STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Deadra Jefferson
Circuit Court Judge

APPELLATE CASE NO. 2015-002533
TRIAL CASE NO. 2012-CP-26-4852

Jacklyn J. Donevant ..... Respondent

v.

Town of Surfside Beach..... Petitioner

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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S.C. SUPREME COURT

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INDEX

BACKGROUND 2

STANDARD OF REVIEW 3

ARGUMENTS 3

I. ANTLEY V. SHEPHERD 3

II. NO EXPANSION OF THE WRONGFUL TERMINATION DOCTRINE 4

III. THIS COURT CORRECTLY FRAMED THE ISSUE ON APPEAL 5

CONCLUSION 6

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Jacklyn J. Donevant ("**Donevant**") hereby submits this return to the Town of Surfside Beach's ("**the Town**") petition for rehearing.

BACKGROUND

Donevant, the building official for the Town, was required by law to enforce the building code of the State of South Carolina. (**R. pp. 131-32, R. pp. 144-45, R. p. 295**). When she witnessed unpermitted construction at the Town owned Pier Restaurant, Donevant complied with her legal duty to enforce the building code and issued a stop work order for the unpermitted construction. (**R. p. 49, R. pp. 51-53, R. p. 276, R. p. 279**). Fifteen days later, the Town fired her. (**R. p. 412**).

Thereafter, Donevant brought suit against the Town, asserting a single cause of action for wrongful termination. Donevant alleged the Town terminated her in violation of a clear mandate of public policy—for complying with her mandatory obligation to enforce the building code. See Donevant v. Town of Surfside Beach, No. 2015-002533, 2018 WL 1077237, at *2 (Feb. 28, 2018) ("[T]he basis of the court's decision—with which we agree—is that the public policy exception applies to [Donevant's] claim because she was fired for enforcing the building code."). The jury returned a verdict in favor of Donevant. Thereafter, the Town appealed, arguing the trial court erred in denying its motion for directed verdict and submitting this case to the jury.

On August 26, 2015, the South Carolina Court of Appeals issued a unanimous decision, finding the trial court properly submitted this case to the jury. Thereafter, the Town filed a Petition for Writ of Certiorari to this Court. This Court granted the Town's Petition, and on, February 28, 2018, this Court issued a unanimous decision, affirming the court of appeals' decision.[1]

[1] In the Town's Petition for Rehearing, the Town contends this Court's decision affirmed as modified the court of appeals' decision. This assertion is incorrect, as this Court made clear it

The Town then filed a Petition for Rehearing. In its Petition for Rehearing, the Town recites the same arguments that it raised on appeal. The Town fails to point to any argument or matter that this Court overlooked or misapprehended in making its decision.

STANDARD OF REVIEW

In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)).

ARGUMENT

I. ANTLEY V. SHEPHERD

The Town argues this Court "effectively overruled" Antley v. Shepherd, 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000), *affirmed as modified*, 349 S.C. 600, 564 S.E.2d 116 (2002), in issuing its opinion in this case.

The Town's position is incorrect. This Court neither explicitly or implicitly overruled Antley in deciding this case. This Court stated as follows:

> **We do not read the court of appeals' opinion to be in conflict with Antley**. Distinguishing Antley from this case, the court of appeals explained that 'unlike Antley, where the statutes 'permitted but did not require' the tax assessor to take action, the statutory and building code provisions at issue here required Donevant's actions of enforcing compliance with the building code.' 414 S.C. at 413, 778 S.E.2d at 329 (quoting Antley, 340 S.C. at 549, 532 S.E.2d at

affirmed the court of appeals' decision and that the Town misinterpreted the court of appeals' decision. Donevant, 2018 WL 1077237, at *1.

> 298) (emphasis in original). Thus, according to the court of appeals, Antley does not control this case because Donevant was not fired for taking the discretionary action of issuing the stop work order. Rather, she was fired for carrying out the building official's mandatory legal duty to 'enforce compliance' with the building code. We agree with the court of appeals.

Donevant, 2018 WL 1077237, at *2 (emphasis added).

The Town has always read Antley to control the result in this case, and the Town made that argument to the court of appeals and then to this Court. Neither Court agreed with the Town's position. The distinguishing feature between the tax assessor in Antley and the building official in Donevant is that the tax assessor in Antley was terminated for taking a discretionary action while Donevant was terminated for carrying out her mandatory legal duty to enforce compliance with the building code. *Id.* This Court clearly highlighted the distinction between Antley and Donevant in issuing its opinion in this case. Antley certainly remains good law following this Court's decision. However, it does not control the result of this case. The basis for the Town's argument on this issue is predicated upon the Town's misapprehension of Antley, not on this Court's misapprehension of the Town's argument concerning Antley.

Therefore, because the Town fails to allege this Court misapprehended or overlooked its argument as it relates to the application of Antley, this Court should deny the Town's Petition for Rehearing.

II. NO EXPANSION OF THE WRONGFUL TERMINATION DOCTRINE

The Town argues this Court greatly expanded the wrongful termination doctrine by affirming this case.

The Town's position is incorrect, and its argument reflects a misapprehension of the wrongful termination doctrine. The decision in this case is nothing new for the wrongful termination doctrine. In affirming this case, this Court stated, "[t]his case fits squarely within the

long-established limits of the public policy exception to the at-will employment doctrine because firing Donevant for enforcing the building code violates a clear mandate of public policy." Donevant, 2018 WL 1077237, at *2 (citing Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011)) ("Under the 'public policy exception' to the at-will employment doctrine ... an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." (citing Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219337 S.E.2d 213 (1985).

In making its argument on this issue, The Town misapprehends both the state of the wrongful termination doctrine and this Court's decision. Contrary to the Town's argument, this Court's decision in the present case does not expand the wrongful termination doctrine; rather, it fits squarely within the well-established contours of existing case law. Donevant, 2018 WL 1077237, at *2.

Accordingly, because the Town fails to point to an issue this Court misapprehended or overlooked, this Court should deny the Town's Petition for Rehearing.

III. THIS COURT CORRECTLY FRAMED THE ISSUE ON APPEAL

Finally, the Town argues this Court incorrectly framed the issue on appeal.

This Court correctly identified the issue on appeal, which was "whether it is a violation of a clear mandate of public policy to fire a building official for enforcing the building code." Id. This has always been Donevant's theory of the case, and it is the posture in which the case was litigated. See Donevant, 2018 WL 1077237, at *2 ("[T]he basis of the court's decision—with which we agree—is that the public policy exception applies to [Donevant's] claim because she was fired for enforcing the building code."). It is uncontroverted that Donevant, as the building official for the Town, was required—a mandatory obligation—to enforce the building code. The

Town clearly conceded the same at oral argument. (**Oral Argument Recording Time 8:39**). That is exactly what Donevant did, when she issued the stop work order for unpermitted construction at the Pier Restaurant. In retaliation for complying with her mandatory obligation to enforce the building code, the Town fired her. This fact scenario creates a jury question as to whether the Town terminated Donevant in violation of a clear mandate of public policy.

The Town seems hung up on the mechanism by which Donevant chose to enforce the building code—the issuance of a stop work order. The fact that Donevant perhaps could have chosen another mechanism to enforce the building code is irrelevant. What matters is that Donevant was complying with her mandatory obligation to enforce the building code when she issued the stop work order for unpermitted construction at the Town owned Pier Restaurant, and the Town fired her for it. See Donevant, 2018 WL 1077237, at *2, n.4 ("We do not read these statements to say Donevant was fired because she chose to issue a stop work order as the means of enforcing the building code, but to merely explain the particular action she took in fulfilling her mandatory duty."). This was how the issue was framed at trial and on appeal. This Court correctly understood the issue and ruled accordingly.

Therefore, because the Town fails to point to any issue this Court misapprehended or overlooked, this Court should deny the Town's Petition for Rehearing.

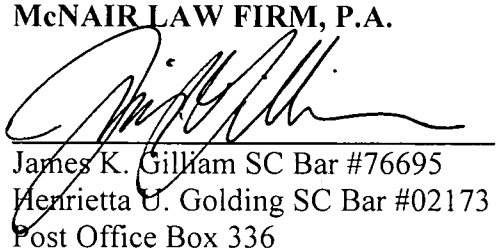
CONCLUSION

For the foregoing reasons, this Court should deny the Town's Petition for Rehearing.

[signature on following page]

Respectfully submitted,

McNAIR LAW FIRM, P.A.



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PROOF OF SERVICE

I, Carole Koerner, an employee of McNair Law Firm, P.A., attorneys for Respondent, Jacklyn J. Donevant, in the above-entitled action, certify that I have served Respondent's Return to Petition for Rehearing and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 29th day of March, 2018.

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