THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Keith R. Kelly, Circuit Court Judge

Case No. 2014-CP-42-1759
Appellate Case No. 2016-000232

Denise Parker, ... Appellant,

v.

The National Honorary Beta Club, ... Respondent.

INITIAL BRIEF OF APPELLANT

Thomas A. Bright (S.C. Bar # 884)
David L. Harris, Jr. (S.C. Bar # 101748)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)
Thomas.Bright@odnss.com
David.Harris@odnss.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

ISSUE PRESENTED

South Carolina law bars the recovery of punitive damages in actions for breach of contract unless fraudulent intent relating to the breach *and* a separate distinct fraudulent act accompanying the breach are established by competent evidence. Despite the fact that the person who terminated her employment had no personal knowledge of her alleged employment contract, Denise Parker contends that her discharge and the reason for her discharge constitute both a breach of contract and an accompanying fraudulent act. Is Parker entitled to punitive damages on her cause of action for breach of contract accompanied by fraudulent act?

STATEMENT OF THE CASE

This appeal concerns the narrow issue of whether a plaintiff can recover punitive damages for breach of an alleged employment contract absent evidence of specific fraudulent intent relating to the breach and a separate and distinct fraudulent act accompanying the breach. This suit was brought by Denise Parker ("Parker") against her former employer, the National Honorary Beta Club ("the Beta Club") on or about April 29, 2014. Parker's initial Complaint alleged causes of action for breach of an oral employment contract and promissory estoppel. After the Beta Club filed its timely Answer, the Parties engaged in extensive discovery including the taking of six (6) depositions. The parties also participated in mediation but were unable to reach a settlement. Following the close of discovery, Parker amended her Complaint to add a cause of action for breach of contract accompanied by fraudulent act.

Judge Keith Kelly of the Seventh Circuit denied the Beta's Club's motion for summary judgment and the Parties proceeded to a jury trial before Judge Kelly on Parker's contractual claims beginning September 28, 2015. Judge Kelly held Parker's promissory estoppel claim under advisement pending a jury verdict. At the close of Parker's case in chief, and again at the close of all evidence, the Beta Club moved for directed verdict on the grounds that it never formed an oral employment contract with Parker and that Parker failed to present the evidence required to make out a claim for breach of contract accompanied by fraud. In particular, the Beta Club argued that Parker had presented neither evidence of a fraudulent intent related to the breaching of her employment contract nor evidence of an independent fraudulent act accompanying the breach.[1] Judge Kelly denied the Beta Club's motions and submitted the case to the jury.

[1] PR Tr. Vol. 2 pp. 263-267; PR Tr. Vol. 3 pp.615-617,622-623.

On October 2, 2015, the jury returned a verdict for Parker on both contractual claims. The jury awarded Parker $518,006 in actual damages and punitive damages in the amount of $350,000 on her claim for breach of contract accompanied by fraudulent act. While Judge Kelly denied the Beta Club's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, and entered judgment in favor of Parker on or about December 15, 2015, a written order was not issued until January 6, 2016.[2] The Beta Club did not receive the court's written order denying its post-trial motion until January 11, 2016. On February 5th 2015, the Beta Club satisfied the actual damages portion of the award ($518,006 plus applicable post-judgment interest) by bank wire transfer to Parker in the gross amount (before taxes) of $530,909.24 and served its Notice of Appeal with regard to the portion of the jury's verdict awarding Parker punitive damages in the amount of $350,000 on her claim for breach of contract accompanied by fraudulent act.[3]

ARGUMENT AND AUTHORITIES

I. RELEVANT FACTS

Denise Parker was employed by the Beta Club for approximately 38 years in a variety of clerical and support staff positions.[4] In 2013, Parker worked as support staff to the National Sponsors and Leadership Development team in The Beta Club's Convention Department.[5] During the late summer and fall of that year, two of the three National Sponsors in Parker's

---

[2] Judge Kelly's Written Order of Judgment Issued January 5, 2016.

[3] The Beta Club's Notice of Appeal, Filed February 5, 2016.

[4] Paper Record, Trial Transcript, September 28, 2015, Volume 1, pp. 99 – 101, 137-139.

[5] *Id.* at pp. 142-145; PR Tr. Vol. 2. pp.426-427; Paper Record, Defendant's Trial Exhibit No. 1, Convention Coordinator Job Description; PR Tr. Def. Tr. Ex. No. 9, 2013 Organizational Chart.

Department—Ritchie Garland and Shannon Meyer—reached out to the Executive Director/CEO/President of the Beta Club, Bob Bright, about difficulties they were having working with Parker.[6] In particular, Garland and Meyer complained that Parker had not been helpful with tasks in their Department.[7] During this time, Bob Bright also noticed that Parker was not getting along with her co-workers and was demonstrating a negative attitude.[8] On October 21, 2015, Bright met with Parker to discuss her performance and presented Parker with an Employee Conference note identifying specific concerns about her attitude and job performance.[9] Parker admits that this meeting with Bright led her to conclude that Bright was not pleased with her performance, that she was on "thin ice," and that she feared she might be terminated.[10]

On October 25, 2013, the Beta Club's Staff Liaison Committee (to which Parker was a member) held its regularly scheduled meeting with the Beta Club Board's Internal Affairs Committee to discuss staff related issues.[11] In attendance at the meeting were Internal Affairs Committee members Pat Stout, Dennis Campbell, Stan Long, Mark Conley, and Ken Dinkins.[12] Staff Liaison Committee members Parker, Pat Mabry, and Barbara Anderson were the only Beta

---

[6] PR. Tr. Vol 2, pp. 296-298,303-326, 352-354; 356-368, 371-374; PR. Tr. Vol. 3 pp. 434-439.

[7] *Id.*

[8] PR. Tr. Vol. 3 pp. 427-439.

[9] *Id.* at 439- 446; PR. Tr. Vol. 1, pp.105-109, 158-160, PR Def. Tr. Ex. No. 6, Employee Conference Note Dated October 21, 2013.

[10] *Id.* at 160.

[11] PR Tr. Vol. 1, pp. 111- 113, 115-116; Plaintiff's Trial Exhibit No. 2, Staff Liaison Committee Procedures.

[12] PR. Tr. Vol. 1 pp. 112-118; PR Tr. Vol. 3 pp. 562-563.

Club staff members present. Bright did not attend the October 25 meeting between the Internal Affairs Committee and the Staff Liaison Committee.[13] At the meeting, Parker was hesitant to speak up about the written warning she received from Bright on October 21 because she was afraid of losing her job after Bright expressed his concerns about her performance several days earlier.[14] After Parker was encouraged to express her concerns by another staff member attending the meeting, Ken Dinkins, a Board member and member of the Internal Affairs Committee, told Parker "[I]f we ask you a question, you have to answer it and Bob Bright can't fire you for that."[15] It is this single statement which Parker argued was her alleged contract with the Beta Club. Parker then went on to speak about her meeting with Bright on October 21, talk about how she feared for her job, and express her concerns about the Beta Club. [16] The entire exchange lasted only a few minutes.[17]

On November 4, 2013, Bright met with Parker again to discuss her attitude and performance issues.[18] Bright's Executive Assistant, Laura Lewis, also attended that meeting.[19] It is uncontradicted that Bright did not enter that meeting with the intention of terminating Parker's employment.[20] Rather, Bright's intent was to reemphasize his concerns expressed in the

---

[13] PR Tr. Vol. 3 pp. 562-566.

[14] PR Tr. Vol. 1. pp. 115-117, 160.

[15] *Id.* at 117.

[16] *Id.* at 117 – 118.

[17] PR. Tr. Vol. 3 pp. 564-565.

[18] PR Tr. Vol. 1. pp 119-121, 162-163; PR Tr. Vol. 3, pp. 446 – 448, 453-454.

[19] PR Tr. Vol. 1. pp. 119; PR Tr. Vol. 3 p. 453.

[20] PR Tr. Vol. 3, pp. 453-455.

October 21, 2013, meeting.[21] During the meeting, Bright, again, presented Parker with an Employee Conference note and expressed concerns about Parker's negativity and her job performance.[22] Bright felt that Parker's attitude had not changed since their last meeting.[23] Bright also believed that Parker was not answering her e-mails after receiving information from the Beta Club's IT Manager, James Moore, showing that Parker had sent very few e-mails compared to the amount of e-mails she and the Department received during the same period.[24] Bright did not meet with Parker on November 4 with the intention of terminating her employment.[25] During the meeting, however, Bright believed that Parker expressed an unwillingness to adjust her attitude and he ultimately terminated Parker's employment at the conclusion of the meeting. [26]

II. STANDARD OF REVIEW

South Carolina appellate courts review questions of law *de novo*.[27] "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." [28] Because breach of contract based on employment agreements are by definition actions at law,

---

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 448-453.

[25] *Id.* at 453-455.

[26] PR Tr. Vol. 3, pp. 453-455.

[27] *See Proctor v. Steedley,* 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct.App.2012).

[28] *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 570, 776 S.E.2d 397, 402 (Ct. App. 2015), *reh'g denied* (Sept. 16, 2015).

the jurisdiction of this court extends merely to correct errors of law.[29] The factual findings of the jury cannot be disturbed on appeal unless there record does not contain any evidence supporting the jury's findings.[30]

"When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must employ the same standard as the trial court-that is, we must consider the evidence in the light most favorable to the non-moving party."[31] Such motions must only be granted when only one reasonable inference can be drawn from the evidence. [32] The Court must only concern itself with the existence or non-existence of evidence in the record; the weight of the evidence is of no consequence.[33]

III. DISCUSSION

The Beta Club has appealed the trial court's decision to deny its motions for directed verdict and JNOV on Parker's claim for breach of contract accompanied by fraudulent act on the grounds that Parker failed to present evidence sufficient to warrant an award of punitive damages. Punitive damages can only be awarded when a plaintiff puts forth clear and convincing evidence that the defendant acted in a willful, wanton, or in reckless disregard of the

---

[29] *See Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012).

[30] *See Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

[31] *Sauers v. Poulin Bros. Homes*, 328 S.C. 601, 605, 493 S.E.2d 503, 504-05 (Ct. App. 1997).

[32] *Brady Dev. Co. v. Town of Hilton Head Island,* 312 S.C. 73, 439 S.E.2d 266 (1993).

[33] *See Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000).

plaintiff's rights.[34] The court below erroneously submitted Parker's claim for punitive damages to the jury, and in the face of clear precedent to the contrary, refused to set it aside. As explained below, neither the record nor the controlling authority in this State supports the trial court's decision to submit Parker's claim for breach of contract accompanied by fraudulent act to the jury or the jury's award of punitive damages.

A. Bob Bright could not have formed the requisite fraudulent intent as it relates to Parker's employment contract.

At trial, Parker had the burden of presenting the jury with evidence upon which they could reasonably infer a fraudulent intent relating to the breach of her alleged employment contract with the Beta Club.[35] The law in South Carolina is clear that in order for a person to harbor dishonest designs as it relates to the breaching of a contract, they must have some personal knowledge of the agreement.[36] The rule requiring personal knowledge is rooted as much in logic as it is the law. Indeed, how can a person have dishonest designs to breach a contract without having some knowledge that an enforceable contract exists in the first place? To conclude that someone could have a fraudulent intent with regard to a specific contract without having any knowledge of that contract and its terms defies reason, common sense, and logic.

Parker's attempt to obtain punitive damages in this case unravels once the law, reason, common sense and logic are considered. There is nothing in the record to establish that Bob

---

[34] *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007).

[35] *See e.g. Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93,111, 780 S.E.2d 611,621 (Ct. App. 2015)("Breach of contract accompanied by a fraudulent act...requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making.")(citations omitted).

[36] *Thompson v. Home Sec. Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978); *see also D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012), *aff'd in part as modified, vacated in part*, 410 S.C. 319, 764 S.E.2d 701 (2014)(noting that there must be a showing of fraudulent intent related to the breach).

Bright, the person who terminated Parker's employment, had even the faintest knowledge of her alleged employment contract with the Beta Club. Accordingly, there was nothing upon which the jury could infer fraudulent intent relating to the breaching of Parker's alleged employment contract, and the punitive damages award must be set aside.

1. The discipline Parker received on October 21, 2013, fails to establish personal knowledge or fraudulent intent pertaining to Parker's subsequent alleged contract.

Evidence relating to Bright's alleged "fraudulent intent" in relation to Parker's contract begins with the Conference Note Parker received on October 21, 2013 ("the Note").[37] The Note itself, which is disciplinary in nature, speaks of various issues relating to Parker's performance including:

- Failure to sustain professional strategy;
- Does not demonstrate an exceptional mastery of professional skills; and
- Professional manner in which coworkers are addressed.[38]

The Note further states that Parker should maintain a professional image, assist coworkers in meeting department objectives, and provide positive assistance to coworkers. At trial, Parker testified that Bright told her the warning was "long past due."[39] Parker further testified that Bright was critical of her for not helping other staff and not addressing coworkers professionally. [40] Bright testified that he spoke with Plaintiff about her negativity and her failure

---

[37] PR. Def. Tr. Ex. No. 6, Employee Conference Note Dated October 21, 2013.

[38] *Id.*

[39] PR Tr. Vol. 1 at 106.

[40] *Id.* at 106, 153– 155; 158-160.

to cooperate with others.[41] Parker testified that after receiving the Note on October 21, 2013, she was scared for her job, that she knew Bright was not happy with her performance, that she was on thin ice, and that she thought she might be fired.[42]

Parker contends that Bright's reasons for the discipline she received on October 21 were dishonest, pretextual, and evidence of dishonest design by Bright. [43] But whether Parker's assessment of the discipline was correct or not, it is of no consequence as it relates to Parker's alleged employment agreement. Parker's alleged contract with the Beta Club did not come into being until October 25, 2013, when she met with the Internal Affairs Committee of the Board. How could Bright's actions and words on October 21 possibly reflect a fraudulent intent to breach a contract that had not yet come into existence? Even if Bright was only looking for an excuse to terminate Parker and he used the October 21 warning to falsely critique Plaintiff's performance as a pretext to accomplish that goal, that evidence is in no way related to Parker's subsequent alleged employment contract. Simply put, Bright could not, factually or legally, have formed the specific intent to fraudulently breach an alleged contract that would not come into being until four (4) days later. Whatever the jury may have concluded about Bright's October 21 discipline, or his motives, one thing is clear: his alleged fraudulent intent could not be related to the breach of an alleged contract that had not yet come into existence.

---

[41] PR Tr. Vol. 3, pp. 439- 446.

[42] PR Tr. Vol. 1, pp. 115-117, 160.

[43] Parker's Brief in Opposition to Post-Trial Motions, 9-12.

2. Bright's critique of Parker's responsiveness to e-mails also fails to establish personal knowledge or dishonest intent relating to Parker's alleged employment contract.

Parker's attempt to use Bright's criticisms pertaining to her responsiveness to e-mails similarly fails to establish a fraudulent intent related to the alleged contract. The e-mail memorandum Bright sent to Melody Cooper on October 22, 2013, critiquing Cooper's Departments'(which at the time included Plaintiff) responsiveness to e-mails suffers from the same deficiency as the evidence and testimony related to Bright's October 21 warning. Bright sent the memorandum to Cooper on October 22, three (3) days before Parker's alleged employment contract came into existence.[44] Again, even if Bright's sole aim in raising the issue of unanswered e-mails was to manufacture false reasons for the purpose of terminating Parker's employment and his criticisms were fabricated and untrue, such evidence cannot show a fraudulent intent related to Parker's alleged contract as it did not yet exist.

3. There is no evidence that Bright knew of the existence of Parker's alleged employment contract when he terminated her employment on November 4, 2013.

In order for Bright to have formed the requisite fraudulent intent relating to the breach of Parker's alleged contract, he would have to have some personal knowledge of the alleged agreement. But there is absolutely no evidence in the record to support the conclusion that Bright had any personal knowledge of Parker's alleged single-term employment contract on November 4, 2013. Parker never testified to having told Bright what Dinkins told her in the October 25th meeting, and she did not testify that Bright told her he knew about the alleged agreement. In fact, Parker testified that she did not know of any board member in attendance at the October

[44] PR Tr. Vol. 2 pp. 208- 214; PR Tr. Vol. 3 at 449; PR Def. Tr. Ex. No. 8, Bob Bright's E-mail to Melody Cooper dated October 22, 2013.

25th Internal Affairs Committee meeting informing Bright of what was discussed at the meeting.[45] Similarly, Ken Dinkins testified that he never told Bright about his alleged "promise" that Bright could not fire Parker for talking with the Internal Affairs Committee.[46] Dinkins also testified that he did not know of any other board member who spoke to Bright about the alleged promise made to Parker during the October 25 meeting.[47] Bright himself testified that he knew nothing about the alleged promise Dinkins made to Parker when he terminated Parker's employment.[48] In short, the record is devoid of any evidence that anyone said anything to Bright to put him on notice of the alleged promise made to Parker during the October 25 meeting with the Internal Affairs Committee (*i.e.*, the alleged contract which forms the basis of Parker's claim).

The only evidence in the record relating to Bright's knowledge of what was discussed during the October 25th meeting with the Internal Affairs Committee stops far short of establishing Bright's personal knowledge of Parker's alleged employment contract. Dinkins testified that he told Bright that he heard that some employees were afraid for their jobs and that Bright should consider providing employees with due process prior to discharge.[49] Dinkins testified that he made those comments to Bright following the October 25th meeting without referencing any names of employees or specifics from the meeting.[50] Parker testified that Bright

---

[45] PR Tr. Vol. 1, pp. 161-162.

[46] PR. Tr. Vol. 3, pp. 566-567.

[47] *Id.*

[48] *Id.* at 455-456.

[49] *Id* at 567.

[50] *Id.*

told her that he heard that she had been "negative in the board meeting," and insinuated that her discharge was in part related to what she said during the October 25 meeting.[51] Importantly, however, none of this testimony does anything to establish Bright's personal knowledge of the alleged contract. Even if the actions taken by Bright to discharge Parker were in retaliation for her comments to the Internal Affairs Committee, there is no evidence that Bright knew of Parker's alleged employment contract. As noted previously, Bright could not have formed fraudulent intent relating to the breach of an alleged contract about which he had no personal knowledge.[52] There is nothing in the record to support a conclusion that Bright had a fraudulent intent relating to Parker's alleged employment contract which is based on Dinkins' comment during the October 25th Internal Affairs Committee meeting. In the absence of such evidence, the jury's award of punitive damages cannot be sustained. Parker has failed to put forth the clear and convincing evidence required to warrant an award of such exemplary damages.[53]

B. Parker's award for punitive damages should be set aside because Parker failed to present evidence of a separate and distinct fraudulent act accompanying the breach of her alleged employment contract.

Despite clear guidance to the contrary, the trial court was persuaded by Parker's erroneous interpretation of Supreme Court precedent concerning the elements required to make out a claim for breach of contract accompanied by fraudulent intent. Parker argues that because the reasons given for her discharge were false, her discharge amounts to both a breach of contract and a separate and distinct fraudulent act. Parker contends that the same act(s)

---

[51] PR Tr. Vol. 1, p. 120.

[52] *Thompson*, 271 S.C. at 55.

[53] *Keane*, 372 S.C. at 148.

constituting the breach may also form the basis of the independent fraudulent act. But the "double-dipping" argument advanced by Parker is neither based in the law nor practicality.

1. The Court should not be persuaded by Parker's misguided attempt to recast the Supreme Court's decision in *Conner v. City of Forrest Acres*.

At trial, and again in her post-trial brief, Parker advances the notion that merely being terminated for false reasons is sufficient to give rise to a cause of action of breach of contract accompanied by fraudulent intent under *Conner v. City of Forrest Acres.*[54] But not only is Parker's reliance on *Conner* misguided, it ignores well-settled law in South Carolina which provides that there must be an independent fraudulent act accompanying the breach. This proposition has been reiterated time and time again by the Supreme Court of this State:

- "[i]n order to recover punitive damages for breach of contract, the plaintiff must show the breach was accomplished with a fraudulent intention and was accompanied by a fraudulent act."[55]
- "[punitive] damages are recoverable only where, in addition to or independently of the fraudulent intent that brought about the breach there was some fraudulent act on the part of the defendant *accompanying the breach.* Even in in the wilful [sic] and fraudulent breach of a contract only actual damages may be recovered, unless the fraudulent breach is accompanied by a fraudulent act."[56]

---

[54] *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002); PR. Tr. Vol. 2, pp. 278-280; Parker's Brief in Opposition to Post-Trial Motions, 9-12.

[55] *Smith v. Canal Ins. Co.,* 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980)(quoting *Thompson v. Home Security Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978)).

[56] *Hardee v. Penn Mut. Life Ins. Co. of Philadelphia*, 215 S.C. 1, 11, 53 S.E.2d 861, 865 (1949)(emphasis included)(internal quotations omitted).

- "Breach of contract, however fraudulent the intent impelling or accompanying it, does not of itself give rise to a cause of action for punitive damages.... this court has adhered to the rule that breach of contract committed with fraudulent intent *and* accompanied by a fraudulent act will entail liability for punitive as well as actual damages"[57]
- "punitive damages are never recoverable in an action for the breach of a contract unless the breach 'is accompanied by a fraudulent act' as distinguished from a 'fraudulent intent.'"[58]

The Court's reasoning in *D.R. Horton, Inc. v. Wescott Land Co., LLC*, is particularly instructive.[59] That case involved a dispute between a purchaser and a real estate developer over a conveyance of real property. On appeal, the real estate developer sought to overturn a lower court's grant of summary judgment on, among other things, its claim for breach of contract accompanied by fraud. The developer argued that the purchaser breached the conveyance agreement by stringing along the transaction and refusing to abide by the agreement for pretextual reasons.[60] This Court found that while the purchaser's "shifting reasons" for refusing to abide by the contract might be evidence of the purchaser's fraudulent intent with regard to the

---

[57] *Blackmon v. United Ins. Co.*, 233 S.C. 424, 428, 105 S.E.2d 521, 523 (1958).

[58] *Holland v. Spartanburg Herald-Journal Co.*, 166 S.C. 454, 165 S.E. 203, 206 (1932)(internal quotations omitted).

[59] *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012) *aff'd in part as modified, vacated in part*, 410 S.C. 319, 764 S.E.2d 701 (2014).

[60] *Id.* at 549-550, 556.

agreement, the pretextual reasons were not evidence of a separate independent fraudulent act.[61] Specifically, the Court held that the same pretextual reasons constituting the alleged breach of contract cannot also form the basis for the allegedly fraudulent act.[62] A plaintiff cannot rely on the same pretextual reasons to prove both the elements of her breach of contract and the fraudulent act accompanying the breach.

Parker's attempt to un-do six decades of precedent on this issue unravels once the South Carolina Supreme Court's decision in *Conner* is analyzed in its proper context. In *Conner*, the plaintiff, a police dispatcher, was terminated by the City for numerous performance deficiencies including tardiness and violating the dress code. After her termination, the dispatcher filed a grievance, and at a hearing before the grievance committee, evidence was presented concerning the reprimands forming the basis for the discharge. The grievance committee voted 2-1 to reinstate the dispatcher. Subsequently, however, the City Council rejected the grievance committee's decision and voted to reinstate the dispatcher's termination. After the dispatcher's complaint was removed to federal court, and subsequently remanded back to state court, only three causes of action remained: breach of contract (based on the dispatcher's employment handbook), breach of contract accompanied by fraudulent act, and bad faith discharge.[63]

After the trial court granted the defendants summary judgment on the dispatcher's claims, the appellate court reversed, finding jury issues remained on each cause of action. On review, the Supreme Court found that a genuine issue of material fact remained as to whether the City fraudulently breached the dispatcher's employment contract. In particular, the Supreme Court

---

[61] *Id.* at 556.

[62] *Id.*

[63] *Conner*, 348 S.C. at 457.

found that the City, in overturning the grievance committee's decision, fabricated pretextual reasons for [the dispatcher's] termination knowing the reasons were false and did not justify termination for cause."[64] The crux of the Supreme Court's finding was that there was a genuine dispute of material fact as to whether the City Council's actions in fabricating reasons for overturning the grievance committee's decision, after the grievance committee had found no cause for the discharge, constituted an independent fraudulent act accompanying the breach. The Supreme Court did not find that terminating the dispatcher without cause amounted to a fraudulent act. Nor did it overrule it decisions in *Hardee* and *Smith* to hold that the accompanying fraudulent act and the breach can be one in the same. Indeed, the Supreme Court merely noted (in dicta) that pretextual actions may constitute an accompanying fraudulent act, and that based on the facts in the record before it, there was evidence to suggest that the City Council's subsequent actions to overturn the grievance committee's decision (which came long after the initial termination decision) was such an act.[65] The Supreme Court, correctly, considered the City Council's actions as separate and district from the actual breach (her termination).

The rationale behind the Supreme Court's findings in *Conner* is distinguishable from the argument advanced by Parker. There is absolutely nothing in *Conner* which disrupts the well-settled rule that a plaintiff must establish a separate and distinct fraudulent act accompanying the breach in order to recover punitive damages on a contract claim. In *Conner*, the act constituting the alleged breach (the dispatcher's termination) was separate and distinct from the fraudulent acts which allegedly accompanied it (the City's actions in overturning the grievance committee).

---

[64] *Id.* at 466.

[65] *Id.*

It is clear that the Supreme Court's decision in *Conner* does not mean what Parker wishes it to mean. Even under *Conner*, a plaintiff must still present evidence of a separate and distinct fraudulent act in order to succeed on a claim for breach of contract accompanied by fraudulent act.

2. Not only is Parker's understanding of *Conner* erroneous, but it threatens to erode the very nature of actions arising out of employment contracts.

The error of Parker's view of *Conner* is further revealed once one considers the practicality of her interpretation. It is unlikely employment contracts were contemplated when the cause of action for breach of contract accompanied by fraudulent act was created. Nevertheless, the action may be applied to employment contracts without issue because of the requirement that there be a separate fraudulent act accompanying the breach. Consider the following facts: an employer hires a stranger off of the street to make false complaints about an employee so that the employer can seize upon and use the fabricated complaints to terminate the employee in violation of an employment contract. In the preceding facts, each and every element necessary to successfully make out a claim for breach of contract accompanied by fraudulent act is present. A breach of contract is committed when the employee is terminated, and the employer's action to hire the stranger to fabricate complaints establishes a fraudulent intent related to the contract as well as an independent fraudulent act separate and distinct from the breach. It all works as it should if a separate fraudulent act is required to accompany the breach of contract.

But things begin to get murkey under Parker's view of *Conner*. If Parker's understanding were accurate, then every contract claim alleging breach of an employment contract may be transformed into a tort claim. Employees would be permitted to recover punitive damages any time a jury rejects an employer's stated reason for termination. The argument would be that

since the jury rejected the employer's proffered reason for termination, the reason must have been pretextual, *i.e.* not the real reason for the discharge. Contract claims arising out of employee handbooks, personnel policies, and "just cause" provisions would become actions based in tort overnight. There would be little separating the level of damages available in actions for breach of contract and actions arising in tort. In fact, the Supreme Court has addressed this very issue:

> The distinction between the right to recover punitive damages in actions for breach of contract and actions in tort has been drawn in numerous cases. It is uniformly emphasized that mere wilful [sic] violation of a contract does not entail upon the defaulting obligor liability for punitive damages...and that breach of contract, however fraudulent the intent impelling or accompanying it, does not of itself give rise to a cause of action for punitive damages... but that, in order to recover punitive damages for breach of contract, the breach must have been accomplished with fraudulent intent and accompanied by a fraudulent act.[66]

Simply put, Parker's radical view of *Conner* would crater nearly every well-settled notion distinguishing contract and tort damages in employment contract cases. The idea that such a result was contemplated and intended by the Supreme Court when it noted that the actions taken by the City Council in *Conner* may be enough to constitute a fraudulent act, stretches the bounds of credulity. Courts applying South Carolina law, before and after the Supreme Court's decision in *Conner*, have consistently held that there must be a separate and distinct fraudulent act associated with the breach. Parker's misguided interpretation of the law erroneously turns the State's well-established precedent on its head.

Accordingly, the Court should not be persuaded by Parker's novel approach to muddy the waters between contract and tort law.

---

[66] *Dunsil v. E. M. Jones Chevrolet Co.*, 268 S.C. 291, 298, 233 S.E.2d 101, 104 (1977) (emphasis added)(internal quotations omitted).

CONCLUSION

The outcome of this appeal rests squarely on the authority and principles of law underlying Parker's entitlement to recover punitive damages for breach of contract accompanied by fraudulent act. The law in South Carolina is clear: a plaintiff can only recover punitive damages for breach contract when both a fraudulent intent and a separate independent fraudulent act are established. Two truths flow from this precedent: (1) one cannot form "fraudulent intent" to breach a contract that does not yet exist nor can the requisite fraudulent intent be formed by one who has no knowledge of the alleged contract; and (2) the acts constituting the breach cannot also serve as the basis of the "accompanying fraudulent act." Furthermore, there must be a separate and distinct fraudulent act accompanying the breach to justify an award for punitive damages. Based on the record in this case and these truisms, the inevitable conclusion is that there was no legal basis for the award of punitive damages in this case. Parker failed to put forth the clear and convincing evidence necessary to justify her entitlement to such damages. Therefore, the Beta Club respectfully asks this Court to set aside the award of punitive damages handed down by the jury.

July 14, 2016

Thomas A. Bright (S.C. Bar #884)
David L. Harris, Jr. (S.C. Bar # 101748)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)
Thomas.Bright@odnss.com
David.Harris@odnss.com

Attorneys for Appellant

Other Counsel of Record:
Brian P. Murphy, Esq.
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Keith R. Kelly, Circuit Court Judge

Case No. 2014-CP-42-1759
Appellate Case No. 2016-000232

Denise Parker, Respondent,

v.

The National Honorary Beta Club, Appellant.

PROOF OF SERVICE

I hereby certify that on this 14th day of July, 2016, I served a copy of the forgoing ***Initial Brief of Appellant*** in the above-styled cause upon the following, by depositing same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

Brian P. Murphy, Esq.
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, SC 29601

Thomas A. Bright

Thomas A. Bright

25275658.1

Ogletree Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys at Law
The Ogletree Building
300 North Main Street, Suite 500 (29601)
Post Office Box 2757
Greenville, SC 29602
Telephone: 864.271.1300
Facsimile: 864.235.4754
www.ogletreedeakins.com

Thomas A. Bright
864.240.8352
thomas.bright@ogletreedeakins.com

July 14, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court for Court Of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Parker v. The National Honorary Beta Club***
Civil Action No. 2014-CP-42-01759
Appellate Case No. 2016-000232

Dear Ms. Kitchings:

Enclosed for service please find an original and one copy of the following documents in the above-referenced matter:

1. Initial Brief of Appellant;
2. Appellant's Designation of Matter to be Included in Record on Appeal; and
3. Proofs of Service.

Please file the original and return a clocked copy to our office in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter.

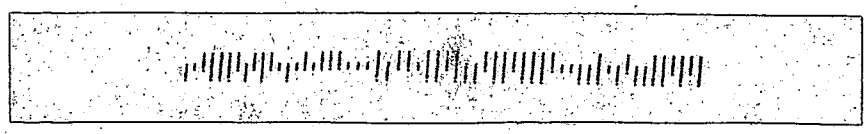
Sincerely,

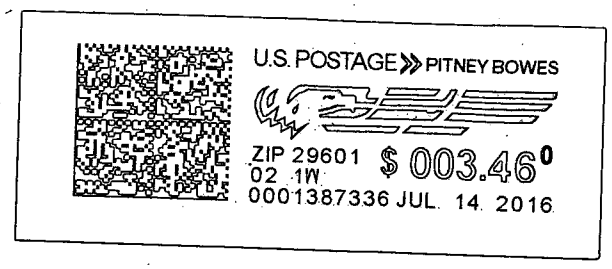
Thomas A. Bright

Thomas A. Bright

TAB/mab
Enclosures
cc: Brian P. Murphy, Esq.

25421110.1





Ogletree Deakins

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

The Ogletree Building
Suite 500
300 North Main Street (29601)
P.O. Box 2757
Greenville, SC 29602

The Honorable Jenny Abbott Kitchings
Clerk of Court for Court Of Appeals
1220 Senate Street
Columbia, SC 29201