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S.C. Supreme Court

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

Op. No. 27568 (Sup. Ct. filed September 2, 2015)
(Shearouse Adv. Sh. No. 34 at 10)

Michael Cunningham, ... Respondent/Petitioner,

v.

Anderson County, ... Petitioner/Respondent.

REPLY

Pursuant to Rule 240(f), SCACR, and this Court's order of October 29, 2015, Mr. Cunningham provides this brief reply to the County's return to the petition for rehearing.

I.

Anderson County asserts incorrectly "[Mr.] 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*." (Return, p. 5) (emphasis in original). The written contract at issue in Count I, however, had nothing to do with the wrongful discharge claim. Count I is for breach of contract, not wrongful discharge.

The County asserts that Mr. Cunningham "refused at every turn to acknowledge any possibility that he might be an at will employee." (Return, p. 6). This statement is

untrue. Mr. Cunningham pointed out in his arguments before the circuit court, before the Court of Appeals, before this Court *and* in the Petition for Rehearing numerous instances where he argued, correctly, that *under the Agreement* he was employed at will (*i.e.*, served at the County's pleasure).

The County's argument throughout this case is founded on a false premise this Court adopted: That because a person has a written contract for a term, such person necessarily may not be employed at will (and thus may not seek remedies for discharge in violation of public policy). (See Return, pp. 6-7, 8). But the two concepts have never been mutually exclusive – that is, until this Court's opinion in *this* case.

The County leans on the provision in the contract that termination for any reason not deemed to be "cause" (*i.e.*, subject to Section 3 of the Agreement) conclusively establishes that the Agreement was *not* at will. (Return, pp. 7-8). That argument is absurd. Section 3 is the severance provision – it does not preclude the County from terminating Mr. Cunningham for any reason, no reason, or even bad reason. The Agreement expressly provided that Cunningham "serve[d] at the pleasure of Council," which unquestionably meant "at will."

What the County hopes this Court ignores most of all, however, is that because the circuit court and Court of Appeals declared the written agreement violates the "term limits" rule (which Mr. Cunningham argued is contrary to the Home Rule Act), then no enforceable written contract of employment (for a term or otherwise) exists. The County then relies on the very existence of the Agreement it successfully tore up to undermine Mr. Cunningham's wrongful discharge claim. The result is unfair at every turn.

Mr. Cunningham respectfully requests that the Court reconsider the impact its ruling has on fundamental concepts of employment law in general and Mr. Cunningham's specific ability to vindicate his rights and the public policy of this State.

II.

The County continues to claim Mr. Cunningham's assertion that he was employed under a contract for a term is inconsistent with the notion that Mr. Cunningham could be terminated at will. This ignores the express provisions of the Agreement and the settled law of at-will employment.

The Agreement was for a specified length of time and provided for various benefits and conditions. Saying a contract is "for a term," however, is not the same as saying that continued employment is *guaranteed* for a term. This Agreement stated clearly that Council could terminate Mr. Cunningham's employment *at any time for any reason*. Termination of employment is simply one term of an employment agreement or contract.

In the absence of an expression to the contrary, the law presumes termination is at will. *Mathis v. Brown & Brown of SC, Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010). The contract in this case does *not* contain an expression to the contrary. Thus, Mr. Cunningham had a written contract and was also subject to termination at will.

To illustrate, assume an employer and employee entered into an agreement for three years, during which the employee agreed to provide certain services and the employer agreed to provide certain benefits. For example, the employer agreed to provide fresh flowers on Mondays, Wednesdays, and Fridays. But the contract, as is the

case here, contained an express provision that the employer may end employment at any time during the term. Those parties have a valid agreement that applies for a term, but the employer can still end employment at any time during the term. It is both a contract for a term and an at will situation. That is precisely the type of contract at issue here.

The fact that the contract in this case is different from the agreements reviewed in other cases is unenlightening. The important fact is this: Mr. Cunningham's representations regarding his status as employed at will have been consistent from the outset, and those representations do not support this Court's determination that Mr. Cunningham's accurate statements – that he was employed under a contract for a term and that his employment could be ended at the will of Council – means he cannot pursue a wrongful discharge claim.

III.

The County misreads and misstates the holding in *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). The contract in this case was never intended to provide a remedy for wrongful discharge. There is no "wrongful discharge" under a contract that allows the employer to terminate an employee for *any* reason.

The County also gets it backwards with its argument that "[t]he 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." (Return at 12). No such deterrence is present here (where the County successfully argued the agreement was void *ab initio*), nor would the public policy be vindicated by the payment of a contractual severance. Negotiated severance is not

necessarily equivalent to damages incurred because of a wrongful discharge. There may be no damages, yet contractual severance is still owed. Conversely, the contract could provide for severance of $3.75 and the employee could have significant actual damages. Contractual severance has nothing to do with the actual damages caused by an employer violating this State's public policy.

Likewise, suppose an employer issues one day "term" contracts that are renewable automatically. The employer then discharges an employee in violation of this State's public policy. This Court's decision allows such an employer to escape accountability completely. That is precisely the result urged by the County, and that result is contrary to settled law.

CONCLUSION

The County asserts all of Mr. Cunningham's arguments "lack merit." (Return, p. 6). Of course, whether any of Mr. Cunningham's arguments have "merit" is a matter for this Court's determination.

Although the County continues to assault the merits of Mr. Cunningham's arguments with misstatements of settled case law, this Court's decision is narrowly based upon error preservation (that is, the view that Mr. Cunningham chose one theory to advance over another inconsistent theory). Mr. Cunningham set forth in his Petition why the Court's view overlooked that (a) he always maintained he was employed at will even though he had a written contract for a term, and (b) settled law in this State permitted him to plead and argue his case in this manner. This Court's opinion creates a significant change in that law, buying into the County's misstatement of the law that one theory (the existence of an enforceable written agreement for a term) necessarily negates the other (that the written agreement created at will employment).

The decision also effectively overrules a number of cases, including *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) (noting county administrator was "at will" and that she "was paid her severance pursuant to her contract"); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (noting a written contract for employment "for an indefinite period can be terminated at will"); *Prescott v. Farmers Telephone Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999) (Court recognized parties may operate under an agreement that maintains "at will" status of employee and that agreement may be modified orally or in writing to alter at-will status);

Cape v. Greenville County School Dist., 365 S.C. 316, 618 S.E.2d 881 (2005) (finding employment contract, while for definite term, was terminable at will); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999) (majority held "an employee under *an at-will contract* with a 30 day notice provision may maintain an action for wrongful discharge in violation of public policy") (emphasis added). All of these cases dealt with written employment agreements – some of them containing notice provisions – yet all of these employees were deemed "at will" and protected by the public policy exception. The County's argument – and this Court's decision – impacts these decisions without expressly saying so, because there is no way to harmonize the facts and results of those cases with the result in this case.

The Court should grant this Petition, rehear the matter, withdraw it previous decision, and enter a new opinion permitting Mr. Cunningham to proceed with his wrongful discharge claim.

Respectfully submitted,

John S. Nichols, SC Bar No. 4210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Brian P. Murphy, SC Bar No. 6770
STEPHENSON & MURPHY, LLC
207 Whitsett Street
Greenville, South Carolina 29601
(864) 370-9400

Attorneys for Respondent/Petitioner

November 3, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner/Respondent with a copy of *Reply to Return to Petition for Rehearing* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

William W. Wilkins, Esquire
Kirsten E. Small, Esquire
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603

Erin Bridges

November 3, 2015
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC