

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 25 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Opinion No. 5616 (S.C. Ct. App. filed January 16, 2019)

James C. Owens,Petitioner,

-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., isRespondent.

PETITION FOR WRIT OF CERTIORARI

John E. Parker
William F. Barnes, III
PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK, P.A.
101 Mulberry Street East
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR PETITIONER

Other Counsel of Record:

Molly H. Cherry
Melissa A. Fried
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
ATTORNEYS FOR RESPONDENT

INDEX

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 1

STATEMENT OF THE CASE..... 1

FACTS 5

STANDARD OF REVIEW 12

ARGUMENT 13

 I. The Court of Appeals Improperly Weighed the Evidence in Contravention of the Well-Established Summary Judgment Standard 14

CONCLUSION 18

CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on January 16, 2019. (App. pp. 1303-1310). Counsel for Petitioner certifies that the Petition for Rehearing was made on January 30, 2019, and denied on February 21, 2019. (App. pp. 1311-1316).

QUESTION PRESENTED

- I. Whether the Court of Appeals erred in finding that Petitioner failed to raise a genuine issue of material fact as to whether he was discharged for exercising his constitutional rights in violation of a clear mandate of public policy as set forth in S.C. Code Ann. § 16-17-560.

STATEMENT OF THE CASE

This action arises from the 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 his exercise of privileges guaranteed by the United States Constitution and South Carolina Constitution. Owens disputes the Court of Appeals’ finding that there was no genuine issue of material fact as to whether he was discharged for exercising his constitutional rights in violation of public policy.

Owens filed a Complaint against ADC and other defendants on October 10, 2014, in the Charleston County Court of Common Pleas. (App. pp. 272-280). 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. (App. pp. 275-276, ¶ 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. (App. p. 276, ¶ 6). Owens, along with numerous other citizens, became concerned that the Building was out of character where it was proposed to be built and contrary to Mount Pleasant’s guidance documents that protect and preserve the area around Shem Creek. (App. p. 276, ¶ 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. (App. p. 276, ¶ 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. (App. pp. 276-277, ¶ 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. (App. pp. 276-277, ¶ 9). Owens followed ADC’s instructions and voiced only his personal opinion. (App. pp. 276-277, ¶ 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, and met with the Mayor, the Developer, Town Council Members and other administration officials to voice his opposition to the Project. (App. p. 276, ¶ 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 at issue. (App. pp. 278-279, ¶ 20).

On September 16, 2014, Stubbs Muldrow wrote ADC and advised it was terminating the agreement with ADC. (App. pp. 278-279, ¶ 20). After receiving the letter from Stubbs Muldrow, ADC terminated Owens on September 23, 2014, for his opposition to the Project, despite the express prior approval from ADC, in violation of S.C. Code Ann. § 16-17-560. (App. p. 279, ¶ 21).

ADC served its Answer on November 14, 2014. The answer generally denied the allegations asserted in Owens’s Complaint. (App. pp. 281-288). In addition to responding to Owens’s Complaint, ADC also filed a counterclaim against Owens alleging that he violated a duty of loyalty to ADC. (App. pp. 281-288). Despite ADC being aware of Owens’s opposition to the

Project, ADC sought actual damages and punitive damages against Owens for his “willful, wanton and reckless actions.” (App. p. 294, ¶ 33).

On February 16, 2016, ADC moved for summary judgment on the basis that the conduct alleged in the Amended Complaint did not give rise to a wrongful termination claim. (App. pp. 26-30). The circuit court heard ADC’s motion on May 16, 2016. (App. pp. 296-356). In an order filed June 22, 2016, the trial court granted ADC’s motion for summary judgment. (App. pp. 7-15).

Owens filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP, on June 30, 2016. (App. pp. 17-20). The circuit 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. (App. pp. 21-22). 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. (App. pp. 22-23). In a Form 4 Order filed August 8, 2016, the lower court denied Owens’s motion to reconsider. (App. p. 16). Owens timely filed his Notice of Appeal on September 1, 2016. (App. pp. 1229-1242).

On appeal, Owens argued the lower court erred in granting summary judgment to ADC on the basis that § 16-17-560 does not provide a private cause of action for wrongful termination in violation of public policy and that Owens’ extensive involvement with the executive, legislative, and administrative process in opposing the Shem Creek project constituted certain privileges and rights protected by the United States Constitution and South Carolina Constitution. (App. pp. 1261-1273).

The Court of Appeals affirmed the circuit court's order granting ADC's motion for summary judgment. (App. pp. 1303-1310). Although the court found that "under limited circumstances a violation of section 16-17-560 supports a cause of action against an employer for wrongful termination", it held that Owens failed to raise a genuine issue of material fact as to whether he was discharged for exercising his constitutional rights in violation of a clear mandate of public policy as set forth under *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985) and § 16-17-560. (App. p. 1307). After discussing that the United States and South Carolina Constitutions provide for freedom of speech, of assembly, and the right to petition the government, and that Owens's use of the political process to oppose the Shem Creek project was within those rights, the court nonetheless found that the evidence showed Owens was fired for other violations of company policy. (App. p. 1309). The Court gave various reasons for its holding, including "ADC had no issue with Owens exercising his right to engage in speech opposing the Shem Creek project", "the uncontroverted testimony was that Owens spent time at work actively opposing a project that ADC had a financial stake in", and "ADC was within its rights to discharge an at-will employee for a violation of rules that brought economic harm to the company." (App. pp. 1309-1310). The Court of Appeals then stated that for these reasons the termination did not violate § 16-17-560 or a clear mandate of public policy. (App. p. 1310).

Owens filed a timely petition for rehearing resubmitting the arguments "put forth in Owens briefs and at hearing on this matter" and, specifically, arguing it should be for a jury to decide if Owens was fired for exercising his constitutional rights or for violating an ADC policy. (App. pp. 1311-1315). Owens argued that there was a genuine issue of material fact as to whether his personal use of office technology was in violation of ADC policy that prohibited only "excessive" personal use. (App. p. 1313). Further, Owens argued that engaging in constitutional conduct

cannot be a valid basis for termination, even if the conduct brings economic harm to ADC. (App. pp. 1313-1314). Finally, Owens argued the Court of Appeals erred in improperly weighing the evidence to affirm summary judgment. (App. p. 1314). The Court of Appeals denied the petition for rehearing on February 21, 2019, and this Petition for a Writ of Certiorari is timely filed.

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'S EMPLOYMENT WITH ADC

Owens grew up in Mount Pleasant and started working for ADC as a construction administrator in mid-September 2004. (App. p. 867, lines, 7-8; p. 872, 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. (App. p. 872, lines 16-23). Owens split his time between working in the office and working in the field, and he had flexibility regarding what he did during the workday. (App. p. 874, lines 8-18; p. 875, lines 17-22).

ADC has four divisions of engineering consulting – building envelope, structural, civil, and landscape.¹ (App. p. 875, line 23 – p. 876, line 12). ADC partners, Greg Jones and Chris Cook, were in charge of civil engineering, where Owens primarily worked. (App. p. 877, lines 17-22). Owens was one of three construction administrators with ADC and was not involved in who

¹ ADC partner, Rick Cook, was in charge of the building envelope division, (App. p. 876, lines 17-22), while ADC partner, Mark Dillon, was in charge of structural engineering. (App. p. 877, lines 2-9). Warren Pruitt was in charge of landscape architecture. (App. p. 877, line 23 – p. 878, line 1).

hired ADC to work on a project. (App. p. 403, line 24 – p. 404, line 3; p. 879, lines 15-19). In 2014, ADC had approximately sixty (60) employees. (App. p. 529, lines 14-16). ADC provided Owens a Motorola mobile phone that he used while employed by ADC. (App. p. 862, lines 8-22).

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

Tyler Flesch is in the real estate investment business. (App. p. 625, lines 5-14). In 2011, Flesch had conversations with Mount Pleasant officials about construction of the Project. (App. p. 631, lines 4-13). Initially, Mount Pleasant was going to build the garage and Flesch was going to be the landlord for the ground floor. (App. p. 631, lines 4-13). However, Mount Pleasant later decided it did not want to spend the money to construct the Project. (App. p. 631, lines 4-13). Following Mount Pleasant's decision, Flesch decided to work on plans to develop the Project with an office building. (App. p. 631, lines 2-5).

Flesch became aware of height restrictions in that area when they started to draw the building. (App. p. 634, 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. (App. p. 634, 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. (App. p. 634, lines 13-25).

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 (App. p. 840, lines 3-7). The purpose of the Facebook page was to disseminate information about the Shem Creek Project. (App. p. 840, lines 15-22). In early June 2014 Owens informed his supervisor

² Saving Shem Creek's Facebook page currently has nearly 8,000 members.

and ADC partner, Cook, about his opposition to the Shem Creek Project. (App. p. 904, lines 4-13; p. 394, line 10 – p. 395, line 25). Owens felt it was his duty to inform ADC because he did not want ADC to see his name in the paper without knowing that he was doing this as a private citizen. (App. p. 904, line 20 – p. 905, line 8). Cook gave Owens permission to oppose the Project as long as he did not mention ADC and it was his personal opinion. (App. p. 395, lines 22-25). At the time of this June 2014 meeting, Cook knew of ADC’s involvement with the Project, (App. p. 396, lines 1-8) but did not tell Owens.³ (App. p. 908, line 25 – p. 909, line 3; p. 989, line 21 – p. 990, line 6). Owens fully complied with Cook’s instructions.

As the opposition to the Project grew, Flesch contacted Charleston morning radio host, Bryan Crabtree, after seeing a podcast Crabtree put out about the Project. (App. p. 636, lines 7-19). Flesch felt the public opposition to the Project was directed against his livelihood. (App. p. 642, lines 14-15). Crabtree supported the Project on his show, The Bryan Crabtree Show, and Flesch thanked him for his support. (App. p. 645, lines 2-9). In an August 12, 2014 email, Flesch emailed Crabtree about that night’s Mount Pleasant Town Council meeting. (App. p. 717). 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.” (App. p. 717).

On the night of September 15, 2016, Flesch began searching Google and Facebook to learn more about Owens. (App. p. 656, lines 16-25). Flesch discovered Owens’s LinkedIn page that listed ADC Engineering as Owens’s employer. (App. p. 656, line 16 – p. 657, 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. (App. p.

³ Cook testified he does not remember specifically talking with Owens about ADC’s involvement in the Project. (App. p. 396, lines 1-8).

656, line 16 – p. 657, line 9). In a September 18, 2014 email to Crabtree, Flesch provided Owens’s LinkedIn page and noted that Owens was a “serous [sic] fraud”. (App. p. 728). However, Flesch testified he did not direct Crabtree to do anything with the information. (App. p. 673, 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.” (App. pp. 726-727). Crabtree subsequently published on his and Kirkman Broadcasting’s website, an image of Owens next to Pinocchio and an individual that is two-faced. (App. p. 1205; pp. 517-518).

IV. OWENS’S TERMINATION

Following Flesch’s directive, Stubbs Muldrow summoned ADC Partner, Mark Dillon, to a meeting on September 16, 2014. (App. p. 530, lines 11-13). Flesch was present during that meeting. At the meeting Flesch informed Dillon of Owens’s 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.” (App. p. 534, line 23 – p. 535, line 3). In the hour-long meeting, Flesch expressed extreme displeasure about Owens’s opposition and was “very upset, very angry about it.” (App. p. 538, lines 14-24). If Flesch had it his way, Dillon would have called Owens on the phone right then and terminated Owens’s employment, and, after pressing the issue quite hard, could not understand why Dillon could not terminate Owens immediately. (App. p. 538, line 24 – p. 539, line 3). Flesch mentioned to Dillon that Owens sent emails and made Facebook posts during working hours. (App. pp. 544-545; p. 607). Flesch also threatened to sue ADC. (App. p. 545, line 24 – p. 546, line 5; p. 607).

Contrarily, Flesch testified that he never asked Dillon or anyone else to fire or terminate Owens during the September 16th meeting. (App. p. 660, lines 8-20). Additionally, Flesch stated

he “never decided to take action against Mr. Owens.” (App. p. 635, line 23 – p. 636, line 5). Flesch believes Owens could have discovered ADC’s involvement in the Project by contacting his bosses. (App. p. 671, 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. (App. p. 612). Flesch ended his email to Dillon by noting “I look forward to speaking to you about how this can be resolved amicably.” (App. p. 612).

The next day, on September 17, 2014, Dillon called Charles Muldrow of Stubbs Muldrow to inform him that ADC was not terminating Owens. (App. p. 550, line 20 – p. 551, line 5). Stubbs Muldrow was one of ADC’s top two clients, and they have worked together since 1990. (App. p. 536, line 16 – p. 537, line 9). Dillon believed ADC was Stubbs Muldrow’s first choice for engineering on their projects. (App. p. 551, lines 9-10). Muldrow was disappointed in ADC’s decision not to fire Owens. (App. p. 551, lines 2-16).

On September 18, 2014, ADC received an evidence preservation letter from Stubbs Muldrow, as well as a September 16, 2014 letter terminating the agreement for structural services on the Shem Creek project. (App. p. 814, lines 12-16; p. 608). Although ADC had decided not to take action with regard to Owens, that changed after it received the evidence preservation letter. (App. p. 406, lines 17-20). After receiving the letter, Cook and Jones met with Owens later that day at 4:15 p.m. (App. p. 814, lines 17-20; pp. 610-611). Cook noted that during the meeting Owens referenced the previous conversation with Cook regarding his involvement in opposing the Project. (App. pp. 610-611). 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. (App. p. 395, lines 18-25; pp. 610-611). Owens’s goal was to keep ADC out of everything. (App. pp. 610-611).

Michael Graham served as the IT Specialist for ADC Engineering for over seven (7) years. (App. p. 733, lines 3-9). Graham seized information from Owens' computer following ADC's receipt of the September 16, 2016 Stubbs Muldrow evidence preservation letter. (App. p. 734, line 1 – p. 735, line 8). ADC management testified that Owens sent approximately twenty personal emails from his ADC computer. (App. p. 1169, lines 16-17; p. 418, lines 11-17). However, there were only fourteen (14) emails Owens sent over a four-month period from May 16, 2014 through September 10, 2014 that Graham located. (App. p. 735, line 24 – p. 736, line 2; pp. 744-801). 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. (App. pp. 744-801; p. 836, 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 use: "Brief or incidental use of office technology for personal, non-business purposes is *understandable* and *acceptable* as long as it is *not excessive* or *inappropriate*, and does not result in expense or loss to the company." (App. p. 1170, lines 15-20; p. 1090). Steve Truschka, ADC's business and human resources manager, acknowledged sending personal emails but does not believe he sent twenty (20) over several months. (App. p. 1169, line 21 – p. 1170, line 11). No one with ADC defined "excessive" and Truschka admitted "it's hard to define excessive." (App. p. 1170, lines 21-22; p. 1177, 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 prior to his termination. (App. p. 1171, lines 5-10).

Cook likewise could not define the "significant" amount of time Owens allegedly used ADC resources that warranted Owens's termination. (App. p. 417, lines 1-23). Like Truschka,

Cook acknowledged frequently using ADC equipment for personal endeavors. (App. p. 418, 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. (App. p. 737, lines 19-25). ADC did not check anyone else's computer when checking Owens's computer as to whether they used ADC equipment for personal use or how the other employees' usage compared to Owens's personal use. (App. p. 1170, lines 12-14; p. 419, lines 4-21; p. 420, lines 19-23). ADC's personal email at work policy is recommended only during lunch hours, but "it is not a very strict policy." (App. p. 738, lines 20-25). Out of approximately sixty (60) employees, Graham is not aware of another ADC employee disciplined or reprimanded for personal computer use. (App. p. 739, 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's email account. (App. p. 432, lines 6-8; p. 941, lines 3-8).

V. OWENS'S EXEMPLARY TEN-YEAR EMPLOYMENT WITH ADC

Owens first learned of ADC's involvement with the Project from a Bryan Crabtree Facebook post. (App. p. 909, 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." (App. p. 909, line 18 – p. 910, line 10).

ADC partner, Greg Jones described Owens as a good employee that carried out his duties with ADC appropriately. (App. p. 809, lines 8-14). He was never given any negative reviews or write-ups. (App. p. 809, lines 15-17). Steve Truschka is ADC's Business Manager in charge of human relations. (App. p. 1152, line 21 – p. 1153, line 5). Truschka did not know anything

negative about Owens until Flesch and Stubbs Muldrow threatened to terminate any relationship with ADC. (App. p. 1154, lines 6-25). In fact, everything Truschka knew about Owens was positive, and he had received no complaints about Owens. (App. p. 1154, lines 12-13; p. 1186, lines 3-5).

Although labeled as Pinocchio and two-faced by Crabtree, Owens' ADC superiors would not label him as such. (App. p. 530, lines 3-8; p. 581, 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. (App. p. 1174, lines 14-25). Up until the threats from Flesch, Cook could not think of anything negative about Owens. (App. p. 393, lines 17-24). Following his termination, Owens applied for many jobs⁴ without success. (App. p. 947, line 14 – p. 962, 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. (App. p. 962, line 21 – p. 963, 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, 493, 443

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. (App. p. 947, line 14 – p. 962, line 20)

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). “Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Clyburn v. Sumter County School Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (Ct. App. 1993) (citing *Baugus v. Wessinger*, 303 S.C. 412, 401, S.E.2d 169 (1991)).

ARGUMENT

It is clear that despite being told by Flesch of Owens’s personal technology use on September 16, 2014 (App. pp. 544-545; p. 607), ADC backtracked and decided to terminate Owens when it realized it may possibly lose the agreement with Stubbs Muldrow, one of its top two clients. 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. section 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 States⁵ or by the Constitution and laws of this State.⁶

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.

S.C. CODE ANN. § 16-17-560. In granting summary judgment to ADC, the Court of Appeals disregarded the established summary judgment standard and weighed 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 and the absence of any evidence defining or quantifying “excessive” use. Even ADC partners and employees admitted to personal use and could not define what constitutes “excessive” use.

If the Court of Appeals’ decision is allowed to stand in its current form, it will essentially act as a bar to wrongful termination actions in violation of section 16-17-560 unless 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. Under the Court of Appeals’ reasoning, a genuine issue of material fact is not enough to survive a motion for summary judgment; a plaintiff seeking to maintain a wrongful termination action under § 16-17-560 has to conclusively establish as a matter of law that the weight of his wrongful termination evidence overcomes an employer’s evidence that the termination was lawful.

This Court should grant the petition and reverse the Court of Appeals because the Court of Appeals improperly weighed the evidence in a light most favorable to the moving party to affirm summary judgment.

I. THE COURT OF APPEALS IMPROPERLY WEIGHED THE EVIDENCE IN CONTRAVENTION OF THE WELL-ESTABLISHED SUMMARY JUDGMENT STANDARD

The Court of Appeals quoted the standard of review that all evidence is to be viewed in a light most favorable to the non-moving party. (App. p. 1307). (quoting *Quail Hill, LLC v. Cty. Of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)). However, one sentence confirms the court weighed the evidence in affirming summary judgment: “We *believe* ADC was within its rights to discharge an at-will employee for *a violation of rules* that brought *economic harm to the company*.” (App. p. 1310) (emphasis added). Belief is not sufficient to hold as a matter of law that Owens was not terminated for exercising his constitutional rights in violation of section 16-17-560.

This action presented two scenarios that led to Owens termination: (1) Owens was terminated for exercising his constitutional rights that harmed ADC or (2) Owens was terminated for violating ADC’s technology policy that specifically allowed personal use but not if it harmed ADC. By holding as a matter of law that ADC was within its rights to terminate Owens for violating the technology policy, the court necessarily had to weigh the evidence in contravention of the well-established summary judgment standard.

As quoted by the court, ADC’s technology policy allowed for “[b]rief or incidental use of office technology for personal, non-business purposes . . . as long as it [was] not excessive or inappropriate, *and* did not result in expense or loss to the company.” (App. p. 1309) (emphasis added). The court omitted from this sentence that personal, non-business use was “understandable and acceptable”. (App. p. 1090). To warrant discipline or termination under the technology policy, the conjunctive “and” requires that the personal, non-business use be both (1) excessive or inappropriate and (2) result in expense or loss to the company. *See Terry v. Lee*, 314 S.C. 420, 425, 445 S.E.2d 435, 437 (1994) (holding the use of “the conjunctive term ‘and’” in a statute required compliance with both stated requirements).

The Court of Appeals did not hold Owens personal use was “excessive” or “inappropriate”, a prerequisite to a violation of the technology policy. It is a jury question as to whether sending fourteen (14) emails over almost four months was “excessive” or “inappropriate”, as the court should not weigh such evidence and hold as a matter of law on summary judgment the personal use was “excessive” or “inappropriate”. ADC employees admitted to personal use and could not define “excessive”. The Court of Appeals’ decision should be reversed on this basis alone.

Despite not holding Owens’s conduct was excessive or inappropriate, the Court of Appeals found Owens’s conduct harmed the company: “rather, the evidence shows Owens was discharged because he used company equipment, materials, and time to engage in an activity that was a violation of company policy and *unquestionably detrimental to ADC.*” (App. p. 1309) (emphasis added). The same conduct that the court held is a constitutional right – “using the political process to actively oppose the Shem Creek project was within his rights as a private citizen” – is the same conduct that the court held brought economic harm to ADC to warrant termination under the technology policy. The issue here is whether that constitutional conduct is and actually was a valid basis for his termination by ADC. ADC moved for summary judgment on the basis that “[n]o public policy is implicated by the alleged conduct in the Amended Complaint giving rise to a wrongful termination claim. (App. p. 28) (emphasis added). As held by the court, ADC could not terminate Owens for exercising his constitutional rights as that is a violation of section 16-17-560, but ADC can terminate Owens if the exercise of those constitutional rights caused expense or loss to ADC. This is allowing ADC to do indirectly what it cannot legally do directly and is merely form over substance. Owens’s constitutionally permissible conduct in opposing the Project is the basis of his termination under either scenario set forth above. This inconsistency must be corrected with a reversal by this Court and remand for consideration by a jury.

The Court of Appeals erred in finding Owens did not raise a genuine issue of material fact as to whether he was discharged for exercising his constitutional rights or for violating ADC's technology policy. The court should not have stepped into the jury's shoes by taking upon itself the task of weighing the evidence presented. Rather, the court should have asked whether Owens presented, at a bare minimum, a mere scintilla of evidence that ADC was motivated to terminate his position for reasons other than the personal use of his cell phone and computer, namely his political activities.

The relevant facts are that Jim Owens had an untarnished record of employment with ADC prior to his opposition to the Shem Creek Project. ADC was aware of his involvement in the opposition and allowed some use of office technology for personal communications. Owens sent a total of fourteen (14) personal emails over an approximately four-month period from his work computer to his personal email account. ADC took no steps to terminate Owens for this behavior until after a prominent client and a local real estate developer demanded his termination due to his political activities. All of this was performed under the peril of cancellation of a business agreement with one of ADC's best clients. The only piece of evidence missing within this chain of events is the "smoking gun" documenting ADC's intent to fire Owens due to his political activities. The summary judgment standard does not dictate that a case should be terminated in the absence of a smoking gun. It only calls for a genuine issue of material fact.

The evidence, viewed in a light most favorable to Owens, shows that he had an exemplary record of employment with ADC prior to his termination, he did not know of ADC's involvement with the project, and a substantial and prominent, repeat client of ADC had terminated ADC's contract for structural services on the Shem Creek project due to Owens political involvement. It

is the role of the jury to decide if ADC terminated Owens for violating the technology policy or for his political activities.

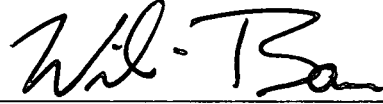
CONCLUSION

The evidence in this case, at a minimum, establishes that Owens informed ADC of his involvement in opposing the Project in June 2014. Despite ADC partner Chris 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 having this knowledge of alleged personal use, the next day, 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 Shem Creek project is protected by the United States Constitution and South Carolina Constitution. He should not be prevented from having his day in court when he has introduced considerably more than the "mere scintilla" of evidence a genuine issue of material fact necessary to survive a motion for summary judgment. For these and all other reasons Owens requests the Court grant certiorari and reverse.

[SIGNATURE TO FOLLOW ON NEXT PAGE]

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

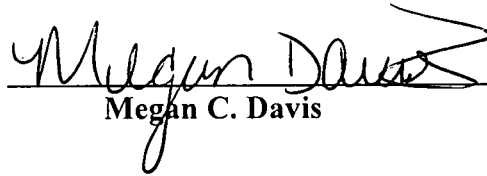


John E. Parker
William F. Barnes, III
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924
(803) 943-2111
jparker@pmped.com
wbarnes@pmped.com
ATTORNEYS FOR PETITIONER

March 21, 2019
Hampton, South Carolina

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

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629


Megan C. Davis

March 21st, 2019
Hampton, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5616 (S.C. Ct. App. Filed January 16, 2019)

James C. Owens, Petitioner,

-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 Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Petition for Writ of Certiorari and Appendix* to:

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk of Court
Post Office Box 11330
Columbia, SC 29211

Molly Hughes Cherry, Esquire
Melissa A. Fried, Esquire
Nexsen Pruet, L.L.C.
Post Office Box 486
Charleston, SC 29402
Attorneys for Respondent, ADC Engineering, Inc.

RECEIVED

MAR 25 2019

S.C. SUPREME COURT