THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-3016

Angela Parsons, Appellant,
v.

Jane Smith, QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System, Defendants,

Of whom QHG of South Carolina d/b/a Carolinas Hospital System, and Carolinas Hospital System are the Respondents.

FINAL BRIEF OF APPELLANT

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II. DID THE TRIAL COURT ERR IN FINDING THAT AN EMPLOYER OWES NO DUTY OF CARE TO AT - WILL EMPLOYEES REGARDING THEIR EMPLOYMENT?

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STATEMENT OF THE CASE

This is an employment law case in which the Plaintiff/Appellant, Angela Parsons ("Parsons"), a nurse, alleges her boss Jane Smith ("Smith"), the Director of the Women's Center at Carolinas Hospital System, engaged in employer fraud in order to cause Parsons' termination. And despite Parsons' complaints to Carolinas about the conduct of the Director, Carolinas allowed Smith to continue her harassing and retaliatory conduct until Parsons was terminated. And after termination, Carolinas upheld the decision of Jane Smith, further supporting the Director's fraudulent conduct.

Plaintiff/Appellant filed suit alleging (1) interference with economic relations (2) wrongful termination in violation of public policy and (3) negligent hiring, supervision and retention of Defendant Jane Smith (ROA p. 9,21).

Defendants filed a motion to dismiss and after a hearing on May 20, 2013, the court determined that Jane Smith was not acting outside of the course and scope of her employment and the actions of Defendant Jane Smith did not constitute an action by a third party; thus the action for interference with economic relations against a supervisor acting within the course of employment was dismissed. However, the remaining causes of action for wrongful termination and negligent hiring, supervision and retention of Defendant Jane Smith survived the motion to dismiss, and the court determined that these issues could only be resolved through facts obtained during discovery. (ROA p.1).

At the conclusion of all depositions, Defendants filed a Motion for Summary Judgment, heard by the Court on June 17, 2014, arguing that Plaintiff failed to produce sufficient evidence to create a material issue of fact as to whether Defendants wrongfully

terminated Plaintiff and as to whether the Defendant engaged in negligent hiring, supervision and retention of the Plaintiff (ROA p. 62,64).

After a Motions Hearing on June 17, 2014, the Court granted Defendant's Motion to Dismiss on June 25, 2014, finding:

1) Parsons has not established a claim for wrongful termination in violation of public policy as a matter of law;

2) Because Parsons was an at-will employee, the hospital did not have a duty to supervise the employee or protect Parsons from the manner or priority in which Smith scheduled her PRN work shifts.

(ROA p. 3)

Plaintiff/Appellant filed the Notice of Appeal on July 24, 2014 and has received the transcript of the June17, 2014, Motions Hearing on September 12, 2014 via mail in an envelope postmarked September 11, 2014. Plaintiff/Appellant now submits an Initial Brief.

FACTS

Plaintiff/Appellant had been employed with Defendant/Respondent Carolinas under a number of different job statuses, most recently working PRN in the Women's Center. Defendant/Respondent maintained a policy requiring PRN nurses to work a minimum of twelve (12) hours for every four (4) week schedule (ROA p. 194 (*p. 11, ll 11-17, p. 12, ll 7-11*); ROA p. 219). If a PRN nurse does not work the required number of hours for three (3) months she is removed from PRN status (ROA p. 220). Although her work status was PRN, Plaintiff and other co workers testified through depositions that

there was "no problem" getting work as a PRN (ROA p. 265 (*p. 8-9)*); (ROA p. 273 (*p. 7-9*) (ROA p. 281 (*p. 6)* (ROA p. 288 (*p. 13*). Even Tammy Dickerson, HR Director at the time, testified that it would not be difficult for a PRN employee to work twelve hours (typically one shift) over four weeks (ROA p. 226, (*p. 17, ll 7-17*)).

When Jane Smith came to work as Plaintiff's director, Plaintiff inquired to Jane Smith how she was back working as Director of the Woman's Center after an alleged HIPAA violation some years ago. Jane Smith recalls this incident and heard through staff that a complaint had been written about it (ROA p. 317, (*p. 47–49*). Donna Sullivan, was a director for the women's center and she recalls the situation and recalls "the family felt like that was a violation of their privacy" (ROA p. 241-242 (*p. 29-30*). As a result of Plaintiff's inquiry about her Director's ability to return to work after Jane Smith's involvement in a HIPAA violation, Plaintiff became the victim of her Director Jane Smith's wrath. Jane Smith began a calculated and deliberate attempt to place Plaintiff in a position to be fired.

Jane Smith manipulated the schedule in a way to guarantee that Angel Parsons would not get the hours required per policy. Ms. Virginia Johnson testified that there was a noticeable difference between the way Jane Smith was scheduling Angel Parsons and the way Jane Smith scheduled other PRN employees. She also testified that Jane would make Angel Parsons the 4th nurse on the schedule, which was known to be a guarantee that Plaintiff was not going to work. Specifically, Johnson testified that Johnson always scheduled 3 people to work, never 4 because 4 were not needed (ROA p. 269, (*p. 22, ll 16-23*); however, Jane Smith would move Angel Parsons from the 3rd person and only

scheduled Angel Parsons as the 4th person to work, thus guaranteeing that Plaintiff would never be called to work. (ROA p. 266,269, *(p. 10 - 13, 22-24)*. Jane Smith tried to force Plaintiff to work in areas in which she was not trained. The most blatant example of Jane Smith's deliberate conduct against Plaintiff is Patricia Gibson's testimony that she was asked to make fraudulent claims against Plaintiff. Patricia Gibson testified that Jane Smith asked her to call the hotline to make complaints about Plaintiff (ROA p. 294-295 *(p. 11-16)*. Jane Smith wanted Patricia Gibson to make statements that Plaintiff was "disrupting the unit with gossip" and Jane Smith stated that she needed Patricia to do that for her (ROA p. 294, *(p. 12, ll 10-21)*.

Other conduct complained of was the testimony that Jane Smith prohibited co workers from calling Angel to come in and work (ROA p. 266 *(p. 10)* (ROA p. 266, *(p. 6)*. Then Plaintiff was terminated on August 19, 2011, for not meeting the required hours (ROA p. 197, *(p. 25, ll 1-4)*.

Costa Cockfield, part of the Senior Executive team, testified that a Director has "24/7 authority over that particular department" (ROA p. 195, *(p. 14, ll 2-4)*. Cockfield testified "The Director is responsible for the schedule" (ROA p. 210, *(p. 77, ln 11)*. Cockfield also testified "A Director has hiring and firing power." (ROA p. 195, *(p. 15, ll 11-15)* . Cockfield testified that Jane Smith had the authority to issue a termination letter (ROA p. 197, *(p. 25, ll 2-9)*. Tammy Dickerson testified that the Director had the discretion of not giving an employee any work hours (ROA p. 231, *(p. 34 ll 23, 35, ll 1-3)*.

When Angel Parsons complained that co workers were prohibited from calling her to work for them, Costa Cockfield testified that she didn't question any co workers about these claims to validate Plaintiff's complaints for help (ROA p. 199, *(p. 30)*. Tammy Dickerson, HR director, testified that if Jane had come to her to talk about the PRN not fulfilling requirements, she would not have looked into it before recommending termination (ROA p. 227, *(p. 20, ll 23; 21 ll 1-7)*. Tammy Dickerson would not even verify that she recommended termination of Plaintiff (ROA p. 227, *(p. 21, ll 10-16)*.

Defendant's HR and administrations, Tammy Dickerson and Costa Cockfield did not question the actions of Jane Smith because she was the director and Plaintiff's employment was at will. Defendants never took any action to control or stop the fraudulent actions of Jane Smith in manipulating the schedule and then terminating Plaintiff for a violation of policy that Jane Smith caused.

Because of the deliberate actions of Plaintiff's supervisor, Director Jane Smith, Plaintiff was wrongfully terminated. Wrongful termination in violation of public policy occurs when a director engages in fraudulent acts in order to cause an employee's termination; and negligent supervision occurs when an employer is aware of complaints about a director, yet continues to allow a Director to have the complete authority over a facility to engage in fraudulent acts that directly causes an employee's termination.

STANDARD OF REVIEW

In reviewing a trial court's decision granting summary judgment, this Court applies the same standard as the trial court applies under Rule 56(c) SCRCP. Brockbank

v. Best Capitol Corp., 341 S.C. 372, 378-379, 534 S.E.2d 688, 692 (2000). The contours of the summary judgment standard are well established. Summary judgment is appropriate only where it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Center, Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Rule 56(c) SCRCP. In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corporation, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment should be denied. Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

ARGUMENTS

I. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

The court should make a decision in the absence of legislation as to whether or not supervisor fraud and manipulation is a matter of public concern when that fraud can result in termination.

As the trial court summarized, "the Hospital fired Parsons because she failed to meet the minimum number of hours required to maintain PRN status with the Hospital" (ROA p. 6). Plaintiff/Appellant only violated policy because her Director manipulated the scheduling in such a way that Plaintiff/Appellant was never called in to work and manipulated the employees in such a way that they were not even allowed to call Plaintiff/Appellant in to work for them. In this case, the Director had almost complete autonomy in personnel decisions, and even when the employer was made aware of her unethical and calculated behavior, the employer continued to condone the Director's conduct as she was the Director and the employee was employed at will.

At - will employment should not be so broadly accepted that it deprives an employee of any protection within the workplace. When a supervisor engages in fraudulent acts to cause an employee's termination, this conduct should not be permitted simply because of an at - will employment status. Allowing a Director, in her supervisory role, to manipulate an employee's circumstances and thus employment status to the point of termination, should be against public policy.

As described in Wagenseller v. Scottsdale Memorial Hosp.,147 Ariz. 370, 378 (Ariz.1985):

> Public policy is usually defined by the political branches of government. Something "against public policy" is something that the Legislature has forbidden. But the Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field.
> It is the courts, to give one example, that originated the whole doctrine that certain kinds of businesses -- common carriers and innkeepers -- must serve the public without discrimination or preference. In this sense, then, courts make law, and they have done so for years.

And South Carolina agrees. "The determination of what constitutes public policy is a question of law for the courts to decide. *See* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("*The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.*"). And as noted also in Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 379(Ariz.1985):

> Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.
> (*quoting* Egerton v. Earl Brownlow, 4 H.L.Cas. 1, 196 (1853).

Plaintiff/Appellant questioned her Director's return to employment in a supervisory role after an alleged HIPAA violation years ago. This inquiry caused the Director to engage in intentional fraudulent acts with respect to scheduling and prohibiting employees from calling Plaintiff/Appellant to work so that Plaintiff/Appellant would be terminated. And with the Hospital refusing to address the situation, the Director was successful. This was not termination with or without cause. This was an orchestrated and manipulated termination by use of a supervisor's fraudulent actions. "Thus, in an at-will hiring we continue to recognize the presumption or to imply the covenant of termination at the pleasure of either party, whether with or without cause. Firing for bad cause -- one against public policy articulated by constitutional, statutory, or decisional law -- is not a right inherent in the at-will contract, or in any other contract, even if expressly provided. *See 1 A. Corbin, Contracts § 7; 6A A. Corbin, Contracts* §§ 1373-75 (1962). Such a termination violates rights guaranteed to the employee by law and is tortious. *See Prosser*

& Keeton on Torts § 92 at 655 (5th ed. 1984)." Wagenseller v. Scottsdale Memorial Hosp.,147 Ariz. 370, 379(Ariz.1985).

The intentional actions of the Director to cause Plaintiff/Appellant's termination by fraudulent means should have been a tort in itself. As early as 1915, the United States Supreme Court, acknowledged an important limitation on the at - will rule:

> The fact that the employment is at the will of the parties, respectively, does not make it at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.
> Truax v. Raich, 239 U.S. 33, 38, 36 S. Ct. 7, 9, 60 L. Ed. 131 (1915).

In this case, the Director was guilty of completely disregarding the employee's interest in the freedom of the employer to exercise judgment free from supervisor fraud. The employer's stated reason for termination was not "at -will" or for "no reason". The employer's reason for termination was failure to meet the required minimum working hours for a PRN nurse. The failure that caused termination was because the Director manipulated Plaintiff/Appellant's ability to work. That supervisor manipulation was fraudulent and in retaliation for Plaintiff/Appellant making an inquiry as to the supervisor's return to work after an alleged HIPAA violation.

The trial court erred in finding that Plaintiff/Appellant's termination did not rise to the level of a public policy violation. This court should make a decision in the absence of legislation as to whether or not supervisor fraud and manipulation and retaliation is a matter of public concern when that fraud can result in termination.

II. NEGLIGENT TRAINING, RETENTION AND SUPERVISION

The trial court, referencing Gause v. Doe, 317 S.C. 39,42,451 S.E.2d 408, 409 (Ct. App. 1994), determined that employers do not owe a duty to at-will employees regarding their employment status since at - will employees can be terminated for any reason, irrespective of any inadequate investigations, false assumptions or failure to reevaluate on the part of the employer. However, when an employment contract only permits termination for cause, the appropriate test on the issue of breach focuses on whether the employer had a "reasonable good faith belief that sufficient cause existed for termination." Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002). If good faith is required in contracted employment, it would be injurious to the entire working class to remove the basic requirement of good faith and fair dealing with respect to at - will employment. The hospital had at least a duty to protect anyone on its premises from injury caused by tort. Although an employee, Plaintiff/Appellant was injured by the fraudulent acts of her Director which interfered with Plaintiff/Appellant's employment status. Plaintiff/Appellant is the victim of the hospital's failure to protect her from tort, from financial injury, and from wrongful termination. In this case, Plaintiff/Appellant was entitled to at least the duty owed any person in a negligence action. While the trial court opined that "the present case does not involve a harm to a member of the public, but rather a co-employee", this case was more than that. This case involved a Director who had almost complete control over the entire Women's Center. And, with that control as her tool, she had the power to manipulate the employment status of any worker within that Women's Center. And, with that tool, she did manipulate the employment of

Plaintiff/Appellant. There is a question of fact as to whether or not the employer knew that the Director could create undue harm to its employees by the Director committing fraud.

The Supreme Court has pointed out the most basic principle of agency law in Burlington Indus. v. Ellerth, 524 U.S. 742, 755-756 (U.S. 1998): "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." And the hospital is liable for the torts of its agents, such as fraud, especially if committed within the scope of her employment.

Furthermore, the finding of the trial court that the employer owes no duty to an at-will employee is contradicted by the fact that tort injuries are covered by workers compensation laws (*See* Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993) (*the Act provides exclusive remedy for employees who sustain work-related injury*; ***claim of negligence for failure to exercise reasonable care in selection, retention, and supervision of co-employee is covered by the Act)***. Obviously a duty is owed to employees to protect them from personal injury; and it would seem persuasive to this court to impose the same duty to protect employees from supervisor fraud that leads to economic injury of termination.

The trial court in Sabb v. S.C. State Univ., 350 S.C. 416, 429-430(S.C.2002), recognized a duty to Plaintiff with respect to employment:

> In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. Steinke, supra. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict. Id.

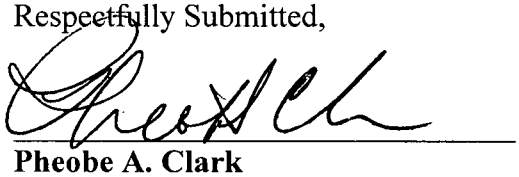
> A duty arose on University's part once University was placed on notice of Chief White's behavior and actions. **After University received the grievances of Sabb and other employees, University had a duty to address the employees's concerns with due care.**
> A jury issue also existed as to whether University had breached that duty. University was on notice of Chief White's activities through conversations Sabb and other employees had with University officials, the petition circulated by members of the police department, the grievances of Sabb and other employees, and through the Committee's report detailing the findings of their investigation into Chief White's actions. Despite these numerous complaints and notifications of Chief White's actions and behavior, University allowed him to continue serving as chief of the department without any real effort to rectify the hostile conditions within the department.
> Viewing the evidence in the light most favorable to Sabb, the trial court properly denied the directed verdict and JNOV motions because evidence existed to show University had possibly breached a duty owed to Sabb.
> Sabb v. S.C. State Univ.,350 S.C. 416, 429-430(S.C.2002)

The circumstances in Sabb are almost identical to those in the present case. And the Supreme Court determined that an employer had a duty to its employees and breached that duty by failing to rectify the hostile conditions within the workplace. And the hospital was the same in this case. It was on notice of the actions of its Director, and it failed to address Plaintiff/Appellant's concerns. And the injury done to Plaintiff/Appellant in this case was termination as a result of supervisor fraud. The Supreme Court's ruling that the employer had a duty based on the facts of that case above, would overrule the trial court in this case and its erroneous reliance on Gause v. Doe, 317 S.C. 39, 42, 451 S.E. 2d 408, 409 (Ct. App. 1994).

CONCLUSION

For the reasons stated, this court should reverse the judgment of the circuit court.

Respectfully Submitted,



December 12, 2014

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ATTORNEY'S CERTIFICATION THAT FINAL BRIEF OF APPELLANT COMPLIES WITH RULE 211(B)

Appellant certifies, through the undersigned attorney, that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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