

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

C.A. No.: 2015-001361

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SC Court of Appeals

MARK D. OSTENDORFF.....Appellant

v.

SCHOOL DISTRICT OF PICKENS COUNTYRespondent.

INITIAL BRIEF OF RESPONDENT

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court Properly Hold That Mr. Ostendorff's Tort Claims Were Time Barred Under the S.C. Tort Claims Act?
2. Did the Trial Court Properly Hold That Mr. Ostendorff Failed To Plead A Breach of Contract Claim?
3. As An Additional Sustaining Ground, Was Mr. Ostendorff's Alleged Oral Employment Contract For A Five-Year Term Barred By The Statute of Frauds?
4. As An Additional Sustaining Ground, Was Any Alleged Five Year Oral Contract Terminable At Will As A Matter of Law?
5. Has Mr. Ostendorff Abandoned The Conclusory Arguments Listed In His Initial Brief By Failing to Support Them With Authority or Record Cites?
6. Has Mr. Ostendorff Waived His Fourth Argument, Failure to Provide Discovery, by Failing to Raise it With the Circuit Court?

II. STATEMENT OF THE CASE

Appellant, Mark Ostendorff, is a former employee of the School District of Pickens County (“SDPC”). He filed this action *pro se* on February 28, 2014 against the School District of Pickens County, its Board of Trustees, and various school board members and employees of the School District. By order dated July 2, 2014, The Honorable Letita H. Verdin dismissed claims against the individual defendants and the Board of Trustees. Mr. Ostendorff appealed that decision to this Court, which upheld the dismissal of the individuals and the Board of Trustees in 2016 UP 421, October 5, 2016. Mr. Ostendorff’s petition for certiorari regarding that decision was filed on December 19, 2016 and is currently pending before the Supreme Court.

SDPC moved for summary judgment on Mr. Ostendorff’s remaining claims. After hearing oral argument and reviewing the parties’ submissions, the Honorable Lee S. Alford granted SDPC’s motion for summary judgment on May 29, 2015. Mr. Ostendorff timely appealed the trial court’s grant of summary judgment

III. STATEMENT OF FACTS

Mr. Ostendorff was employed by SDPC from June 2008 until March 2011 as a Building Project Manager. (R. p. ___, Complaint ¶ 10). Due to the scheduled completion of Building Fund projects, Mr. Ostendorff was notified in December 2010 that his employment would end on June 30, 2011. (R. p. ___, Ostendorff Dep. pp. 76-77, Dep. Exh. 4). However, due to performance concerns, including taking time off without approval, failing to maintain established work hours, and not completing assigned tasks, Mr. Ostendorff’s employment was terminated on March 1, 2011. (R. p. ____, Ostendorff Dep. pp. 123-124, Dep. Exh. 7). Mr. Ostendorff attempted to challenge his termination

through an internal grievance with SDPC. (R. p. __, Ostendorff Dep. Exh. 10.) At deposition, Mr. Ostendorff conceded that he was an at-will employee, (R. p. __, Ostendorff Dep. p. 60, ll. 17-19, Dep. Exh. 3), and thus, could be terminated for any reason, with or without notice or cause.

After his termination on March 1, 2011, Mr. Ostendorff eventually filed a complaint in the Pickens County Court of Common Pleas on February 28, 2014. (R. pp. __, Compl.) In his Complaint, Mr. Ostendorff asserted the following causes of action: fraud, "intentional fraud," civil conspiracy, "false testimony under sworn oath," "subordination [sic] of false testimony under sworn oath," negligence, gross negligence, "reckless (willful) negligence," "retaliatory discharge," "unequal treatment," and wrongful discharge against the Defendant. (R. p. __, Complaint ¶ 6.) He did not allege a breach of contract claim or attempt to amend his complaint to add a breach of contract claim prior to the Circuit Court's order granting summary judgment.

IV. ARGUMENTS

A. The Circuit Court Properly Held That Mr. Ostendorff's Claims Were Time Barred Under The Tort Claims Act.

Under the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-110, the applicable statute of limitations for any tort claim against any governmental entity, including a school district, is two years. Further, the Tort Claims Act requires liberal construction in favor of limiting governmental liability. See S.C. Code Ann. § 15-78-20(f). The Circuit Court properly held that any of Mr. Ostendorff's claims would have arisen out of Defendant's actions on or before March 1, 2011, the date his employment with the School District was terminated. Therefore, any alleged actionable conduct of

SDPC occurred more than two years prior to Plaintiff's filing of the Complaint on February 28, 2014. (Exhibit 1 - Complaint ¶¶ 23-31, 44-47, 50.)

While Mr. Ostendorff now argues that he made a "verified claim" that should have extended his statute of limitations to three years under S.C. Code Ann. § 15-78-80, he offered no evidence of any verified claim that met the requirements of Section 15-78-80 in opposition to summary judgment. In his initial brief, he offers nothing more than a bald assertion that he "provided a verified claim within two years" but does not refer to any evidence in the record of such a claim. Plaintiff concedes that all of Defendant's actions occurred before March 2011, or at the latest May 2011, in his "settlement demand letter," that he sent to the Defendant on February 11, 2014, after the two year statute of limitations had run. (R. p. __, Ostendorff Dep. Exh. 10.) As such, the Trial Court properly held that Mr. Ostendorff's Complaint, which was filed almost three years after his alleged injury, was untimely as a matter of law under Section 15-78-110. There is no evidence in the record that Mr. Ostendorff filed a verified claim under S.C. Code Ann § 15-78-80 within a year of his termination that would have extended the statute of limitations to three years. Thus, the Circuit Court properly granted summary judgment based on the Tort Claims Act's statute of limitations.

**B. The Circuit Court Properly Held That Mr. Ostendorff's
Complaint Did Not Properly Allege A Breach Of Oral
Contract Claim.**

In his Initial Brief, Mr. Ostendorff makes a conclusory argument that various unconnected paragraphs of his Complaint could be construed to allege a breach of contract claim and that the Circuit Court essentially erred by not helping him re-draft the Complaint to allege breach of a five year oral contract. These arguments fail for two

reasons. First, no reasonable reader of Mr. Ostendorff's Complaint would interpret it as alleging a breach of oral contract claim as opposed to a wrongful discharge tort claim. Second, Mr. Ostendorff's clear intent to plead a wrongful discharge tort claim would have required him to very specifically plead a breach of contract claim in the alternative. *See Cunningham v. Anderson County*, 414 S.C. 298, 304 778 S.E.2d 884, 887 (2015). Even if a breach of contract claim could have been deciphered from Mr. Ostendorff's complaint, it would have been logically and legally inconsistent with his wrongful discharge claim, which is founded upon at-will employment. *Id.* Accordingly, the Circuit Court properly granted summary judgment on the grounds that Mr. Ostendorff's complaint did not allege a breach of contract claim.

C. As An Additional Sustaining Ground, Any Alleged Five-Year Oral Contract Was Barred By The Statute Of Frauds.

Even if Mr. Ostendorff had properly alleged breach of a five-year oral contract in his Complaint, such a claim would fail as a matter of law because a five-year oral contract would be barred by the statute of frauds. S.C. Code Ann. § 32-3-10(5), **Agreements to be in writing and signed**, provides: "No action shall be brought whereby: . . . (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof . . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

On its face, a five-year oral contract clearly cannot be "performed within the space of one year from its making" and is thus, unenforceable under the statute of frauds.

Mr. Ostendorff neither argued nor proved any exception to the statute of frauds in the Circuit Court. *See* 9 WILLISTON ON CONTRACTS § 24:9 (4th ed. 2011) (“[M]ost cases . . . hold a contract to render service for more than a year to be within the intention and force of the statute [of frauds], notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance cannot be rendered in a year consistently with the understanding of the parties.” (first and second alteration in original) (footnote omitted)). *See also* *Hempfling v. L.M. Commc'ns of S.C., Inc.*, No. CIVA 2:04-1373, 2005 WL 4541041, at *7 (D.S.C. Aug. 30, 2005), *aff'd sub nom. Hempfling v. LM Commc'ns Inc.*, 172 F. App'x 523 (4th Cir. 2006) (alleged oral contract to employ plaintiff until retirement at age 65 unenforceable under statute of frauds). This Court should affirm the Circuit Court’s grant of summary judgment on this additional sustaining ground.

D. As An Additional Sustaining Ground, Any Alleged Five-Year Contract Was Terminable At-Will As A Matter Of Law.

Under South Carolina law, a contract for a term is terminable only for “cause” unless an employer includes an at-will provision in the alleged contract. *See Cape v. Greenville Cty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005). At deposition, Mr. Ostendorff admitted that he was an at-will employee. (R. ___, Ostendorff Dep. p. 60). He also clearly signed a “Notice of Intent to Employ” specifying his understanding that he was an at-will employee who could be terminated whenever it was determined to be in the best interest of the school district. (R. ___, Ostendoff Dep. Exh. 3.) Based on this clear, undisputed evidence in the record, any alleged five year oral contract would have included an at-will termination provision that would have prevented Mr. Ostendorff from

recovering for breach of contract arising out of the termination of his employment as a matter of law. *See Cape* 365 S.C. at 319, 618 S.E.2d at 883.

E. Mr. Ostendorff's Failure To Support Conclusory Arguments Contained In Headings In His Initial Brief With Record Cites Or Legal Authority Constitutes Abandonment Of Those Issues.

Mr. Ostendorff's Initial Brief consists of broad, conclusory, and general statements without supporting authority or reference to record evidence to support the arguments. As such, this Court should consider the arguments abandoned and affirm the trial court on all issues. *See, e.g., R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding an issue is abandoned if the appellant's brief treats it in a conclusory manner); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *aff'd as modified on other grounds*, 337 S.C. 622, 525 S.E.2d 246 (2000) *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (finding a one-sentence argument is too conclusory to present any issue on appeal); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling.").

F. Mr. Ostendorff Waived The Discovery Argument Asserted In The Fourth Argument Heading In His Initial Brief.

Mr. Ostendorff's Fourth Argument heading seeks reversal on the grounds that "plaintiff" failed to provide discovery. Presumably, Mr. Ostendorff is referring to newly alleged conduct of Respondent rather than his own conduct. Mr. Ostendorff made no

argument or suggestion to the Circuit Court that it stay SDPC's motion for summary judgment to allow additional discovery nor did he pursue any motion to compel discovery. In addition to failing to support the argument in his brief, as noted above, Mr. Ostendorff has failed to preserve any discovery or timing-based arguments and has waived them. *See Ewing v. State Bd. of Med. Examiners of S.C.*, 290 S.C. 89, 92, 348 S.E.2d 361, 363 (1986); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

V. CONCLUSION

For the foregoing reasons and any other reasons in the record before this Court, the Order of the Circuit Court granting Respondent summary judgment in this case should be affirmed in its entirety.

Respectfully submitted,

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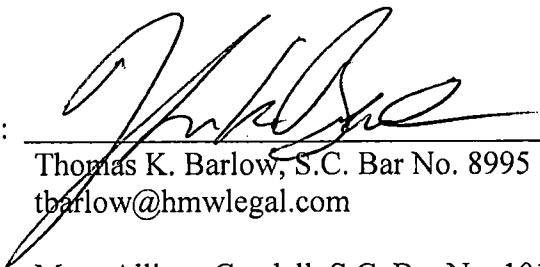
CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Brief of Respondents complies with Rule 208(b), SCACR.

Respectfully submitted,

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