THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-000961

Betty J. Keitt.....Appellant.

v.

City of Columbia.....Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

By Petition filed March 9, 2016, Appellant ("Keitt") asserts that the order issued by this Court on February 17, 2016 overlooked or misapprehended a material aspect of her whistleblower claim. Specifically, Keitt contends that her unsuccessful grievance following termination from employment cannot bar access to the Whistleblower Act. For the following reasons, Keitt's petition is without merit and should be dismissed.

STANDARD OF REVIEW

A petition for rehearing is limited to points overlooked or misapprehended by the court. Rule 221(a), SCACR. A petition may not be presented to address new issues or to have the case tried in the appellate court a second time. Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933) In this instance, Keitt merely reiterates arguments presented in her appellate briefs. Accordingly, Keitt has failed to satisfy the

requirement of identifying an overlooked or misapprehended issue necessary for reconsideration. Further, as stated below, the Court properly applied the controlling law of this State in affirming the entry of summary judgment by the Court of Common Pleas for Richland County.

LEGAL ARGUMENT

I. This Court properly ruled that Keitt's unsuccessful grievance barred pursuit of a wrongful termination claim.

Keitt alleges that her termination was in retaliation for making reports of unethical and unlawful conduct to the City's Human Resources Department and to the Office of Disciplinary Council. (Complaint ¶¶ 6, 7, 21 and 25, R. pp. 20-24) The exclusive statutory remedy for adverse employment action resulting from reports of public wrongdoing or malfeasance is through the South Carolina Whistleblower Act. S.C. Code Ann. § 8-27-10 et seq. Keitt elected not to pursue any relief under this statute.

As a matter of law, the availability of alternative recourse bars Keitt's common law cause of action for wrongful discharge. Keitt seeks to circumvent this bar by asserting that her statutory grievance claim was not successful. This argument has no support in established precedent.

Keitt argued in her brief and before the appellate panel that the absence of judicial review in the County and Municipal Employees Grievance Procedure Act renders the exhaustion requirement in the Whistleblower Act inapplicable to her claim. Nothing in the Whistleblower Act itself or the jurisprudence of this State supports Keitt's argument. For example, in section 8-27-10(1) the Whistleblower Act defines "public body" to include counties and municipalities. Section 8-27-10(2) defines "employee" to include

employees of counties and municipalities. Section 8-27-30(A) provides that no action can be brought unless the "employee" (1) has exhausted "all available grievance or other administrative remedies" and (2) obtained a finding that there would have been no discipline "but for the reporting of the alleged wrongdoing."

When adopting the Whistleblower Act in 1988 the legislature had notice of the grievance procedures available to county and municipal employees since 1971. See, S.C. Code Ann. § 8-17-110, et seq. Despite this knowledge, the legislature made no provision to exempt county and municipal employees from its exhaustion provisions. Absent a constitutional infirmity, no court may alter an exercise of legislative policy making. See, Brunson v. Stewart, 345 S.C. 283, 287-288, 547 S.E.2d 504, 505-506 (Ct. App. 2001)(courts do not sit as a super legislature to second guess decisions of the General Assembly)

II. Keitt had other available alternatives that bar her wrongful termination claim. (Additional Sustaining Ground)

Keitt also initiated proceedings under state and federal civil rights statutes. Controlling Supreme Court precedent provides that a claim for common law wrongful termination is not available "where the employee has a statutory remedy." Stiles v. American General Life Ins. Co., 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999), *citing* Dockins v. Ingles Markets, Inc., 306 S.C. 496, 413 S.E.2d 18 (1992) (FLSA claim available) and Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386 (1991) (42 U.S.C. § 1983 claim available); see also, Lawson v. S.C. Dep't. of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000) (dismissing wrongful discharge cause of action based upon availability of a statutory remedy under the state's Whistleblower Act even though the

plaintiff did not invoke it); Newman v. S.C. Department of Employment and Workforce, 2010 WL 4791932 (D.S.C. September 22, 2010), *adopted* 2010 WL 4666360 (D.S.C. November 18, 2010) (dismissing wrongful discharge cause of action based upon availability of statutory remedies even though untimely); Frazier v. Target Corp., 2009 WL 3459221 (D.S.C. October 27, 2009) (wrongful termination claims must be dismissed as a matter of law if another cause of action **can be stated**); Lawson v. Gault, 2013 WL 2010224 (D.S.C. May 13, 2013) (Epps decision requires dismissal if an alternative claim is available) Keitt's filing of discrimination claims and her status as a public employee demonstrate that she had the opportunity to seek relief under through the State Human Affairs Act, Title VII of the Civil Rights Act of 1991, and 42 U.S.C. § 1983 as well as the Whistleblower Act.

III. Keitt cannot establish the elements necessary to pursue wrongful termination. (Additional Sustaining Ground)

Wrongful termination provides a narrow exception to the employment at-will doctrine. There is no dispute that Keitt's at-will employment was subject to the provisions of the County and Municipal Employee's Grievance Act. S.C. Code Ann. § 8-17-110 et seq. To maintain a wrongful termination claim, a plaintiff must establish a "public policy exception" **and** must demonstrate that termination was in retaliation for complying with public policy. Ludwick v. This Minute of Carolina, Inc, 287 S.C. 219, 337 S.E.2d 213 (1985); Barron v. Labor Finders of S.C., 393 S.C. 609, 713 S.E.2d 634 (2011) (public policy is a question of law for the court to determine)

Keitt directs allegations of retaliation against her supervisor, the City's Chief Administrative Judge. She offers no evidence or argument that the City's grievance

committee or manager was motivated by retaliation in exercising their statutory duty to review the reasons for her termination from employment. By law, the City's manager alone had the ultimate authority to terminate Keitt's employment. S.C. Code Ann. § 8-17-160. In the absence of retaliation by the statutory decision maker, there can be no "wrongful" termination.

Additionally, our Supreme Court has never extended wrongful termination beyond retaliation in violation of established public policy. See, Ludwick, *supra.* (public policy exception invoked when an employer requires an at-will employee to violate the law); Culler v. Blue Ridge Elec. Co-op, Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (wrongful discharge arises for refusal to contribute to a political fund); Barron, *supra.*(plaintiff failed to take measures necessary to invoke a statutory retaliation claim) This Court has recognized that wrongful termination is limited to "a retaliatory termination of the at-will employee in violation of a **clear mandate of public policy**." McNeil v. South Carolina Dept. of Corrections, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013) (Emphasis added) citing Ludwick 287 S.C. at 235, 337 S.E.2d at 216. McNeil arose from dismissal of a complaint on a Rule 12(b)(6) motion. The issue was whether plaintiff's complaint contained sufficient allegations to support wrongful termination. The majority opinion concluded that plaintiff's failure to allege that SCDC required her to violate law or that her termination violated law warranted dismissal of her wrongful termination cause of action. This application was subsequently confirmed in Taghivand v. Rite Aid Corp., 411 S.C. 240, 245, 768 S.E. 2d 385, 387 (2015) (mere reports of alleged wrongdoing insufficient to support a wrongful termination claim)

CONCLUSION

For reasons expressed in this Court's order, the decision by the trial judge to grant summary judgment was proper. Moreover, as in McNeil and Taghivand, Keitt's complaint does not allege that she was required to violate a statutory mandate or that her termination in itself violated a statute. Absent a claim and supporting evidence that she was terminated for refusing to violate law, rather than merely reporting perceived violations, Keitt may not obtain relief on the basis of wrongful termination.

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By: _____

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March 15, 2016
Columbia, South Carolina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Respondent's Return to Petition for Rehearing by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

J. Lewis Cromer, Esquire
Julius W. Babb, IV, Esquire
J. Lewis Cromer & Associates, LLC
Post Office Box 11675
Columbia, South Carolina 29211

This 15th day of March, 2016.

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March 15, 2016

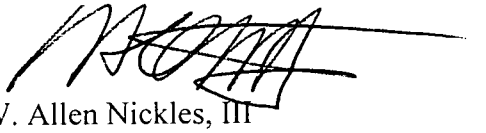
Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Betty J. Keitt v. City of Columbia
Appellate Case No.: 2014-000961

Dear Ms. Kitchings:

Enclosed for filing, please find Respondent's Return to Appellant's Petition for Rehearing and Certificate of Service in the above matter. Please file the original and return the extra, clocked-in copies with the bearer. Thank you for your cooperation and assistance in this matter.

Sincerely,



W. Allen Nickles, III

WAN/pfb
cc: J. Lewis Cromer, Esquire
Julius W. Babb, IV Esquire
Enclosures
File #12-094