** a tort action to recover "lost wages" due to his wrongful termination.

In that same filing, Cunningham complained that the County should not be allowed "to argue on the one hand that the contract is void (and refuse to pay or perform), while on the other hand arguing that the contract it so strenuously disavows poses a bar to tort liability." (Pet. App. 288.) If there is a problem, it is one of Cunningham's own making. Cunningham could have asserted his wrongful discharge claim as an ***alternative*** to his breach of contract claim—for example by arguing that if the Master Employment Agreement was void *ab initio*, then he was an at-will employee and was wrongfully discharged in violation of public policy—but he deliberately elected not to do so. In fact, when the Court of Appeals (in its initial opinion filed January 16, 2013 and subsequently withdrawn) reasoned that Cunningham had in fact pleaded his wrongful discharge claim as an alternative to his breach of contract claim, Cunningham petitioned for rehearing, telling the Court of Appeals that it had misunderstood his claim. (Pet. App. 89-90.) Cunningham told the Court of Appeals that he had not pleaded his wrongful discharge claim in the alternative and that it did not matter whether he was an at-will employee because even an employee for a

definite term could bring a wrongful discharge claim. (*Id.*) Moreover, Cunningham first made this "it doesn't matter" argument in his petition for rehearing. Throughout the circuit court proceedings, Cunningham steadfastly maintained that he was employed for a definite term under the Master Employment Agreement.

> **Cunningham's 3d, 6th, 7th, 10th, 11th, and 12th Arguments:** Status as an at-will employee is not a necessary element of a wrongful discharge claim; therefore, Cunningham can recover severance payments under a breach of contract theory, ***as well as*** lost wages under a wrongful discharge theory.

These six arguments reiterate, in various guises, Cunningham's central claim that that a person who is employed for a definite term and who is fired without cause is entitled to bring ***both*** an action in contract for breach of the employment agreement ***and*** an action in tort for wrongful discharge. This simply is not the law.

South Carolina law distinguishes between employment at-will, which may be terminated at any time, and employment for a definite term, which may be terminated (without incurring liability) only for cause. *See Stiles*, 335 S.C. at 227, 516 S.E.2d at 451-52 (Toal, J., concurring). "The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace." *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 19 (Ct. App. 2006). In an at-will employment relationship, "an employer [can] discharge an employee without incurring liability for good reason, no reason, or bad reason." *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992).

South Carolina has recognized, as an exception to the at-will employment doctrine, that an employee whose termination violates public policy may bring a claim in tort for wrongful discharge. *See Ludwick v. This Minute of Carolina, Inc.*,

287 S.C. 219, 224-25, 337 S.E.2d 213, 216 (1985) (recognizing exception). However, a wrongful discharge claim "is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists." *Stiles*, 335 S.C. at 228, 516 S.E.2d at 452 (Toal, J., concurring). The very existence of the public policy exception to the at-will employment doctrine is premised on the fact that, ***unlike an employee for a definite term***, an at-will employee has no contractual remedy for a wrongful termination. *See Stiles*, at 225-26, 516 S.E.2d at 451; *see also, e.g., Epps v. Clarendon County*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (holding that a wrongful discharge claim is not available to an employee who has an alternate remedy). Because an employee for a definite term can bring a breach of contract action if he is terminated without cause (which necessarily includes termination in violation of public policy), a wrongful discharge claim is not available.

In support of his argument that he should be able to seek and obtain two remedies for his termination—an action in contract for breach of the Master Employment Agreement and an action in tort for wrongful discharge—Cunningham asserts that these two remedies serve different purposes. This is not so, however. Because an employee for a definite term may only be terminated for cause, termination for ***any other*** reason—including a reason that violates public policy—violates the parties' agreement and entitles the employee to a breach of contract remedy. The availability of a breach of contract remedy deters employers from terminating employees for reasons that violate public policy, and protects employees by providing a remedy for such terminations. These are precisely the purposes served by a wrongful discharge claim. *See Stiles*, 335 S.C. at 228, 516 S.E.2d at 452 (Toal, J., concurring) ("The *Ludwick* public policy exception is designed to serve two important policy goals: (1) the vindication of

the state's interest by prohibiting termination in violation of the clear mandate of public policy; and (2) the protection of at-will employees who are often without a remedy when terminated in violation of public policy."). Therefore, there is no basis in law, and no reason in fact, why an employee for a definite term, like Cunningham, should be entitled to both remedies.

> **Cunningham's Eighth Argument.** "Even if this Court were to hold that at-will employment is an element of the public policy tort, this Court has never held that it is a pleading requirement."

Cunningham raises this argument for the first time in his petition for rehearing, although it was an argument he could have raised previously. Accordingly, it should be rejected on that basis alone. Regardless, this argument is flatly contrary to the elementary rules of pleading, which require, at a minimum, that the plaintiff allege all elements of a cause of action. *See, e.g., Kleckley v. Nw. Nat'l Casualty Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (holding that claim was properly dismissed because the plaintiff failed to plead all elements in the complaint).

> **Cunningham's Ninth Argument.** "In holding Mr. Cunningham's complaint did not contain any allegations that he was employed at will, the Court overlooked the fact that the County contended the employment agreement was void *ab initio*, and the trial court so found."

This argument amounts to a contention that Cunningham should be excused from the burden of pleading the elements of his wrongful discharge claim based on arguments the County made in defense of the breach of contract claim. This Court should not countenance this argument, which would effectively nullify Rule 8(a)'s initial pleading requirement.

CONCLUSION

This Court should reject Cunningham's challenges to its decision, and deny his petition for rehearing.

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PROOF OF SERVICE

I certify that I have served the foregoing document on Respondent/Petitioner Michael Cunningham by depositing a copy of same in the United States Mail, postage prepaid, on October 22, 2015, addressed to his attorneys of record as follows:

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