

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Deadra Jefferson
Circuit Court Judge

Case No.: 2012-CP-26-004852

Jacklyn ☐ Donevant, ...Respondent,

vs.

Town of Surfside Beach, ...Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. As set forth in the Barron v. Labor Finders of South Carolina, 393 S.C. 609, 615-16, 713 S.E.2d 634, 637 (2011), the wrongful termination doctrine is not limited to situations where the employer requires the employee to violate the law or the reason for the employee's termination itself is a violation of the law.
- II. The decision in Antley v. Sheperd, 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) does not control this case, as Jacklyn J. Donevant, the building official for the Town of Surfside Beach, unlike the tax assessor in Antley, possessed the sole, absolute, and unfettered authority to issue stop work orders and was required to do so to stop unpermitted construction.
- III. The Town of Surfside Beach's employment termination of Jacklyn J. Donevant for issuing a stop work order, which immediately stopped unpermitted construction at the Town owned Pier Restaurant, presents an issue of fact as to whether her termination violates a clear mandate of public policy, as the General Assembly has declared that the public policy of the State of South Carolina is to maintain reasonable construction standards for the protection of the health, safety, and welfare of its citizens, and to that end, the General Assembly has enacted legislation requiring all municipalities and counties to enforce the building code of the State of South Carolina.

STATEMENT OF CASE

This case arises out of the Town of Surfside Beach's (hereafter "the Town") employment termination of Jacklyn J. Donevant ("Donevant"). (**R. pp. 1-5**). At the time of her termination, Donevant held the positions of Director of Planning, Building, and Zoning and building official. (**R. pp. 25-26; R. p. 301; R. pp. 292-93**). As building official, Donevant was required by law to enforce the building code of the State of South Carolina, including issuing stop work orders¹ for unpermitted construction. (**R. pp. 131-32; R. pp. 144-45; R. p. 295**). On March 20, 2012, Donevant observed unpermitted construction at the Surfside Pier Restaurant (hereafter "Pier Restaurant"), which was owned by the Town. (**R. p. 49; R. pp. 51-53; R. p. 276; R. p. 279**). Donevant issued a stop work order to stop the unpermitted construction. (**R. p. 401**). Upon learning of the issuance of the stop work order, the Town Administrator, James Duckett, Jr. (hereafter "Duckett"), suspended Donevant for three (3) days, beginning on March 21, 2012. (**R. p. 405**). Donevant returned to work on March 25, 2012, and on that date, Donevant informed Duckett in writing that she must follow the law even if it meant not following his instructions. (**R. p. 410**). On April 4, 2012, Duckett terminated Donevant. (**R. p. 412**). Duckett provided Donevant with no reason for her termination, and subsequently, Duckett informed the South Carolina Department of Employment and Workforce, that Donevant's termination was due to "operational changes." (**R. p. 66; R. p. 68; R. p. 413; R. p. 332**).

Donevant filed suit against the Town in the Horry County Court of Common Pleas on June 19, 2012, asserting a single cause of action for wrongful termination, alleging the

¹ "A stop work order is an order given by the building official to stop work, just completely shut the work down." (**R. p. 143**).

Town terminated her in violation of a clear mandate of public policy. (**R. pp. 1-5**). This case was tried before a jury on February 10, 11, 13, and 14, 2014.² The Honorable Deadra Jefferson presided over the trial.

At the conclusion of Donevant's case, the Town moved for directed verdict, arguing the Town's termination of Donevant did not constitute a violation of a clear mandate of public policy. The trial court denied the Town's motion and, after the Town presented its case, the trial court submitted the case to the jury, which returned a verdict in favor of Donevant in the amount of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars. The verdict was reduced to Three Hundred Thousand and 00/100 (\$300,000.00) Dollars pursuant to the relevant provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (2005 & Supp. 2014). Following the jury's verdict, the Town moved for a judgment notwithstanding the verdict (hereafter "JNOV") on the same grounds as argued in its motion for directed verdict. The trial court denied the Town's JNOV motion, and this appeal followed, with the Town filing a notice of appeal on March 10, 2014. On appeal, the Town contends the trial court erred in denying its motion for directed verdict.

STATEMENT OF FACTS

In 2005, the Town hired Donevant for the positions of Director of Planning, Building, and Zoning and building official.³ (**R. pp. 25-26; R. p. 301; R. pp. 292-93; R. p. 387**). In this capacity, Donevant served as the head of the building department and

² By order of Chief Justice Toal, all courts in South Carolina were closed on February 12, 2014 due to inclement weather.

³ Previously, Donevant worked for the Town as the deputy building official and then as the building official. (**R. pp. 24-25**). Donevant left her employment with the Town in 2002 to work in the private sector. (**R. p. 67**). In total, Donevant worked for the Town for almost fifteen (15) years. (**R. pp. 67-68**).

supervised two (2) employees, Sabrina Morris and Sue Shmaruk. (**R. p. 28**). As building official, Donevant was required by law to enforce the building code of the State of South Carolina, including issuing stop work orders for unpermitted construction. (**R. pp. 131-32; R. pp. 144-45**). Also, as building official, Donevant made all “final decisions on ... code interpretations” and was the only person authorized to approve the issuance of building permits and to issue stop work orders within the Town’s jurisdiction. (**R. p. 26; R. p. 28; R. p. 387; R. p. 177; R. pp. 245-46; R. p. 145; R. p. 295**).

In December 2010, the Town hired Duckett as Town Administrator. (**R. p. 30**). Duckett had no experience in the construction industry. (**R. p. 30**). During Duckett’s tenure as Town Administrator, there was an ongoing controversy with the vacancy of the Pier Restaurant, which was owned by the Town. (**R. p. 49; R. pp. 95-96**). The Town acquired the Pier, which included the Pier Restaurant, in 2008. (**R. p. 276**). Shortly after the Town acquired the Pier, a long-time tenant of the Pier Restaurant vacated the premises, leaving the space vacant and depriving the Town of expected revenue. (**R. p. 49; R. p. 279**). The Town experienced difficulty finding a new tenant for the Pier Restaurant. (**R. p. 49; R. p. 94; R. p. 276; R. p. 279**). The vacancy of the Pier Restaurant was a prominent, public issue in the Town, with stories appearing in a number of newspaper articles. (**R. pp. 95-96**). As Town Administrator, Duckett worked to find a new tenant for the Pier Restaurant. (**R. p. 49**).

Throughout Donevant’s employment with the Town, she regularly inspected construction sites on her way to work in the morning and on her way from work in the evening. (**R. p. 34; R. p. 290; R. p. 186**). There was no Town policy prohibiting Donevant from conducting inspections in this manner. (**R. p. 186**). On the morning of June 17, 2011,

Donevant conducted an inspection on her way to work. (R. p. 34). Donevant called a member of her staff to inform her that she was conducting an inspection and would be in the office as soon as she finished. (R. p. 34). Duckett apparently did not know or did not recall that Donevant was conducting an inspection. (R. p. 34). When Donevant completed the inspection and arrived at work, Duckett intercepted Donevant before she could walk in her office. (R. p. 33). Duckett wrote the following sentence on a piece of paper, “Since Jim Duckett has a poor memory, I will in the future send him an email if I will not be in to work by 9 AM each workday.” (R. p. 33; R. p. 388). Duckett then gave the piece of paper to Donevant and made her write the sentence five (5) times in front of the employees she supervised.⁴ (R. p. 33; R. p. 388). Duckett considered this funny and told others about it. (R. pp. 334-37).

On September 29, 2011, Duckett conducted performance evaluations of the Town’s five (5) department heads, including Donevant. (R. p. 38; R. p. 389). In Donevant’s performance evaluation, Duckett acknowledged that Donevant is “very knowledgeable in the area of building official duties ...,” but he complained that she attended too much training and did not focus on Town business. (R. p. 39; R. p. 86; R. p. 389). On November 29, 2011, Donevant prepared a rebuttal to Duckett’s performance evaluation and requested that he reconsider his findings. (R. pp. 40-42; R. p. 391). In Donevant’s rebuttal, she pointed out that Duckett approved every training session she attended, and he never once objected or indicated that there was a problem with her attending required training. (R. pp. 40-42; R. p. 391). Donevant further stated that she focused on the Town’s business,

⁴ Prior to the hiring of Duckett as Town Administrator in December 2010, Donevant maintained an unblemished record of service as a Town employee, devoid of any write-ups or disciplinary actions. (R. p. 187).

which involved having good relations with Town citizens, and this should not be reflected negatively in her evaluation. **(R. p. 391).**

Duckett refused to consider Donevant's rebuttal to the performance evaluation, claiming he received the rebuttal too late after the initial evaluation. **(R. pp. 343-44).** Donevant submitted the rebuttal to Duckett on November 29, 2011. **(R. p. 391).** Donevant would have submitted it sooner, but she was diagnosed with breast cancer on October 17, 2011, and this diagnosis "devastated" Donevant, causing her to delay in preparing the rebuttal. **(R. p. 40; R. p. 88).** When Duckett refused to consider Donevant's rebuttal, he knew of her diagnosis. **(R. p. 344).** Further, at trial, Duckett conceded that there was no deadline for Donevant to respond to the performance evaluation. **(R. p. 344).**

After being diagnosed with breast cancer, Donevant applied for and received twelve (12) weeks of leave from work pursuant to the mandates of the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (LexisNexis 2014). **(R. p. 43).** During her absence, the Town was forced to contract with the City of Myrtle Beach to perform Donevant's duties of building official, because no other Town employee was qualified to perform these duties. **(R. pp. 47-48).** Thus, while Donevant was on sick leave, the City of Myrtle Beach assumed the responsibility of reviewing plans, issuing permits, conducting inspections, and issuing stop work orders within the Town's jurisdiction. **(R. pp. 47-48).**

While Donevant was on sick leave, Duckett found a new tenant to occupy the vacant Pier Restaurant space. **(R. p. 49).** The new tenant wished to remodel the interior of the space. **(R. p. 49).** Because Donevant was on sick leave, the City of Myrtle Beach initiated the plan review for the Pier Restaurant and issued a demolition permit for the requested demolition work. **(R. p. 90; R. p. 96; R. p. 394).** The demolition permit allowed

for “demo interior of building only.” (R. p. 90; R. p. 96; R. p. 394). This demolition permit was the only permit issued to the Pier Restaurant during Donevant’s absence. (R. pp. 49-50; R. p. 394). While Donevant was on sick leave, Mr. Duckett visited the Pier Restaurant frequently and remained in direct communications with the City of Myrtle Beach about the construction plans. (R. pp. 200-01; R. p. 316).

Donevant returned from sick leave on March 13, 2012. (R. p. 400). Before allowing her to resume her duties, Duckett required Donevant to meet with him on the morning of March 13, 2012. (R. pp. 44-45; R. pp. 313-14). Duckett requested that Debera E. Herman, Town clerk, witness the meeting. (R. p. 233; R. pp. 44-45). During the meeting, Duckett informed Donevant that she would resume all of her job duties, but he warned her that if she reversed anything that was done in her absence, he would “fire” her. (R. pp. 44-45). Duckett testified the reason for this instruction was to prevent Donevant from revisiting any decisions made by the City of Myrtle Beach in her absence. (R. p. 313). Herman prepared a memorandum from the meeting, that read:

Mr. Duckett explained that Jackie was now officially returned to work; however, he gave her a direct order that she could not and would not change, ameliorate, or in any other manner amend any action that was taken during her absence. That if she did so, she would be fired.

(R. p. 400; R. p. 234).

After the meeting, Donevant spoke with Herman, expressing concern over the instruction given to her by Duckett. (R. p. 240). Donevant informed Herman that “if she did not do [her] job, she would lose her license.” (R. p. 240). Herman responded, “well, your boss is giving you an order, you need to do what your boss tells you.” (R. p. 240).

On March 19, 2012, Duckett instructed Micki Fellner, the Deputy Town Administrator, to instruct Donevant that she could no longer report to Fellner; instead, from that point forward, she was required to report directly to Duckett. (**R. p. 205; R. pp. 212-14; R. pp. 218-19; R. p. 225**). This instruction contradicted Duckett's previous instruction regarding Fellner's authority. (**R. pp. 179-80; R. p. 321; R. pp. 32-33**). In December 2010, when Duckett took over as Town Administrator, Fellner became the Deputy Town Administrator. (**R. pp. 179-80**). Duckett informed all employees, including Donevant, that Fellner "was in charge when [he] wasn't there." (**R. p. 321**). Duckett added that Fellner "had the same authority [he] had when [he] was there." (**R. p. 321; R. p. 180; R. p. 32**).

On March 20, 2012, shortly after Donevant returned to work, she discovered, by reading a local newspaper article, that new construction had commenced at the Pier Restaurant. (**R. p. 51**). At this point in time, there was no construction permit issued for the Pier Restaurant. (**R. p. 50**). The only permit issued for the Pier Restaurant was a demolition permit, which allowed for "demo interior of building only." (**R. pp. 49-51; R. p. 394**). Upon reading the newspaper article, Donevant contacted John Harrah⁵ with the City of Myrtle Beach to ensure that no construction permit was issued in her absence. (**R. p. 90; R. p. 102**). Donevant was informed that no construction permit had been issued. (**R. p. 102**).

Thereafter, Donevant drove to the Pier Restaurant to inspect the premises. (**R. pp. 52-53**). Upon arrival, she saw that new construction had begun at the Pier Restaurant. (**R. pp. 52-53**). Specifically, Donevant observed that the contractors at the Pier Restaurant had

⁵ John Harrah's name is mistakenly transcribed as "John Harold" on page 144.

cut openings for doors and windows, studded a new wall, installed plumbing, installed electrical, and installed subflooring. (R. p. 53). In Donevant's view, this work constituted "construction," which required the issuance of a construction permit before such work could be lawfully performed. (R. p. 53; R. p. 401). In Donevant's view, allowing unpermitted construction to continue within the Town's jurisdiction posed a significant safety risk to the public. (R. pp. 54-55; R. pp. 58-59). Donevant testified, "Well, it was unsafe and it was dangerous. They had openings that anybody could step in and fall. There was loose wires and plumbing. There was stuff that hadn't been inspected, how do you know whether it's safe or not. We have to protect the public. The pier is a busy place. A lot of kids go [out] there." (R. pp. 58-59). Therefore, Donevant issued a stop work order to halt construction at the Pier Restaurant and taped the stop work order to the door. (R. p. 53).

Donevant, as the building official, was obligated to issue a stop work order to halt the unpermitted construction at the Pier Restaurant. (R. p. 145; R. pp. 152-53). If Donevant refused or neglected to do so, she would be disciplined by the South Carolina Building Codes Council, with such discipline ranging from a letter of caution to a full revocation of her license as a building official. (R. pp. 155-56; R. pp. 161-63; R. pp. 169-72). As Gary Wiggins, an expert in the field of building code enforcement testified, "any time that there is a potential of life safety or fire safety or if there's a direct violation of the law, the building official is obligated to issue a stop work order." (R. p. 144). The following colloquy occurred at trial between counsel for Donevant and Wiggins:

Q. What if with respect to there's no construction permit?

- A. That's a violation of the law. And anytime there's a violation of the law, a stop work order must be issued.

(**R. p. 145**).

When Duckett learned Donevant issued the stop work order, he became angry. (**R. p. 319**). Duckett immediately drove to the Pier Restaurant, and in his words, “[i]n a fit of anger, I tore [the stop work order] off the door.” (**R. p. 319**). Duckett continued, “I do get angry, and I was angry.” (**R. p. 319**). Duckett also cursed at the stop work order, saying aloud “all this ... for putting some damn boards down.” (**R. p. 349**). Thereafter, Duckett called Donevant that evening and directed her to be in his office at eight o'clock in the morning. (**R. pp. 60-61**). Duckett added, “I can't believe you been to that pier.” (**R. p. 61**).

After Donevant issued the stop work order, which was after four o'clock in the afternoon on March 20, 2012,⁶ she followed up on others matters on her way back to the office. (**R. pp. 59-60**). Earlier in the day, Donevant called Fellner to ask a question regarding requesting information in accordance with the Freedom of Information Act. (**R. p. 60; R. p. 64; R. p. 106; R. pp. 214-16**). Fellner had not returned Donevant's call, so Donevant called Fellner again about the matter on her way back to the office. (**R. p. 60; R. p. 64; R. p. 106; R. pp. 214-15**). This time, Fellner answered Donevant's telephone call. (**R. p. 60**). In the course of the conversation, Donevant mentioned to Fellner that she issued a stop work order for unpermitted construction at the Pier Restaurant. (**R. p. 60**).

⁶ Even if Donevant wanted to report this matter to Duckett, he was gone for the day, when Donevant issued the stop work order. (**R. p. 216**). Duckett regularly left at three o'clock in the afternoon, as he had done on the date when Donevant issued the stop work order. (**R. p. 216; R. p. 180**).

Donevant was not “reporting” to Fellner the fact she issued a stop work order. **(R. p. 64)**. As Sabrina Morris, Kevin Otte, current building official for the Town, and Donevant confirmed, the fact that the building official issued a stop work order is not a reportable matter. **(R. p. 64; R. pp. 299-300; R. p. 246)**.

On March 21, 2012, the morning following Donevant’s issuance of the stop work order, she reported to Duckett’s office as he instructed. **(R. p. 62)**. During the meeting, Duckett told Donevant he could not believe she stopped work at the Pier Restaurant after all the work he had done on the project. **(R. p. 114; R. p. 120)**. With this statement, Duckett turned his attention to the three (3) pieces of paper, lying face down on his desk. **(R. p. 62)**. Duckett turned over the first piece of paper, which was a written reprimand. **(R. p. 63; R. p. 406)**. Donevant refused to sign the written reprimand because it was not true. **(R. p. 63)**. When Donevant refused, Duckett turned over the second piece of paper, which was an order of suspension. **(R. p. 63; R. p. 405)**. Donevant disagreed with the suspension and the insinuation of wrongdoing in the suspension notice. **(R. p. 63; R. p. 116)**. However, Donevant suspected the third and final document lying facing down on Duckett’s desk was a termination notice. **(R. p. 63; R. p. 116; R. p. 407)**. Even though she disagreed with the suspension, Donevant signed the document and served a three-day suspension, because she “needed to work.” **(R. p. 63; R. p. 116)**. Donevant testified, “I got suspended for putting a permit on the pier.” **(R. p. 118)**. Duckett claims he suspended Donevant for not reporting directly to him before issuing the stop work order.⁷ **(R. p. 322)**.

⁷ As set forth above, Donevant was under no obligation to “report” that she issued a stop work order. **(R. p. 64; R. pp. 299-300; R. p. 246)**. However, even if she wanted to report this to Duckett, he was already gone for the day when Donevant issued the stop work order at the Pier Restaurant. **(R. p. 216)**.

Donevant returned to work on March 25, 2012, and on that date, Donevant informed Duckett in writing that she must follow the law even if it meant not following his instructions. **(R. p. 410)**. The letter Donevant delivered to Duckett stated:

My suspension was not right. All I did was follow the law, which you didn't want me to follow. Like I told you the other day, I will follow the law even if that means not following your instructions. You have been picking on me and treating me badly, for a long time, even though I do my work by the book and I am dedicated to the Town.

(R. p. 410).

On April 4, 2012, Duckett terminated Donevant. **(R. p. 412)**. Duckett provided Donevant with no reason for her termination, and subsequently, Duckett informed the South Carolina Department of Employment and Workforce, that Donevant's termination was due to "operational changes." **(R. p. 66; R. p. 68; R. p. 332; R. p. 413; R. p. 350)**. Donevant maintained that Duckett fired her for issuing a stop work order for unpermitted construction at the Pier Restaurant. **(R. p. 120)**. Therefore, Donevant brought this suit against the Town, asserting a single cause of action for wrongful termination. **(R. pp. 1-5)**.

This case was tried before a jury for four (4) days in Conway, South Carolina. At trial, the Town denied wrongdoing and claimed it terminated Donevant for attendance issues, punctuality issues, and insubordination. The Town made these assertions, even though Duckett specifically testified that Donevant was not fired for these reasons. **(R. p. 350)**. Ultimately, the jury returned a verdict in favor of Donevant in the amount of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars. The verdict was reduced to Three Hundred Thousand and 00/100 (\$300,000.00) Dollars pursuant to the relevant portions of

the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* This appeal followed.

STANDARD OF REVIEW

In reviewing a directed verdict, this Court must view the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the motion. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The trial court is required to deny motions for directed verdict and JNOV where either the evidence yields more than one inference or its inference is in doubt. Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). “In essence, this Court must determine whether a verdict for a party opposing the motion would be reasonably possible under facts as liberally construed in his favor.” Bultman v. Barber, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). The trial court can only be reversed where there is no evidence to support the rulings or where the rulings are controlled by an error of law. Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

ANALYSIS

I. SCOPE OF WRONGFUL TERMINATION DOCTRINE

The South Carolina Supreme Court's decision in Barron v. Labor Finders of South Carolina, 393 S.C. 609, 615-16, 713 S.E.2d 634, 637 (2011) made clear that the wrongful termination doctrine is not limited to situations where the employer requires the employee to violate the law or the reason for the employee's termination itself is a violation of the law.

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. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). The public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law. Culler v. Blue Ridge Elec. Co-op., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992). In Barron v. Labor Finders of South Carolina, the South Carolina Supreme Court expressly held that the public policy exception is not limited only to situations where the employer asks the employee to violate the law or the reason for the termination itself is a violation of criminal law. 393 S.C. 609, 615-16, 713 S.E.2d 634, 637 (2011). The Court in Barron stated:

Here, the Court of Appeals correctly recognizes that the public policy exception applies to situations where an employer requires an employee to violate the law, or the reason for the termination itself is a violation of criminal law. **We find the court erred, however, in holding the exception is limited to these situations Accordingly, we overrule the Court of Appeals' opinion to the extent it holds the public policy exception applies only in situations where the employer asks the employee to violate the law or the reason for the termination itself is a violation of criminal law.**

Id. at (emphasis added).

Barron continues, “[A]n at-will employee may have a cause of action for wrongful termination even if the discharge did not violate criminal law or the employer did not require the employee to violate the law.” Id. at 615, 713 S.E.2d at 637.

The Town argues the trial court erred in denying its motion for directed verdict because the wrongful termination doctrine is limited to situations where the employer requires the employee to violate the law or the reason for the employee's termination itself

is a violation of the law. According to the Town, because Donevant failed to demonstrate that she could face criminal penalties if she refused or neglected to issue the stop work order, the trial court should have directed a verdict in the Town's favor. However, the Town does not correctly articulate the state of the wrongful termination doctrine following the Supreme Court's decision in Barron. Barron clearly holds that the wrongful termination doctrine is not limited to situations where the employer requires the employee to violate the law or the reason for the employee's termination itself is a violation of the law. Id. at 615, 713 S.E.2d at 637. The Town's argument that the wrongful termination doctrine is limited to these situations fails to consider the Court's holding in Barron. Accordingly, the trial court correctly denied the Town's motion for directed verdict on this ground, and therefore, this Court should affirm the trial court's ruling.

II. THE ANTLEY DECISION IS INAPPLICABLE TO THIS CASE

The decision in Antley v. Sheperd, 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) does not control this case, as Donevant, unlike the tax assessor in Antley, possessed the sole, absolute, and unfettered authority to issue stop work orders and was required to do so for unpermitted construction.

In Antley, a county tax assessor refused to comply with the county administrator's directive not to initiate an appeal from a decision by the board of assessment appeals. 340 S.C. at 546, 532 S.E.2d at 296. When the tax assessor refused to dismiss a pending appeal, the county administrator terminated the tax assessor for refusing to follow his directives. Id. Following her termination, the tax assessor filed a claim for wrongful termination against the County, alleging she, as tax assessor, maintained the statutory right to file appeals from decisions by the board of assessment appeals. The tax assessor relied on the

sections 12-37-90 and 12-60-2540 of the South Carolina Code of Laws in support of her argument. 340 S.C. at 549, 532 S.E.2d at 298.

Section 12-37-90(f) of the South Carolina Code of Laws provides that the tax assessor has “the **right** of appeal from a disapproval of or modification of an appraisal made by him.” S.C. Code Ann. § 12-37-90(f) (2014) (emphasis added). Section 12-60-2540(A) provides that within thirty (30) days of a decision by the board of assessment appeals, “a property taxpayer or county assessor **may** appeal a property tax assessment.” S.C. Code Ann. § 12-60-2540(A) (2014) (emphasis added).

Based upon the statutory language, the Court of Appeals affirmed the trial court’s decision granting summary judgment to the County on the tax assessor’s wrongful termination claim. Antley, 340 S.C. at 549, 532 S.E.2d at 298. The Court observed the above cited statutory provisions “permitted, but did not require, [the tax assessor] to appeal adverse board decision.” The Court of Appeals continued:

[N]othing in sections 12-37-90 or 12-60-2540 gave [the tax assessor] **the sole discretion** in determining which cases to appeal. If the General Assembly had intended the assessor’s right of appeal to be **unfettered** by the county administrator or county council, it certainly could have provided that the decision of whether or not to appeal a board’s determination is solely that of the assessor.

Id. (emphasis added).

The Town interprets the holding in Antley broadly; however, the plain language of Antley announces a much narrower holding than the one advocated for by the Town. The statutes at issue in Antley did not grant any real authority to the tax assessor. The fact that the statutes were discretionary in nature was merely part of the calculus the Court of Appeals used to affirm the trial court’s ruling. The Court of Appeals made three (3)

observations about the statutes to determine they granted no real authority to the tax assessor: (1) they were permissive in nature; (2) they did not grant the tax assessor an “unfettered” right of appeal; and (3) they did not grant her “*sole discretion* in determining which cases to appeal.” Id. (emphasis in original). The Court of Appeals in Antley affirmed the trial court’s grant of summary judgment because the statutes in question granted no real authority to the tax assessor, no mandate she appeal, no unfettered right to appeal, no sole discretion to determine whether to appeal. The fact the statutes were couched in permissive language was again, only part of the calculus. In other words, if the statutes in question clothed the tax assessor with an unfettered right to appeal and/or granted her sole discretion to appeal, the holding may have been different.

The Court of Appeals decision in Antley, as affirmed by the Supreme Court, should be viewed based upon its unique facts and the statutes applicable to the tax assessor. This case presents facts drastically different from Antley, because the statutes and building codes granted absolute authority, sole and unfettered, to Donevant to issue stop work orders. Thus, this Court should affirm the trial court’s denial of the Town’s motion for directed verdict without even reaching the issue of whether Donevant was required to issue the stop work order. Unlike Antley, section 114.1 of the building code⁸ grants exclusive authority to Donevant, as the building official, to issue stop work orders. Section 114.1 of

⁸ Pursuant to section 6-9-50(A) of the South Carolina Code of Laws, the Building Codes Council adopts the International Building Code for every municipality or county governing body in the State, with the exception of Chapter 1 of the International Building Code, which does not apply unless adopted by the municipality or governing body. S.C. Code Ann. § 6-9-50(A) (Supp. 2014). The Town of Surfside Beach adopted Chapter 1 of the International Building Code pursuant to section 13-21 of the Town of Surfside Beach’s Code of Ordinances. Town of Surfside Beach, South Carolina, Code of Ordinances § 13-21. (R. pp. 424-25).

the International Building Code provides, “Whenever the building official finds any work regulated by this code being performed in a manner either contrary to the provisions of this code or dangerous or unsafe, the building official is authorized to issue a stop work order.” International Building Code § 114.1 (2006).

Every individual who testified about the matter agreed Donevant, and Donevant alone as building official, was empowered with absolute, sole, and unfettered authority to issue a stop work order. (**R. p. 28; R. p. 177; R. pp. 245-46; R. p. 145-46; R. p. 295**). Donevant, alone, as the Town’s building official, possessed the unfettered and sole discretion to determine whether to issue a stop work order to halt unpermitted construction at the Pier Restaurant. Donevant testified she perceived it to be unsafe and a danger to the public to allow unpermitted construction to continue at the Pier Restaurant. (**R. pp. 54-55; R. pp. 58-59**). Donevant testified, “Well, it was unsafe and it was dangerous. They had openings that anybody could step in and fall. There was [sic] loose wires and plumbing. There was stuff that hadn’t been inspected, how do you know whether it’s safe or not. We have to protect the public. The pier is a busy place. A lot of kids go [out] there.” (**R. pp. 58-59**). The building code does not grant any other individual any discretion or any right to make the determination of whether to issue a stop work order. As Gary Wiggins, an expert in the field of building code enforcement, testified “As a matter of fact ..., the building official is charged with [the] responsibility [of issuing stop work orders] specifically and no other person either the city manager, the mayor, chief of police, fire chief any other person can perform is authorize[d] or can perform that function or task.”⁹

⁹ Any alleged defects with respect to Mr. Wiggins’ testimony are unappealed and therefore, the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is the law of the case); see also

(R. p. 145). Wiggins further testified that the issuance of a stop work order was required “any time that there is a potential of life safety or fire safety or if there’s a direct violation of the law.” (R. p. 144).

Thus, unlike the tax assessor in Antley, section 114.1 grants real authority to Donevant as the building official for the Town. It grants her the sole, absolute, and unfettered right to make a determination of whether a stop work order should be issued. In this case, Donevant performed this analysis, and in her view, the stop work order was necessary for the protection of the public. Accordingly, this Court should affirm the trial court’s denial of the Town’s motion for a directed verdict because Antley does not control this case.

Furthermore, while this analysis is perhaps unnecessary, this case is also distinguishable from Antley because Donevant, as building official, was required to issue a stop work order at the Pier Restaurant. Section 6-9-10(A) of the South Carolina Code of Laws requires all municipalities and counties to enforce the building code. The exact statutory language provides:

All municipalities ... and counties in this State **shall** enforce building, energy, electrical, plumbing, mechanical, gas, and fire codes, referred to as building codes in this chapter, relating to the construction, livability, sanitation, erection, energy efficiency, installation of equipment, alteration, repair, occupancy, classification, or removal of structures located within their jurisdictions and promulgate regulations to implement their enforcement.

S.C. Code Ann. § 6-9-10(A) (Supp. 2014) (emphasis added).

Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.”).

Section 6-9-30 of the South Carolina Code of Laws requires all municipalities and counties to appoint a building official or contract for a building official within the municipal limits. S.C. Code Ann. § 6-9-30 (Supp. 2014). Again, the statute uses the mandatory “shall” language. S.C. Code Ann. § 6-9-30. Pursuant to section 6-9-50(A), the International Building Code, with the exception of Chapter 1, is adopted in every municipality or county in the State. S.C. Code Ann. § 6-9-50(A). The Town specifically adopted Chapter 1 of the International Building Code by passing section 13-21 of the Town of Surfside Beach’s Code of Ordinances. Town of Surfside Beach, South Carolina, Code of Ordinances § 13-21. Thus, Chapter 1 of the International Building Code is applicable within the Town’s jurisdiction. Id.

“The building official is hereby authorized **and directed to enforce the provisions of this code.**” International Building Code § 104.1 (2006) (emphasis added). “**The building official shall** ... issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and **enforce compliance with the provisions of the code.**” International Building Code § 104.2 (2006) (emphasis added). “The building official shall issue all necessary notices or orders to ensure compliance with this code.” International Building Code § 104.3 (2006).

Section 105.1 of the International Building Code provides:

Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, **shall first make application to the building official and obtain the required permit.**

International Building Code § 105.1 (2006) (emphasis added).

“It shall be unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, **in conflict with or in violation of any of the provisions of this code.**” International Building Code § 113.1 (2006) (emphasis added).

Thus, pursuant to Chapter 1 of the International Building Code, the building official shall enforce compliance with the provisions of the building code. International Building Code § 104.2. The building official is, in fact, “directed” by the code to do so. International Building Code § 104.1. The code requires any owner or authorized agent, before engaging in any construction on the premises, to “first make application to the building official and obtain the required permit.” International Building Code § 105.1. Chapter 1 declares it unlawful for any person to erect, construct, or alter any building or structure “in violation of any provisions of this code.” International Building Code § 113.1.

Applying Chapter 1 of the International Building Code to the facts in this case illustrates that Donevant was required to issue a stop work order for unpermitted construction at the Pier Restaurant. On March 20, 2012, when Donevant inspected the Pier Restaurant, only a demolition permit was issued for the premises. (**R. p. 394**). The only work the demolition permit allowed was “demo interior of building only.” (**R. p. 394**). As Donevant testified, no work could be performed pursuant to the demolition permit other than demolition. (**R. p. 50**). When Donevant arrived at the Pier Restaurant, she observed work being performed outside the scope of the existing permit. (**R. pp. 53-54**). That is, Donevant observed “construction” that had been performed at the Pier Restaurant. (**R. pp.**

53-54). Donevant saw the contractors had cut openings for doors and windows, studded a new wall, installed plumbing, installed electrical, and installed subflooring. (R. p. 53). In Donevant's view, this work constituted "construction," which required the issuance of a construction permit before such work could be lawfully performed. (R. pp. 53-54; R. p. 401). The owner/contractor of the Pier Restaurant failed to obtain a construction permit before beginning this work. Therefore, the work being performed violated sections 105.1 and 113.1 of the International Building Code, in that the construction was being performed without a construction permit. Accordingly Donevant, as the building official, was required by sections 104.1, 104.2, and 104.3 to enforce the building code and to issue a stop work order to halt the unpermitted construction. Thus, unlike the tax assessor in Antley, Donevant was required to issue a stop work order at the Pier Restaurant on March 20, 2012, when she observed unpermitted construction.

Gary Wiggins, an expert in the field of building code enforcement, opined that Donevant, as the building official, was required to issue a stop work order for unpermitted construction. Wiggins testified that if construction was taking place at the Pier Restaurant without a construction permit, "[t]hat's a violation of the law. And anytime there's a violation of the law, a stop work order must be issued." (R. p. 145). Therefore, Wiggins opined that Donevant was required to issue a stop work order for unpermitted construction, that was taking place at the Pier Restaurant. (R. pp. 152-53).

In sum, this case does not present facts analogous to the tax assessor in Antley. Unlike the tax assessor, the above cited statutes and building codes granted Donevant authority, sole and unfettered, to issue a stop work order at the Pier Restaurant. See International Building Code § 114.1. Additionally, the statutes and building codes required

Donevant to issue the stop work order for unpermitted construction. Accordingly, this Court should affirm the trial court's denial of the Town's motion for directed verdict.

III. DONEVANT'S TERMINATION PRESENTS AN ISSUE OF FACT AS TO WHETHER SHE WAS TERMINATED IN VIOLATION OF A CLEAR MANDATE OF PUBLIC POLICY

As an additional sustaining ground, this Court should affirm the trial court's denial of the Town's motion for directed verdict because Donevant presented facts sufficient to submit to the jury for a wrongful termination claim.

"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." Barron, 393 S.C. at 618, 713 S.E.2d at 639 (citing Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925)). "[O]nce a public policy is established, the jury would determine the factual question whether the employee's termination was in violation of that public policy." Barron, 393 S.C. at 618, 713 S.E.2d at 639.

Title 6 of the South Carolina Code of Laws is the title that deals with the building code. See S.C. Code Ann. § 6-9-5 *et seq.* (1977 & Supp. 2014). Section 6-9-5(A) of the South Carolina Code of Laws provides:

The public policy of South Carolina is to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens. To secure these purposes, a person performing building codes enforcement must be certified by the South Carolina Building Codes Council, and this act is necessary to provide for certification.

S.C. Code Ann. § 6-9-5(A) (Supp. 2014) (emphasis added).

To achieve the stated public policy of South Carolina, to maintain reasonable construction standards in building to protect the health, safety, and welfare of its citizens,

the General Assembly adopted the remaining statutory provisions in Title 6 of the South Carolina Code of Laws, including section 6-9-10(A) of the South Carolina Code of Laws which requires “[a]ll municipalities ... and counties” to enforce the building code “within their jurisdiction and promulgate regulations to implement their enforcement.” S.C. Code Ann. § 6-9-10(A). It is within this public policy context that the General Assembly allows municipalities and counties to either adopt Chapter 1 of the International Building Code,¹⁰ or to promulgate and adopt its own regulations to enforce the building code. S.C. Code Ann. § 6-9-50(A); S.C. Code Ann. § 6-9-10(A).

The Town adopted Chapter 1 of the International Building Code. Town of Surfside Beach, South Carolina, Code of Ordinances § 13-21. The building code requires any owner or authorized agent, before engaging in any construction on the premises, to “first make application to the building official and obtain the required permit.” International Building Code § 105.1. Chapter 1 declares it unlawful for any person to erect, construct, or alter any building or structure “in violation of any provisions of this code.” International Building Code § 113.1. The building code requires the building official to enforce compliance with its provisions. International Building Code §§ 104.1-104.3.

It is a rare event for the General Assembly to use the magic words “the public policy of South Carolina.” It is additionally an unusual step for the General Assembly to implement the public policy of the State by requiring counties and municipalities to enforce the building code. S.C. Code Ann. § 6-9-50(A); S.C. Code Ann. § 6-9-10(A). This

¹⁰ Chapter 1 of the International Building Code provides a mechanism upon which the building code can be enforced. The General Assembly gives municipalities or counties the option to either adopt Chapter 1 or to promulgate and adopt their own enforcement regulations. See S.C. Code Ann. § 6-9-10(A).

legislative intent, design, and policy of this statutory framework cannot be ignored. See State v. Morgan, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002) (“The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.”).

Here, Donevant presented a cognizable theory for wrongful termination, which was correctly sent to the jury. See Barron, 393 S.C. 609, 615-16, 713 S.E.2d 634, 637 (holding a wrongful termination claim is not limited to situations where the employer requires the employee to violate the law or the reason for the employee’s termination itself is a violation of the law). The public policy of the State of South Carolina is to maintain reasonable construction standards in building to protect the health, safety, and welfare of its citizens. S.C. Code Ann. § 6-9-5(A). To achieve these purposes, the General Assembly requires the building code to be adhered to and requires them to be enforced. S.C. Code Ann. § 6-9-10(A); International Building Code §§ 104.1-104.3, 105.1, 113.1, 114.1. Donevant was enforcing the building code on March 20, 2014, when she issued a stop work order for unpermitted construction at the Pier Restaurant. Donevant presented evidence that after issuing the stop work order, Duckett initially suspended her and ultimately terminated her. Thus, Donevant testified and presented evidence to support a theory for wrongful termination that was proper to submit to the jury.

From there, it was an issue of fact as to whether the jury believed the Town terminated Donevant for issuing a stop work order or for other reasons not related to Donevant’s issuance of the stop work order. Donevant clearly presented evidence to support her theory that “[Duckett] fired [her] for putting a stop-work order, for doing my

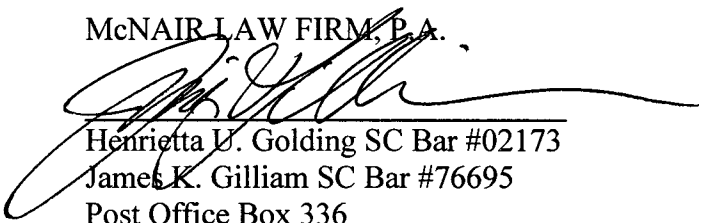
job.”¹¹ (R. p. 120). Ultimately, the jury believed the version of facts as presented by Donevant. Accordingly, this Court should not disturb the jury’s verdict as there was an issue of fact as to whether the Town terminated Donevant in violation of a clear mandate of public policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s denial of the Town’s motion for directed verdict and uphold the jury’s verdict of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars.

Respectfully submitted,

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January 21, 2015

¹¹ On appeal, the Town does not allege that Donevant failed to present sufficient evidence in support of her wrongful termination claim. Therefore, this issue is not preserved for appellate review.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Deadra Jefferson
Circuit Court Judge

Case No.: 2012-CP-26-004852

Jacklyn J. Donevant, ...Respondent,

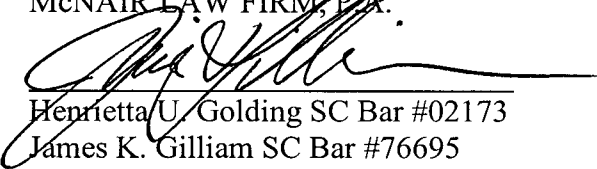
vs.

Town of Surfside Beach, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief complies with Rule 211(b), SCACR.

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