THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin Culbertson, Circuit Court Judge

Case No. 2017-CP-26-05913

John Kennedy, ...Appellant,

v.

Myrtle Beach Police Department
Amy Prock, Angela Kegler, and
John Pedersen, ...Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an employment law action alleging breach of contract, breach of contract accompanied by fraud, and civil conspiracy. (Complaint). Appellant John Kennedy ("Kennedy") is a former police officer who was terminated by the City of Myrtle Beach ("the City"). (*Id.*)

Respondents filed a motion for judgment on the pleadings. (Defs. Mot. To Dismiss). That motion was heard and granted without prejudice by Judge Benjamin Culbertson on July 31, 2018. (July 31, 2018 Order, filed Aug. 1, 2018). Kennedy filed a motion to reconsider. (Aug 8, 2018 Mot. Reconsider). Judge Culbertson granted that motion and ordered a *de novo* hearing of Respondents' motion because Kennedy's counsel was not present for the July 31, 2018, hearing. (Oct. 3, 2018 Order, filed Oct. 4, 2018).

Respondents' motion for judgment on the pleadings was then heard again by Judge Culbertson on April 23, 2019, and granted with prejudice on April 24, 2019. (Apr. 24, 2019 Ord, filed Apr. 25, 2019). Kennedy again filed a motion to reconsider. (May 2, 2019 Mot. to Reconsider). Judge Culbertson denied that motion. (July 15, 2019 Order, filed July 16, 2019). This appeal followed.

STATEMENT OF FACTS

There are only two truly relevant facts in this appeal. First, Kennedy was last employed by the City as a police officer. (Brief of App. p. 5). Second, the City operates under a council-manager form of government. (*Id.* p. 9). The only other facts of note pertain to the identification of the individual Respondents. John Pedersen ("Pedersen") is the City's Manager, Amy Prock ("Chief Prock") is the City's Chief of Police, and Angela Kegler ("Kegler") is the City's Human Resources Director. (*Id.* p. 6).

STANDARD OF REVIEW

"A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed 'to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Williams v. Condon,* 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). "An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6) or Rule 12(c), SCRCP." *Arata v. Vill. W. Owners' Ass'n, Inc.,* 2011 WL 11735004, at *2 (S.C. Ct. App. June 30, 2011) (citing *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). Such "motion[s] must be bottomed and premised solely upon the allegations set forth by the plaintiff." *Williams, supra.* "The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* "The question to be considered is whether, in the light most

favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Id.* "Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court." *Id.*, 553 S.E.2d at 500.

ARGUMENT

1. The Trial Court Correctly Held That Kennedy Could Not Assert Contract-Based Claims Because He Was Employed At-Will As a Matter of Law.

As set out above, the fact that the City operates under a council-manager form of government is a crucial fact in this case. Judge Culbertson properly noted that "[h]iring and firing authority in a council-manager form of government rests in the City Manager under S.C. Code § 5–13–90(1)." (Apr. 24, 2019 Ord, filed Apr. 25, 2019). Section 5-13-90(1) provides, in pertinent part, that a city manager "shall . . . [a]ppoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality. . . ." It is well-settled that S.C. Code § 5–13–90(1) codifies at-will employment as the law in council-manager municipalities. *See Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) ("[i]n light of unambiguous language of the Employee Handbook and § 5-13-90, it is clear that Dew was an 'at will' employee"); *Eastlake v. City of Cayce*, 7 F.3d 223 (4th Cir. 1993) ("Because the city manager is empowered to dismiss city employees for the good of the city, S.C. Code Ann. § 5-13-90(1) . . . Eastlake served at the pleasure of the city and did not have a property interest in continued employment."); *Bunting v. City of Columbia*, 639 F.2d 1090, 1093-1094 (4th

Cir. 1981) (under § 5-13-90(1) "city employees . . . hold their positions at the will and pleasure of the city"); *Bordner v. Town of Atl. Beach*, 2017 WL 1190874, at *5 (D.S.C. Mar. 31, 2017) ("Courts have interpreted this statute to provide for at-will employment of municipal employees.") (citing *Mills v. Leath*, 709 F. Supp. 671, 674 (D.S.C. 1988) ("Courts have consistently interpreted [§ 5-13-90(1)] as providing only for at-will employment of municipal employees."); *Bane v. City of Columbia*, 480 F.Supp. 34, 37-38 (D.S.C. 1979) ("[U]nder state law, the City Manager is empowered to dismiss employees 'for the good of the municipality.' Unless, the statutory scheme is modified in some way, the state provides only for 'at will' employment of city employees.") (applying § 5–13–90(1)); *Lamond v. City of Myrtle Beach*, 1991 WL 433750, at *1 (S.C. Com. Pl. Oct. 25, 1991) ("Every court that has considered [§ 5–13–90(1)] has held that this statutory provision means that employees in municipalities with the council-manager form of government serve at the will and pleasure of the City.").

Kennedy "does not dispute the statutory authority nor the validity of the properly cited case law." (Brief of App. p. 6). Instead, he argues that his "theory of the case is unique [because t]he instant case raises the novel theory that the City of [sic] Manager, who has the statutory authority to hire and fire City employees 'at will', likewise has the power to abrogate this power in favor of contractually binding the city." (*Id.*). His argument is unavailing.

The rule established in *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993), controls here. There, a former sheriff's deputy argued that he had an implied contract for more than at-will employment which he contended was created by the sheriff "adopting certain procedures and performing routine evaluations. . . ." 432 S.E.2d at 461. The Court noted that under S.C. Code Ann. § 23–13–10 "[a] deputy serves at the sheriff's pleasure." *Id.* at 460. The Court rejected the plaintiff's contract claim, holding that "a sheriff may not compromise his statutory authority to discharge deputies at his discretion." *Id.* (citing *Jenkins v. Weatherholtz*, 909 F.2d 105 (4th Cir. 1990)). "To hold otherwise renders the language of § 23–13–10 meaningless and eviscerates the sheriff's ability to discharge deputies at his 'pleasure.'" *Id.* Thus, Botchie stands for the proposition that where a statute provides for at-will employment, it cannot be compromised or altered by an employer's actions or policies.

Since *Botchie*, other courts have reaffirmed the soundness of its holding. *See, Fields v. Richland Cty. Sheriff's Dep't*, 2018 WL 4001830, at *4 (D.S.C. Aug. 22, 2018) (dismissing under *Botchie* and *Jenkins* because "[e]ven an employee handbook containing a grievance procedure is insufficient to overcome the dictates of a statute such as § 23–13–10"); *Harris v. Beaufort Cty. Sheriff's Dep't*, 2011 WL 11733052, at *1 (S.C. Ct. App. Feb. 1, 2011) (quoting *Botchie* and affirming summary judgment on contract claim because a "sheriff may not compromise his statutory authority to discharge deputies at his discretion"); *Thompson v. Dorchester Cty. Sheriff's Dep't*, 2007 WL 5681972, at *5 (D.S.C. May 4, 2007), *aff'd*, 280 F.

App'x 328 (4th Cir. 2008) ("Included in the power to terminate deputies is the principle that '[a] sheriff may not compromise his statutory authority to discharge deputies at his discretion,' meaning that the at-will nature of a sheriff's deputy's employment cannot be altered.") (quoting *Botchie*).

The plaintiff in *Lamond* made the same arguments Plaintiff makes here: that he could have a contract based on oral assurances or the City's policies. *Lamond* rejected those arguments because "[a]ny [oral] assurance . . . was contrary to Section 5-13-90(1)" and held that even if the City's policies could arguably alter at-will employment, "state statutory law and case law support the conclusion that employees of the city of Myrtle Beach are at-will employees" as a matter of law. *Id.; see also* City of Myrtle Beach Code of Ordinances Section 2-81(b) ("The city has a policy that all employment status is 'at will', with the exception of judges under the unified court system.").

The court in *Lamond* reached the exact same conclusion that the Supreme Court in *Botchie* and the trial courts in *Fields, Harris* and *Thompson* reached: where at-will employment is statutorily mandated, an employer "may not compromise his statutory authority to discharge . . . at his discretion,' meaning that the at-will nature of [the employee's] employment cannot be altered." *Thompson. supra.* Accordingly, not only is Plaintiff's theory not novel, it was specifically proffered and rejected in *Lamond,* and rejected under virtually identical circumstances in *Botchie.*

Because Kennedy was an at-will employee of the City as a matter of law, the trial court correctly held that Kennedy cannot assert a contract-based claim relating to the termination of his employment. *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh'g denied* (Oct. 26, 2016) (where "there is nothing to suggest this was anything other than an at-will relationship," there is "no contract on which [Plaintiff] can predicate [hi]s claims of breach of contract and breach of contract accompanied by a fraudulent act."); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) ("The termination of employment at will by either party does not normally give rise to a cause of action for breach of contract.").

2. The Trial Court Correctly Held That Because Kennedy Was Employed At-Will He Could Not Assert a Civil Conspiracy Claim Against the Individual Who Terminated His Employment.

To the extent Kennedy asserts his civil conspiracy claim against City Manager Pedersen, this court's holding in *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) ("Angus I"), *rev'd on other grounds*, 368 S.C. 167, 628 S.E.2d 261 (S.C. 2006) ("Angus II"), controls. There the former Horry County administrator was employed at-will. She asserted a civil conspiracy claim against the county council members who terminated her employment. Relying on *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 259 S.E.2d 814 (1979), this court rejected the plaintiff's civil conspiracy claim.

> *Ross* clearly holds that employers can fire at-will employees for any reason. *Moody v. McLellan*, 295 S.C. 157, 162, 367 S.E.2d 449 (1988). It also holds that an at-will employee cannot maintain an action against a former employer for civil conspiracy that resulted in the

> employee's termination. *Mills v. Leath,* 709 F.Supp. 671, 675 (D.S.C.1988). The trial court was therefore correct to dismiss the action as to the four council members. Angus claims that she was suing them not as council members, but in their capacity as individuals. That argument is unpersuasive. The employment agreement stated on its face that Angus served "at the will" of the Council. Clearly, the council members acted within their authority when they fired Angus and they cannot be sued for doing what they had a right to do.

Id., 358 S.C. at 503, 596 S.E.2d at 70.

Pedersen was authorized by § 5-13-90(1) to terminate Kennedy's employment. He "cannot be sued for [conspiracy for] doing what []he[] had a right to do." *Angus; see also Brailsford v. Wateree Cmty. Action, Inc.,* 135 F. Supp. 3d 433, 450 (D.S.C. 2015) (Angus I stands for the proposition "that an at-will employee cannot sue his employer, or anyone acting within his authority on behalf of his employer, for civil conspiracy arising out of his termination").

Accordingly, the trial court correctly ruled that Kennedy's civil conspiracy claim against Pedersen is barred by Angus I.

3. The Trial Court Correctly Held That Because Kennedy Was an At-Will Public Official He Could Not Sue Anyone for Civil Conspiracy Relating to His Termination.

Kennedy also asserts his civil conspiracy claim against City Police Chief Prock and Human Resources Director Kegler. The trial court correctly ruled that that claim is barred by Angus II.

In Angus II, our Supreme Court affirmed Angus I's holding that neither an employer nor its terminating decisionmaker could be sued for civil conspiracy. Angus II, however, broadened that holding as it pertains to at-will *public officials*. Because the plaintiff there was both at-will and a public official, Angus II barred civil conspiracy claims against anyone.

The *Angus* plaintiff had also sued a local newspaper and a local developer. The Court held:

> The critical factor here is Angus's status as an at-will public official. In our democratic society, a public official is answerable to the public; members of the public are not third-party interlopers. Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants.

Id, 368 S.C. at 170, 628 S.E.2d at 262.

Kennedy concedes that, as a police officer, he was a public official. (Brief of App. p. 13 ("the Court is correct based on these cases that a public official such as a police officer"). And there is ample caselaw to that effect. *See State v. Bridgers*, 329 S.C. 11, 16, 495 S.E.2d 196, 198 (1997) (collecting cases and stating that "city police officers are . . . public officials"); *Saxton v. Town of Irmo Police Dep't*, 2016 WL 1178201, at *3 (D.S.C. Mar. 28, 2016) ("it is clear that the [police officer] Plaintiff is in fact a public official"); *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) (holding that a police officer is a public official); *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994) (noting that a police officer is a public official).

He contends, however, that Chief Prock and Kegler, both private citizens, lost the democratic rights guaranteed by Angus II when they went to work for the City. Such an argument is untenable and the trial court rightly rejected it. The Court in Angus II did not limit its holding to a particular class of "member[s] of the public." Other courts confirm that the relevant portion of Angus II applies to any citizen. *See Reed v. Town of Williston*, 2010 WL 1409427, at *10 (D.S.C. Feb. 26, 2010) ("[u]nder South Carolina law a public official who is employed at-will is prohibited from suing *anyone* for a civil conspiracy" relating to the termination of their employment.") (emphasis added), *report and recommendation adopted*, 2010 WL 1409425 (D.S.C. Mar. 31, 2010); *Brown v. City of Columbia*, 2011 WL 3654472, at *1 (D.S.C. June 16, 2011) ("[An at-will] plaintiff who is a public official cannot maintain a civil conspiracy claim against non-employer third parties."), *report and recommendation adopted*, 2011 WL 3654468 (D.S.C. Aug. 19, 2011).

As individuals, Chief Prock and Kegler are "non-employer third parties" because in their individual capacities they did not employ Plaintiff. They are citizens of Horry County against whom Kennedy seeks to impose personal liability. The fact that they are City employees is wholly irrelevant for purposes of an Angus II analysis because "a public official who is employed at-will is prohibited from suing anyone for a civil conspiracy. . . ." *Reed, supra.* To hold otherwise would be to deprive these Respondents of their democratic rights. Suffice it to say Chief Prock, as Kennedy's supervisor, and Kegler, as the City's Human Resources Director, had every reason to be involved in issues

pertaining to Kennedy's employment. To subject them to suit for civil conspiracy despite Angus II's broad holding, while barring such a suit against a random citizen with no connection whatsoever to Kennedy, is absurd and certainly not what the Angus II Court intended. As a "public official is answerable to the public," Kennedy was unquestionably answerable to members of the public who also happen to be in his chain of command and in charge of his employer's personnel matters. And notably, Kennedy has failed to direct the court to a single case to the contrary.

Accordingly, the trial court correctly rejected Kennedy's civil conspiracy claim against Chief Prock and Kegler.

CONCLUSION

The trial court correctly ruled that Kennedy was an a-will employee and public official who was barred from pursuing claims for breach of contract, breach of contract accompanied by a fraudulent act and civil conspiracy. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,

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SC Court of Appeals

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John Kennedy, Appellant,

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Amy Prock, Angela Kegler, and
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PROOF OF SERVICE

I hereby certify that I have this day caused to be served a copy of the **Final Brief of Respondent, Respondent's Designation Of Matter to be Included in the Record on Appeal**, and **Motion to File Out of Time** on counsel of record by deposit in the United States mail, first-class postage prepaid, addressed to:

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The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
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Kennedy v. City of Myrtle Beach Police Department, et al.
Civil Action No. 2017-CP-26-05913
Appellate Case No.: 2019-001556

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Respondents' Motion to File Out of Time, Initial Brief of Respondents, Respondents' Designation of Matter to be Included in the Record on Appeal, and a Proof of Service, along with a check in the amount of $50.00 for the filing fee for the above-referenced action. Please file the original and return the clocked copy to my courier.

With highest regards,

Respectfully,

Amber Pardue
Paralegal

DLA/ap
Enclosure
cc: Donald Gist, Esquire (w/encl)
Aaron Wallace, Esquire (w/encl)