

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Lee S. Alford, Circuit Court Judge

Appellate Case No.: 2018-001391
Unpublished Opinion No.: 2018-UP-193 (S.C. Ct. App. filed May 9, 2018)

Mark D. Ostendorff..... Petitioner,

v.

School District of Pickens County..... Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Respondent, School District of Pickens County, hereby submits its return to Mark Ostendorff's Petition for Certiorari to the Court of Appeals of its May 9, 2018 opinion affirming the Circuit Court's order granting the Respondent's motion for summary judgment on Petitioner's claims.

I. QUESTIONS PRESENTED

1. Do the factors set forth in SCACR 242(b) support a writ of certiorari?
2. Did the Court of Appeals properly hold that the Tort Claims Act statute of limitations barred Petitioner's Tort Claims?
3. Did the Court of Appeals properly hold that Petitioner was an at-will employee with no contractual right to termination only for cause?
4. Did the Court of Appeals properly hold that Petitioner's alleged five year oral contract was barred by the statute of frauds?
5. Did Petitioner fail to preserve his argument that he was not provided sufficient discovery to prove his claims?

II. STATEMENT OF THE CASE

Petitioner, Mark Ostendorff, is a former employee of the Pickens County School District who worked as a project manager in the building program. He filed this lawsuit *pro se* on March 4, 2014, essentially alleging wrongful termination of his employment and various tort claims against his immediate supervisor, Robert Folkman; the assistant superintendent for human resources at that time, Kelly Pew; the superintendent of the school district, Henry Hunt; and individual members of the school district's Board of Trustees: Alex Saitta, Judy Edwards, Jimmy Gillespie, Herbert Cooper, Jim Shelton, and Ben Trotter; the School District of Pickens County; and against the School District of Pickens County board of trustees as a putative legal entity. On July 2, 2014, the

Honorable Letitia H. Verdin granted a Rule 12(b)(6) motion to dismiss any and all claims against the individual defendants in their individual capacities and against the board of trustees. The Court of Appeals upheld Judge Verdin's ruling in Unpublished Opinion No. 2016-UP-421 on October 5, 2016, and this Court denied certiorari of that ruling on September 11, 2017.

By order filed May 29, 2015, the Honorable Lee S. Alford granted the School District's motion for summary judgment on Petitioner's remaining claims in their entirety. The Court of Appeals affirmed Judge Alford in its May 9, 2018 opinion on the grounds that Petitioner's tort claims were time barred under S.C. Code Ann. § 15-78-110; his alleged breach of contract claims were barred by his at-will status and the statute of frauds, S.C. Code Ann. § 32-3-10(5); and that he had not preserved any discovery-related arguments for appeal under *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

III. ARGUMENT

A. Petitioner Has Not Identified Any Special and Important Reasons for this Court To Grant a Writ of Certiorari.

SCACR 242(b), **Considerations Governing Review**, provides as follows:

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Petitioner makes no argument that any of these factors are implicated in this appeal, and none of them warrant certiorari to the Court of Appeals in this case. Accordingly, certiorari should be denied.

B. The Court of Appeals Properly Held that Petitioner’s Tort Claims Were Time Barred.

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 Court of Appeals properly held that any of Petitioner’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 Respondent occurred more than two years prior to Petitioner’s filing of the Complaint on February 28, 2014. (R. pp. 12-25 - Complaint ¶¶ 23-31, 44-47, 50.)

While Petitioner argued to the Court of Appeals 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 § 15-78-80 in opposition to summary judgment. Petitioner conceded that all of Respondent’s complained-of 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. (Supp. R. pp. 45-48, Ostendorff Dep. Exh. 10.) As such, the Court of Appeals properly held that Petitioner’s Complaint,

which was filed almost three years after his alleged injuries, was untimely as a matter of law under § 15-78-110. There is no evidence in the record that Petitioner ever 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 Court of Appeals properly upheld summary judgment based on the Tort Claims Act's statute of limitations.

**C. The Court of Appeals Properly Upheld Summary
Judgment on Petitioner's Breach of Contract Claim.**

Petitioner argued to the Court of Appeals 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. The Court of Appeals properly rejected these arguments. First, Petitioner's alleged breach of contract claim was logically and legally inconsistent with his time-barred wrongful discharge tort claim which required at-will employment. *See Cunningham v. Anderson County*, 414 S.C. 298, 304 778 S.E.2d 884, 887 (2015). Further, the Court of Appeals properly found that Petitioner had not alleged a contract that would have altered the presumption that that he was an at-will employee. *See Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011) ("In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment.")

Second, the Court of Appeals properly held that the oral contract for a five-year employment term Petitioner claimed would have been clearly barred by the Statute of Frauds, S.C. Code Ann. § 32-3-10(5), as it could not have been performed within a year and thus a writing was required. *See Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Accordingly, the Court of Appeals properly upheld

summary judgment on the grounds that Petitioner could not maintain a breach of contract claim as a matter of law.

**D. The Court of Appeals Properly Held that Petitioner's
Discovery Arguments Had Not Been Properly Preserved.**

Petitioner's also seeks reversal on the grounds that "plaintiff" failed to provide discovery. Presumably, he was referring to newly alleged conduct of Respondent rather than his own conduct. Petitioner made no argument or suggestion to the Circuit Court that it stay Respondent's motion for summary judgment to allow additional discovery nor did he pursue any motion to compel discovery. Petitioner has failed to preserve any discovery or timing-based arguments and the Court of Appeals thus properly found that he had 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.").

**E. Petitioner's "Free Speech" Claim Was Not Raised Or
Preserved For Review.**

The petition for certiorari's fifth heading attempts to argue a constitutional free speech claim. This claim was not part of the original complaint nor raised to either the trial court or the Court of Appeals. As such, it has also been waived.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 27, 2018

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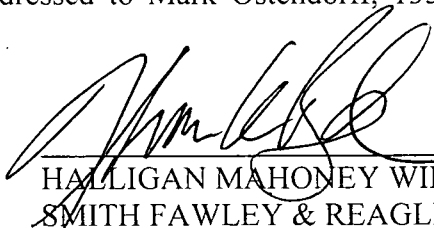
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School District of Pickens County Board of Trustees, School District
of Pickens County, Alex Saitta, Judy Edwards, Jimmy Gillespie,
Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt,
and Robert Folkman..... Respondents.

PROOF OF SERVICE

I certify that I have served **Respondent's Return to Petition for Writ of Certiorari** on the *Pro Se* Appellant, by depositing a copy of it in the U.S. Mail, postage prepaid, on August 27, 2018, addressed to Mark Ostendorff, 135 Cedar Creek Circle, Central, SC 29630.



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