IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2016-001811

James C. Owens, ... Appellant,

-v-

Bryan Crabtree, Kirkman Broadcasting, Inc. d/b/a
WQSC Radio, ADC Engineering, Inc., Tyler Flesch,
and Red Drum Capital Group, LLC, ...Defendants,

of whom ADC Engineering, Inc., is ..... Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This appeal arises from the wrongful termination of James "Jim" Owens ("Owens") by ADC Engineering, Incorporated ("ADC") in violation of S.C. CODE ANN. § 16-17-560, which makes it unlawful to discharge a person because of the exercise of privileges guaranteed by the United States Constitution and South Carolina Constitution. Owens filed a Complaint against ADC, and other defendants, on October 10, 2014, in the Charleston County Court of Common Pleas. (R. pp. 271-279). Owens alleges that until September 23, 2014, he was employed by ADC for over ten (10) years and had always been praised by his supervisors. (R. pp. 274-275, ¶ 5). Around mid-December 2013, Owens learned of a proposed high rise parking garage and office building ("Building", "Project", or "Shem Creek Project") that was to be built near Shem Creek in Mount Pleasant. (R. p. 275, ¶ 6). Owens, along with numerous other citizens, became concerned that the Building was out of character where it was proposed to be built as well as contrary to Mount Pleasant's guidance documents that protect and preserve the area around Shem Creek. (R. p. 275, ¶ 6).

Owens, along with the other concerned citizens, formed a Facebook group called "Saving Shem Creek" to oppose the Building at the proposed location and persuade Mount Pleasant to support a building more compatible with the surrounding area. (R. p. 275, ¶ 7). As Owens became involved in opposing the Building, he met with his supervisor at ADC Engineering in early-June 2014 to talk about his opposition to the Project. (R. pp. 275-276, ¶ 9). His supervisor told him that it was permissible for him to be involved as long as he made it clear that his opposition was his personal opposition and he did not reference ADC. (R. pp. 275-276, ¶ 9). Owens followed ADC's instructions and only voiced his personal opinion. (R. pp. 275-276, ¶ 9).

Exercising his right to free speech guaranteed by the First Amendment of United States Constitution and Article 1, § 2 of the South Carolina Constitution, Owens attended Mount Pleasant Town Council meetings, met with the Mayor, the Developer, Town Council Members and other administration officials in voicing his opposition to the Project. (R. p. 275, ¶ 8). Unbeknownst to Owens, on September 27, 2013, Stubbs Muldrow Herin Architects, Inc. ("Stubbs Muldrow) entered into an agreement with ADC for structural services related to Building. (R. pp. 277-278, ¶ 20).

On September 16, 2014, Stubbs Muldrow wrote ADC and advised it was terminating the agreement with ADC. (R. pp. 277-278, ¶ 20). After receiving the letter from Stubbs Muldrow, ADC terminated Owens on September 23, 2014, for his opposition to the Project, despite express approval from ADC, in violation of S.C. CODE ANN. § 16-17-560. (R. p. 278, ¶ 21).

ADC served its Answer on November 14, 2014. The answer generally denied the allegations asserted in Owens' Complaint. (R. pp. 280-287). In addition to responding to Owens' Complaint, ADC also filed a counterclaim against Owens alleging that he violated a duty of loyalty to ADC. (R. pp. 280-287). Despite ADC being aware of Owens opposition to the Project, ADC sought actual damages and punitive damages against Owens for his "willful, wanton and reckless actions." (R. p. 293, ¶ 33).

On February 16, 2016, ADC moved for summary judgment on the basis that conduct alleged in the Amended Complaint does not give rise to a wrongful termination claim. (R. pp. 25-29). The lower court heard ADC's motion for summary judgment on May 16, 2016. (R. pp. 295-355). In an order filed June 22, 2016, the lower court granted ADC's motion for summary judgment. (R. pp. 6-14).

Owens filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP, on June 30, 2016. (R. pp. 16-19). The lower court held that Owens does not have a private cause of action against ADC under S.C. Code Ann. § 16-17-560. However, South Carolina precedent mandates that the prohibition of retaliatory discharge in violation of clear mandate of public policy extends to legislatively defined "Crimes Against Public Policy" of which § 16-17-560 is one. (R. pp. 20-21). Owens also took exception to the Order characterizing his activity as a "personal endeavor" when the evidence supported an inference that he was terminated for potentially costing ADC substantial revenue despite their blessing of his opposition to the Project, and his engagement in the executive, legislative, and administrative process. (R. pp. 21-22). In a Form 4 Order filed August 8, 2016, the lower court denied Owen's motion to reconsider. (R. p. 15). Owens timely filed his Notice of Appeal on September 1, 2016. (R. pp. 1222-1235).

FACTS

Given that this appeal is before the Court on a motion for summary judgment, the facts below are to be viewed in a light most favorable to Owens as the non-moving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

I. OWENS EMPLOYMENT WITH ADC

Owens grew up in Mount Pleasant and started working for ADC as a construction administrator in mid-September 2004. (R. p. 866, lines, 7-8; p. 871, lines 5-12). His job responsibilities included working with engineers, reviewing designs and submissions for construction, and ensuring that projects were installed in accordance with the plans and specifications. (R. p. 871, lines 16-23). Owens split his time between working in the office and working in the field, and had flexibility regarding what he did during the workday. (R. p. 873, lines 8-18; p. 874, lines 17-22).

ADC has four divisions of engineering consulting – building envelope, structural, civil, and landscape.[1] (R. p. 874, line 23 – p. 875, line 12). ADC partners, Greg Jones and Chris Cook, were in charge of civil engineering, where Owens primarily worked. (R. p. 876, lines 17-22). Owens was one of three construction administrators with ADC and was not involved in who hired ADC to work on a project. (R. p. 402, line 24 – p. 403, line 3; p. 878, lines 15-19). In 2014, ADC had approximately sixty (60) employees. (R. p. 526, lines 14-16). ADC provided Owens a Motorola mobile phone that he used while employed by ADC. (R. p. 861, lines 8-22).

II. TYLER FLESCH'S DEVELOPMENT OF THE SHEM CREEK PROJECT

Tyler Flesch is in the real estate investment business. (R. p. 622, lines 5-14). In 2011, Flesch had conversations with Mount Pleasant officials about construction of the Project. (R. p. 628, lines 4-13). Initially, Mount Pleasant was going to build the garage and Flesch was going to be the landlord for the ground floor. (R. p. 628, lines 4-13). However, Mount Pleasant later decided it did not want to spend the money to construct the Project. (R. p. 628, lines 4-13). Following Mount Pleasant's decision, Flesch decided to work on plans to develop the Project with an office building. (R. p. 628, lines 2-5).

Flesch became aware of height restrictions in that area when they started to draw the building. (R. p. 631, lines 3-6). The law capped building height at forty-five (45) feet which resulted in Flesch needing a variance from Mount Pleasant to construct the Building as designed. (R. p. 631, lines 7-12). The request for a variance brought public opposition to the Project and Flesch later learned Owens was leading the opposition group, Saving Shem Creek. (R. p. 631, lines 13-25).

[1] ADC partner, Rick Cook, was in charge of the building envelope division, (R. p. 875, lines 17-22), while ADC partner, Mark Dillon, was in charge of structural engineering. (R. p. 876, lines 2-9). Warren Pruitt was in charge of landscape architecture. (R. p. 876, line 23 – p. 877, line 1).

III. FLESCH'S EFFORTS TO EXERT FINANCIAL PRESSURE ON ADC

Owens set up a Facebook page named Saving Shem Creek in March or April 2014.[2] (R. p. 839, lines 3-7). The purpose of the Facebook page was to disseminate information about the Shem Creek Project. (R. p. 839, lines 15-22). In early June 2014 Owens informed his supervisor and ADC partner, Cook, about his opposition to the Shem Creek Project. (R. p. 903, lines 4-13; p. 393, line 10 – p. 394, line 25). Owens felt it was his duty to inform ADC as he did not want ADC seeing his name in the paper without him informing ADC of what he was doing as a private citizen. (R. p. 903, line 20 – p. 904, line 8). Cook gave Owens permission to oppose the Project as long as he did not mention ADC and it was his personal opinion. (R. p. 394, lines 22-25). At the time of this June 2014 meeting, Cook knew of ADC's involvement with the Project, (R. p. 395, lines 1-8) but did not tell Owens.[3] (R. p. 907, line 25 – p. 908, line 3; p. 982, line 21 – p. 983, line 6).

As the opposition to the Project grew, Flesch contacted morning radio host, Bryan Crabtree, after seeing a pod cast Crabtree put out about the Project. (R. p. 633, lines 7-19). Flesch felt the public opposition to the Project was directed against his livelihood. (R. p. 639, lines 14-15). Crabtree supported the Project on his show, The Bryan Crabtree Show, and Flesch thanked him for his support. (R. p. 642, lines 2-9). In an August 12, 2014 email, Flesch emailed Crabtree about that night's Mount Pleasant Town Council meeting. (R. p. 714). Flesch said to "look for a Jim Owens soliloquy of over 20 minutes by folks yielding their time. Guy doesn't know when to quit lying." (R. p. 714).

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[2] Saving Shem Creek's Facebook page currently has over 5,000 members.

[3] Cook testified he does not remember specifically talking with Owens about ADC's involvement in the Project. (R. p. 395, lines 1-8).

On the night of September 15, 2016, Flesch began searching Google and Facebook to learn more about Owens. (R. p. 653, lines 16-25). Flesch discovered Owens' Linkedin page that listed ADC Engineering as Owens' employer. (R. p. 653, line 16 – p. 654, line 9). After confirming ADC employed Owens on September 15, Flesch sought to terminate ADC or have Stubbs Muldrow, the Project's architect, terminate ADC the next day, September 16th. (R. p. 653, line 16 – p. 654, line 9). In a September 18, 2014 email to Crabtree, Flesch provided Owens' Linkedin page and noted that Owens was a "serous [sic] fraud". (R. p. 725). However, Flesch testified he did not direct Crabtree to do anything with the information. (R. p. 670, lines 8-10). In a September 22, 2014 email, Flesch wrote to Crabtree that "[t]his guy [Owens] is out of control and the fact he makes a living off of us commercial developers is so hyporcritical [sic] . . . . . call this guy out, HARD." (R. pp. 723-724). Crabtree subsequently published on his and Kirkman Broadcasting's website, an image of Owens next to Pinocchio and an individual that is two-faced. (R. p. 1198; pp. 514-515).

IV. OWENS TERMINATION

Following Flesch's directive, Stubbs Muldrow summoned ADC Partner, Mark Dillon, to a meeting on September 16, 2014. (R. p. 527, lines 11-13). Flesch was present during that meeting. At the meeting Flesch informed Dillon of Owens' opposition to the Project, how unhappy he was that Owens was an ADC employee, and that ADC "would be fired from the job unless [ADC] fired Jim." (R. p. 531, line 23 – p. 532, line 3). In the hour long meeting, Flesch expressed extreme displeasure about Owens' opposition and was "very upset, very angry about it." (R. p. 535, lines 14-24). If Flesch had it his way, Dillon would have called Owens on the phone right then and terminated Owens' employment, and, after pressing the issue quite hard, could not understand why Dillon could not terminate Owens immediately. (R. p. 535, line 24 – p.

536, line 3). Flesch mentioned to Dillon that Owens sent emails and made Facebook posts during working hours. (R. pp. 541-542; p. 604). Flesch also threatened to sue ADC. (R. p. 542, line 24 – p. 543, line 5; p. 604).

Contrarily, Flesch testified that he never asked Dillon or anyone else to fire or terminate Owens during the September 16th meeting. (R. p. 657, lines 8-20). Additionally, Flesch stated he "never decided to take action against Mr. Owens." (R. p. 632, line 23 – p. 633, line 5). Flesch believes Owens could have known about ADC's involvement in the Project by contacting his bosses. (R. p. 668, lines 9-12). After the September 16, 2014 meeting, Flesch wrote to Dillon by email and included portions of Facebook posts and emails from Owens about his opposition to the Project. (R. p. 609). Flesch ended his email to Dillon by noting "I look forward to speaking to you about how this can be resolved amicably." (R. p. 609).

The next day, on September 17, 2015, Dillon called Charles Muldrow of Stubbs Muldrow to inform him that ADC was not terminating Owens. (R. p. 547, line 20 – p. 548, line 5). Stubbs Muldrow was one of ADC's top two clients as they have worked together since 1990. (R. p. 533, line 16 – p. 534, line 9). Dillon believed ADC was Stubbs Muldrow's first choice for engineering on their projects. (R. p. 548, lines 9-10). Muldrow was disappointed in ADC's decision. (R. p. 548, lines 2-16).

On September 18, 2016, ADC received an evidence preservation letter from Stubbs Muldrow. (R. p. 811, lines 12-16; p. 605). Although ADC had decided not to take action with regard to Owens, that changed after it received the evidence preservation letter. (R. p. 405, lines 17-20). After receiving the letter, Cook and Jones met with Owens later that day at 4:15 p.m. (R. p. 811, lines 17-20; pp. 607-608). Cook noted that during the meeting Owens referenced the previous conversation with Cook regarding his involvement in opposing the Project. (R. pp. 607-

608). Owens remembered that Cook asked him to keep ADC out of it but stated that Owens had a right to oppose the Project a private citizen. (R. p. 394, lines 18-25; pp. 607-608). Owens' goal was to keep ADC out of everything. (R. pp. 607-608).

Michael Graham served as the IT Specialist for ADC Engineering for over seven (7) years. (R. p. 730, lines 3-9). Graham seized information from Owens' computer following ADC's receipt of the September 16, 2016 Stubbs Muldrow evidence preservation letter. (R. p. 731, line 1 – p. 732, line 8). ADC management testified that Owens sent approximately twenty personal emails sent from his ADC computer. (R. p. 1162, lines 16-17; p. 419, lines 11-17). However, there were only fourteen (14) emails Owens sent from May 16, 2014 through September 10, 2014 that Graham located. (R. p. 732, line 24 – p. 733, line 2; pp. 741-798). The fourteen (14) emails were all sent to Owens personal email account – jcowenssr@comcast.net – and eleven (11) to twelve (12) contained little to no text. (R. pp. 741-798; p. 833, lines 10-11). Despite the intense business pressure from Flesch and Stubbs Muldrow, and Flesch's suggestion to ADC that Owens sent emails during working hours, ADC asserts it terminated Owens solely for violating ADC's Technology Policy. ADC's Technology Policy specifically ***allowed*** personal emails as long as it was not "excessive." (R. p. 1163, lines 15-20; p. 1083). Steve Truschka, ADC's business and human resources manager, acknowledged sending personal emails but does not believe he sent twenty (20) over several months. (R. p. 1162, line 21 – p. 1163, line 11). No one with ADC defined "excessive" and Truschka admitted "it's hard to define excessive." (R. p. 1163, lines 21-22; p. 1170, lines 2-7). Unfortunately, Owens was not advised as to what constitutes excessive use of ADC equipment that was expressly permitted in ADC's Technology Policy. (R. p. 1164, lines 5-10).

Cook likewise could not define the "significant" amount of time Owens allegedly used ADC resources that warranted Owens termination. (R. p. 418, lines 1-23). Like Truschka, Cook acknowledged frequently using ADC equipment for personal endeavors. (R. p. 419, lines 21-25).

In Graham's seven years as the IT Specialist, ADC has never had another instance where employee use of a computer was checked for personal use. (R. p. 734, lines 19-25). ADC did not check anyone else's computer when checking Owens' computer of whether they had used ADC equipment for personal use or how the other employees' usage compared to Owens' personal use. (R. p. 1163, lines 12-14; p. 420, lines 4-21; p. 421, lines 19-23). ADC's personal email at work policy is recommended only during lunch hours, but "it is not a very strict policy." (R. p. 735, lines 20-25). Out of approximately sixty (60) employees, Graham is not aware of another ADC employee disciplined or reprimanded for personal computer use. (R. p. 736, lines 1-9).

Owens had already told ADC of his use of company equipment, which is expressly allowed under the ADC Technology Policy, when it received the emails from Graham after his search of Owens' email account. (R. p. 433, lines 6-8; p. 940, lines 3-8).

V. OWENS EXEMPLARY TEN YEAR EMPLOYMENT WITH ADC

Owens first learned of ADC's involvement with the Project from a Bryan Crabtree Facebook post. (R. p. 908, lines 8-17). Had Owens known or been told ADC was the structural engineer, he would have removed himself from opposing the Project as he deemed it a "conflict of interest" and would not have "knowingly subjected [ADC] to harm." (R. p. 908, line 18 – p. 909, line 10).

ADC partner, Greg Jones described Owens as a good employee that carried out his duties with ADC appropriately. (R. p. 806, lines 8-14). He was never given any negative reviews or write-ups. (R. p. 806, lines 15-17). Steve Truschka is ADC's Business Manager which makes

him in charge of human relations. (R. p. 1145, line 21 – p. 1146, line 5). Truschka did not know anything negative about Owens until Flesch and Stubbs Muldrow threatened to terminate any relationship with ADC. (R. p. 1147, lines 6-25). In fact, everything Truschka knew about Owens was positive, and he had received no complaints about Owens. (R. p. 1147, lines 12-13; p. 1179, lines 3-5).

Although labeled as Pinocchio and two-faced by Crabtree, Owens' ADC superiors would not label him as such. (R. p. 527, lines 3-8; p. 578, lines 23-24). Truschka did not find the Pinocchio image to be a fair representation of Owens as he never knew Owens to be a liar. (R. p. 1167, lines 14-25). Up until the threats from Flesch, Cook could not think of anything negative about Owens. (R. p. 392, lines 17-24). Following his termination, Owens applied for many jobs[4] without success. (R. p. 946, line 14 – p. 961, line 20). When Owens deposition was taken on May 20, 2015, Owens had not received a paycheck since his termination from ADC in September 2014. (. p. 961, line 21 – p. 962, line 3).

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490,

[4] Owens unsuccessfully applied for a job with Weston & Sampson, Lowcountry Land Development Consultants, Water Missions International, MeadWestvaco, Choate Construction, Medical University of South Carolina, Charleston County, Jacobs Engineering, Summerville CPW, Charleston Water Systems, Premier Integrated Consultants, Dorchester County Public Works, Armchem International Corp., Power Home Technologies, US Health Group, Jones Ford, and Jackson Built Custom Homes. (R. p. 946, line 14 – p. 961, line 20)

493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

ARGUMENT

The evidence set forth above, viewed in a light most favorable to Owens, supports an inference that ADC terminated Owens for exercising his right to free speech which is guaranteed by the United States Constitution and South Carolina Constitution in violation of S.C. CODE ANN. § 16-17-560. Section 16-17-560 provides, in part:

> It is unlawful for a person to . . . discharge a citizen from employment or occupation . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States[5] or by the Constitution and laws of this State.[6]

S.C. CODE ANN. § 16-17-560. In granting summary judgment to ADC, the lower court disregarded the established summary judgment standard and viewed the evidence in a light most favorable to ADC – concluding that Owens was terminated for violating ADC's Technology Policy despite extensive evidence of the financial pressure put on ADC by Flesch and Stubbs Muldrow. If the lower court's decision is allowed to stand in its current form, the only time an

[5] The United States Constitution's First Amendment provides freedom of speech: "Congress shall make no law . . . abridging the freedom of speech . . . , or . . . to petition the Government for a redress of grievances." U.S. CONST. AMEND. 1.

[6] The South Carolina Constitution provides that "[t]he General Assembly shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances." S.C. CONST. ART. I, § 2.

employee could maintain a wrongful termination action for violation of § 16-17-560 would be when the employer admits it terminated the employee for exercising his or her constitutional rights. Unfortunately this would never happen as the employer would come up with another reason to terminate an at-will employee which the employee could not challenge or present evidence of another reason for the termination.

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ADC ON THE BASIS THAT S.C. CODE ANN. § 16-17-560 DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION WHEN SOUTH CAROLINA LAW PROVIDES OTHERWISE

The lower court incorrectly granted summary judgment based on the evidence in this case in contravention of established South Carolina law. In its Order, the Court acknowledges that termination of an "at-will employee will give rise to an action for wrongful termination when there is a violation of clear mandate of public policy." (R. p. 11). Despite acknowledging a wrongful termination action can be maintained based on a violation of public policy, the lower court improperly weighed the evidence and held "Owens was an at-will employee who was terminated as a result of his use of ADC's resources during his pursuit of a personal endeavor that harmed the company." (R. p. 10). This was the central issue in the case – whether Owens was terminated based on the financial pressure exerted by Flesch and Stubbs Muldrow or for violating ADC's technology policy that expressly allows personal email use. By granting summary judgment on the fact that Owens was terminated for violating the Technology Policy, the lower court improperly weighed the evidence in contravention of the well-established summary judgment standard.

A. Ludwick Holds a Wrongful Termination Action Can Be Maintained for a Violation of a Clear Mandate of Public Policy

The lower court also incorrectly notes that the statute relied upon by Owens – S.C. CODE ANN. § 16-17-560 – does not create a private cause of action. The South Carolina Supreme Court held that a wrongful termination action for a violation of a clear mandate of public policy could be maintained in Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). Ludwick involved a seamstress that was an at-will employee at a sewing plant in Summerville. Id. at 220, 337 S.E.2d at 213. Ludwick was served a subpoena to appear before the South Carolina Employment Security Commission. Id. at 221, 337 S.E.2d at 213-14. She was advised by her employer that if she obeyed the subpoena she would be fired. Id. at 221, 337 S.E.2d at 214. Ludwick honored the subpoena, testified at the hearing, and was terminated upon returning to her job. Id. Ludwick filed a wrongful termination action and, following the presentation of her evidence at trial, the trial court dismissed her action on the basis that neither statutory nor common law recognized a public policy exception to the employment at-will doctrine. Id. On appeal, the Supreme Court reversed and noted that "[w]here the retaliatory discharge of an at-will employee constitutes a violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." Id. at 225, 337 S.E.2d at 216.

B. Culler Holds a Public Policy Violation Includes the Legislatively Defined "Crimes Against Public Policy", Of Which S.C. CODE ANN. § 16-17-560 is Included

Following Ludwick, the South Carolina Supreme Court expanded a public policy violation to include legislatively defined "Crimes Against Public Policy" in Culler v. Blue Ridge Elec. Coop., 309 S.C. 243, 422 S.E.2d 91 (1992). Culler involved a wrongful termination case brought by Gerald Culler, a Blue Ridge Electric Coop employee, when he was terminated for not contributing to Blue Ridge's PAC. Id. at 244, 422 S.E.2d at 91. Prior to the 1980's, Blue Ridge maintained a pay-roll deduction plan for its employees to donate to the PAC. Id. at 244, 422

S.E.2d at 91-92. The PAC gave money to the campaigns of politicians who supported cooperative utilities. Id. at 244, 422 S.E.2d at 92. Although Blue Ridge was itself prohibited from directly contributing to political campaigns by federal law, Blue Ridge employees testified that it encouraged employees to contribute to the PAC fund. Id. When Culler began working for Blue Ridge, the PAC dues were deducted from his pay check. Id. at 244-45, 422 S.E.2d at 92. Once PAC dues were no longer pay-roll deducted, Culler discontinued his membership. Id. at 245. When Blue Ridge reinstated pay-roll deduction for PAC membership, Culler refused to join. Id. Soon thereafter, Culler was transferred from a line crew to right of way crew, and later terminated. Id.

Culler claimed Blue Ridge terminated him because he refused to join the PAC. Id. The trial court, ***sitting without a jury***, held that Culler did not have an actionable claim under the public policy exception to the at-will employment doctrine. Id. Additionally, the trial court found that the evidence did not support Culler's claim. Id.

On appeal, the Supreme Court analyzed Ludwick and noted that "Chapter 17 of Title 16 defines 'Crimes Against Public Policy.'" Id. at 246, 422 S.E.2d at 92. In holding that a wrongful termination action could be maintained, the Supreme Court held "[w]e believe that Ludwick's prohibition of retaliatory discharge in violation of a clear mandate of public policy of this State extends at least to legislatively defined 'Crimes Against Public Policy."[7] Id. at 246, 422 S.E.2d at 92-93. "Thus, if Culler was discharged because he refused to contribute to a political action fund, he would have a cause of action for wrongful termination under Ludwick and S.C. Code Ann. § 16-17-560." Id. at 246, 422 S.E.2d at 93. While noting that an action could be

[7] Section 16-17-560, upon which Owens relies here, is included in the legislatively defined "Crimes Against Public Policy." Id.

maintained for violating § 16-17-560, the Supreme Court affirmed the trial court's findings (sitting without a jury) because it found the evidence supported Blue Ridge's termination for Culler's "bad attitude."[8] Id. at 247, 422 S.E.2d at 93.

C. ADC's Position Changed Upon Receipt of the Evidence Preservation Letter and Potential Loss of Substantial Revenue

Contrary to the express holding in Culler, the lower court here held that S.C. CODE ANN. § 16-17-560 does not create a private cause of action. Other than merely citing Culler, the lower court's order does not address or analyze the Supreme Court's holding upon which Owens relies. (R. pp. 6-14). Culler makes clear that § 16-17-560 can be relied upon to support a public policy violation for wrongful termination.

The evidence presented here, when viewed in a light most favorable to the Owens as the non-moving party, establishes that ADC terminated Owens for his involvement with the Project. Owens notified ADC of his opposition to the Project in early June 2014. (R. p. 903, lines 4-13; p. 393, line 10 – p. 394, line 25). Cook gave Owens permission to oppose the Project as long as he did not mention ADC and it was his personal opinion.[9] (R. p. 394, lines 22-25). At that time Cook knew of ADC's involvement with the Project but did not inform Owens of ADC's involvement.[10] (R. p. 395, lines 1-8; p. 982, line 21 – p. 983, line 6). Owens continued opposing the Project. On September 16, 2014, Flesch and Stubbs Muldrow summoned Dillon to a meeting

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[8] In addition to Culler, the Court of Appeals in Moshtaghi v. Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994), noted that the South Carolina Constitution, along with the United States Constitution, provide for freedom of speech, of assembly, and the right to petition the government for redress of grievances in an action for wrongful termination in violation of constitutional rights. Id. at 323, 443 S.E.2d at 919.

[9] Despite ADC's express approval of Owens' opposition to the Project in June 2014, ADC filed a counterclaim against Owens seeking both actual and punitive damages for his "willful, wanton and reckless actions." (R. p. 293, ¶ 33).

[10] Owens submits there is no evidence that he knew of ADC's involvement in the project until September 2014.

regarding Owens' opposition to the Project. Flesch demanded that Dillon call Owens on the phone right then and terminate Owens' employment. (R. p. 535, line 24 – p. 536, line 3). Flesch could not understand why Dillon would not terminate Owens immediately. (R. p. 535, line 24 – p. 536, line 3). Flesch also informed Dillon, during this meeting, that Owens sent emails and made Facebook posts during working hours, and ADC ultimately terminated Owens under the pretext of personal use of a work computer. (R. pp. 541-542; p. 604). Flesch also threatened to sue ADC. (R. p. 542, line 24 – p. 543, line 5; p. 604).

Following the September 16th meeting, on September 17, 2015, Dillon called Stubbs Muldrow to inform them that ADC was not terminating Owens. (R. p. 547, line 20 – p. 548, line 5). Stubbs Muldrow was one of ADC's top two clients, and Dillon believed ADC was one of Stubbs Muldrow's first choices for engineering projects. (R. p. 533, line 16 – p. 534, line 9; p. 548, lines 9-10). ADC's decision not to take action with regard to Owens changed after its receipt of the September 18, 2016 evidence preservation letter from Stubbs Muldrow. (R. p. 405, lines 17-20; p. 811, lines 12-16; p. 605).

This evidence supports an inference that ADC terminated Owens, not for violating the Technology Policy, but for potentially costing ADC substantial revenue for exercising his right to free speech (with ADC's prior approval). Stubbs Muldrow is one of ADC's top two clients. (R. p. 533, line 16 – p. 534, line 9). ADC generates revenue of about $8,000,000.00 per year and generates about $3,000,000.00 in revenue from their top architectural firm client, LS3P. (R. p. 1171, lines 9-11; p. 400, lines 2-11). This is a substantial amount of revenue to lose if Stubbs Muldrow terminated its relationship with ADC. This evidence, taken alone, is sufficient to reverse the lower court's granting of ADC's motion for summary judgment.

D. *ADC Already Knew of Owens Emails and Facebook Posts Prior to Advising Stubbs Muldrow It was not Terminating Owens and ADC's Management Engaged in Personal Email Use and Could Not Define "Excessive" Use*

The only argument put forth on this point by ADC is that Owens was not terminated for exercising his constitutional rights but for violating the company's Technology Policy. In Culler, the Supreme Court affirmed trial court's finding, ***sitting without a jury***, that the evidence did not support Culler's claim that he was terminated for exercising his constitutional rights, but instead his "bad attitude." Culler, 309 S.C. at 246-47, 422 S.E.2d at 93. This matter was before the lower court on ADC's motion for summary judgment which requires the evidence to be viewed in a light most favorable to Owens as the non-moving party. If Owens is forced to accept ADC's reason for his termination and could not present evidence to the contrary – extensive evidence to the contrary exists here – an individual could never maintain a wrongful termination action for violation of § 16-17-560 – especially an at-will employee that can be terminated for any reason.[11] See Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 334, 516 S.E.2d 923, 925 (1999) ("At-will employment is generally terminable by either party at any time, for any reason or for no reason at all."). Under this scenario an at-will employee could never maintain an action for a violation of § 16-17-560 despite Culler's holding to the contrary.

Culler and its progeny hold a wrongful termination action can be maintained for violating S.C. CODE ANN. § 16-17-560. This is highlighted by the Court's statement at the motion to reconsider hearing:

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[11] Accepting ADC's position at face value would be akin to accepting a drunk driver's testimony – at the summary judgment stage – that he was not drunk despite evidence of swerving outside of his lane and slurred speech. Another example would be a company testifying it did not have notice of a premises defect despite notice in its records. These discrepancies illustrate the summary judgment standard which requires the court to view the evidence and all inferences in a light most favorable to the non-moving party. Rule 56, SCRCP.

> - - and I don't have any question about that. The question I have in my mind is there sufficient evidence to show that possibly they did fire him for free speech; for exercising his right to speech, okay at a summary judgment level. That's where we're talking about; is there a scintilla. Can somebody reach a logical conclusion with a scintilla of evidence that they fired him for that reason, okay.
>
> Now, I know your argument is its not political speech and you're trying to close that in legal language and not factual language. You may be right and may not be; I don't know. But's that an issue and quite frankly I thought that Mr. Owens was aware that the company was involved in the Shem Creek business.

(R. p. 380, lines 11-24).

ADC's argument that it terminated Owens for violating the Technology Policy is further undercut by ADC's principals' testimony about their personal use of the ADC equipment and email. Additionally, ADC knew of Owens' emails and Facebook posts on September 16th at the meeting with Flesch. (R. pp. 541-542; p. 604). Despite having this knowledge, ADC informed Stubbs Muldrow on September 17th that it was not terminating Owens. (R. p. 547, line 20 – p. 548, line 5). ADC found only fourteen (14) emails Owens sent from May 16, 2014 through September 10, 2014. (R. p. 732, line 24 – p. 733, line 2; pp. 741-798). The fourteen (14) emails sent over nearly four months were all sent to Owens personal email account – jcowenssr@comcast.net – and eleven (11) to twelve (12) contained little to no text in the body of the email. (R. pp. 741-798; p. 833, lines 10-11). ADC's Technology Policy specifically allowed personal emails as long as it was not "excessive." (R. p. 1163, lines 15-20). Steve Truschka, ADC's business and human resources manager, acknowledged sending personal emails. (R. p. 1162, line 23 – p. 1163, line 11). No one with ADC defined "excessive" and Truschka admitted "it's hard to define excessive." (R. p. 1163, lines 21-22; p. 1170, lines 2-7). Cook likewise could not define the "significant" amount of time Owens allegedly used ADC resources that warranted

Owens termination. (R. p. 418, lines 1-23). Like Truschka, Cook acknowledged frequently using ADC equipment for personal endeavors. (R. p. 419, lines 21-25).

In Graham's seven years as the IT Specialist, ADC has never had another instance where an employee's use of a computer was checked for personal use. (R. p. 734, lines 19-25). ADC, likewise, did not check anyone else's computer when checking Owens' computer for personal use or assess how the other employees' use compared to Owens' personal use. (R. p. 1163, lines 12-14; p. 420, lines 4-21; p. 421, lines 19-23). Graham is not aware of another ADC employee that has been disciplined or reprimanded for personal computer use. (R. p. 736, lines 1-9). This evidence indicates that ADC's principals were in violation of the policy they allegedly terminated Owens for violating and supports an inference that the technology policy violation was a pretext for terminating Owens. It can hardly be argued that sending fourteen (14) emails over a period of four months is "excessive" personal email use. Owens submits this is why no other employees' equipment was searched and compared to Owens because Owens use would not be "excessive." This evidence, when viewed in a light most favorable to Owens as the non-moving party, indicates that Owens was not terminated for violating the Technology Policy, especially when expressly permitted by the Policy and ADC management could not define "excessive." As this evidence indicates, Owens was terminated for exercising his right to free speech in opposing the Project, and the lower court's granting of summary judgment to ADC should be reversed.

II. OWENS' EXTENSIVE INVOLVEMENT WITH THE EXECUTIVE, LEGISLATIVE, AND ADMINISTRATIVE PROCESS IN OPPOSING THE PROJECT CONSTITUTES PRIVILEGES AND RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION OR SOUTH CAROLINA CONSTITUTION

Even though the evidence presents a question of fact as to whether ADC terminated Owens for exercising his constitutional rights, the lower court also held that Owens' speech

"does not amount to protected political speech under the statute at issue." (R. p. 12). In support of this finding, the lower court relies upon a District Court opinion in Vanderhoff v. John Deere Consumer Prods., No. C.A. 3:02-0685-22, 2003 WL 23691107, 2003 U.S. Dist. LEXIS 25805 (D.S.C. 2003). As an initial matter, the District Court's decision is not binding on this Court or the lower court. Although persuasive authority, Owens submits that Vanderhoff is easily distinguished given Owens' extensive involvement in opposing the Project.

Vanderhoff involved a case for William Vanderhoff, who described himself as a member of the "Confederate Southern American" ethnic group, and claimed he was prohibited from displaying a confederate flag on his work toolbox. Id. at 2. In 2001, Vanderhoff filed an employment discrimination complaint under Title VII of the Civil Rights Act of 1964. Id. He also sought recovery under state law for wrongful discharge pursuant to § 16-17-560. Id. The District Court granted summary judgment on the Title VII claim and dismissed without prejudice the wrongful discharge claim. Id. at 2-3. Vanderhoff subsequently filed another action in state court alleging wrongful termination pursuant to § 16-17-560. Id. The District Court granted John Deere's motion for summary judgment as "the display of a confederate flag decal is not a political opinion or the exercise of any political right or privilege . . . because such expression is not protected as a matter of clear public policy either as set forth in section 16-17-560 or otherwise." Id. at 6. Although the District Court held § 16-17-560 did not extend to placement of a confederate flag decal on a work toolbox, the Court noted that "the political opinion and expression covered by section 16-17-560 extends only to matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote." Id. at 7.

Owens submits that, based on the statute's plain and ordinary meaning, § 16-17-560 is not as limited as the lower court interpreted the district court to hold in Vanderhoff.. See Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.").

Section 16-17-560 mandates that "it is unlawful for a person to . . . discharge a citizen from employment or occupation . . . because of (1) political opinions or the exercise of (2) political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State." S.C. CODE ANN. § 16-17-560. The Fourth Circuit Court of Appeals in Dixon v. Coburg Dairy, 369 F.3d 811, 818 (4th Cir. 2004)[12] – decided subsequent to Vanderhoff - noted three ways liability could be predicated on § 16-17-560: "(1) Dixon was fired because of his political opinions; (2) Dixon was fired for exercising political rights guaranteed by the United States Constitution; and (3) Dixon was fired for exercising political rights guaranteed by the South Carolina Constitution." Section 16-17-560 is not as narrow as Vanderhoff holds in light of the Fourth Circuit's decision in Dixon. If § 16-17-560 is as narrow as Vanderhoff holds, then the opinions, rights, and privileges guaranteed by the United States Constitution and South Carolina would be greatly diminished and the statute would protect very few privileges.

Even if the Court is inclined to follow the rationale in Vanderhoff over Dixon, Owens took more affirmative steps to exercise his free speech rights and privileges than merely placing a confederate flag decal on his work toolbox, and actually engaged in the executive, legislative,

[12] The Fourth Circuit in Dixon remanded the case back to the South Carolina Court of Common Pleas. Id. at 819.

and administrative process in opposing the Project. Owens set up a Facebook page named Saving Shem Creek in March or April 2014 to disseminate information about the Shem Creek Project. (R. p. 839, lines 3-22).[13] Owens, along with other individuals, formed Save Shem Creek Corp., a nonprofit. (R. p. 842, lines 8-25). There were more than ten (10) officers of Save Shem Creek Corp. and Owens served on the board of directors. (R. p. 843, lines 8-25). Save Shem Creek Corp.'s Board of Directors met once or twice a month and Owens attended those meetings. (R. p. 844, lines 1-8). Owens attended Mount Pleasant Town Council meetings and prepared a Powerpoint presentation to give to Town Council, a political body. (R. p. 632, lines 2-8; p. 930, lines 4-25). Owens also emailed with members of the Mount Pleasant Town Council (R. pp. 912-914) and attended Mount Pleasant Planning Commission meetings regarding the Project. (R. p. 925, lines 11-24). Owens also had frequent communications with Mount Pleasant Mayor Linda Page regarding the Project. (R. p. 1009, lines 11-13). Attending Town Council and Planning Commission meetings and meeting with the Mayor is exercising his political rights and privileges guaranteed by the Constitutions. If Owens' extensive involvement with the political process by exercising his constitutional rights is not protected by § 16-17-560 then what is?

This evidence, when viewed in a light most favorable to Owens, indicates that he was much more involved with the executive, legislative, and administrative process than simply putting a confederate flag decal on a work toolbox. This extensive involvement with the governing process is the type of conduct the Legislature intended to protect in enacting § 16-17-560. As Vanderhoff is inapplicable to this case given the extensive evidence of political involvement, the lower court's order granting summary judgment on this ground should be reversed.

[13] The Saving Shem Creek Facebook page had at least seven (7) other administrators. (R. p. 840, lines 2-6).

CONCLUSION

The evidence in this case, at a minimum, establishes that Owens informed ADC of his involvement in opposing the Project in June 2014. Despite Cook's knowledge of ADC's involvement in the Project, he did not inform Owens. At the meeting on September 16, 2014, Flesch exerted financial pressure on ADC and informed ADC that Owens sent emails and made Facebook posts during working hours. Despite this knowledge, the next day on September 17, 2014, ADC informed Stubbs Muldrow that it was not terminating Owens. Following receipt of the evidence preservation letter, ADC's position changed. ADC then terminated Owens for violating its Technology Policy when the policy expressly allowed personal email use and ADC management could not quantify excessive use. Owens extensive involvement in the executive, legislative, and administrative process to oppose the Project is protected by the United States Constitution and South Carolina Constitution, and the type of conduct Culler intended to protect. For these and all other reasons put forth to the lower court and viewing this evidence in a light most favorable to Owens, as the Court is required to do at summary judgment, the lower court's granting of summary judgment to ADC should be reversed.

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January 26, 2017
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2016-001811

RECEIVED
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SC Court of Appeals

James C. Owens, ... Appellant,

-v-

Bryan Crabtree, Kirkman Broadcasting, Inc. d/b/a
WQSC Radio, ADC Engineering, Inc., Tyler Flesch,
and Red Drum Capital Group, LLC, ...Defendants,

of whom ADC Engineering, Inc., is ..... Respondent.

CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Appellant's Final Brief*** to:

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January 27th, 2017
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