STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

APPELLATE CASE NO. 2015-002533

Jacklyn J. Donevant . .....Respondent

v.

Town of Surfside Beach. ..... Petitioner

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING AND RECONSIDERATION

Introduction

This court issued its opinion on February 28, 2018 affirming, as modified, the decision of the Court of Appeals affirming the verdict in favor of Donevant. The Petitioner Town of Surfside Beach now moves for rehearing and reconsideration under S.C. Rule App. P. 221.

This Court clearly recognized the difficulty the Court of Appeals created when it determined that Donevant was terminated because she issued a discretionary stop-work order. As made clear throughout the case, a stop work order is a discretionary act and a building inspector is not required to issue it in order to address a building code violation. The problem for Donevant has always been that, under *Antley v. Shepherd*, an employee may be terminated for how she exercises a discretionary act. *Antley v. Shepherd*, 532 S.E.2d 294, 297 (S.C. 2000) (aff'd as modified 564 S.E.2d 116 (S.C. 2002)).

This Court attempted to avoid the *Antley* problem by recasting the case as, not just an effort to regulate Donevant's exercise of one discretionary stop-work order, but as an effort to foreclose her from enforcing the building code at all.

First, recasting the case in this light still effectively overrules *Antley* because every future case will always be a jury question between whether the employer was terminating an employee for a specific discretionary act or as part of an effort to block the employee from effectuating a more general legal authority. Secondly, this decision is a dramatic expansion of the public

policy exception to at-will employment which the Court, before now, steadfastly resisted. Finally, recasting the case in this manner is contrary to how the case was always defined. Donevant never alleged she was foreclosed from enforcing the building code in general. Her pleadings, the evidence, and arguments are all based on the allegation she was terminated for issuing a stop work order. The trial court and the Court of Appeals also made clear this was how the case was framed. There is no basis for the Supreme Court to recast the case as a broader action by the Town to block enforcement of the building code entirely.

The Court Has Effectively Overruled Antley

The Court's decision has effectively overruled *Antley*. This Court distinguishes *Antley* by speculating that this case could have been a broader effort by Surfside Beach to foreclose Donevant from enforcing the Building Code. Based on this decision, any future case involving discrete acts based on discretionary legal authority of an employee will be simply be cast as a broader effort to foreclose the employee from enforcing whatever statutes, regulations, or other law that gives them some authority. For example, a police officer terminated for making marginal, or even improper, arrests can simply allege he was terminated as part of a scheme to prevent him from enforcing the criminal code. An Architect who is terminated for refusing to approve plans could allege it was part of a scheme to supplant his duty to apply State Architectural regulations. In fact, the Court of Appeals decision in this case has already been cited by an Engineer in Missouri who claimed he was terminated because he objected that a job did not meet prevailing professional engineering standards. *Van Kirk v. Burns & McDonnell Engineering*, 2016 Westlaw 1106193 (Mo. Ct. App. 2016). *Antley* will become meaningless under the Court's decision.

The Court Has, for the First Time, Explicitly Expanded the Public-Policy Exception to At-Will Employment Well Beyond Its Previous Limits

The decision significantly erodes the at-will employment rule despite recent history of the Court and the legislature to reinforce the rule. The Court of Appeals decision in this case has already been recognized by commentators as a significant expansion of the public-policy exception to the at-will employment rule. *See, e.g., Burnette, The Public Policy Exception to South Carolinas At-Will Employment Doctrine*, https://burnetteshutt.law/donevant-v-town-surfside-beach-public-policy-exception-south-carolinas-will-employment-doctrine.

For many years, South Carolina law was seen to be greatly diminishing the at-will employment rule. South Carolina was being viewed as becoming a difficult and expensive legal environment for employers. This perhaps began with the "handbook exception" recognized in *Small v. Springs Industries* 357 S.E.2d 452 (S.C. 1987). Despite language in the *Small* decision promising that the exception could easily be avoided by employers, the exception broadened tremendously in subsequent caselaw. Eventually, almost any promissory language, including vague assurances of "fairness," could create contractual promises. *Conner v. City of Forrest Acres*, 560 S.E.2d 606, 611 (S.C. 2002). This occurred even though employers incorporated prominent and explicit disclaimers in their handbooks. The Court finally issued a decision which became the high (and then the ebb) tide of the handbook exception. In *Hessenthaler v. Tri-Cty Sister Help*, the Court initially held that a statement in a handbook summarizing federal anti-discrimination law was a contractual promise not to discriminate (adding to the federal remedies already available). 616 S.E.2d 694 (S.C. 2005). South Carolina employers , and the Defendant in the case, requested rehearing and the decision was ultimately withdrawn when the Court apparently recognized this was too much of an erosion of the at-will rule. About the same time,

the South Carolina legislature stepped in and passed S.C. Code § 41-1-110 which became effective in 2004 and provided a clear mechanism for employers to avoid the handbook exception. The law dictated that a court could not submit the issue to a jury but must rule on the issue as a matter of law. Thereafter, the handbook exception claim is rarely seen in South Carolina courts.

A similar, and concurrent, story unfolded with the public-policy exception. Initially, it was recognized as applicable only to cases where the employee was forced to choose between his job and violating a law having a criminal penalty. *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 214 (S.C. 1985). This Court later hinted that the tort could be expanded to cover other situations such as retaliation for reporting safety concerns or raising wage complaints. *Garner v. Morrison Knudsen Corp.*, 456 S.E.2d 907 (S.C. 1995); *Keiger v. Citgo Coastal Petroleum*, 482 S.E.2d 792 (S.C. Ct. App. 1997).[1] However, most recently, this Court emphasized the strong public policy in favor of the at-will employment rule.

> "the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development."

Taghivand v. Rite Aid Corp., 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015). The *Taghivand* Court went out of its way to emphasize (despite *Keiger* and *Garner*) that it had never expanded the public-policy exception beyond the instances wherein the employee was required to "break the law" or the termination was explicitly illegal under statute. *Id.* The Court also remarked that it must exercise restraint in applying the public policy exception.

With the decision in this case, the Court has announced it is now set (back) down the path of eroding the at-will employment rule. The recent sensitivity to economic development cited in

[1] These decisions were not an express expansion of the exception as they were based on Rule 12 motions to dismiss and the cases were remanded for further discovery The courts expressly noted that they deemed further discovery important before "novel" issues could be actually decided.

Taghivand appears to have been abandoned and the South Carolina courts are headed down the road paved by other "progressive" jurisdictions, contrary to nearby states such as Georgia who have expressly rejected expanding the public policy exception to claims an employee was acting pursuant to legal authority. *Jellico v. Effingham*, 221 Ga. App. 252, 471 S.E.2d 36 (1996).

This Court's decision constitutes a significant erosion of the at-will employment rule in South Carolina and could apply to a host of governmental and private-sector employee who have authority to enforce, or comply with, law. These employees become impossible to discipline if the reason for the discipline touches on a statutory or regulatory duty. For this reason alone, this Court should reconsider its decision.

The Court Has Improperly Recast the Case as One in Which the Employer Sought to Completely Block its Building Inspector from Enforcing the Building Code

As to the final point, it was clearly improper to recast the case as a situation in which Surfside Beach was attempting to keep inspectors from enforcing the building code at all. The case was defined from the beginning by the Complaint which specifically alleged that Donevant was terminated for issuing the stop work order.

> In accordance with her duties . . . Plaintiff issued a stop work ticket . . . when Plaintiff did so, the Defendant took swift and retaliatory employment actions . . .

(R. 4).

Nowhere in the Complaint does Donevant allege the City was attempting to foreclose her from enforcing the building code—only that they improperly reacted to the issuance of the stop-work order.

Similarly, Donevant's testimony was that she was suspended and then fired for issuing the stop-work order. "I got suspended for putting a permit on the pier . . . [I mean] [I] issued a

no permit stop work order. I didn't mean to say "permit," excuse me." (R. 118). "He fired me for putting a stop-work order." [R. 120]. "I felt by him [the Town Administrator] ripping that [the stop work order] off that he oppose me issuing a stop work order and he oppose me doing my job." (R. 121). Donevant made clear that the Town Administrator had never before interfered with the issuance of a stop work order. (R. 61). Donevant issued many such stop work orders over time. (R. 198). There is no allegation the Town Administrator ever intervened in any other incidence. The sole occurrence concerned the issuance of the stop work order on one occasion.

The trial judge also understood the case this way. "Her position is that her employer required her to violate the law by instructing her blatantly to not issue a stop-work order." (R. 205-51). "Her perception that her supervisor was instructing her to break the law or disregard the law and that she was instructed not to issue a stop-work order." (R. 248). "Her position is that he told me to violate the law by not issuing it . . .." (R.250). Likewise, the Court of Appeals also understood the case this way. Court: "Is it an issue before us about whether or not the jury, by its verdict, basically determined that Donevant was fired by Duckett for issuing a stop work order?" (Oral Argument Recording at 10:01)

Exactly like the Complaint, Donevant's Brief to the Court of Appeals specifically alleges "Duckett [the Town Administrator] fired her for issuing a stop work order for unpermitted construction at the pier restaurant." (R. 464). Donevant never argued that *Antley* was distinguishable because she was prevented from enforcing the building code more broadly. She merely argued that her discretion to issue the order was different from Antley's authority to pursue appeals. (R. 469-470). Nowhere is there an allegation or evidence of a broader prohibition. The case was always clearly about one specific, and discretionary, stop-work order.

As support for its redefinition of the case, this Court cites a supposed concession made by the Town's counsel to the Court of Appeals that the reason for Donevant's termination was not an issue in the case. The Court has misconstrued the concession. Counsel conceded only that it was a factual issue whether or not Donevant was terminated for issuing a stop-work order. That is how the Court of Appeals posited the question that evoked the concession and it is all that counsel conceded. This Court is expanding that concession to be one that the jury could have found there was an effort by the Town to completely bar Donevant from enforcing the Building Code. This is neither what was posited, nor asked, nor what was conceded.

> Mr. Thompson: Of course, you want to have and enforce a building code, are required to have and enforce building code. The question in this case is whether or not the code required Ms. Donevant to issue a stop work order . . .

(Oral Argument Recording time 07:40)

> Court: I have another question I want to ask you. Is it an issue before us about whether or not the jury, by its verdict, basically determined that Donevant was fired by Duckett **for issuing a stop work order**, . . . because that in essence is what it appears in the trial record and the judge's comments and nobody appealed anything in regard to that or challenges that. Is that right that we can assume looking at this that the jury had its evidence and it made a decision of fact that Duckett fired her **because of her issuing the stop work order**.
>
> Mr. Thompson: I'd like to argue about that but no I can't. The jury . . . that is a factual issue.

(Oral Argument Recording time 10:01) (emphasis added)

Counsel, therefore, clearly conceded only that the stop-work order had to have been found by the jury to be a motivating factor. A broader concession was not made and it was not correct for the Court to expand the concession. It would be disheartening for a concession, made to the court in good faith and candor on a narrow issue, to be used to mean something much greater on a determinative issue. *See, Sassy, Inc. v. United States*, 23 C.I.T. 425 (1999) ("the

Court must construe Defendant's admission as limited to what its counsel was willing to concede at oral argument."); *Fish v. Adams*, 37 Mich. 598, 602 (1877) ("The concession made by counsel was not fairly capable of the construction given to it by the request."); *Johnson v. Rancho Guadalupe, Inc.*, 789 S.W.2d 596, 601 (Tex. App. 1990), writ denied (Oct. 3, 1990) ("I believe it a poor appellate judicial process which relies upon appellate judges' memory of the precise wording used by a lawyer during the course of oral argument.").

This Court also cites the absence of the jury charge to support its position that the jury could have found the broader effort to forestall enforcement of the building code. As the above indicates, this was never Donevant's theory of the case. Therefore there would be no reason to include the charge to clarify the issue. The Court is using the absence of something as proof that the case might have been broader than it actually was. This is, in fact, precluded by the court's own rules. S.C. Rule App. P. 220(c) permits the court to affirm on other grounds. But it requires those grounds to appear in the record. "An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record . . .." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). *Also, e.g*, *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995); *State v. Johnson*, 278 S.C. 668, 301 S.E.2d 138 (1983) (same). This is consistent with Rule 210(h) which limits the review to the record and to Respondent's obligation under Rule 209 to designate anything in the record she deems relevant.[2]

[2] It is true that the Court can affirm on the basis of something absent in the appeal. For example, if there was no evidence of fault by a Defendant but he was nonetheless found liable. *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 489, 709 S.E.2d 71, 76 (Ct. App. 2011). That is not what the Court is doing in this case. In this case, it is inferring something was charged to the jury based on the absence of the jury charge from the record.

As the above demonstrates, there would have been no reason to charge the jury on a scheme to prelude code enforcement completely because, as the Court of Appeals itself recognized, the case presented had to do with the stop-work order only.

CONCLUSION

For the foregoing reasons, the decision of the Court on Donevant's claim that she was terminated in violation of public policy should be reconsidered and the trial court judgment reversed.

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March 15, 2018

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PROOF OF SERVICE

The foregoing Petitioner's Petition for Rehearing and Reconsideration was served on Respondent, via first class mail, postage prepaid and addressed to Plaintiff's counsel of record:

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March 15, 2018