

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. Supreme Court

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5072 (S.C. Ct. App. filed Jan. 16, 2013)
(Withdrawn, Substituted, and Refiled Feb. 27, 2013)

Michael Cunningham, ... Respondent,

v.

Anderson County, ... Petitioner.

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(Court of Appeals Filings)

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The South Carolina Court of Appeals

Michael Cunningham, Appellant,

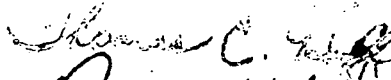
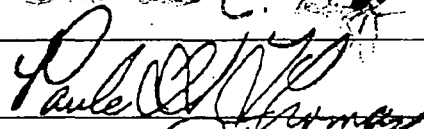
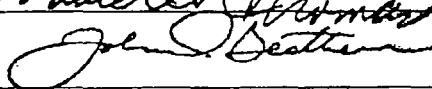
v.

Anderson County, Respondent.

Appellate Case No. 2011-194209

ORDER

After careful consideration of Appellant's and Respondent's respective petitions for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied. However, Opinion Number 5072, filed January 16, 2013, is withdrawn and the attached opinion is substituted.

	J.
	J.
	J.

Columbia, South Carolina

cc:

Kirsten Elena Small
Brian Patrick Murphy
Ray E. Jones
William W. Wilkins
John S. Nichols
Michael Enrico Kozlarek
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FILED
27 Feb 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Cunningham, Appellant,

v.

Anderson County, Respondent.

Appellate Case No. 2011-194209

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5072

Heard November 14, 2012 – Filed January 16, 2013

Withdrawn, Substituted and Refiled February 27, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and Brian P. Murphy, of Brian Murphy Law Firm, PC, of Greenville, for Appellant.

William W. Wilkins and Kirsten E. Small, of Nexsen Pruet, LLC, of Greenville, and Tanya A. Gee, of Nexsen Pruet, LLC, of Columbia, for Respondent.

Michael E. Kozlarek and Ray E. Jones, of Parker Poe Adams & Bernstein, LLP, of Columbia, for Amicus Curiae South Carolina City and County Management Association.

GEATHERS, J.: In this breach of contract case, Appellant Michael Cunningham seeks review of the circuit court's order granting summary judgment to Respondent Anderson County (the County) on all of Cunningham's causes of action. Cunningham challenges the circuit court's conclusion that his employment contract with the County was void. Cunningham also challenges the circuit court's conclusions that (1) he could not avail himself of the public policy exception to the at-will employment doctrine, and (2) his accrued sick leave did not constitute "wages" under the South Carolina Payment of Wages Act.¹ We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The County operates under a Council-Administrator form of government, in which the Council employs an administrator to serve as the administrative head of the County's government. The administrator is responsible for the administration of all departments over which the Council has control.² The Council's members are elected for two-year, non-staggered terms.³ Three of the Council's seven members were not reelected in the November 4, 2008 general election.⁴

During its November 18, 2008 meeting, the lame-duck Council (the 2008 Council) amended the previously-noticed agenda to vote on a severance contract with the then-current administrator, Joey Preston. This contract was drafted in anticipation of the termination of his employment. The 2008 Council voted 5-2 in favor of the contract.⁵ During the same meeting, the 2008 Council voted 5-2 in favor of a "Master Employment Agreement" appointing Cunningham, then the assistant

¹ S.C. Code Ann. § 41-10-10 to -110 (Supp. 2012).

² See S.C. Code Ann. § 4-9-620 (1986) (describing office of the administrator).

³ See S.C. Code Ann. § 4-9-610 (1986) (requiring council members to be elected in the general election for terms of two or four years "commencing on the first of January next following their election").

⁴ The seven members were Michael Thompson, Bob Waldrep, Cindy Wilson, Larry Greer, Gracie Floyd, Bill McAbee, and Ron Wilson. Thompson, Greer, and McAbee were not reelected in the November 2008 election.

⁵ The five members voting in favor of the contract, which provided for a \$1 million dollar payment to Preston, included the three "lame-duck" members.

administrator, as the new administrator for a three-year term.⁶ On November 19, 2008, Cunningham signed the contract, which provided for a severance package in the event he was later terminated "without cause."

On January 6, 2009, the new Council (2009 Council) met and passed a resolution condemning the 2008 Council's actions in entering into the severance contract with Joey Preston and entering into the employment contract with Cunningham.⁷ Subsequently, the 2009 Council's ad hoc personnel committee presented Cunningham with a written at-will employment contract based on the position of the 2009 Council that Cunningham's November 19, 2008 employment contract was no longer valid.⁸ After reviewing the new contract, Cunningham wrote a letter to the members of the 2009 Council, dated January 27, 2009, stating that he saw no need to sign a contract for at-will employment as the 2009 Council already viewed his employment as at-will.

At its February 3, 2009 meeting, the 2009 Council voted to terminate Cunningham's employment, stating that he had rejected the 2009 Council's two separate proposals for an at-will employment contract.⁹ On February 9, the ad hoc personnel committee met with Cunningham in executive session to discuss his employment. Cunningham offered to "enter into an agreement through the end of the term of the [2009] [C]ouncil." At Cunningham's request, the 2009 Council conducted a public hearing on March 2, 2009 concerning his termination. At the conclusion of the hearing, the 2009 Council once again voted to remove Cunningham from his position as Administrator.

Cunningham filed this action on April 22, 2009, asserting causes of action for Breach of Contract, Wrongful Discharge, and violation of the Payment of Wages Act. The parties engaged in discovery on the breach of contract claim but agreed to postpone discovery on the wrongful discharge claim until after the contract claim had been resolved. Subsequently, Cunningham filed a motion for summary

⁶ Likewise, the five members voting in favor of this contract included the three lame-duck members.

⁷ The members of the 2009 Council were Eddie Moore, Bob Waldrep, Cindy Wilson, Gracie Floyd, Tommy Dunn, Ron Wilson, and Tom Allen.

⁸ This committee consisted of Bob Waldrep, Tommy Dunn, and Eddie Moore.

⁹ The record does not indicate when the ad hoc personnel committee made the second proposal, which was for a demotion to the Assistant Administrator position, but with a higher salary than what Cunningham previously received in that position.

judgment as to the breach of contract claim. The County filed a cross-motion for summary judgment as to all three causes of action in Cunningham's complaint. Cunningham then filed a second motion for summary judgment as to his claim under the Payment of Wages Act. The circuit court denied Cunningham's summary judgment motions and granted the County's summary judgment motion.

In granting the County's summary judgment motion, the circuit court concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. The circuit court also concluded that Cunningham's claim for accrued sick leave was not compensable under the Payment of Wages Act because (1) the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination; (2) the provision for sick leave in Cunningham's contract was part of a void contract; and (3) the sick leave provision was part of the severance package set forth in the contract, and the Payment of Wages Act excludes severance from the definition of "wages." Finally, the circuit court concluded Cunningham could not avail himself of the public policy exception to the at-will employment doctrine in support of his wrongful discharge claim because he did not claim that he was an at-will employee. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment to the County as to the breach of contract cause of action on the ground that Cunningham's employment contract was void?
2. Did the circuit court err in granting summary judgment to the County as to Cunningham's cause of action for violation of the South Carolina Payment of Wages Act on the ground that Cunningham's accrued sick leave did not constitute "wages" under the Act?
3. Did the circuit court err in granting summary judgment to the County as to Cunningham's wrongful discharge cause of action on the ground that Cunningham did not claim he was an at-will employee?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted

when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Rather, "[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Comm. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, 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.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "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." *Id.* at 329-30, 673 S.E.2d at 802.

LAW/ANALYSIS

I. Breach of Contract

Cunningham asserts the circuit court erred in concluding that his employment contract was void. We disagree.

In *Piedmont Public Service District v. Cowart*, this court considered a twenty-year employment contract between a special purpose district and its administrator that required five years' severance pay. 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (*Cowart I*), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (*Cowart II*). Relying on *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948), which involved an employment contract with the City of Greenville, the court held that the contract involved the "governmental or legislative powers" of the District, and, therefore, could not be binding on successor boards.¹⁰ *Id.* at 133, 459 S.E.2d at 881. In

¹⁰ The court also stated that the public policy concerns underlying this rule are equally applicable in cases where the members of the governing body have

applying the law of municipalities to the District, the court acknowledged that public service or special purpose districts are "not necessarily equivalent to municipalities or municipal corporations for all purposes." *Id.* at 131 n.2, 459 S.E.2d at 880 n.2 (citation omitted). However, the court noted "for the purpose of determining the scope of the District's power to enter into contracts, the law governing municipal corporations is applicable." *Id.* (citations omitted); *see also City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 178-79, 480 S.E.2d 728, 731 (1997) (applying *Cowart I* to Beaufort-Jasper County Water and Sewer Authority, a special purpose district).

In discussing contracts involving governmental or legislative powers, the opinions in *Cowart I* and *Cowart II* referenced not only municipalities but also "each governing body" and "the local governing body." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (holding that the appointment of a public officer "is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body"); *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 ("[I]t is clear the rule is intended to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties."). By logical extension, the fundamental principle applied in *Cowart I* and *Cowart II* also applies to Anderson County's actions in the present case.¹¹

staggered terms. *Id.* at 134-35, 459 S.E.2d at 881-82. Our supreme court agreed with this statement. *See Cowart II*, 324 S.C. at 241-42, 478 S.E.2d at 838 ("We agree with the Court of Appeals that the policy considerations are not changed by the bestowal of perpetual succession.").

¹¹ Other jurisdictions have recognized the applicability of the prohibition against binding successor governing bodies to counties and county agencies. *See Telford v. Clackamas Cnty. Hous. Auth.*, 710 F.2d 567, 570 (9th Cir. 1983) (applying Oregon state law to a contract of a county housing authority); *id.* ("An Oregon public body may not enter a contract for governmental functions extending beyond its own term of office."); *Valvano v. Bd. of Chosen Freeholders of Union Cnty.*, 183 A.2d 450, 454 (N.J. Super. Ct. App. Div. 1962) (stating that a county board's "eleventh-hour employment contract on the eve of a new administration" circumscribed the successor county board of its discretionary powers, "which powers should have been transmitted unimpaired to the newly-constituted board"); *id.* ("Public policy demands the utmost good faith and that municipal officials be not [sic] shorn of the discretionary powers of their office by any final action of their predecessors on their way out of office."); *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) (recognizing that, but for a provision in a county's charter allowing for appointment

We find the following primer from *Cowart I* to be instructive:

If the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract. The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, *if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.*

Id. at 132, 459 S.E.2d at 880 (emphasis added). Quoting from *Newman*, the court set forth the following rationale:

[W]here the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council[,], *unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council to do so exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their*

of the county manager for a four-year term, the county's legislators would be unable to appoint the county manager for a term extending into the term of the legislators' successors); *Uintah Basin Med. Ctr. v. Hardy*, 54 P.3d 1165, 1168 (Utah 2002) (analyzing a contract between a doctor and a county-owned hospital); *id.* ("Under the governmental/proprietary test, a contract is . . . unenforceable against successor governing bodies if it involves a governmental power or function . . .").

efficiency, but must transmit them unimpaired to their successors.

Id. at 132, 459 S.E.2d at 880-81 (quoting *Newman*, 212 S.C. at 25-26, 46 S.E.2d at 256) (emphasis added). The court distinguished between proprietary and governmental functions as follows:

[T]he difference between proprietary and governmental functions is often difficult to determine, because, as the scope of "governmentality" expands, the intertwining and overlapping of such functions make it increasingly more difficult to draw any definitive line of separation.

However, it is clear the rule is intended to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties. Thus, when determining whether a contract is binding on successor boards, it appears that *the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.*

Id. at 132-33, 459 S.E.2d at 881 (emphasis added) (citations omitted). Examples of proprietary functions include a town's contract with a private corporation to furnish parking meters to the town¹² and a city's contract with a private company for the operation of the city's waterworks system.¹³

In *Cowart II*, our supreme court emphasized that the appointment or removal of a public officer "is a *governmental* function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." 324 S.C. at 241, 478 S.E.2d at 837 (emphasis added) (citation omitted). "Such a contract is not binding on the successors to the local governing

¹² See *Town of Graham v. Karpark Corp.*, 194 F.2d 616, 619 (4th Cir. 1952).

¹³ See *Green v. City of Rock Hill*, 149 S.C. 234, 147 S.E. 346 (1929). This should not be confused with the power to decide when a governmental entity may provide water to anyone in its own service area, i.e., the "provision of water service," which is a governmental function. See *City of Beaufort*, 325 S.C. at 180-82, 480 S.E.2d at 731-32.

body." *Id.*¹⁴ "[T]he rule is intended to ensure that governing bodies are free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. An exception to this rule exists when "enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838 (emphasis added).

Cunningham argues that *Cowart I* and *Cowart II* do not apply to this case because *Cowart I* applied the common-law principle known as Dillon's Rule, which our

¹⁴ Other jurisdictions also recognize this fundamental principle. See *Grassini v. DuPage Twp.*, 665 N.E.2d 860, 864 (Ill. App. 1996) ("[I]t is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision."); *id.* ("This principle has not been confined in application to county governments Indeed, it has found expression with respect to employment decisions in . . . the Municipal Code" (citation omitted)); *City of Hazel Park v. Potter*, 426 N.W.2d 789, 793 (Mich. App. 1988) (holding that an employment contract between an outgoing city council and the city manager was void on public policy grounds because it attempted to take away "the governmental or legislative power of the incoming council to appoint and remove public officers"); *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) ("[I]t is obvious that the appointment of a county manager is precisely and unmistakably a governmental matter within the rule's purview and the Monroe County legislators would be limited by it but for the fact that the county charter specifically provides for appointment of the manager to a four-year term."); *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1289 (Pa. 2000) ("With respect to those agreements involving municipal or legislative bodies that encompass governmental functions, we have repeatedly held that governing bodies cannot bind their successors."); *id.* at 1289-90 ("The obvious purpose of the rule is to *permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected . . .*" (emphasis added)); *id.* at 1290 n.5 ("The rule against binding governmental successors is recognized in most other jurisdictions as well."); *Falls Twp. v. McManamon*, 537 A.2d 946, 948 (Pa. Cmmw. Ct. 1988) (holding that a three-year employment contract between the lame-duck supervisors of a township and the individual appointed by them to serve as police chief was invalid as against public policy because it was an attempt by the lame-duck supervisors to influence the governmental functions of their successors).

supreme court declared abolished by the Home Rule Act.¹⁵ See *Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) ("This Court concludes that by enacting the Home Rule Act, . . . the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."). Dillon's Rule states:

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

The court in *Cowart I*, which post-dated the Home Rule Act, admittedly recited Dillon's rule at the beginning of its discussion of the contract's validity. 319 S.C. at 131, 459 S.E.2d at 880. However, the court did not ultimately rely on Dillon's rule in determining that Cowart's employment contract was void. Rather, the court relied on the independent principle that governmental bodies have no authority to impair the power and discretion delegated to their successors by the public,¹⁶ as aptly expressed in *Newman v. McCullough*:

The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors. *That acting as a governmental agency, it is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it.*

212 S.C. at 25-26, 46 S.E.2d at 256 (emphasis added).

¹⁵ Codified at S.C. Code Ann. § 4-9-10 to -1230 (1986 & Supp. 2012) for counties and at S.C. Code Ann. § 5-7-10 to -310 (2004 & Supp. 2012) for municipal corporations.

¹⁶ 319 S.C. at 132-36, 459 S.E.2d at 880-83.

As stated above, when determining whether a contract is binding on successor governing bodies, "the true test is whether the contract itself *deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.*" *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (emphasis added). This prohibition against limiting the powers of a successor council as to governmental functions does not at all conflict with the requirement of the Home Rule Act to construe the powers of municipalities and counties in a liberal manner. *See* S.C. Code Ann. § 4-9-25 (Supp. 2012) ("The powers of a county must be liberally construed in favor of the county . . ."); S.C. Code Ann. § 5-7-10 (2004) ("The powers of a municipality shall be liberally construed in favor of the municipality . . ."). Therefore, Cunningham's argument regarding the abolition of Dillon's Rule is irrelevant to our analysis.

Cunningham also argues that the County's enabling legislation, the Home Rule Act, clearly authorized the lame-duck council to enter into an employment contract extending beyond the outgoing members' terms of office. We disagree. Section 4-9-620 of the South Carolina Code (1986) states, in pertinent part, "The term of employment of the [county] administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the administrator for a definite term."¹⁷ Despite Cunningham's argument to the contrary, the provisions of the Home Rule Act governing municipal corporations operating under the Council-Manager form of government contain identical language as to municipal managers. *See* S.C. Code Ann. § 5-13-70 (2004) ("The term of employment of the manager shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the manager for a definite term."). Notwithstanding the existence of section 5-13-70, the courts in *Cowart I* and *Cowart II* continued to endorse the principle that a local governing body cannot bind its successor with regard to the appointment or removal of a public officer.

In any event, we do not view the language of section 4-9-620 as *clearly* authorizing the "definite term" to extend beyond the terms of the outgoing council members. Therefore, it does not fall within *Newman's* exception to the prohibition against binding successor governing bodies. *See Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838 ("*Newman* allows an exception, however, where the enabling legislation

¹⁷ In his petition for rehearing, Cunningham references the "Surreply Brief of Amicus." We remind the parties that by order filed on June 1, 2012, this court declined to accept the Surreply Brief of Amicus for filing.

clearly authorizes the local governing body to make a contract extending beyond its members' own terms." (emphasis added)); *see also 16 Jade St., LLC v. R. Design Const. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012), *reh'g granted* (May 7, 2012) (holding that if a statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent); *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007) ("[A]ny legislation [that] is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent."); *id.* ("Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable."); *State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("[I]t is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute." (citing *Nuckolls v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939))); *Nuckolls*, 192 S.C. at 161, 5 S.E.2d at 864 (holding that it is presumed that no change in the common-law was intended by the legislature's enactment of a statute on the same subject unless the language employed clearly indicates such an intention); *id.* ("[T]he rules of the common-law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language.").

Cunningham further maintains "[a] limiting interpretation of Section 4-9-620 also violates both the constitutional and statutory requirements that grants of power to Anderson County be interpreted as broadly as possible to include any fairly implied powers." Cunningham relies on S.C. Code Ann. § 4-9-25 (Supp. 2012), which we previously referenced in this opinion. Section 4-9-25 requires the powers of a county to be liberally construed. Section 4-9-25 states in full:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, *not inconsistent with the Constitution and general law of this State*, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. *The powers of a county must be liberally construed in favor of the county* and the specific mention of particular powers may not be

construed as limiting in any manner the general powers of counties.¹⁸

S.C. Code Ann. § 4-9-25 (Supp. 2012) (emphasis added).

We do not view this provision as authorizing a county's lame-duck council to bind the successor council as to governmental functions. Quite to the contrary, Cunningham's argument that the outgoing Council could so bind its successor would have a restrictive effect on county powers rather than a liberal one—that is, it would be restrictive on the successor governing body. Again, we find the statutory requirement to liberally construe the powers of a county, as long as consistent with our Constitution and general laws, to be compatible with *Newman's* policy of prohibiting local governing bodies from binding their successors as to governmental functions unless clearly authorized by enabling legislation.

Cunningham argues in the alternative that the payment of severance under his employment contract would be a proprietary function rather than a governmental function, and, hence, the 2008 Council was permitted to bind the 2009 Council as to payment of his severance. *See Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880 (holding that if the contract involves the exercise of the municipal corporation's business or proprietary powers, it is binding on successor bodies "if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality"). Again, the appointment of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body. *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837. Accordingly, all provisions of such a contract, including provisions for severance pay, are void.

Based on the foregoing, the circuit court properly concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. Therefore, we affirm summary judgment for the County on this cause of action.

¹⁸ Notwithstanding the existence of a virtually identical provision for municipal corporations, S.C. Code Ann. § 5-7-10 (2004), the courts in *Cowart I* and *Cowart II* continued to endorse the principle that a local governing body cannot bind its successor with regard to governmental functions.

II. Payment of Wages Act

Cunningham asserts the circuit court erred in concluding that his accrued sick leave did not constitute "wages" under the Payment of Wages Act. Contrary to the circuit court's ruling, Cunningham argues that the Act's exclusion of "severance" from the definition of "wages" does not bar his claim for sick leave because his contract's provision for payment of accrued sick leave was not part of the severance package required by the contract.¹⁹ See S.C. Code Ann. § 41-10-10(2) (Supp. 2012) ("Wages" means all amounts at which labor rendered is recompensed . . . and includes vacation, holiday, and sick leave payments *which are due to an employee under any employer policy or employment contract.*") (emphasis added).

This court may affirm for any ground appearing in the record on appeal. Rule 220(c), SCACR. Here, we need not determine whether sick leave was part of the contract's severance package because the sick leave claim is based solely on the proposition that the contract was valid and binding on the 2009 Council.²⁰

¹⁹ The circuit court's ruling as to the exclusion of severance from the Act's definition of wages was an alternative ruling; the circuit court's primary ruling as to the Payment of Wages claim was that Cunningham was not entitled to accrued sick leave "resulting from the termination of a void contract."

²⁰ Cunningham submits the alternative argument that the contract's provision for payment of accrued sick leave is severable from the remainder of the contract pursuant to the severability clause in section 17(D) of the contract, which states, in pertinent part:

If any *provision*, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed severable, shall not be affected thereby, and shall remain in full force and effect.

(emphasis added). The County maintains that this argument is not preserved because the circuit court did not rule on it and Cunningham did not file a Rule 59(e) motion seeking a ruling. Cunningham responds that because the trial court viewed the contract in its entirety as void, it would have been futile for him to seek a ruling on the severability argument. Assuming, without deciding, this precise issue is preserved for review, we reject Cunningham's argument. Because the

However, the contract was void. Further, Cunningham has admitted that he would not be entitled to sick leave from the County if his contract is determined to be void as the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination. Therefore, we affirm summary judgment for the County on this cause of action.

III. Wrongful Discharge

Cunningham maintains the circuit court erred in concluding he could not avail himself of the public policy exception to the at-will employment doctrine on the ground that he did not claim he was an at-will employee. We agree.

In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Under the "public policy exception" to the at-will employment doctrine, however, 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. 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.

Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) (citations and quotation marks omitted). However, "the public policy exception is not limited to these situations." *Id.* at 614, 713 S.E.2d at 637.²¹

circuit court correctly ruled that the contract was void in its entirety, no part of the contract is valid or enforceable against the 2009 Council.

²¹ "The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination." *Id.* at 615, 713 S.E.2d at 637; *see Epps v. Clarendon Cnty.*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (declining to extend the public policy exception when the employee has an existing remedy for a discharge that allegedly violates rights other than the right to the employment itself and stating that the appellant claimed an infringement of his constitutional rights to free speech and association, for which he could seek redress in a § 1983 action). Additionally, "[t]he determination of

Further, the existence of an employment contract does not preclude a determination that the employment is terminable at will. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) ("An employment contract for an indefinite term is presumptively terminable at will . . .").

Here, within the wrongful discharge cause of action in the complaint, Cunningham alleged that the County conditioned his continued employment on his agreement to (1) "implement directives of individual council members, including those that violate actions directed by the body itself[;]" (2) commit acts violating "the public policy regarding the respective powers of Administrator and Council[;]" and (3) "commit acts that, upon information and belief, would violate the policy set forth in S.C. Code Ann. § 16-17-560[.]" Section 16-17-560 prohibits discharging a citizen from employment because of political opinions or the exercise of political rights and privileges.

The County states that Cunningham has never claimed to be an at-will employee, and, therefore, he may not obtain relief based on the law governing at-will employment. The County's statement is not entirely correct. Cunningham presented to the circuit court a "Supplemental Filing Regarding Plaintiff's Motions for Summary Judgment on Count[s] I and III and Defendant's Motion for Summary Judgment as to Counts I-III." Curiously, in this filing, Cunningham likened his contract to the contract in *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999)²²: "Plaintiff's contract is, by statute, defined as one for a definite term

what constitutes public policy is a question of law for the courts to decide." *Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (citation omitted). "It is not a function of the jury to determine questions of law such as what constitutes public policy. Rather, once a public policy is established, the jury would determine the factual question [of] whether the employee's termination was in violation of that public policy." *Id.*

²² In *Stiles*, our supreme court expanded the public policy exception to the at-will doctrine to contracts with a mere thirty-day notice provision, technically a "contract for a definite term." 335 S.C. at 225, 516 S.E.2d at 450. However, this expansion was based on the fact that the employee did not have an alternative remedy for wrongful discharge as provided by typical contracts for a definite term; he was merely entitled to a thirty-day notice of termination. *Id.* at 225-26, 516 S.E.2d at 451. In other words, while a contract with a mere thirty-day notice provision technically becomes a contract for a definite term once notice is given, it is otherwise effectively an at-will employment contract leaving the employee with no remedy for a wrongful termination. *Id.* at 225-26, 516 S.E.2d at 450-51.

and it *therefore* falls within the rule recognized by the majority in *Stiles*." (emphasis added). While this argument is based on a misunderstanding of *Stiles*, it sufficiently undercuts the County's suggestion that Cunningham waived his "at-will" argument by not presenting it to the circuit court; Cunningham presented the argument, albeit incorrectly, that his contract should be treated like the contract in *Stiles*, which our supreme court viewed as "placing the employee in the same position as an at-will employee" with the only difference being the contract's notice provision. 335 S.C. at 226, 516 S.E.2d at 451.

On appeal, Cunningham continues to rely on *Stiles* by characterizing his contract as providing for "at-will status with a notice provision." Even though we have already determined Cunningham's contract to be void, we engage in the following analysis only to address Cunningham's characterization of his contract as "at-will." Cunningham claims that his contract's only limitation on the County's right to terminate him "was the requirement that the County abide by the severance provisions." Cunningham asserts that he "still faced termination for any reason, including a reason that violates public policy." Curiously, Cunningham maintains both that (1) the Master Employment Agreement established an at-will employment relationship, despite the contract's generous severance remedy, and (2) at the same time, he can recover contract damages if the County does not pay the designated severance amount upon terminating him without cause.

However, the contract's severance provisions served as the intended contractual remedy for termination without cause before the end of the three-year term; the intent underlying the contract was that such an event would trigger the requirement to pay Cunningham the remainder of his salary and benefits for the balance of the contract period. Such a contract does not establish an at-will employment relationship. See *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992) ("The doctrine [of employment at will] in its pure form allows an employer to discharge an employee *without incurring liability* for good reason, no reason, or bad reason." (emphasis added) (citation omitted)); see also *Stiles*, 335 S.C. at 225, 516 S.E.2d at 450 ("The measure of damages when an employee is wrongfully discharged under a contract for a definite term generally is the wages for the unexpired portion of the term."); *id.* at 227, 516 S.E.2d at 451 (Toal, J., concurring) ("Employment in South Carolina has been classified as either for a definite term or at-will. Employment for a definite term has two important characteristics: (1) it exists for a fixed period of time; and (2) [it] may only be terminated before the end of that term by just cause." (citations omitted)); *id.* (Toal, J., concurring) ("If an employee is wrongfully terminated under a definite contract, the measure of damages is determined by the contract and is generally the wages

for the unexpired portion of the term." (citation omitted)); *Shivers v. John H. Harland Co., Inc.*, 310 S.C. 217, 220, 423 S.E.2d 105, 107 (1992) ("This measure of damages allows an employee to receive the benefit of the bargain by putting him in as good a position as he would have been had the contract been performed.").

Cunningham cites *Angus v. Burroughs & Chapin Company*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), *rev'd on other grounds*, 368 S.C. 167, 628 S.E.2d 261 (2006) and *Cape v. Greenville County School District*, 365 S.C. 316, 618 S.E.2d 881 (2005) in support of his position that his contract shows an intent to establish an at-will relationship. However, the contract in *Angus* stipulated that the public official was to be given "365 days notice or 365 days severance pay in the event of a termination." 358 S.C. at 500, 596 S.E.2d at 69 (emphasis added). The Record on Appeal in *Angus* shows that the contract left the choice between these two options to "the discretion of [Horry County] Council" and did not set forth any distinction between termination with cause and termination without cause. In contrast, Cunningham's contract sets forth the grounds for termination "with cause" and requires the County to pay Cunningham his salary and financial benefits for the remainder of the three-year term if the County terminates Cunningham without cause.

Further, the contract in *Cape* contained language specifically stating "THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON BY EITHER EMPLOYER OR EMPLOYEE." 365 S.C. at 317, 618 S.E.2d at 882. In contrast, Cunningham's contract states:

The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, *subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement.*

(emphasis added). Again, the provisions in Section 3, Paragraphs A and B, of Cunningham's contract set forth the grounds for termination "with cause" and require the County to pay Cunningham his salary and financial benefits for the remainder of the three-year term if the County terminates Cunningham without cause.

Our supreme court has not expanded the public policy exception beyond contracts like the one in *Stiles*. The reason is clear: contracts for a definite term that require

the payment of severance in the event of termination without cause provide a remedy for the employee if he is wrongfully discharged. *See id.* at 225, 516 S.E.2d at 450 ("The measure of damages when an employee is wrongfully discharged under a contract for a definite term generally is the wages for the unexpired portion of the term."); *see also Cape*, 365 S.C. at 318, 618 S.E.2d at 882 ("Cape argues the judge erred in finding her contract was at-will. She *correctly* points out that decisions from this Court have indicated an employment contract for a specific term cannot also be at-will because these terms are mutually exclusively." (emphasis added)); *Stiles*, 335 S.C. at 228, 516 S.E.2d at 452 (Toal, J., concurring) ("[T]he [public policy] exception is not designed to overlap an employee's statutory *or contractual rights* to challenge a discharge, but rather to provide a remedy for a clear violation of public policy *where no other reasonable means of redress exists.*" (emphasis added)).

Here, the intent underlying Cunningham's contract was to provide the exact measure of damages specified by our supreme court in *Stiles*, i.e., the wages, or salary, for the unexpired portion of the three-year term. This ability to recover damages in the form of "severance" would normally preclude recovery under a cause of action for wrongful termination based on the public policy exception to the at-will doctrine. *See id.* However, as we have previously concluded, Cunningham's contract was void because it purported to bind the 2009 Council. It was the illegality of his contract, rather than any contractual intent to create an at-will employment relationship; that relegated Cunningham to an at-will status.²³ Hence, there is nothing incorrect or unjust in allowing Cunningham to seek any remedy available to an at-will employee. *See* Rule 8, SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."); *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties."). Therefore, the circuit court erred in concluding that Cunningham was precluded from asserting a wrongful discharge claim based on the public policy exception to the at-will employment doctrine.

The County also argues that even if Cunningham could invoke the public policy exception to the at-will employment doctrine, the facts alleged in the complaint would not entitle him to relief because they do not establish a violation of public

²³ *See Barron*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 ("In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. An at-will employee may be terminated at any time for any reason or for no reason, with or without cause.").

policy. We disagree. Cunningham alleged that the County conditioned his continued employment on his agreement to engage in acts that would violate S.C. Code Ann. § 16-17-560, which prohibits discharging a citizen from employment because of political opinions or the exercise of political rights and privileges. Therefore, the allegations in Cunningham's complaint clearly invoke the public policy exception. *See Barron*, 393 S.C. at 614, 713 S.E.2d at 637 ("The public policy exception clearly applies in cases where . . . the employer requires the employee to violate the law").²⁴

Further, during the motions hearing, counsel for the County admitted that if the circuit court denied the County's summary judgment motion as to Cunningham's legal ability to assert the wrongful discharge cause of action and as to the sufficiency of the allegations in the complaint, then the parties would have to engage in further discovery. Counsel for both parties represented to the circuit court that they had an agreement to allow discovery on this cause of action if the circuit court denied summary judgment on it. Both counsel further agreed to allow the County the option of submitting another summary judgment motion on the wrongful discharge claim after the completion of discovery. "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted).

Finally, Cunningham has demonstrated the likelihood of uncovering additional relevant evidence during discovery. *See Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 (holding that when the nonmoving party requests a delay in ruling on a summary judgment motion until further discovery may be completed, the party must demonstrate the likelihood that further discovery will uncover additional relevant evidence). Cunningham testified in his deposition that Eddie Moore, who had recently been elected but had not yet taken office, stated to him: "[T]here are lots of employees that there's problems with . . . If I were to give you a list of employees to fire, would you get rid of them?" Cunningham responded by indicating that there would have to be a reason for a termination and "some demonstration of some attempt to remedy the situation in most cases" Although Mr. Moore was not yet seated on council, after he was sworn in he voted to terminate Cunningham's employment. Hence, Cunningham's testimony

²⁴ We decline to rule on whether the other allegations in the complaint invoke the public policy exception. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

sufficiently demonstrates a likelihood that further discovery will uncover additional evidence relevant to an attempted violation of section 16-17-560.

Based on the foregoing, we reverse the grant of summary judgment on the wrongful discharge claim and remand the claim to the circuit court so that the parties may engage in further discovery.

CONCLUSION

Accordingly, we affirm the circuit court's grant of summary judgment to the County as to Cunningham's causes of action for breach of contract and violation of the Payment of Wages Act. We reverse the circuit court's grant of summary judgment to the County as to Cunningham's wrongful discharge cause of action and remand to the circuit court to allow the parties to engage in further discovery.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Cunningham, Appellant,

v.

Anderson County, Respondent.

Appellate Case No. 2011-194209

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5072
Heard November 14, 2012 – Filed January 16, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and Brian P. Murphy, of Brian Murphy Law Firm, PC, of Greenville, for Appellant.

William W. Wilkins, E. Grantland Burns, and Kirsten E. Small, of Nexsen Pruet, LLC, of Greenville, for Respondent.

Michael E. Kozlarek and Ray E. Jones, of Parker Poe Adams & Bernstein, LLP, of Columbia, for Amicus Curiae South Carolina City and County Management Association.

GEATHERS, J.: In this breach of contract case, Appellant Michael Cunningham seeks review of the circuit court's order granting summary judgment to Respondent Anderson County (the County) on all of Cunningham's causes of action. Cunningham challenges the circuit court's conclusion that his employment contract with the County was void. Cunningham also challenges the circuit court's conclusions that (1) he could not avail himself of the public policy exception to the at-will employment doctrine, and (2) his accrued sick leave did not constitute "wages" under the South Carolina Payment of Wages Act.¹ We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The County operates under a Council-Administrator form of government, in which the Council employs an administrator to serve as the administrative head of the County's government. The administrator is responsible for the administration of all departments over which the Council has control.² The Council's members are elected for two-year, non-staggered terms.³ According to the County, three of the Council's seven members were defeated in the November 4, 2008 general election.⁴

During its November 18, 2008 meeting, the lame-duck Council (the 2008 Council) amended the previously-noticed agenda to vote on a severance contract with the then-current administrator, Joey Preston. This contract was drafted in anticipation of the termination of his employment. The 2008 Council voted 5-2 in favor of the contract.⁵ During the same meeting, the 2008 Council voted 5-2 in favor of a "Master Employment Agreement" appointing Cunningham, then the assistant administrator, as the new administrator for a three-year term.⁶ On November 19,

¹ S.C. Code Ann. § 41-10-10 to -110 (Supp. 2011).

² See S.C. Code Ann. § 4-9-620 (1986) (describing office of the administrator).

³ See S.C. Code Ann. § 4-9-610 (1986) (requiring council members to be elected in the general election for terms of two or four years "commencing on the first of January next following their election").

⁴ The seven members were Michael Thompson, Bob Waldrep, Cindy Wilson, Larry Greer, Gracie Floyd, Bill McAbee, and Ron Wilson. Thompson, Greer, and McAbee were defeated in the November 2008 election.

⁵ The five members voting in favor of the contract, which provided for a \$1 million dollar payment to Preston, included the three "lame-duck" members.

⁶ Likewise, the five members voting in favor of this contract included the three lame-duck members.

2008, Cunningham signed the contract, which provided for a severance package in the event he was later terminated "without cause."

On January 6, 2009, the new Council (2009 Council) met and passed a resolution condemning the 2008 Council's actions in entering into the severance contract with Joey Preston and the employment contract with Cunningham.⁷ Subsequently, the 2009 Council's ad hoc personnel committee presented Cunningham with a written at-will employment contract based on the position of the 2009 Council that Cunningham's November 19, 2008 employment contract was no longer valid.⁸ After reviewing the new contract, Cunningham wrote a letter to the members of the 2009 Council, dated January 27, 2009, stating that he saw no need to sign a contract for at-will employment as the 2009 Council already viewed his employment as at-will.

At its February 3, 2009 meeting, the 2009 Council voted to terminate Cunningham's employment, stating that he had rejected the 2009 Council's two separate proposals for an at-will employment contract.⁹ Before the vote was taken, Cunningham reminded the 2009 Council that he had offered in his January 27, 2009 letter to continue to work under his "current conditions," referencing the 2009 Council's position that he was an at-will employee. Cunningham also indicated that he intended to request a public hearing on his termination.

On February 9, the ad hoc personnel committee met with Cunningham in executive session to discuss his employment. Cunningham offered to "enter into an agreement through the end of the term of the [2009] [C]ouncil." At Cunningham's request, the 2009 Council conducted a public hearing on March 2, 2009 concerning his termination. At the conclusion of the hearing, the 2009 Council once again voted to remove Cunningham from his position as Administrator.

Cunningham filed this action on April 22, 2009, asserting causes of action for Breach of Contract, Wrongful Discharge, and violation of the Payment of Wages Act. The parties engaged in discovery on the breach of contract claim but agreed

⁷ The members of the 2009 Council were Eddie Moore, Bob Waldrep, Cindy Wilson, Gracie Floyd, Tommy Dunn, Ron Wilson, and Tom Allen.

⁸ This committee consisted of Bob Waldrep, Tommy Dunn, and Eddie Moore.

⁹ The record does not indicate when the ad hoc personnel committee made the second proposal, which was for a demotion to the Assistant Administrator position, but with a higher salary than what Cunningham previously received in that position.

to postpone discovery on the wrongful discharge claim until after the contract claim had been resolved. Subsequently, Cunningham filed a motion for summary judgment as to the breach of contract claim. The County filed a cross-motion for summary judgment as to all three causes of action in Cunningham's complaint. Cunningham then filed a second motion for summary judgment as to his claim under the Payment of Wages Act. The circuit court denied Cunningham's summary judgment motions and granted the County's summary judgment motion.

In granting the County's summary judgment motion, the circuit court concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. The circuit court also concluded that Cunningham's claim for accrued sick leave was not compensable under the Payment of Wages Act because (1) the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination; (2) the provision for sick leave in Cunningham's contract was part of a void contract; and (3) the sick leave provision was part of the severance package set forth in the contract, and the Payment of Wages Act excludes severance from the definition of "wages." Finally, the circuit court concluded Cunningham could not avail himself of the public policy exception to the at-will employment doctrine in support of his wrongful discharge claim because he did not claim that he was an at-will employee. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment to the County as to the breach of contract cause of action on the ground that Cunningham's employment contract was void?
2. Did the circuit court err in granting summary judgment to the County as to Cunningham's cause of action for violation of the South Carolina Payment of Wages Act on the ground that Cunningham's accrued sick leave did not constitute "wages" under the Act?
3. Did the circuit court err in granting summary judgment to the County as to Cunningham's wrongful discharge cause of action on the ground that Cunningham did not claim he was an at-will employee?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v.*

Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Rather, "[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Comm. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, 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.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "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." *Id.* at 329-30, 673 S.E.2d at 802.

LAW/ANALYSIS

I. Breach of Contract

Cunningham asserts the circuit court erred in concluding that his employment contract was void. We disagree.

In *Piedmont Public Service District v. Cowart*, this court considered a twenty-year employment contract between a special purpose district and its administrator that required five years' severance pay. 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (*Cowart I*), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (*Cowart II*). The court held that the contract involved the "governmental or legislative powers" of the District, and, therefore, could not be binding on successor boards. *Id.* at 133, 459 S.E.2d at 881. In applying the law of municipalities to the District, the court acknowledged that public service or special purpose districts are "not necessarily equivalent to municipalities or municipal corporations for all purposes." *Id.* at 131 n.2, 459

S.E.2d at 880 n.2 (citation omitted). However, the court noted "for the purpose of determining the scope of the District's power to enter into contracts, the law governing municipal corporations is applicable." *Id.* (citations omitted); *see also City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 178-79, 480 S.E.2d 728, 731 (1997) (applying *Cowart I* to Beaufort-Jasper County Water and Sewer Authority, a special purpose district).

By logical extension, the law of municipalities would apply to Anderson County's actions in the present case. Notably, other jurisdictions have applied the prohibition against binding successor governing bodies to counties. *See Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) (recognizing that, but for a provision in a county's charter allowing for appointment of the county manager for a four-year term, the county's legislators would be unable to appoint the county manager for a term extending into the term of the legislators' successors); *accord Valvano v. Bd. of Chosen Freeholders of Union Cnty.*, 183 A.2d 450, 453 (N.J. Super. Ct. App. Div. 1962).

In addressing municipal contracts extending past the term of a governing body, the court in *Cowart I* set forth the following primer:

If the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract. The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, *if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.*

Id. at 132, 459 S.E.2d at 880 (emphasis added). Quoting from *Newman v. McCullough*, 212 S.C. 17, 25-26, 46 S.E.2d 252, 256 (1948), which involved an employment contract with the City of Greenville, the court set forth the following rationale:

[W]here the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council[,] *unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term*, no power of the council to do so exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.

Id. at 132, 459 S.E.2d at 880-81 (emphasis added). The court distinguished between proprietary and governmental functions as follows:

[T]he difference between proprietary and governmental functions is often difficult to determine, because, as the scope of "governmentality" expands, the intertwining and overlapping of such functions make it increasingly more difficult to draw any definitive line of separation. However, it is clear the rule is intended to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties. Thus, when determining whether a contract is binding on successor boards, it appears that *the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.*

Id. at 132-33, 459 S.E.2d at 881 (emphasis added) (citations omitted).

In *Cowart II*, our supreme court emphasized that the appointment or removal of a public officer "is a *governmental* function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (emphasis added) (citation omitted). "Such a contract is not binding on the successors to the local

governing body." *Id.*¹⁰ "[T]he rule is intended to ensure that governing bodies are free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. An exception to this rule exists when "enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838 (emphasis added).

Cunningham argues that *Cowart I* and *Cowart II* do not apply to this case because *Cowart I* applied the common-law principle known as Dillon's Rule, which our

¹⁰ Other jurisdictions also recognize this fundamental principle. See *Grassini v. DuPage Twp.*, 665 N.E.2d 860, 864 (Ill. App. 1996) ("[I]t is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision."); *id.* ("This principle has not been confined in application to county governments Indeed, it has found expression with respect to employment decisions in . . . the Municipal Code" (citation omitted)); *City of Hazel Park v. Potter*, 426 N.W.2d 789, 793 (Mich. App. 1988) (holding that an employment contract between an outgoing city council and the city manager was void on public policy grounds because it attempted to take away "the governmental or legislative power of the incoming council to appoint and remove public officers"); *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) ("[I]t is obvious that the appointment of a county manager is precisely and unmistakably a governmental matter within the rule's purview and the Monroe County legislators would be limited by it but for the fact that the county charter specifically provides for appointment of the manager to a four-year term."); *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1289 (Pa. 2000) ("With respect to those agreements involving municipal or legislative bodies that encompass governmental functions, we have repeatedly held that governing bodies cannot bind their successors."); *id.* at 1289-90 ("The obvious purpose of the rule is to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected" (emphasis added)); *id.* at 1290 n.5 ("The rule against binding governmental successors is recognized in most other jurisdictions as well."); *Falls Twp. v. McManamon*, 537 A.2d 946, 948 (Pa. Cmmw. Ct. 1988) (holding that a three-year employment contract between the lame-duck supervisors of a township and the individual appointed by them to serve as police chief was invalid as against public policy because it was an attempt by the lame-duck supervisors to influence the governmental functions of their successors).

supreme court declared abolished by the Home Rule Act.¹¹ See *Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) ("This Court concludes that by enacting the Home Rule Act, . . . the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."). Dillon's Rule states

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

The court in *Cowart I*, which post-dated the Home Rule Act, admittedly recited Dillon's rule at the beginning of its discussion of the contract's validity. 319 S.C. at 131, 459 S.E.2d at 880. However, the court did not ultimately rely on Dillon's rule in determining that Cowart's employment contract was void; in addition to relying on the contract's unreasonable duration, the court relied on the independent principle that governmental bodies have no authority to impair the power and discretion delegated to their successors by the public,¹² as aptly expressed in *Newman v. McCullough*:

The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors. *That acting as a governmental agency, it is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it.*

212 S.C. at 25-26, 46 S.E.2d at 256 (emphasis added).

¹¹ Codified at S.C. Code Ann. § 4-9-10 to -1230 (1986 & Supp. 2011).

¹² 319 S.C. at 132-36, 459 S.E.2d at 880-83.

As stated above, when determining whether a contract is binding on successor governing bodies, "the true test is whether the contract itself *deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.*" *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (emphasis added). This prohibition against limiting the powers of a successor council is consistent with the requirement of the Home Rule Act to construe the powers of a county in a liberal manner. Therefore, Cunningham's argument regarding the abolition of Dillon's Rule is irrelevant to our analysis.

Cunningham also argues that the County's enabling legislation, the Home Rule Act, clearly authorized the lame-duck council to enter into an employment contract extending beyond the outgoing members' terms of office. We disagree. Section 4-9-620 of the South Carolina Code (1986) states, in pertinent part, "The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the administrator for a definite term." We do not view this language as clearly authorizing the "definite term" to extend beyond the terms of the outgoing council members.

Cunningham also maintains that the Act's requirement that the powers of a county be liberally construed authorized the 2008 Council to bind the 2009 Council. In support of this proposition, Cunningham cites S.C. Code Ann. § 4-9-25 (Supp. 2011), which states:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, *not inconsistent with the Constitution and general law of this State*, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. *The powers of a county must be liberally construed in favor of the county* and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (Supp. 2011) (emphasis added).

We do not view this provision as authorizing a county's lame-duck council to bind the successor council as to governmental functions. Cunningham's argument that the County's 2008 Council could bind the 2009 Council requires the court to take a narrow view of the 2009 Council's powers, which is contrary to the requirement that a county's powers must be given a liberal construction.

Cunningham argues in the alternative that the payment of severance under his employment contract would be a proprietary function rather than a governmental function, and, hence, the 2008 Council was permitted to bind the 2009 Council as to payment of his severance. *See Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880 (holding that if the contract involves the exercise of the municipal corporation's business or proprietary powers, it is binding on successor bodies "if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality"). Cunningham is making a distinction without a difference, and "[w]hatever doesn't make a difference doesn't matter' in the law." *See McClurg v. Deaton*, 395 S.C. 85, 92, 716 S.E.2d 887, 890 (2011) (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)). The payment of severance would be based on an employment contract that purports to bind the 2009 Council and is therefore void. *See Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (holding that the appointment of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body).

Based on the foregoing, the circuit court properly concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. Therefore, we affirm summary judgment for the County on this cause of action.

II. Payment of Wages Act

Cunningham asserts the circuit court erred in concluding that his accrued sick leave did not constitute "wages" under the Payment of Wages Act. Contrary to the circuit court's ruling, Cunningham argues that the Act's exclusion of "severance" from the definition of "wages" does not bar his claim for sick leave because his contract's provision for payment of accrued sick leave was not part of the severance package required by the contract.¹³ *See* S.C. Code Ann. § 41-10-10(2)

¹³ The circuit court's ruling as to the exclusion of severance from the Act's definition of wages was an alternative ruling; the circuit court's primary ruling as to

(Supp. 2011) ("Wages' means all amounts at which labor rendered is recompensed . . . and includes vacation, holiday, and sick leave payments *which are due to an employee under any employer policy or employment contract.*") (emphasis added).

This court may affirm for any ground appearing in the record on appeal. Rule 220(c), SCACR. Here, we need not determine whether sick leave was part of the contract's severance package because the sick leave claim is based solely on the proposition that the contract was valid and binding on the 2009 Council.¹⁴ However, the contract was void. Further, Cunningham has admitted that he would not be entitled to sick leave from the County if his contract is determined to be void as the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination. Therefore, we affirm summary judgment for the County on this cause of action.

the Payment of Wages claim was that Cunningham was not entitled to accrued sick leave "resulting from the termination of a void contract."

¹⁴ Cunningham submits the alternative argument that the contract's provision for payment of accrued sick leave is severable from the remainder of the contract pursuant to the severability clause in section 17(D) of the contract, which states, in pertinent part:

If any *provision*, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed severable, shall not be affected thereby, and shall remain in full force and effect.

(emphasis added). The County maintains that this argument is not preserved because the circuit court did not rule on it and Cunningham did not file a Rule 59(e) motion seeking a ruling. Cunningham responds that because the trial court viewed the contract in its entirety as void, it would have been futile for him to seek a ruling on the severability argument. Assuming, without deciding, this precise issue is preserved for review, we reject Cunningham's argument. Because the circuit court correctly ruled that the contract was void in its entirety, no part of the contract is valid or enforceable against the 2009 Council.

III. Wrongful Discharge

Cunningham maintains the circuit court erred in concluding he could not avail himself of the public policy exception to the at-will employment doctrine on the ground that he did not claim he was an at-will employee. We agree.

In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Under the "public policy exception" to the at-will employment doctrine, however, 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. 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.

Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) (citations and quotation marks omitted). However, "the public policy exception is not limited to these situations." *Id.* at 614, 713 S.E.2d at 637.¹⁵ Further, the existence of an employment contract does not preclude a determination that the employment is terminable at will. *See Cape v. Greenville*

¹⁵ "The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination." *Id.* at 615, 713 S.E.2d at 637; *see Epps v. Clarendon Cnty.*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (declining to extend the public policy exception when the employee has an existing remedy for a discharge that allegedly violates rights other than the right to the employment itself and stating that the appellant claimed an infringement of his constitutional rights to free speech and association, for which he could seek redress in a § 1983 action). Additionally, "[t]he determination of what constitutes public policy is a question of law for the courts to decide." *Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (citation omitted). "It is not a function of the jury to determine questions of law such as what constitutes public policy. Rather, once a public policy is established, the jury would determine the factual question [of] whether the employee's termination was in violation of that public policy." *Id.*

Cnty. Sch. Dist., 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) ("An employment contract for an indefinite term is presumptively terminable at will . . .").

Here, within the wrongful discharge cause of action in the complaint, Cunningham alleged that the County conditioned his continued employment on his agreement to (1) "implement directives of individual council members, including those that violate actions directed by the body itself[;]" (2) commit acts violating "the public policy regarding the respective powers of Administrator and Council[;]" and (3) "commit acts that, upon information and belief, would violate the policy set forth in S.C. Code Ann. § 16-17-560[.]" Section 16-17-560 prohibits discharging a citizen from employment because of political opinions or the exercise of political rights and privileges.

The County argues that Cunningham has never claimed to be an at-will employee, and, therefore, he may not obtain relief based on the law governing at-will employment. We agree with Cunningham that the County should not be permitted to argue that the Master Employment Agreement was unenforceable and then rely on the contract's existence to deflect liability on the wrongful discharge claim. By pleading both a breach of contract cause of action and a wrongful discharge cause of action, Cunningham simply set forth alternative theories of relief due to the parties' dispute over the legality of the contract. Rule 8, SCRPC, allows for such pleading in the alternative: "Relief in the alternative or of several different types may be demanded."¹⁶

In its brief, the County implies that Cunningham did not properly plead a cause of action for wrongful discharge because he did not allege that he was an at-will employee: "[H]e could have alleged that if the Contract was void, then he was an at-will employee entitled to bring a wrongful discharge claim. Cunningham elected not to do so." The County further states: "Instead he has always maintained that *the terms of the Contract* allow him to maintain both a breach of contract claim and a wrongful discharge claim." (emphasis in Brief of Respondent). The County then quotes a statement made by Cunningham's counsel

¹⁶ See also *Harper v. Ethridge*, 290 S.C. 112, 118, 348 S.E.2d 374, 377 (Ct. App. 1986), *declined to extend on other grounds by Mendelsohn v. Whitfield*, 312 S.C. 17, 19, 430 S.E.2d 524, 526 (Ct. App. 1993) ("[A] plaintiff may join as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent." (citations omitted)).

during the motions hearing: "[J]ust because you have a contract doesn't mean you give up the right to sue in court. . . . *It's not alternative causes of action.*" (emphasis in Brief of Respondent).

We view this statement of Cunningham's counsel as merely a reference to our supreme court's precedent indicating that the existence of an employment contract does not preclude a determination that the employment is terminable at will. *See Cape*, 365 S.C. at 319, 618 S.E.2d at 883 ("An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. These are mere presumptions, however, which the parties can alter by express contract provisions."); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999) ("[A]n employee under an at-will contract with a 30 day notice provision may maintain an action for wrongful discharge in violation of public policy").

Therefore, counsel's statement during the motions hearing did not waive the complaint's assertion of a cause of action for wrongful discharge. Further, Cunningham's complaint adequately expresses a cause of action for wrongful discharge despite the omission of the words "at will." *See* Rule 8, SCRPC ("All pleadings shall be so construed as to do substantial justice to all parties."); *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties.").

Based on the foregoing, the circuit court erred in concluding that Cunningham was precluded from asserting a wrongful discharge claim based on the public policy exception to the at-will employment doctrine.

The County also argues that even if Cunningham could invoke the public policy exception to at-will employment, the facts alleged in the complaint would not entitle him to relief. Cunningham responds that the County's sole basis for its summary judgment motion as to the wrongful discharge cause of action was that the public policy exception was unavailable to Cunningham as a matter of law. Cunningham asserts that this ground for summary judgment on the wrongful discharge claim was the only ground litigated and ruled on by the circuit court. Cunningham's assertion is correct.

During the motions hearing, counsel for the County admitted that if the circuit court denied the County's summary judgment motion as to Cunningham's legal

ability to assert the wrongful discharge cause of action, then the parties would have to engage in further discovery. Counsel for both parties represented to the circuit court that they had an agreement to allow discovery on this cause of action if the circuit court denied summary judgment on it.¹⁷ Both counsel further agreed to allow the County the option of submitting another summary judgment motion on the wrongful discharge claim after the completion of discovery.

"Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted). Therefore, we reverse the grant of summary judgment on this claim and remand the claim to the circuit court so that the parties may engage in further discovery.

CONCLUSION

Accordingly, we affirm the circuit court's grant of summary judgment to the County as to Cunningham's causes of action for breach of contract and violation of the Payment of Wages Act. We reverse the circuit court's grant of summary judgment to the County as to Cunningham's wrongful discharge cause of action and remand to the circuit court to allow the parties to engage in further discovery.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and THOMAS, JJ., concur.

¹⁷ Two months prior to the hearing, on March 8, 2011, Cunningham's attorney filed a "Rule 56(f) Affidavit of Counsel" stating that further discovery was necessary "regarding the issue of whether Plaintiff was terminated for, among other reasons, refusing to carry out a directive to terminate employees." The affidavit sets forth the agreement of counsel for both parties to delay discovery on the wrongful discharge claim until the contract claim was resolved.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

RECEIVED
JAN 30 2013
SC Court of Appeals

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

PETITION FOR REHEARING

Anderson County respectfully petitions this Court to reconsider its January 16, 2013 opinion to the extent it reversed the circuit court's grant of summary judgment on Michael Cunningham's wrongful discharge claim. This Court overlooked that Cunningham's decision not to plead at-will employment as an alternative to his breach of contract claim was a necessary¹ and strategic decision given the circumstances leading up to this lawsuit.

By way of background, this appeal primarily addressed whether a lame-duck County Council could create an enforceable three-year contract to employ a County Administrator, thereby binding the newly-elected County Council with an Administrator of the old-Council's choosing. This Court correctly found that

¹ During the period of time when the Anderson County Council declared Cunningham's written contract null and void it offered him employment on an at-will basis, which Cunningham specifically rejected. (R. 325, l. 3-7; R. 341, l. 19-23)

such a contract was unenforceable, and as a result, affirmed the circuit court's grant of summary judgment on Cunningham's breach of contract and violation of the Payment of Wages Act claims.

In addition to those claims, Cunningham also asserted a cause of action for wrongful discharge, alleging the County improperly conditioned employment on his agreeing to commit acts that would violate public policy. The circuit court granted summary judgment to the County on this cause of action because Cunningham chose not to allege that he was an at-will employee, a necessary element for a party seeking to assert the "public policy exception" to the at-will employment doctrine.

On appeal, Cunningham suggested – for the first time – that he was an at-will employee, a position he steadfastly denied from the inception of this litigation through the hearing on summary judgment, and indeed, a position he strategically *had* to deny considering that his refusal to accept the County's proposal to continue as an at-will employee formed the backdrop of this entire litigation. (R. 325, l. 3-7; R. 341, l. 19-23) It was only after this strategy was rejected by the trial court that Cunningham changed horses and claimed on appeal that as an alternative his employment was at-will. This new argument understandably confused this Court, which reversed summary judgment on Cunningham's wrongful discharge claim and held: "By pleading both a breach of contract cause of action and a wrongful discharge cause of action, Cunningham simply set forth alternative theories of relief due to the parties' dispute over the legality of the

contract.” With all due respect, this statement is not correct. The County respectfully asks this Court to reconsider this portion of its opinion, which overlooked or misapprehended the following points:

1. Cunningham did not inadvertently fail to use the words “at-will” in his complaint. He purposely and deliberately elected not to allege, in the alternative or otherwise, that he was an at-will employee. This strategic decision was abundantly clear in all of his pleadings, motions, memoranda, and oral arguments before the circuit court. It is manifestly unfair to Anderson County for this Court to re-write Cunningham’s Complaint and to ignore preservation of issue requirements, for an argument which, in this case, Cunningham never intended to preserve.

The Court found that Cunningham’s Complaint adequately expressed a cause of action for wrongful discharge despite the absence of the words “at will.” In so finding, the Court overlooked the words Cunningham’s Complaint *did* include: in Paragraph 30 of his Complaint, under the heading “Count II, For a Second Cause of Action, Wrongful Discharge – Public Policy” Cunningham specifically incorporated the previous allegations in his Complaint “as if set forth here in full.” Paragraph 25 (a previous allegation found in “Count I, For a First Cause of Action, Breach of Contract”) states, “Plaintiff and Defendant were parties to the Master Employment Agreement, which constitutes a valid and binding contract.” In other words, Cunningham’s litigation strategy was not merely based on omission (failing to include the terms “at will” or “in the alternative” when he

asserted his cause of action for wrongful discharge), but one of commission, boldly proclaiming that he had a cause of action for wrongful discharge based on his written employment contract.

Cunningham's theory that he had a cause of action for wrongful discharge as a contractual employee was further highlighted during the hearing on summary judgment. At that hearing, his attorney adamantly argued that Cunningham's cause of action for wrongful discharge was not dependent upon a finding that the employment contract was unenforceable, stating: "just because you have a contract doesn't mean you give up the right to sue in court. *They're not the same. It's not alternative causes of action. They address very different things.*" (emphasis added). (R. 147, l. 4-7)

Furthermore, although Cunningham argues he was fired for a variety of improper reasons, he acknowledges that the reason given by the County was his refusal to agree that his employment was at-will. (R. 86; R. 325, l. 3-5) As a matter of strategy, Cunningham held fast to his contract-employee argument, placing all his proverbial eggs in one basket and choosing to live or die on his mistaken belief that he had an enforceable contract which the County breached when it declared it null and void.

2. While Cunningham did allege a cause of action for wrongful discharge in violation of public policy, he did so in the context of his written employment agreement, which provided for a minimum three-year term. Cunningham alleged that his employment was terminated because the County

declared the employment contract null and void and that this same contract was also breached because his termination was in violation of public policy. Of course, as a matter of law this position is simply wrong because the public policy exception does not apply to written employment contracts for a fixed term. See *Ludwick v. this Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (adopting the cause of action for wrongful discharge based on a violation of public policy as an *exception* to the general rule that at-will employment is terminable by an employer for any reason or for no reason without incurring liability for wrongful discharge); *Stiles v. Am. General Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999) (Toal, J., concurring) (“[T]he *Ludwick* exception is not designed to overlap an employee's statutory or contractual rights to challenge a discharge . . .”).

As set forth in its brief, the County whole-heartedly agrees with the Court's opinion to the extent it found that a plaintiff is entitled to make alternative arguments – that on the one hand he has a contract that was breached when his employer terminated him, or on the other hand (in the event the court found he had no contract) that he is an at-will employee who was wrongfully discharged based on a violation of public policy. The County disagrees, however, that this plaintiff was entitled to survive summary judgment after he deliberately chose NOT to make alternative arguments, refusing at every turn to acknowledge any possibility that he might be an at-will employee. Under such

circumstances, the law does not (and a court should not) infer that an alternative argument has been made. As this Court noted in *Charleston County School District v. Laidlaw Transit, Inc.*, “[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise” and “[a]ny allegations, statements or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position.” 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) (internal quotations and citations omitted).

Thus, while it is true that a plaintiff “may . . . state as many separate causes of action . . . as he has regardless of consistency” in his Complaint, the plaintiff still bears the responsibility of stating a valid claim for relief. See Rules 8(e)(2) & 12(b)(6), SCRCP. The public policy doctrine is premised on an employee being “at will,” and Cunningham not only elected not to plead that necessary element, but instead pled the opposite – that he was a contract employee and a contract employee only.

3. In finding “the County should not be permitted to argue that the Master Employment Agreement was unenforceable and then rely on the contract’s existence to deflect liability on the wrongful discharge claim,” the Court overlooked the fact that it was Cunningham who controlled his own fate and elected to rely on his alleged status as a contract employee to assert causes of action for both breach of contract and wrongful discharge, and he based both of

those causes of action on his written employment agreement,² rather than asserting those causes of action in the alternative.

Cunningham's position was that those causes of action were "*not the same. [They're] not alternative causes of action. They address very different things,*" and that as a contract employee he was entitled to seek damages for his breach of contract claim (including a request for specific performance) as well as for his wrongful discharge claim (including punitive damages). Where the Plaintiff chooses not to hedge his bets by pleading in the alternative and instead goes "all in" for both contractual damages and tort damages, he suffers the consequences when that gamble does not pay off.

4. The Court misapprehended Rule 8(f), SCRCP, when it construed Cunningham's Complaint to adequately express a cause of action for wrongful discharge. Pursuant to that Rule, "[a]ll pleadings should be so construed as to do substantial justice to *all* parties." Rule 8(f), SCRCP (emphasis added). By construing Cunningham's Complaint this way the Court ignored an allegation he made (that both Count I and Count II were based on a written contract) and inserted an argument he deliberately chose not to make (that in the alternative he was an at-will employee), the Court improperly changed Cunningham's all-or-nothing strategy to the County's undeserved detriment.

5. The Court also overlooked or misapprehended the County's

² Some confusion may have occurred because as this Court well knows, contrary to what Cunningham alleged in his Complaint, the public policy exception does not apply to the written employment agreement between Cunningham and the County.

argument that even if Cunningham were an at-will employee, the facts alleged in his Complaint would not entitle him to relief. In the opinion, the Court appears to find that this argument had not been raised or ruled on below; however, out of an abundance of caution, the County did raise this argument in its motion for summary judgment and memorandum in support. (R. 73; 76-78) The circuit court did not rule on these precise arguments because it granted summary judgment to the County for other reasons. However, having raised those arguments to the circuit court in its motion for summary judgment, it was appropriate for the County to raise them again as additional sustaining grounds in the appeal.³ See *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (“Under the present rules, a respondent – the “winner” in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.”).

Pursuant to *Ludwick*, a cause of action for wrongful discharge exists “where

³ In the Opinion, the Court noted that counsel for both parties agreed to allow discovery on the wrongful discharge cause of action if the circuit court denied summary judgment on it. However, such an agreement in no way waived the arguments the County made in its motion for summary judgment. Rather, this agreement merely acknowledged that *in the event* summary judgment was not granted, additional discovery could ensue if sought by Cunningham. Importantly, this was not an effort by Cunningham to further a claim of at-will employment status, but was always within the context of his incorrect assertion that the public policy exception applied to the written contract at issue.

the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy.” 287 S.C. at 225, 337 S.E.2d at 216. Our Supreme Court has declined “to extend the public policy exception to situations where an employee is terminated for refusing to comply with a directive which she simply believes would require her to violate the law.” *Antley v. Shepherd*, 340 S.C. 541, 550, 532 S.E.2d 294, 298 (2000).

Here, although the County denies the allegations Cunningham asserts against it, even if those allegations were true, they are insufficient to sustain a cause of action for wrongful discharge based on the public policy exception. At most, Cunningham claims that a member of County Council asked him whether he would fire a list of employees if he were presented with such a list. (R. 16 – paragraph 10 of Cunningham’s Complaint). As with the unsuccessful plaintiff in *Antley*, Cunningham’s mere belief that the names on the list (which Cunningham never saw) would be of people who were being fired based on their political leanings does not rise to the level of a “violation of a clear mandate of public policy” as required. (R. 333-36)

Likewise, Cunningham’s allegation that a council member informed him that he “would need to do exactly what council members told him to do in order to remain employed” does not meet *Ludwick*’s standard. (R. 16 – paragraph 12 of Cunningham’s Complaint). A council member is free to state his or her expectations to the administrator, even if those expectations are unrealistic. Indeed, section 4-9-630(2) of the South Carolina Code provides that the duties of

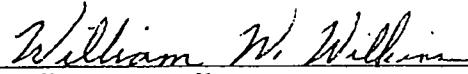
a County Administrator include executing the "policies, directives and legislative actions of the council."

CONCLUSION

Cunningham made a calculated decision to plead his case in an all-or-nothing fashion. This Court should not rewrite his Complaint just because he could have pled an alternative cause of action but purposely elected not to do so. While the Court need not reach the public policy issue, alternatively, this Court could grant rehearing and affirm the circuit court's grant of summary judgment on the wrongful discharge cause of action because none of Cunningham's allegations rise to the level of a violation of a clear mandate of public policy.

[Signature block on following page.]

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January 30, 2013
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing Petition for Rehearing on Appellant by depositing a copy of same in the United States Mail, postage prepaid, on January 30, 2013, addressed to his attorneys of record as follows:

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RECEIVED

JAN 30 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209
Op. No. 5072 (Ct. App. filed Jan. 16, 2013)

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent..

**APPELLANT'S RETURN TO RESPONDENT'S
PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240, SCACR, Appellant Michael Cunningham files the following Return to the Petition for Rehearing filed by the Respondent Anderson County regarding Issue III of this Court's decision in *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3 at 37) (Wrongful Discharge). The Court should deny the County's petition.

The upshot of the County's position is that Mr. Cunningham cannot be an "at will" employee because he had a written contract (which the County contends conversely is void *ab initio*). As an alternate argument, the County contends that even if Mr. Cunningham were an at-will employee, "the facts alleged in his Complaint would not entitle him to relief." (County's Petition, p. 8). The Court should reject both of these assertions.

1. Mr. Cunningham May Maintain the Claim for Wrongful Termination Even Though He Has a Written Employment Contract

The County asserts that "On appeal, [Mr.] Cunningham suggested – for the first time – that he was an at-will employee, a position he steadfastly denied from the inception of this litigation through the hearing on summary judgment...." (County's Petition, p. 2). This assertion, however, demonstrates a fundamental misunderstanding of this case and Mr. Cunningham's arguments below and on appeal.

Mr. Cunningham did not take the position that he was "not at will." Instead, Mr. Cunningham asserted that the County could terminate him for any reason at any time; however, it would owe him the severance and other benefits under the agreement. (R. p. 17, ¶ 17; p. 18, ¶ 22; p. 19, ¶ 26). This was the basis of Mr. Cunningham's motion for

summary judgment as to this claim. (R. pp. 40-41). In his Memorandum in Support of the Motion for Summary Judgment, Mr. Cunningham pointed out that he served “at the pleasure of Council,” and nothing in the Agreement otherwise interfered with the County’s right “to terminate his services at any time, subject only to the [severance provisions].” (R. pp. 42-43; see Master Employment Agreement, R. p. 235, ¶ 2(A)).

As this Court stated in *Baril v. Aiken Regional Medical Centers*:

South Carolina recognizes the doctrine of employment at-will. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999). This doctrine provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer’s duty to provide compensation in exchange for the employee’s duty to perform a service or obligation. *Id.* “At-will employment is generally terminable by either party at any time, for any reason or no reason at all.” *Prescott*, 335 S.C. at 334, 516 S.E.2d at 925.

However, an employer and employee may contractually alter the general rule of employment at-will, thereby restricting the freedom of either party to terminate the employment relationship without incurring liability. *See Small v. Springs Indus., Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987). For example, an employee handbook may create a contract altering an at-will arrangement. *Id.*

352 S.C. 271, 281-282, 573 S.E.2d 830, 836 (Ct. App. 2002). In this case, the council always retained the right to terminate Mr. Cunningham’s employment at any time and for any reason that does not violate public policy. Under the Agreement, if the council terminated Mr. Cunningham without “cause,” as defined in the Agreement, then the County agreed to pay severance. The Agreement, however, did not bind the council to continue to employ Mr. Cunningham.

The County argues, “During the period of time when the Anderson County

Council declared [Mr.] Cunningham's written contract null and void it offered him employment on an at-will basis, which [Mr.] Cunningham rejected." (County's Petition, p. 1, footnote 1; p. 2, 4). The implication of this statement is that Mr. Cunningham rejected the "at-will" employment aspect of the new agreement, contending he was not employed "at will" under the Master Employment Agreement. This implication, however, is misleading.

The actual question and answer to which the County points is revealing. The exchange was as follows:

Q. Do you remember a meeting with Mr. Waldrep?

A. Yes, sir.

Q. Is it true that he told you [that] you would need to agree to a new at-will agreement?

A. Yes, sir.

(R. p. 341, ll. 19-23) (emphasis added). Thus, the exchange involved the County's attempt to enter into a "new" at-will agreement as opposed to the at-will agreement that already existed.

Furthermore, while the County has always maintained the Master Employment Agreement was void *ab initio* (R. p. 62, 72), the County has never denied (A) that Mr. Cunningham did, in fact, work for the County and (B) that the County terminated his employment. (R. p. 80, acknowledging County paid some benefits when it terminated Mr. Cunningham; p. 96, argument as to Count III acknowledging Mr. Cunningham's position that County was not required to employ him but had to pay the severance because he was

terminated without “cause”; R. p. 325, l. 3 - p. 327, l. 22). Under these circumstances, then, the council employed Mr. Cunningham and paid him for services; this activity amounts to a contract for at will employment (even in the face of a written agreement).

In this litigation, Mr. Cunningham has repeatedly asserted his employment was terminable at will and that the County could terminate him “at any time for any reason.”

(R. p. 114, ll. 1-5). As Mr. Cunningham’s counsel pointed out:

Mr. Murphy: But this contract didn’t require them to keep Michael Cunningham as the administrator. That’s what the distinction in his contract is. It just merely said the County has taken on an obligation if the County doesn’t retain him as the administrator. And that, that obligation they took on was taken on in the prior term of the last council.

But this is a very different situation. Had the contract said, [“]Michael Cunningham is the administrator for three years and nobody can do anything about it. He cannot be terminated under any circumstances.[“] Then if the common law applied, there would be an issue, okay?

(R. p. 125, l. 21 - p. 126, l. 7).

Mr. Murphy: Judge Wilkins also said that it’s a fundamental principle that one body should not hamstring another with an administrator not of its choosing. He said that was the core principle of his argument.

This contract doesn’t do that, your honor. As I said in my opening, this contract does not require any subsequent council to keep Michael Cunningham in office. It specifically says they may terminate him at any point in time.

(R. p. 140, ll. 12-20).

The Court: Now, what authority did the council that came in on January 4th, 2009, have to employ?

Mr. Murphy: Complete authority.

The Court: Pardon

Mr. Murphy: Complete authority. They didn't have to keep Michael Cunningham.

(R. p. 141, ll. 13-18).

The Court: So they really couldn't employ somebody unless they violated or terminated the contract.

Mr. Murphy: No. No, sir. It's not a violation of the contract to terminate his employment.

The Court: Well, that's what I'm saying: Unless they violated or terminate the contract. No one is bound by this contract.

Mr. Murphy: They can terminate his employment under the contract without violating the contract.

The Court: Then they would be violating their responsibility to employment.

Mr. Murphy: No, sir. They just need to pay him.

(R. p. 142, l. 21 - p. 143, l. 7).

Mr. Murphy: [T]here is case law about just because you have a contract doesn't mean you give up the right to sue in court. They're not the same. It's not alternative causes of action. They address very different things.

(R. p. 147, ll. 3-7).

The County confuses the concepts of "at will" employment with the existence of an employment contract. (See argument at R. 138, ll. 24-25). The two concepts are not mutually exclusive, as the County would have this Court believe.

Mr. Cunningham references here the point he made in his Petition for Rehearing. (Petition of Appellant, pp. 12-13). All employment is contractual in nature. *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999). This principle is an important

underpinning in cases, for example, that recognize that even contracts terminable “at will” are subject to protection from third party interference claims because “at will” arrangements are just as “contractual,” as a contract that limits termination during its term. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163-64, 321 S.E.2d 602, 607 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Threlkeld v. Christoph*, 280 S.C. 225, 227 312 S.E.2d 14, 16 (Ct. App. 1984). The question whether a contract allows for termination at will should not impact the availability of a claim for wrongful discharge in violation of public policy—at will employment does nothing to vindicate the public’s interest and such a limitation would accordingly “violate[] the spirit of the public policy exception.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999).

The existence of a written employment contract does not negate the fact that the employment may still be considered “at will.” *See, e.g., Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) (noting county administrator was “at will” and that she “was paid her severance pursuant to her contract”); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), *rev’d on other grounds* 368 S.C. 167, 628 S.E.2d 261 (2006) (noting employment agreement stated on its face that plaintiff served “at the will” of county council so that county officials could fire plaintiff “for any reason”); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936) (written contract for employment for indefinite term “for so long as the employee gives satisfactory service” was revocable “at will” of either party); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (noting a written contract for employment “for an indefinite

period can be terminated at will”); *Prescott v. Farmers Telephone Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999) (Court recognized parties may operate under an agreement that maintains “at will” status of employee and that agreement may be modified orally or in writing to alter at-will status).

Lastly, whether Mr. Cunningham was employed “at will” is really a red herring in this case. He may still bring a wrongful termination case for a violation of public policy even if he is not at will, as Mr. Cunningham set forth in his Petition for Rehearing.

The Court appropriately reversed the grant of summary judgment as to Mr. Cunningham’s cause of action for wrongful termination as a matter of law. The Court should reject the County’s arguments to the contrary.

2. The Court’s Opinion Correctly Described the Parties’ Agreement Regarding the Nature of the County’s Motion Directed at Count Two, Mr. Cunningham’s Claim for Wrongful Termination

The County asserts it is entitled to affirmance on the ground that the record does not support recovery even if the County’s assertion as to the law is not correct. (County’s Petition, pp. 8-10). The argument should not be persuasive.

The Court’s opinion did not misapprehend or overlook what happened at the hearing below. As the Court noted:

During the motions hearing, counsel for the County admitted that if the circuit court denied the County’s summary judgment motion as to Cunningham’s legal ability to assert the wrongful discharge cause of action, then the parties would have to engage in further discovery. Counsel for both parties represented to the circuit court that they had an agreement to allow discovery on this cause of action if the circuit court denied summary judgment on it. Both counsel further agreed to allow the County the option of submitting another summary judgment motion on the

wrongful discharge claim after the completion of discovery.

(Slip at 9). The record supports the Court's holding.

The wrongful discharge count was described as "Count Two." (R. p. 138, ll. 10-11). At the hearing, the following exchanges took place:

Mr. Wilkins: * * * Count two perhaps should be construed as motion to dismiss. (R. p. 152, ll. 6-7).

Mr. Murphy: * * * Count two, there are certain things we agreed to do more discovery on and they may renew that motion...

Mr. Wilkins: Well, Mr. Cunningham is. But if the court denies our motion for summary judgment dismissal on count two, then we'll have to engage in further discovery. Now, I'm not sure that's gonna change any facts and so forth, Judge. But, nevertheless, if we are entitled to dismissal as a matter of law, Mr. Murphy and I have agreed not to foreclose further discovery. (R. p. 153, ll. 1-10).

Mr. Murphy: Count two I don't believe, the only argument you heard today was is if he is not at-will, then the tort doesn't cover him, and I agreed to cite, provide you a case on that.

We didn't get into factually a lot of that, and I appreciate that Judge Wilkins didn't do that because I have some more discovery on a count. They have not waived - - they can come back later and bring another motion after I've done my discovery on it, and we've agreed on that.

Mr. Wilkins: Well, that's correct, your honor. I do agree with Mr. Murphy. (R. p. 155, ll. 2-13).

Furthermore, as the Court correctly noted, Mr. Cunningham's counsel had previously filed a Rule 56(f), SCRCP, memorializing the parties' agreement and advising the court that to the extent the County was just arguing the law, Mr. Cunningham did not object to going forward on Count Two. (R. p. 83-85; p. 153, ll. 20-25).

The Court's opinion therefore describes precisely what happened at the hearing. The County now wants to renege on the agreement its counsel confirmed repeatedly at the hearing. The Court correctly rejected the County's reversal of its position on appeal.

Accordingly, the Court should reject the County's argument and adhere to its opinion regarding this aspect of the discussion of the wrongful termination claim.

CONCLUSION

For the reasons stated, the Court should deny the County's Petition for Rehearing as to Count Two, subject to the arguments Mr. Cunningham made regarding this Count in his Petition for Rehearing.

Respectfully submitted,



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February 12, 2013

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

PROOF OF SERVICE

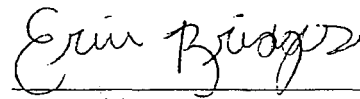
The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Return to Petition for Rehearing* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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Also via hand delivery to the following address:

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February 12, 2013
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A handwritten signature in cursive script that reads "Erin Bridges". The signature is written in black ink and is positioned above a horizontal line.

Erin Bridges
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BLUESTEIN, NICHOLS, THOMPSON
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

ANDERSON COUNTY'S REPLY TO CUNNINGHAM'S
RETURN TO THE COUNTY'S PETITION FOR REHEARING

RECEIVED

FEB 19 2013

SC Court of Appeals

As set forth in Anderson County's Petition for Rehearing, the County asks this Court to reconsider its decision as it relates to Michael Cunningham's wrongful discharge cause of action. This Court reversed the grant of summary judgment and found that Cunningham's wrongful discharge claim survived as an alternative to his breach of contract claim; however, *this finding overlooked that Cunningham made the deliberate decision to plead his wrongful discharge claim as a contract employee (based on the Master Employment Agreement) and not as an alternative to his contract claim.* Perhaps he felt compelled to do so based on his previous refusal to accept the County's offer of at-will employment. Whatever the reason, *Cunningham's decision to pursue a wrongful discharge claim as a contract employee was done purposely.* Having made that strategic decision at the onset of litigation and having continued to champion it at the hearing before the circuit court, Cunningham is estopped from

arguing otherwise on appeal. Thus, in his Return to the County's Petition for Rehearing, Cunningham does not attempt to argue that he pled alternatively, but instead attempts to repeat his claim that he can bring a wrongful discharge action because of the termination of the Master Employment Agreement which provided for a minimum term of employment of three years. As explained more fully below, this Court should reject that argument and grant rehearing.

I. The Red Herring

Cunningham claims that whether he "was employed 'at will'" is really a red herring. He asserts that he "may still bring a wrongful termination case for a violation of public policy even if he is not at will." (Appellant's Return, p. 7.) This is, of course, clearly not the law. As our Supreme Court has held in *Stiles*, "[t]he public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law." *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999).¹

This red herring argument is legally incorrect, and it boldly highlights the position Cunningham took from the very beginning of this litigation. Most tellingly, he cites not one opinion from South Carolina or anywhere else in the United States in support of this novel idea.

The Court will recall that in Appellant's Petition for Rehearing, Cunningham stated in paragraph 11:

Appellant is concerned that this Court's conclusion that

¹ In very limited circumstances, our appellate courts have recognized that the existence of an employment contract does not preclude a determination that the employment is terminable at-will; however, those situations are limited to contracts that are akin to at-will employment, i.e., a contract which is for an indefinite term or a contract in which the only protection afforded to the employee is to receive notice prior to being terminated. See *Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005); *Stiles*, 335 S.C. at 226, 516 S.E.2d at 451. The contract upon which Cunningham relies was for a definite term and required the County to pay his unpaid anticipated salary for the years remaining on the three-year term and the value of other benefits to Cunningham if it terminated him without cause. It was in no way akin to at-will employment.

“Cunningham set forth alternate theories of relief” . . . indicates that the Court does not fully understand Appellant’s claim. (Emphasis added.)

In the last sentence of paragraph 11, Appellant again demonstrates that he believes that a cause of action in tort (wrongful discharge) is not an alternative cause of action:

Nor does Appellant see the tort claim as an alternative cause of action to the extent that suggests it is mutually exclusive with the existence of a contract claim.

II. Cunningham’s Alleged Contract Was Not One for “At-Will” Employment

Recognizing he cannot re-write the Record, Cunningham claims to be a former employee who can sue under the Master Employment Agreement for wrongful discharge. According to Cunningham, this type of employment is at-will because, although there may be ramifications, an employer *has the ability* to terminate an employee. As Cunningham explains it:

Under the Agreement,² if the council terminated Mr. Cunningham without “cause,” as defined in the Agreement, then the County agreed to pay severance. The Agreement, however, did not bind the council to continue to employ Mr. Cunningham.

...

[T]his contract didn’t require them to keep Michael Cunningham as the administrator. . . . Had the contract said, [“]Michael Cunningham is the administrator for three years and nobody can do anything about it. He cannot be terminated under any circumstances.[“] Then if the common law applied, there would be an issue[.]

(Appellant’s Return p. 2; 4.)

This argument is nonsensical. If Cunningham’s present position is accepted, every employment contract would be at-will because every employer always possesses the authority to

² When the parties refer to the Agreement, it is undisputed that reference is being made to the written Master Employment Agreement for a minimum term of three years entered into between Cunningham and the lame-duck county council.

fire every employee if the employer is willing to accept the consequences.

But this Court knows better. The agreement between Anderson County and Cunningham was not at-will because it restricted Anderson County's freedom to terminate Cunningham without incurring liability. See *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281-82, 573 S.E.2d 830, 836 (Ct. App. 2002) ("[A]n employer and employee may contractually alter the general rule of employment at-will, thereby restricting the freedom of either party to terminate the employment relationship without incurring liability.") (Emphasis added.)

Case law is settled that the public policy exception doctrine cannot be pursued as part of a challenge to a discharge based on statutory or contractual rights. It is instead a judicially carved-out exception to protect only those at-will employees who otherwise have no recourse. See, e.g., *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999) (Toal, J., concurring) ("[T]he *Ludwick* exception is not designed to overlap an employee's statutory or contractual rights to challenge a discharge . . ."). Cunningham's insistence that he was entitled to maintain a wrongful discharge cause of action as a contract employee for a definite term (and his refusal to pursue wrongful termination as an alternative to his breach of contract claim) precludes him from now changing strategies to maintain a cause of action he did not plead.

Even if Cunningham's written contract had provided that Cunningham "cannot be terminated under any circumstances," the Council still had the authority to terminate. If one pauses only momentarily and analyzes Cunningham's position, its absurdity becomes clear. An employer can always terminate an employee who has a written contract, even one for a definite term. The employee is then entitled to sue for damages under a breach of contract cause of action. The trial court's determination that the contract was null and void (and this Court's affirmance of that decision) should not give Cunningham a "do over" to conform his pleadings

with that decision. To allow him to do so would be especially unfair in this case where Cunningham had the option of agreeing to be an at-will employee, but he specifically rejected that offer and chose to litigate instead.

III. Cunningham's Sworn Testimony

Cunningham has given sworn testimony that he never accepted and would not have accepted employment on an at-will basis. In addition to Cunningham's election not to plead that he was, in the alternative, an at-will employee, during his deposition testimony Cunningham stated that he considered an at-will contract as "not really being a contract for employment" and that, "without knowing what time frame they were alluding to," he would have preferred to stay as the deputy administrator as opposed to "the interim administrator."

In fact, when asked if he would accept "an at-will contract," Cunningham testified, "I don't think so[.]" He emphasizes his position when asked again if he would have been interested in an at-will position by stating, "No, sir, simply because I would not have seen a purpose behind it." (See Cunningham Deposition, pp. 97-100, attached as Exhibit "A".) Accordingly, Cunningham very clearly did not consider his contract to be an at-will contract.³

IV. A New At-Will Agreement

On page 3 of Appellant's Return, he quotes from his deposition where a question is asked about what Cunningham would do if Mr. Waldrep "told you [that] you would need to agree to a new at-will agreement?" For the first time, Cunningham claims that this means that there were two at-will employment contracts at issue, a new one and an old one already in existence. Of course, the question was referring to a new contract that was to be "at-will" as opposed to the "old" written employment contract known as the Master Employment Agreement into which

³ This excerpt from the deposition was not included in the Record because it was not relevant to the appeal, but is now relevant to the Petition for Rehearing.

Cunningham and the lame-duck county council had entered.

And finally, Appellant references on page 6 of his Return the unremarkable principle of law that “[t]he existence of a written employment contract does not negate the fact that the employment may still be considered ‘at-will.’” (Emphasis added.) Of course it may, if the contract provides for at-will employment as opposed to employment “for a definite term.” Cunningham’s contract was for a definite term; therefore, this principle of law has absolutely no relevance to the argument Cunningham is attempting to advance.

V. The County Did Not Waive Its Argument that the Allegations in Cunningham’s Complaint Did Not Support a Cause of Action for Wrongful Discharge

In its motion for summary judgment and memorandum in support, the County argued that even if Cunningham had alleged he was an at-will employee, the allegations in his Complaint did not rise to the level of a violation of a clear mandate of public policy. This argument was never waived by the County, as Cunningham claims. Rather, at the hearing before Judge Macaulay, the County’s attorney conceded only that, if the circuit court denied the County’s motion for summary judgment as to this cause of action, the parties would engage in further discovery. This agreement did nothing more than recognize that additional work would have to be done before a trial could take place on this cause of action if summary judgment were denied. The County in no way conceded that the meager accusations in Cunningham’s Complaint were sufficient to sustain a cause of action, and this Court should grant rehearing to rule on this additional sustaining ground.

CONCLUSION

As reflected in the Record, the Briefs, Cunningham’s own Petition for Rehearing, and Cunningham’s Return to the County’s Petition for Rehearing, Cunningham continues to maintain that he was entitled to sue Anderson County for both breach of contract and wrongful discharge

based on the written contract the lame-duck county council entered into with Cunningham. As this Court properly recognized, the only way Cunningham could do that was to plead those causes of action in the alternative. Because Cunningham purposely and strategically chose not to plead alternatively, his cause of action for wrongful discharge was improperly pled,⁴ and the circuit court's grant of summary judgment should be affirmed.

Alternatively, this Court misapprehended counsel's colloquy with the circuit court regarding further discovery. The parties' agreement regarding discovery was relevant only in the event the circuit court denied summary judgment; the County in no way waived its argument that the facts alleged, even when viewed in the light most favorable to Cunningham, would not entitle him to relief.

The County urges this Court to carefully analyze the choice of words Cunningham has used in identifying his position. Otherwise the Court, as it did, will come to an incorrect conclusion. For example, on page 1 of his Return, Cunningham asserts that he "did not take the position that he was 'not at will.'" (Emphasis added.) Of course he did not – that is exactly what the County alleged. A plaintiff is not required to allege what he claims he is not – he is required to allege what he claims he is. Here, to assert a wrongful discharge cause of action, he must allege that in the alternative he was an at-will employee – something he never did and, according to his Petition for Rehearing, is something he does not want to do.⁵

Accordingly, the County respectfully requests that this Court grant rehearing and affirm the circuit court's grant of summary judgment.

⁴ This is so because he bases his wrongful discharge on his employment status pursuant to the written Master Employment Agreement which provides for a definite term, not as an at-will employee, which is a predicate to maintaining a wrongful discharge action.

⁵ In paragraph 11 of his Petition for Rehearing, Cunningham took issue with the Court's finding that his complaint "set forth alternative theories of relief," asserting that the Court "does not fully understand Appellant's claim."

Respectfully submitted,

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Attorneys for Respondent Anderson County

February __, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

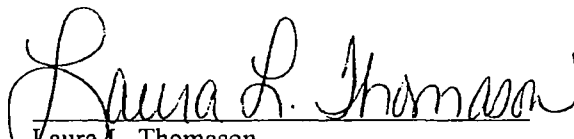
Anderson County, ... Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing *Respondent's Reply to Appellant's Return to Petition for Rehearing* by depositing a copy of same in the United States Mail, postage prepaid, on February 19, 2013, addressed to his attorneys of record as follows:

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RECEIVED

FEB 19 2013

SC Court of Appeals

EXHIBIT "A"

1 candidates?

2 A. No.

3 Q. ~~If the term of your contract had been at will,~~
4 ~~would you have accepted that contract?~~

5 MR. MURPHY:

6 Object to the form.

7 EXAMINATION RESUMED BY MR. BURNS:

8 Q. And when I'm talking about a contract, I'm talking
9 about the master employment agreement that you
10 signed on November the 19th. If it had had a term
11 of at will rather than three years, would you have
12 agreed to that?

13 MR. MURPHY:

14 Object to the form.

15 WITNESS ANSWERS:

16 A. I think I would have viewed a contract with -- an
17 at-will contract as one without terms, thus not
18 really being a contract for employment.

19 EXAMINATION RESUMED BY MR. BURNS:

20 Q. If Mr. Greer, Mr. Wilson, and Ms. Floyd had come
21 to you and said, "We want you to be the interim
22 administrator until a full-time administrator is
23 hired," would you have been interested in that
24 job?

25 MR. MURPHY:

1 Object to the form.

2 WITNESS ANSWERS:

3 A. Not without knowing what time frame they were
4 alluding to.

5 EXAMINATION RESUMED BY MR. BURNS:

6 Q. You would have preferred just to stay as the
7 deputy?

8 MR. MURPHY:

9 Same objection.

10 WITNESS ANSWERS:

11 A. As opposed to be the interim administrator, I
12 think so.

13 EXAMINATION RESUMED BY MR. BURNS:

14 Q. So you had nothing to do with the Preston buyout?
15 I think I've asked you that a couple times and
16 you've answered it, correct?

17 A. No, sir. I had nothing to do with Mr. Preston's
18 --

19 Q. So no matter what happens with Michael Cunningham,
20 what happens with Mr. Preston is separate and
21 apart?

22 A. Yes, sir. I agree.

23 Q. So let's assume that Mr. Preston gets his buyout
24 on November 18, 2009. Somebody's got to run the
25 county after he leaves?

1 A. Yes, sir.

2 Q. As it turned out, you were offered a contract for
3 three years?

4 A. Yes, sir.

5 Q. Which you accepted?

6 A. Yes, sir.

7 Q. My next question was, what if they would have
8 offered you a contract for no specific term, which
9 I refer to as an at-will contract, but a contract
10 with salary, benefits, car allowance, other stuff
11 in it, just no term? Would you have been
12 interested in that?

13 MR. MURPHY:

14 Object to the form.

15 WITNESS ANSWERS:

16 A. I don't think so because that would have been the
17 nature of what I was at that current moment as the
18 deputy with -- when the administrator was not
19 there, I would have had that responsibility.

20 EXAMINATION RESUMED BY MR. BURNS:

21 Q. But it was more money.

22 MR. MURPHY:

23 Object to the form.

24 WITNESS ANSWERS:

25 A. Okay. Yes, sir, it would have been more money.

1 EXAMINATION RESUMED BY MR. BURNS:

2 Q. But you wouldn't have been interested in it?

3 MR. MURPHY:

4 Object to the form.

5 WITNESS ANSWERS:

6 A. No, sir, simply because I would not have seen a
7 purpose behind it.

8 EXAMINATION RESUMED BY MR. BURNS:

9 Q. What if they had come to you -- again, Mr.

10 Preston's out of the picture -- and said, "We
11 want you to be the interim. We don't know how
12 long, but we want you to run the county until, you
13 know, a decision is made whether you're the long-
14 term person or somebody else is." He's going to
15 object to the form. But what would have been your
16 reaction to that?

17 MR. MURPHY:

18 Object to the form.

19 WITNESS ANSWERS:

20 A. I would have told them that that was -- that would
21 have been my responsibility as a deputy and that I
22 would continue to serve in that capacity.

23 EXAMINATION RESUMED BY MR. BURNS:

24 Q. So you wouldn't have taken more money?

25 MR. MURPHY:

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209
Op. No. 5072 (Ct. App. filed Jan. 16, 2013)

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Appellant Michael Cunningham files the following Petition for Rehearing regarding this Court's decision in *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Ct. App. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3 at 37). Appellant contends that in affirming the decision below as to Issue I (Breach of Contract) and Issue II (Payment of Wages Act), the Court overlooked or misapprehended the points set forth below.

1. In affirming the circuit court's decision to hold the employment contract was void, the Court relied upon *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"), which involved a special purpose district. In doing so, the Court overlooked that this case involves the actions of a county government, not a special purpose district.

The Court overlooked that the Home Rule Act did not affect special purpose districts, such as the one at issue in *Cowart*. See *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts."). In fact, the *Evins* court noted dicta in *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997), which applied Home Rule to special purpose districts, and held "[t]o the extent that *D.W. Flowe* can be read to apply Home Rule to special purpose districts, it is overruled." *Id.*, at n. 7. The holding in *Cowart* is irrelevant to this case; yet this Court's opinion is completely silent as to this distinction, which our Supreme Court has said *does* make a difference.

The Court also relied upon cases from other jurisdictions in affirming the circuit

court's ruling. *Cunningham*, slip at 6-8 and note 10. In doing so, the Court misapprehended the holdings of these cases and overlooked that each of these jurisdictions either do not have Home Rule, or the cases involved entities not subject to Home Rule.

For example, the Court cited to *Morin v. Foster*, 380 N.E.2d 217 (N.Y. 1978) for the rule that “but for a provision in a county’s charter allowing for appointment of the county manager for a four-year term, the county’s legislators would be unable to appoint the county manager for a term extending into the term of the legislator’s successors.” *Cunningham*, slip at 6. What actually happened in *Morin*, however, distinguishes it from this matter. New York has Municipal Home Rule, and requires an amendment of the county charter which abolishes or curtails “any power of an elective county officer” to provide for a permissive referendum; South Carolina does not use referenda to enact legislation, *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 643, 528 S.E.2d 647, 652 (1999) (“our constitution does not give the people the right of direct legislation by referendum”).

Furthermore, the county charter in *Morin* permitted the employment of a manager for a four-year term, but the county legislature passed a local law that amended the charter by striking the provision for a four-year term and established, instead, that the manager would “serve at the pleasure of the county legislature.” The *Morin* court noted that where the charter specifically grants the authority, one legislature may be empowered to bind its successors.

In relying upon *Morin*, the Court overlooked that the South Carolina’s Home Rule

Act specifically authorizes a county council to enter into a contract with its administrator “for a definite term,” which is precisely what the council did in this case. Like the charter in *Morin* under New York’s version of Home Rule (which is different from South Carolina’s version of Home Rule), Section 4-9-620 gives unique authority for a council to enter into an agreement with its administrator beyond the terms of the council’s members.

The Court also relied upon *Valvano v. Board of Chosen Freeholders of Union County*, 183 A.2d 450, 453 (N.J. Super. Ct. App. Div. 1962) for the same rule as set forth in *Morin*. *Valvano*, however, involved a county board’s written annual agreement with an insurance advisor and consultant. The actions in that case (increasing the contract from one to three years) were not authorized by a statute such as Section 4-9-620. Furthermore, the individual was not the administrator, but someone who looked after the county’s insurance needs. This Court overlooked that there is nothing about *Valvano* that is relevant to this case except for a general discussion of the effects of checks on local government power (i.e., Dillon’s Rule). See David J. Barron, *Reclaiming Home Rule*, 116 Harv. L.Rev.. 2255 (2003) (describing the origin of the Rule).

Each of the cases this Court cited in Footnote 10 of its opinion are also meaningfully distinct from this case. See *Grassini v. DuPage Twp.*, 665 N.E.2d 860, 864 (Ill. App.1996) (case involved classic application of Dillon’s Rule without discussion of Home Rule, and Illinois Court noted there was *no* statutory authority for the Township to enter into a contract for a specified term); *City of Hazel Park v. Potter*, 426 N.W.2d 789, 793 (Mich. App.1988) (Michigan Court discussed *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948) and distinguished a Florida case which was decided under Florida’s

version of Home Rule; Michigan Court did not find statutory authority that allowed the local government to enter into contract apart from limitation on local government (which amounts to Dillon's Rule)); *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1289 (Pa.2000) (case involved whether a construction contract one school board entered at the expiration of the board's term was binding on a successor board; case involved school board, not county government, and Pennsylvania court discussed authority under rules that amount to Dillon's Rule without discussion of Home Rule or any statutory authority to enter into contracts); *Falls Twp. v. McManamon*, 537 A.2d 946, 948 (Pa. Cmmw. Ct.1988) (case involved a municipality's employment of a police chief beyond the terms of the "lame duck" council; court held these actions violated the principle that "a municipality has only those powers specifically granted and inherent powers needed to implement these powers," otherwise known as Dillon's Rule; there was no discussion of Home Rule or any statutory authority to enter into a contract for "a definite term").

Accordingly, the Court should grant this petition, permit rehearing, withdraw its prior decision, and issue a new opinion reversing the circuit court's holding that Appellant's contract with Anderson County was void.

2. In affirming the circuit court's decision to hold the employment contract was void, the Court stated "[b]y logical extension, the law of municipalities would apply to Anderson County's actions in the present case." In so holding, the Court overlooked or misapprehended that the principles being applied are common-law principles, and that in South Carolina, municipalities are governed by different provisions of the Constitution

and an entirely separate Title of the Code (Title 5) from the sections governing counties (Title 4). For instance, with regard to municipal corporations, Section 5-13-30(1) provides that a municipality may “employ a manager” but does not contain any language about “for a definite term,” as permitted by Section 4-9-620. In finding this to be a “logical extension,” the Court overlooked the vast differences not only between the common law and South Carolina’s statutory schemes, but also between the two distinct statutory schemes themselves.

The Court also overlooked and misapprehended the fact that both counties and municipalities are different from special purpose districts (the entity at issue in *Cowart*). That is, the holding in *Cowart*, which applied common law rules under Dillon’s Rule as described in *Newman*, involved a third entity, a special purpose district, which is *not* subject to the Home Rule Act.

Accordingly, the Court should grant this petition, permit rehearing, withdraw its prior decision, and issue a new opinion reversing the circuit court’s holding that Appellant’s contract with Anderson County was void.

3. In affirming the circuit court’s decision to hold the employment contract was void, the Court held that under *Cowart*, “Appellant’s argument regarding the abolition of Dillon’s Rule is irrelevant” to the Court’s analysis. *Cunningham*, slip at 10. In so holding, the Court overlooked or misapprehended several crucial aspects of *Cowart*.

While it is true, as the Court points out, that *Cowart* post-dated the Home Rule Act, as Appellant pointed out in his brief and at oral argument, *Cowart* involved a special

purpose district which our Supreme Court has held is not subject to Home Rule. See *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts."). *Cowart* is meaningfully distinct from this case.

Secondly, the Court focused on a pre-Home Rule case, *Newman*, to support the Court's reliance upon *Cowart*. *Cunningham*, slip at 9-10. In doing so, the Court overlooked or misapprehended Appellant's argument that even if this case was subject to *Cowart* (and it is not), the Home Rule Act supplies the necessary authority to contract under the *Newman* exception. (Brief of App., pp. 15-17). See *Cowart*, 324 S.C. at 241, 478 S.E.2d at 838 ("*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms."). Here, Section 4-9-620 is legislation that authorizes the local governing body to make a contract "for a definite term" without limitation to its members' own terms of office. Thus, even under *Cowart*, the contract is valid under the exception to Dillon's Rule described in *Newman*. The Court overlooked this entire discussion in Appellant's brief.

Accordingly, the Court should grant this petition, permit rehearing, withdraw its decision, and enter a new opinion reversing the circuit court's order declaring Appellant's agreement to be void.

4. In affirming the circuit court's decision to hold the employment contract was void, the Court held that Section 4-9-620 of the South Carolina Code of Laws (1986) did not

permit a council to enter into a contract that extends beyond the terms of the outgoing council members. *Cunningham*, slip at 10. The Court overlooked or misapprehended that the statute does not contain any such limitation. The express language of the statute provides: "The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. *The council may, in its discretion, employ the administrator for a definite term.*" (Emphasis added). Without citation to authority, this Court added language to the statute. That is, the Court tacitly appended that a council may employ the administrator for a definite term "*but not to extend beyond the terms of any outgoing council members.*"

Had the legislature desired to add the limiting language this Court read into the statute, the legislature could easily have done so; it did not. *See, e.g., Taylor v. South Carolina Dept. of Motor Vehicles*, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009) (if Legislature had intended certain result in a statute it would have said so); *Giannini v. SC Department of Transportation*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) (same). *Accord State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004) (legislature, had it chosen to do so, could easily have specified certain result in statute). The goal of this statute was to permit a council the flexibility to recruit the best talent and enter into a contract that did not become void simply because all members of the council did not stand for re-election or were not re-elected. *See* (Brief of Amicus SC City and County Management Association, pp. 7-9). This Court overlooked that its holding improperly reads additional language into the statute by implication. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (rejecting implied additional requirements to annexation

powers where statute did not contain words of limitation).

The Court overlooked that its holding creates an untenable situation for a local government. Any time there is an election in which not every member of the council is re-elected or in which a member decides not to seek re-election, then a contract the council entered into with the administrator expires by operation once any new council member takes office. See (Surreply Brief of Amicus, pp. 4-6). This holding creates uncertainty for both council members and administrators, and will make it extremely difficult for counties to attract talented individuals to that office.

The Court also overlooked that its holding results in the electorate indirectly determining the administrator's contract terms instead of allowing that decision to be made through our chosen form of representative government. The State Constitution provides for a representative form of government in this State. S.C. Const. art. III, § 1; *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). By adding this implied language to the statute, the Court impinges on the authority the General Assembly places in the hands of council members, that is, to engage a county administrator under an at-will arrangement but for a definite term that the council deems, in its discretion, to be reasonable. Here, that term was three years, which is not uncommon, not excessive, and within reason.

The Court should grant this Petition, rehear this matter, withdraw its prior opinion, and issue a new opinion reversing the circuit court's order that declared Appellant's contract void.

5. In affirming the circuit court's decision to hold the employment contract was void, the Court held that Section 4-9-25 of the South Carolina Code (Supp. 2011) did not authorize the outgoing council to bind the successor council as to governmental functions. *Cunningham*, slip at 10-11). The Court stated Appellant's argument amounts to a "narrow view" of the council's powers, "which is contrary to the requirement that a county's powers must be given a liberal construction." *Id.* at 11.

In reaching this conclusion, the Court overlooked or misapprehended the arguments Appellant made, which align with the discussion proffered by the Amicus. Recognizing a council's authority under the Home Rule Act to enter into the contract in this case "for a definite term" is not a narrowing of the power – it is, instead, a liberal construction of those powers in favor of the county's ability to act. S.C. Code Ann. § 4-9-25. (App. Br., p. 13; Amicus Br., pp. 5-8).

The Court should grant this Petition, rehear this matter, withdraw its prior opinion, and issue a new opinion reversing the circuit court's order that declared Appellant's contract void.

6. In affirming the circuit court's decision to hold the employment contract was void, the Court overlooked Appellant's argument that the circuit court's construction of the Home Rule Act rendered provisions to be superfluous.

The Court failed to discuss Appellant's contention that although the HRA does not contain language providing that a contract can extend beyond the term of a particular council, such express language is not necessary in these circumstances. As Appellant

pointed out in his brief, prior to Home Rule, there was no need for a legislative authority to hire someone only for the term of the members of the governing body. Thus, if Section 4-9-620 were read as limiting any appointment to the terms of the members of the governing body, then the language would be superfluous. The courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 661 S.E.2d 349 (2008) (in construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing). (App. Br. pp. 15-16).

The Court should grant this Petition, rehear this matter, and address this argument. The Court should also withdraw its prior opinion and issue a new opinion reversing the circuit court's order that declared Appellant's contract void.

7. The Court also failed to address Appellant's argument that the payment of severance under the employment contract was a proprietary function rather than a governmental function. The Court stated this argument did not matter since the Court agreed with the circuit court that the agreement was void under *Cowart. Cunningham*, slip at 11.

The Court overlooked Appellant's arguments that the payment of the severance was a proprietary and not a governmental function. (App. Br. pp. 17-18; Reply Br., pp. 4-5). Appellant raises this point here to preserve the argument on review to the Supreme Court. That is, Appellant has pointed out to this Court numerous places where its opinion

declaring the contract void overlooks or misapprehends both arguments and the law. In the event the Supreme Court agrees with Appellant, then this argument does not present a “distinction without a difference” and does, in fact, matter in the law.

The Court should address this issue anew in the event the Court agrees with Appellant that it has overlooked or misapprehended arguments and the law with regard to the validity of the council’s authority to enter into this agreement.

8. In affirming the circuit court’s decision on Appellant’s claim under the Payment of Wages Act, the Court affirmed pursuant to Rule 220(c), SCACR, on the ground that because the Court agreed the contract was void, then any claim for sick leave fails. *Cunningham*, slip at 11-12.

The Court overlooked Appellant’s arguments that he was entitled to relief under the Payment of Wages Act. (App. Br. pp. 19-20; Reply Br. p. 9). Appellant raises this point here to preserve this argument on review to the Supreme Court. That is, Appellant has pointed out to this Court numerous places where its opinion declaring the contract void overlooks or misapprehends both arguments and the law.

The Court should address this issue anew in the event the Court agrees with Appellant that it has overlooked or misapprehended arguments and the law with regard to the validity of the council’s authority to enter into this agreement.

9. With respect to the Court’s determination that “[t]he payment of severance would be based on an employment contract that purports to bind the 2009 council and is

therefore void,” *slip* at 11, the Court fails to make the appropriate distinction between proprietary and governmental function as it applies to this case. By its express terms, the contract at issue permitted the “2009 Council” to fire Appellant and employ an administrator of its own choosing. The touchstone between government and proprietary function is not whether a successive council is bound, as successive councils are bound by many contracts entered into by their predecessors. All that is at issue here is the payment of money, and not the continued employment of Appellant an administrator.

10. With respect to this Court’s determination that “Cunningham argues that the Act’s exclusion of ‘severance’ from the definition of ‘wages’ does not bar his claim for sick leave because his contract’s provision for payment of wages was not part of the severance package,” *slip at 11*, this Court misapprehended Appellant’s argument and failed to rule upon it. Appellant’s argument is that sick leave benefits are expressly included in the statutory definition of “wages,” and any reference to “severance,” is misleading.

11. While this Court was correct in stating that “the existence of an employment contract does not preclude a determination that the employment is terminable at will,” *slip* at 13, 15, Appellant is concerned that this Court’s conclusion that “Cunningham set forth alternate theories of relief,” and that “Cunningham’s complaint adequately expresses a cause of action . . . despite the omission of the words ‘at will,’” *id.* at 15, indicates that the Court does not fully understand Appellant’s claim. All employment is contractual in nature. *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999). This

principle is an important underpinning in cases, for example, that recognize that even contracts terminable “at will” are subject to protection from third party interference claims because “at will” arrangements are just as “contractual,” as a contract that limits termination during its term. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163-64, 321 S.E.2d 602, 607 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Threlkeld v. Christoph*, 280 S.C. 225, 227 312 S.E.2d 14, 16 (Ct. App. 1984). Put simply, whether one term of the contract permits for the termination of the agreement at the will of either party has nothing to do with the availability of the tort of wrongful discharge in violation of public policy as it does nothing to vindicate the public interest and such a limitation would “violate[] the spirit of the public policy exception.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999).

Accordingly, while Appellant has repeatedly noted that the contract at issue in this case permits for his employment to be terminated at the will of council, Appellant never suggested that this was a predicate fact necessary to maintain a tort claim. Nor does Appellant see the tort claim as an alternative cause of action to the extent that suggests it is mutually exclusive with the existence of a contract claim.

12. The Court made the following factual misstatements in its opinion:

- A. The Court stated “According to the County, three of the council’s seven members were defeated in the November 4, 2008 general election.” In fact, the County simply asserted that these members “were voted out of office

in the election of November 2008.” (Resp. Br. p. 2). Although it is a technical mistake, the members were in fact defeated in the June 2008 Republican primary. The source of this factual mistake may be the circuit court’s order, which the County submitted as its proposed order, and which stated, “At the general election just held, three of the seven members of the County Council were not reelected.” (R. p. 2, lines 1-2). Members Thompson, Greer, and McAbee were not actually defeated in the November 2008 election. (Op. p. 1, note 4). Appellant points this out merely for factual accuracy.

B. The Court stated, “Before the vote was taken, Cunningham reminded the 2009 Council that he had offered in his January 17, 2009 letter to continue to work under his ‘current conditions,’ referencing the 2009 Council’s position that he was an at-will employee.” (Op. p. 3, second full paragraph). In fact, Appellant was referencing his offer to work, with each party retaining their respective positions regarding the efficacy of the contract; Appellant was noting that, given their stated positions (that they were not out to fire him), the issue would likely be moot.

CONCLUSION

For the reasons stated, Appellant requests that the Court grant this Petition, withdraw its opinion, rehear the matter, and issue a new opinion reversing the circuit court's finding that the contract of employment was void. Appellant further requests that the Court address the remaining issues raised, that is, Appellant's argument that payment of severance is a proprietary function and that Appellant is entitled to judgment under the Payment of Wages Act.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

RECEIVED

FEB 11 2013

SC Court of Appeals

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On January 16, 2013, this Court issued an opinion that (1) affirmed the trial court's grant of Anderson County's motion for summary judgment on Michael Cunningham's causes of action for breach of contract and violation of the Payment of Wages Act; and (2) reversed the trial court's grant of summary judgment on Cunningham's cause of action for wrongful discharge based on the public policy exception to the at-will employment doctrine. Both parties have filed petitions for rehearing.

Cunningham Says "the Court does not fully understand [his] claim"

In his petition for rehearing, Cunningham acknowledges (just as he did in the circuit court) that he was not, in the alternative, an at-will employee.¹ Specifically, Cunningham expresses his "concern" with "this Court's conclusion that Cunningham set

¹ The County offered Cunningham an at-will employment contract which he rejected. After the written contract was declared unenforceable, Cunningham invoked his statutory right for a public hearing. He stayed on the County payroll until the public hearing was held, and the council once again voted to terminate his written contract.

forth alternative theories of relief.” (See numbered paragraph 11 of Cunningham’s Petition for Rehearing) (emphasis added). In fact, Cunningham says that this Court’s conclusion that he pled alternative causes of action “indicates that the Court does not fully understand Appellant’s claim.” He further states: “Nor does Appellant see the tort claim as an alternative cause of action to the extent that suggests it is mutually exclusive with the existence of a contract claim.” In other words, Cunningham advances the very point that formed the heart of the County’s petition for rehearing—that Cunningham did not plead and does not claim that in the alternative he was an at-will employee. Instead, he has consistently, albeit incorrectly, maintained that he can invoke the public policy exception as a contract employee.

Additionally, in numbered paragraph 12.B in his petition, Cunningham takes issue with this Court’s statement that “[b]efore the vote was taken, Cunningham reminded the 2009 Council that he had offered in his January 27, 2009 letter to continue to work under his ‘current conditions,’ referencing the 2009 Council’s position that he was an at-will employee.” *Cunningham v. Anderson Cty.*, Op. No. 5072 (S.C. Ct. App. filed Jan. 16, 2013, Shearouse Adv. Sh. No. 3 at 39). Cunningham points out that his reference to “current conditions” meant (contrary to the assumption this Court made) that “each party [would retain] their respective positions regarding the efficacy of the contract.” (See p. 14 of Cunningham’s Petition for Rehearing.) Neither Cunningham nor the County ever considered Cunningham to be an at-will employee.

In making these arguments, Cunningham confirms what the County argues in its Petition for Rehearing: in his complaint, supporting written memoranda and oral arguments before the circuit court Cunningham never asserted that he was an at-will employee, as an alternative position or otherwise. Cunningham has always, from the very beginning of this litigation and including his recent petition for rehearing, taken the

position that when the council declared his written employment contract null and void, a cause of action in tort (wrongful discharge) was created along with an action for breach of his employment contract. Of course, this is simply not correct. An employee for a definite term (this is what Cunningham claimed to be) cannot invoke the public policy exception (which is applicable to only at-will employment) because he has a remedy available in the form of a breach of contract claim.² See *Epps v. Clarendon Cty.*, 405 S.E.2d 386, 387 (S.C. 1991) (holding that a wrongful discharge claim is not available to an employee who has an alternative remedy); *King v. Charleston Cty. Sch. Dist.*, 664 F.Supp. 571, 584 (D.S.C. 2009) (holding that an employee for a definite term could bring a breach of contract action and therefore could not claim wrongful discharge).

Dillon's Rule

Cunningham repeatedly refers to Dillon's Rule as if it had some relevance. As this Court correctly held, Dillon's Rule "is irrelevant to our analysis." *Cunningham*, Shearouse Adv. Sh. No. 3 at 46. Dillon's Rule was used by courts when construing statutes in which the Legislature gave certain powers to local governments. Dillon's Rule is only a tenet of statutory construction. It has nothing to do with the relationship between a former county council and its successor council.

Cunningham's Other Arguments

(1) Cunningham argues that this Court's reliance on *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) was misplaced because that case involved a special district, which is not affected by the Home Rule Act (hereafter HRA).

² The rule is not that the employee have a remedy available *that will produce success* but only that he have available one which allows him to plead a cause of action, in this case breach of contract. After correctly holding Cunningham's employment contract was void the Court misconstrued his complaint as pleading at-will employment in the alternative, a construction even Cunningham says is incorrect. *Cunningham*, Shearouse Adv. Sh. No. 3 at 51.

Just like Dillon's Rule, the HRA is equally irrelevant to this case. And, similar to Dillon's Rule, the HRA concerns the relationship between a county and the state. Under the HRA, courts are to liberally construe the powers granted to the County when those are at odds with the powers of the Legislature; the intent of the HRA was to diminish the power legislative delegations had traditionally wielded at the local level. The HRA has nothing to do with the relationship between a county council and its successors.

Furthermore, in response to Cunningham's argument that this Court "overlooked" the fact that *Cowart* involved a special district, the County points out that this very same argument was raised in Appellant's Brief, considered by this Court, and rejected. Thus, this Court was absolutely correct in relying on *Cowart*, a case in which the HRA was also irrelevant, for the proposition that one county council cannot bind its successor in a contract that involves governmental or legislative powers.

Cunningham further argues that the out-of-state cases cited by this Court are inapplicable because those jurisdictions either do not have an HRA or the cases involved entities not subject to an HRA. Again, the HRA was equally irrelevant to this set of facts, so the Court's reliance on those cases was appropriate.

Rounding out his first argument, Cunningham boldly claims (on page 3 of his petition) that "[s]ection 4-9-620 gives unique authority for a council to enter into an agreement with its administrator beyond the terms of the council's members." This section does no such thing. Rather, this section merely authorizes a county council to do what it already had the right to do, i.e., hire a county administrator for a definite term. Before the HRA became law, a county council could always hire its county administrator for a definite term. But, this definite term was limited to the term of that county council. In this case, because it is undisputed that the Anderson County Council's term was for two years, the County Administrator's employment agreement could not be enforced

after the expiration of this two-year term. The HRA codified, but did not change, the existing law.

(2) In Cunningham's second argument, he again claims that this Court overlooked section 4-9-620 of the South Carolina Code, which allows a County to employ a manager for a definite term. The Court did not overlook this statute, but instead, specifically found that the power to contract for a definite term does not entitle a county council to contract for a term that extends beyond the term of that council. *Cunningham*, Shearouse Adv. Sh. No. 3 at 46.

In advancing his argument, Cunningham contends that the law of municipalities does not "logically extend" to counties because section 5-13-30(1), which governs municipal corporations, does not contain any language about employing a manager "for a definite term" as permitted by section 4-9-620. There is no relevant difference between these two statutes, however, because neither a county nor a city may enter into an employment agreement that binds its successors. Of course, city managers and county administrators can be reappointed over and over again, but only by the newly elected body and for a term that does not exceed the term of that newly elected body.

(3) Cunningham's third argument accuses this Court of "misapprehend[ing] several crucial aspects of *Cowart*." According to Cunningham, "the holding in *Cowart*, which applied common law rules under Dillon's Rule as described in *Newman*, involved a third entity, a special purpose district, which is not subject to the Home Rule Act." (See p. 5 of Cunningham's Petition.) Neither *Cowart I* or *II* opinions say what Cunningham says they say.

What *Cowart I* actually held was that "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils." *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C.

124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (citing *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948)). “[T]he rule is intended to ensure that governing bodies are free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve.” *Id.* at 135, 459 S.E.2d at 882.

If Appellant is referring to *Cowart II*, it actually held that an “employment contract was not binding on the commissioners who terminated Cowart because the contract extended beyond the terms of the commissioners who signed it.” *Piedmont Pub. Serv. Dist. v. Cowart*, 324 S.C. 239, 241, 478 S.E.2d 836, 837 (1996). The Supreme Court went on to state that “[s]uch a contract is not binding on the successors to the local governing body.” *Id.* (emphasis added).

(4), (5) & (6) In Cunningham’s fourth, fifth, and sixth arguments, he contends that this Court “overlooked or misapprehended” that section 4-9-620 does not explicitly limit the County’s power to enter into a contract beyond the term of the outgoing council; that Cunningham’s reading of the statute was not a “narrow view” of the council’s powers; and that express language allowing the County to enter into a contract that extends beyond the term of a particular council was not necessary because such language would be superfluous. These arguments merely rehash those assertions Cunningham already made in his Appellant’s Brief and during oral argument. As this Court recognized in its opinion, when construing statutes, courts presume the Legislature did not intend to abrogate or modify a rule of the common law unless the Legislature expresses its intent to do so with clear and unambiguous language. Here, the Legislature’s enactment of section 4-9-620 does not clearly and unambiguously abrogate the common law principle that one county council cannot bind its successor with regard to employment contracts.

The *Newman* exception states that “unless the statute...clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists....” *Newman*, 212 S.C. at 23, 46 S.E.2d at 255. The HRA regarding the employment of a county administrator merely codifies what was already well established in the law. It certainly did not clearly authorize a lame-duck county council to bind a newly-elected successor council.

Nor has this Court “added language to the statute,” as Cunningham asserts. This Court simply recognized that while a county administrator can be hired for a definite term that term cannot extend “beyond the terms of the outgoing council members.” This is a recognition of long-standing case law from our Supreme Court, this Court, and courts in jurisdictions throughout the United States.

Furthermore, to the extent this Court were to consider public policy as Cunningham suggests, Cunningham’s interpretation of section 4-9-620 poses a much more significant policy problem because, under his reading, incoming officials (and, in this case, even future officials yet to be elected) would be hamstrung by contracts employing key personnel that were entered into by ousted officials. Such an outcome would essentially strip our elected officials of their ability to make changes mandated by the electorate.

(7) Cunningham further complains that this Court failed to address his argument that the payment of severance under the employment contract was a proprietary function rather than a governmental function. The Court, however, did address this argument, finding that the employment contract was a governmental function:

The payment of severance would be based on an employment contract that purports to bind the 2009 Council and is therefore void. *See Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (holding that the appointment of a public officer is a governmental function that cannot be impaired

by an employment contract extending beyond the terms of the members of the local governing body).

Cunningham, Shearouse Adv. Sh. No. 3 at 47-48.

Accordingly, this argument was neither overlooked nor misapprehended.

(8) Cunningham next argues that this Court should address the Payment of Wages issue anew in the event the Court reconsiders its determination that the employment contract was void. As explained above, there is no reason for this Court to revisit its holding that the employment contract is void, and therefore the Court correctly declined to rule on an issue that is unnecessary to the resolution of this appeal.

(9) Similar to his seventh argument, Cunningham argues in his ninth argument that the contract between him and the County dealt only with the payment of money, not employment, and therefore, the contract dealt with a subject matter that was proprietary in nature. This Court addressed this issue, stating that Cunningham was making a “distinction without a difference,” and held that there was no difference between an employment contract and a contract that binds an employer to pay the employee for the entire term of the contract in the event the employee is terminated. *Cunningham*, Shearouse Adv. Sh. No. 3 at 47.

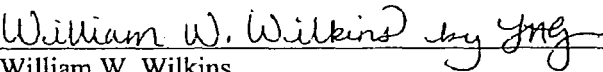
(10) In his tenth argument, Cunningham accuses this Court of misapprehending his argument that sick leave benefits are expressly included in the statutory definition of “wages.” The Court did not misapprehend this argument, but rather chose not to rule on it because its holding that the employment contract was void was dispositive of this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

(11) & (12) Cunningham's eleventh and twelfth arguments support the County's request that this Court reconsider its decision as it relates to the reversal of summary judgment on the wrongful discharge claim. Again, as is now abundantly clear, Cunningham and the County agree that he was never an at-will employee.

Conclusion

Aside from confirming the arguments made by the County in its petition for rehearing (i.e., Cunningham never asserted that in the alternative he was an at-will employee), Cunningham's petition merely rehashes the arguments he made to this Court in his brief and oral argument. Those arguments were thoroughly considered and addressed by this Court. Accordingly, Cunningham's Petition for Rehearing should be denied.

Respectfully submitted,



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February 11, 2013
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appeal from the Circuit Court of Anderson County, South Carolina **SC Court of Appeals**

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

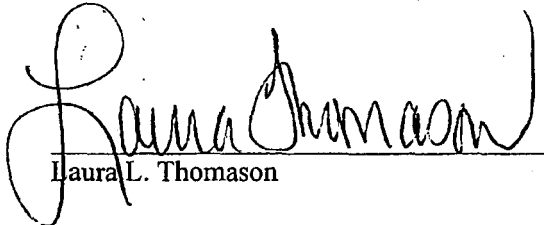
Anderson County, ... Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing *Return to Appellant's Petition for Rehearing* by depositing a copy of same in the United States Mail, postage prepaid, on February 11, 2013, addressed to his attorneys of record as follows:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2011-194209
Op. No. 5072 (Ct. App. filed Jan. 16, 2013)

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

**APPELLANT'S REPLY TO COUNTY'S RETURN
TO APPELLANT'S PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240(f), SCACR, Michael Cunningham files this Reply to Anderson County's Response to his Petition for Rehearing.

The County's arguments create a false dichotomy between having a "contract," and having one's employment subject to being terminable "at will." The County's argument fails to acknowledge settled law that the "at-will" doctrine is nothing more than a common-law presumption regarding one term of the employment contract, while the tort of wrongful discharge arises completely independently of a specific contractual term.

In general, the "at-will" doctrine presumes that in the absence of a term to the contrary, a contract for an indefinite term is terminable at the pleasure of either party. *Shealy v. Fowler*, 182 S.C. 81, 87, 188 S.E. 499, 502 (1936). A necessary element of this presumption is that, regardless of the right to terminate, the relationship continues to be "contractual." See *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999) (noting that employment terminable "at will" is still contractual in nature); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163-64, 321 S.E.2d 602, 607 (Ct. App. 1984) (at-will employment constitutes a contract for which third party interference is actionable), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); *Threlkeld v. Christoph*, 280 S.C. 225, 227 312 S.E.2d 14, 16 (Ct. App. 1984) (same).

Again, the presumption under *Shealy* merely applies to one term of the employment contract (the right to terminate its operation), and as this Court correctly noted, these presumptions are not irrebuttable; even a contract for a term can be terminable at will if the parties so declare. *Cunningham*, at p. 50 (citing *Cape v. Greenville County Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005)). Because

everyone whose employment is terminable “at will” still has a “contract,” the County’s arguments, though thoroughly bolded, italicized and underlined, simply ignore the law.

The County’s argument continues to mis-state Mr. Cunningham’s argument. Mr. Cunningham has always maintained that the contract he had with the County did not prevent him from being “at will.” The County could terminate him at any time for any reason. Mr. Cunningham has never wavered from this position.

The County, however, relentlessly re-characterizes the argument to assert that Mr. Cunningham insists he was not an at-will employee. (County’s Return, p. 1-2). But just because the County says this does not make it so.

The County contends that “[n]either [Mr.] Cunningham nor the County ever considered [Mr.] Cunningham to be an at-will employee.” (Return, p. 2). The falsity of this statement is revealed by referencing the Agreement itself, which provides:

The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement.

(R. p. 235, ¶ 2(A)) (emphasis added). Section 3 governs “Termination and Severance Pay,” and permits the County to fire him with or without cause. (R. p. 236-237). The County could fire Mr. Cunningham with cause and he would not be entitled to severance pay. (R. p. 236, ¶ 3(A), last sentence). The County could also fire Mr. Cunningham without cause, but if it did so, Mr. Cunningham would be entitled to severance pay. (R. p. 237, ¶ 3(B)). Either way, the County had the unfettered right to fire Mr. Cunningham – with or without cause – at any time. This is “at will” employment.

Contrary to the County's contentions, Mr. Cunningham consistently asserted below that the County could terminate him for any reason at any time; however, it would owe him the severance and other benefits if it terminated him without "cause" as defined in the Agreement. (R. p. 17, ¶ 17; p. 18, ¶ 22; p. 19, ¶ 26). This was the basis of Mr. Cunningham's motion for summary judgment as to this claim. (R. pp. 40-41). In his Memorandum in Support of the Motion for Summary Judgment, Mr. Cunningham pointed out that he served "at the pleasure of Council," and nothing in the Agreement otherwise interfered with the County's right "to terminate his services at any time, subject only to the [severance provisions]." (R. pp. 42-43). The County's claim that Mr. Cunningham "never asserted he was an at-will employee, as an alternative or otherwise" (Return, p. 2), is patently false.

Next, the County's argument misstates the law applicable to the wrongful discharge claim. The County contends that "[a]n employee for a definite term (this is what [Mr.] Cunningham claimed to be) cannot invoke the public policy exception (which is applicable to only at-will employment) because he has a remedy available in the form of a breach of contract claim." (Return, p. 3). This statement by the County is astounding.

Either there is an enforceable contract which provides Mr. Cunningham with a remedy in the form of a claim for its breach (as the County implies here but denies elsewhere), or this is a "void" contract in violation of *Cowart*, which changes nothing because Cunningham would still be subject to termination at will under *Shealy*'s common law presumption. And if this case involves a "void" contract, the County's argument against the application of the public policy exception is inconsistent and nonsensical.

In any event, the law is otherwise – even an at-will employee who has a written contract of employment may have a claim for wrongful termination in violation of public policy. *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999). The County offers no case law to the contrary.

The County cites to *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386 (1991), for the purported rule that “a wrongful discharge claim is not available to an employee who has an alternative remedy.” (Return, p. 3). This is a gross over-statement of the holding of that case.

In *Epps*, Mr. Epps was employed as a front-end loader operator for the Clarendon County Department of Public Works. He was originally hired as an at-will employee in 1980 by the former Director of the Department, Tootsie Hardy. At some point in his employment, Mr. Epps received an employee handbook.

In January 1987, Hezekiah Gibson replaced Mr. Hardy as Director of the Department when the position became an appointed rather than elected one. In March 1987, Director Gibson was advised of budget cuts and laid off Mr. Epps on April 30, 1987. Although he was recommended for rehiring, he was never re-employed.

Mr. Epps commenced an action alleging breach of an employment contract as evidenced by the County’s Personnel Policy Manual and wrongful discharge in violation of his constitutional rights of free speech and association. The trial judge granted County summary judgment on the ground Mr. Epps was an at-will employee. Mr. Epps appealed.

On appeal, Mr. Epps first argued summary judgment should not have been granted on his cause of action for breach of contract based on the employee handbook under

Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). The Supreme Court stated it reviewed the handbook and found no provision concerning procedures for termination or any provision which might otherwise be construed as altering an employee's at-will status. The Court stated, "Under the general rule that an at-will employee may be terminated for any reason, we find no breach of an employment contract. See *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981)." *Epps*, 304 S.C. at 425, 405 S.E.2d at 386-387.

Mr. Epps also claimed summary judgment was improperly granted on his cause of action for wrongful discharge because he presented evidence he was terminated for his political association with the former Director of the Department, Tootsie Hardy. The Supreme Court disagreed, stating:

Generally, an action for wrongful discharge is premised on an alleged infringement of a right to the employment. In *Ludwick, supra*, we recognized an exception to this rule in order to allow an at-will employee to bring a wrongful discharge action where the employee was discharged because she complied with a subpoena to testify at a state agency hearing. We found such a discharge constituted "a violation of a clear mandate of public policy" because it required an employee, as a condition of employment, to violate the law. 287 S.C. at 225, 337 S.E.2d at 216. We decline to extend the *Ludwick* exception to a situation where, as here, the employee has an existing remedy for a discharge which allegedly violates rights other than the right to the employment itself.

Here, [Mr. Epps] claims an infringement of his constitutional rights to free speech and association. Title 42 U.S.C. § 1983 (1982) allows a civil action for damages against a government official who deprives an individual of a constitutionally protected right. A public employee, even one employed at-will, may state a claim under § 1983 for violation of his First Amendment rights by alleging damages from hiring decisions that are based solely upon political belief or association and are unjustified by a

vital government interest. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). We therefore affirm the trial judge's disposition of this case without prejudice to appellant's right to commence a § 1983 action.

Epps, 304 S.C. at 426, 405 S.E.2d at 387.

The holding of this case is the Court's refusal to extend the rule from *Ludwick* to Mr. Epps's claims of violation of his rights to free speech and association because he had another way to pursue those rights (through a § 1983 claim). That is why the Court stated its holding in narrow terms: "We decline to extend the *Ludwick* exception to a situation where, as here, the employee has an existing remedy for a discharge which allegedly violates rights *other than the right to the employment itself*." (Emphasis added). The County's statement of the holding of *Epps* is misleading when the context of the Court's ruling is added.

The County next cites to *King v. Charleston Cty. Sch. Dist.*, 664 F.Supp. 571 (D.S.C. 2009) (Duffy, J), asserting the Court held "that an employee for a definite term could bring a breach of contract action and therefore could not claim wrongful discharge." (County's Return, p. 3). Once again, the County over-states the holding of this case.

What Judge Duffy actually stated was the following:

Plaintiff also asserts that the Charleston County School District violated public policy when it reassigned him to a teaching position after he "blew the whistle" on the alleged misuse of Title I funds. In *Ludwick v. This Minute of Carolina, Inc.*, the South Carolina Supreme Court joined a growing majority of states that recognize the "public policy" exception to the doctrine of employment at will. 287 S.C. 219, 221, 337 S.E.2d 213, 214 (1985). Under the public policy exception, an employee has a cause of

action in tort for wrongful discharge where there is a “retaliatory discharge of the at-will employee in violation of a clear mandate of public policy.” *Id.* at 219, 337 S.E.2d at 216. The School District contends that Plaintiff misapplies “this exception to Plaintiff’s situation, as Plaintiff had a contractual right to his employment for the 2005–2006 school year and, as such, was not an at-will employee. Moreover, the South Carolina Supreme Court has declined to extend the public policy exception to cases where the employee has an existing remedy for a discharge which allegedly violates rights other than the right to employment itself.” *Epps v. Clarendon County*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (noting that 42 U.S.C. § 1983 allows a civil action for damages against a government official who deprives an individual of a constitutionally protected right). Therefore, the court grants the Charleston County School District motion for summary judgment to Plaintiff’s public policy cause of action since that exception applies to the at-will employment doctrine, which is not implicated by the facts of this case.

King, 664 F.Supp. at 584.

The narrow holding of this case is that King had the right to litigate his claims for breach of contract, violation of the FMLA, and violation of § 1983 through a violation of his First Amendment rights in his proceedings before the County Board of Trustees and before the Court of Common Pleas – the District Court had agreed those claims were barred by claim preclusion. Since King had an existing statutory remedy for violation of rights other than the right to employment itself, the holding in *Epps* precluded a wrongful termination claim.

It was not the ability to bring a breach of contract claim that precluded the claims in *Epps* and *King* – rather, it was the availability of a remedy to vindicate rights other than those emanating from the employment contract that prevented the litigants from pursuing wrongful termination/public policy claims.¹ *See also Barron v. Labor Finders of South*

¹ The need for clarification by this Court is exemplified by the fact that the District Court recently indicated that the holding in this case is contrary to the Supreme Court’s holding in

Carolina, 393 S.C. 609, 713 S.E.2d 634 (2011) (the public policy exception does not extend to situations where the employee has an existing statutory remedy for wrongful termination, citing *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under Fair Labor Standards Act had existing statutory remedy for wrongful termination)). *Epps, Barron, Dockins* and *King* reflect a simple application of the principle that where the public policy a plaintiff is trying to vindicate emanates from a statute or constitutional provision that provides its own remedial scheme, an independent tort claim for wrongful discharge does not exist. A worker fired for a discriminatory reason does not need a wrongful discharge claim in order to vindicate his rights. This reasoning is not implicated when the firing does not implicate constitutional or statutory rights.

Regarding the remaining points in the Petition, the County contends Mr. Cunningham merely “rehashes” arguments he has already made and that were rejected. Of course, a Petition for Rehearing is not only a way to convince the appellate court to rethink its holding, it is the *only* means for preserving issues and arguments for Supreme Court review. See Rule 242(d)(2), SCACR (“Only those questions *raised* in the Court of

Stiles. See *Brunson v. School Dist. of Fairfield County*, C/A No. 0:11-1794-MBS (filed Jan. 21, 2013) (2013 WL 394205) (Seymour, J) (“The court will assume for purposes of summary judgment that the public policy exception to at-will employment is applicable in this case where Plaintiffs were employed pursuant to a contract for a definite term. See *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (S.C.1999) (extending *Ludwig* to employment contracts that do not provide for a specific termination date, but rather contain a notice provision); but see *Cunningham v. Anderson County*, 2013 WL 163836 (S.C. Ct. App.2013) (finding that employee who never claimed to be at-will employee may not obtain relief based on the law governing at-will employment) (opinion not released for publication in permanent law reports, and thus subject to revision or withdrawal).”).

Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari....”(emphasis added). *See, e.g., Mazloom v. Mazloom*, 392 S.C. 403, 709 S.E.2d 661 (2011) (noting issue not preserved for review before supreme court where party seeking review by writ of certiorari failed to raise the issue in a petition for rehearing to the Court of Appeals). Mr. Cunningham does not intend to merely rehash anything, rather, he intends to properly state issues for this Court’s reconsideration as permitted by the Appellate Court Rules to give this Court the opportunity to revisit its opinion and to preserve these issues for consideration by the Supreme Court

Accordingly, this Court should not find the arguments the County makes to be persuasive, and should address the points Mr. Cunningham raises in his Petition for Rehearing, grant the Petition, and issue a new decision reversing the circuit court’s order which is wrong as a matter of law.

February 19, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

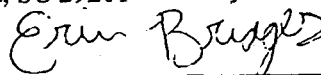
Anderson County, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
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by mailing a copy of the same by United States Mail with first class postage prepaid to
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in granting summary judgment to the County on Cunningham's claim for breach of contract on the ground that the contract was invalid as a matter of law?
- II. Did the Circuit Court err in granting summary judgment to the County on Cunningham's claim for wrongful discharge based upon the court's ruling that the public policy exception to termination of employment was not available because Cunningham was not an "at-will" employee?
- III. Did the Circuit Court err in granting summary judgment to the County on Cunningham's wage payment claim based upon the court's ruling that the accrued vacation and sick leave were not "wages" under the South Carolina Payment of Wages Act?

STATEMENT OF THE CASE

On April 22, 2009, Michael Cunningham brought an action against Anderson County for breach of contract, wrongful discharge in violation of public policy, and failure to pay wages due arising out of the County's termination of Cunningham from his position as Anderson County Administrator. (R.p.14). Cunningham's claims arose out of the County's failure to abide by its employment agreement, including its failure to pay an agreed-upon severance package. Cunningham also alleged the County terminated him in violation of public policy.

The County filed an answer on May 27, 2009. (R.p.23). The County denied liability, pled several affirmative defenses, and pled a counterclaim based upon civil conspiracy. On June 10, 2009, Cunningham filed an amended reply to the counterclaim. (R.p.34). On June 25, 2009, the County filed a stipulation of dismissal of the counterclaim with prejudice. (R.p.38).

The parties engaged in extensive discovery and in February and March 2010 the parties filed cross-motions for summary judgment. (R.pp. 40, 72). Following briefing of the issues and a hearing, the trial court entered an order on May 13, 2011, denying Cunningham's motion and granting the County's motion for summary judgment. (R.p. 1).

Cunningham filed and served his notice of appeal on June 10, 2011. (R.p. 108).

FACTS

On November 18, 2008, Anderson County Council voted 5-2 to enter into a Master Employment Agreement ("Contract") with Mr. Cunningham to serve as the County's Administrator. (R.pp.200, 204). Mr. Cunningham signed the Contract on November 19, 2008. (R.pp.234, 242). Mr. Cunningham began serving as Administrator on December 1, 2008. (R.p.235).

The Contract provides in part:

The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(R.p.235, Section 2(A)). The Contract term was for a period of three (3) years until November 30, 2011. (R.p.235, Section 2(C)). The Contract also provided:

In the event written notice of intent to not renew this Agreement is not given by either party to this Agreement to the other at least ninety (90) days prior to any annual anniversary of the date first above written, this agreement shall be extended on the same terms and conditions as herein provided, all for a new term consisting of the term then remaining at such annual anniversary date plus an additional period of one (1) year; such that the maximum effective term of this Agreement shall never exceed three (3) years and not be less than the respective term remaining when any notice of intent to not renew is given. Said agreement shall continue thereafter for a continuing, annually renewable term consisting of the respective term then remaining at such annual anniversary date unless written notice of intent to not renew is given by either party to this Agreement to the other at least ninety (90) days prior to any subsequent annual anniversary of the date first above written.

(R.pp.235-236, Section 2(D)). The Contract provided for severance if Mr. Cunningham is terminated for reasons that do not constitute "cause," which the Contract limits to serious matters such as criminal convictions and refusal to perform the duties of Administrator.

(R.pp.236-237, Sections 3(A) and 3(B)).

After a new term of Council commenced in January 2009, the Council continued to recognize and deal with Mr. Cunningham as its Administrator. At the first meeting of the new term, the Council passed a "Resolution" criticizing the manner in which it had hired Mr. Cunningham, but the Council did not attempt to declare the Contract invalid. (R.p.249, p. 6). At a meeting on January 16, 2009, then Chair Eddie Moore stated publicly that there was no desire to terminate Mr. Cunningham's employment. (R.pp.253-254).

At the February 3, 2009 Council meeting, the personnel committee noted that Mr. Cunningham had rejected an "at will" agreement to replace the Contract. (R.p.258). The committee claimed that the "old contract ... is null and void, unenforceable, and therefore he is presently an at-will employee." (*Id.*) The committee chair, Bob Waldrep, then made a motion to approve a recommendation (*Id.*) which was clarified as stating that "Mr. Cunningham would no longer be an employee of Anderson County," that "that would mean a termination," and "he's been terminated. (R.p.259, ll. 6-7, 12, 16).

Mr. Waldrep confirmed that the reason for the termination was Mr. Cunningham's unwillingness to sign a new "at will" contract. (R.p.261). County Council then voted 5-2 to terminate Mr. Cunningham. (R.p.263). Mr. Cunningham gave notice that he would be requesting a public hearing pursuant to Section 4-9-620 of the South Carolina Code (the Home Rule Act (the "HRA"))).

On February 4, 2009, Chairman Moore provided Mr. Cunningham with written reasons for termination as required by the HRA. (R.p.265). Mr. Moore does not contend that Mr. Cunningham engaged in any misconduct, or that "cause" existed for termination

under Section 3(A) of the Contract. (*Id.*).

On March 2, 2009, the Council convened a meeting and voted on a resolution, although the text of the resolution is unclear because of a tape change. (R.pp.272-273). The Council then voted 5-2 to terminate Mr. Cunningham. (R.p.275). The County thereafter refused to pay the compensation provided by Section 3(B) of the Contract. (R.p.26, ¶¶ 17, 20, 22).

Following discovery, the parties made cross-motions for summary judgment as to each cause of action. Mr. Cunningham contended there was no genuine issue of material fact that the County Council had terminated him without cause as defined by the Contract and had refused to pay compensation due under Section 3(B). Mr. Cunningham also moved for summary judgment as to his cause of action under the South Carolina Payment of Wages Act, asserting the Contract called for payment for accrued sick leave which the County failed to do. The County defended on the ground that the three-year contract was void and unenforceable in violation of the "Term Limits Rule," as set forth in *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996).

The County based its motion for summary judgment on the following grounds: (1) Mr. Cunningham's breach of contract claim fails because the contract was void under the "Term Limits Rule"; (2) Mr. Cunningham's wrongful discharge claim fails under the South Carolina Tort Claims Act as well as the lack of any clear, unambiguous mandate to violate the law; and (3) Mr. Cunningham's claim for violation of the South Carolina Payment of Wages Act fails because the County paid him all he was due, and the amounts claimed under the severance package are not recoverable under the Act. (R.pp.72-81).

The County also argued that the tort of wrongful discharge only applies to “at-will employees,” and because Mr. Cunningham alleged the existence of a valid contract with the County, he was not “at-will.”

On March 10, 2011, the circuit court held a hearing on the cross-motions for summary judgment. On May 13, 2011, the circuit court entered an order finding:

- (A) Mr. Cunningham’s claim based upon breach of contract must fail because it was an attempt by a “lame duck” council to bind a successor council under the “term limit rules” set forth in *Cowart and Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948). The Court rejected Mr. Cunningham’s argument that the Contract was permissible under the Home Rule Act. The court concluded the Contract was invalid as a matter of law and Mr. Cunningham had no right of action to enforce it or to seek damages for its breach beyond the term of the old council.
- (B) The County was entitled to summary judgment on Mr. Cunningham’s claim for wrongful discharge because the public policy exception to termination of employment only applies to at-will employees, and Mr. Cunningham was never an at-will employee. Instead, he was employed under the Contract.
- (C) Mr. Cunningham’s claim under the South Carolina Payment of Wages Act also fails because Mr. Cunningham was not entitled to the severance under the void contract. Further, because the payment of accrued sick leave was a portion of severance, and severance is not “wages” under the Act, there was no violation of the Act when the County refused to pay for accrued

sick leave.

Accordingly, the court denied Mr. Cunningham's motion for summary judgment and granted summary judgment for the County as to all causes of action. This appeal follows.

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S CLAIM FOR BREACH OF CONTRACT ON THE GROUND THAT THE CONTRACT WAS INVALID AS A MATTER OF LAW

The circuit court held that the Council's agreement with Mr. Cunningham was void and unenforceable in violation of the "term limits" rule as set forth in *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948) and *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"). The circuit court rejected Mr. Cunningham's arguments that (1) the rule from *Newman* and *Cowart* did not apply because of the South Carolina Home Rule Act (HRA); and (2) even if the "term limits" rule applied, the circumstances of this case met an exception to the rule as set forth in *Newman*. This Court should reverse and remand.

A. The Contract Is Valid under the South Carolina Home Rule Act

The South Carolina Constitution, the HRA, and *Cowart* all compel the conclusion that the common-law principles espoused in *Cowart* have no application to Mr. Cunningham's Contract, which the parties entered pursuant to the HRA.

In *Cowart*, the Piedmont Public Service District employed the administrator pursuant to an employment agreement the parties entered into in 1984. The original agreement was for a twenty-year term and provided a two-year buyout. The agreement was amended in 1985 to increase the buyout to five years. In November 1992, outgoing board members voted 4-1 to terminate the administrator without cause and to approve an agreement to pay the plaintiff out over five years with an initial payment of \$30,000. This

was before two new commissioners took office. After the new commissioners took office (creating a new 3-2 majority), the board deemed the vote invalid because it occurred in executive session. The new board demanded that the administrator return to work and that he return the \$30,000 initial payment. When the administrator refused, the board terminated him for insubordination.

The District brought a declaratory judgment action against the administrator and sought return of the \$30,000. The administrator counterclaimed for damages for breach of contract. The circuit court granted summary judgment for the District on all claims, including a determination that the severance contract improperly bound a future commission and that the severance was unconscionable. The Court of Appeals affirmed.

The Supreme Court granted a writ of certiorari and affirmed. The Court agreed with the circuit court and the Court of Appeals that the case was controlled by *Newman*, a pre-HRA decision involving a municipality. The Court stated:

In *Newman*, we held the appointment or removal of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body. *Id.* at 23, 46 S.E.2d at 255. Such a contract is not binding on the successors to the local governing body.

Cowart II, 324 S.C. at 241, 478 S.E.2d at 837. The Court added that “*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its own members’ own terms.” *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838.

The “term limits” rule derived from *Newman* and *Cowart* does not apply in light of the HRA. Even if the “term limits” rule applied to these facts, the exception set forth in *Newman* permitted Council to enter the agreement with Mr. Cunningham.

1. Cowart/Newman Principles do not Apply to the HRA

a. The Common-Law Principles of Dillon's Rule

Under the common-law principle known as Dillon's Rule:

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Williams v. Town of Hilton Head Island, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993);

Underwood, James L., *The Constitution of South Carolina, Volume II: The Journey*

Toward Local Self-Government (Univ. of South Carolina Press 1989). The principle of

Dillon's Rule applied to restrictions on the powers of counties. See *Hospitality Ass'n of*

South Carolina v. County of Charleston, 320 S.C. 219, 225 n. 4, 464 S.E.2d 113, 117 n. 4

(1995) ("Prior to ratification of Article VIII, courts of this State strictly and narrowly

construed any grant of local government power under what was commonly referred to as

'Dillon's Rule.'").

In *Cowart I*, the Court of Appeals applied Dillon's Rule, as evidenced by the

following language from the opinion:

A municipal corporation is a creature of statute and has only the powers expressly granted it, those which are necessarily or fairly implied in or incident to the express powers, or those powers essential to the accomplishment of its purpose.

Cowart I, 319 S.C. at 131, 459 S.E.2d at 880. The Court of Appeals cited to *Creech v.*

South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (1942), a case that applied

Dillon's Rule. See *Williams v. Town of Hilton Head*, 311 S.C. at 421, 429 S.E.2d at 804

(citing *Creech* for Dillon's Rule, and holding the HRA abolished the doctrine). The

Court's adherence to Dillon's Rule in *Cowart I*, however, does not control here because an entirely different set of rules applies. Instead, as set forth below, Dillon's Rule was abolished by the HRA for County Councils.

**b. The Constitution of 1973 and the Home Rule Act Abrogated
Dillon's Rule as to the Authority of Counties**

In 1973, the South Carolina Constitution was amended with new article VIII, which provided for the transfer of government powers from the legislative delegations to the counties and municipalities. Article VIII provides, in relevant part:

The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties.... Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.

S.C. Const. art. VIII, § 7. Article VIII, § 7 thus required the General Assembly to provide for the structure and organization of not more than five alternative forms of county government. *Hospitality Ass'n of S.C. v. County of Charleston*; *Duncan v. York County*, 267 S.C. 327, 228 S.E.2d 92 (1976); *Eargle v. Horry County*, 335 S.C. 425, 517 S.E.2d 3 (Ct. App. 1999); *see also* Act No. 283, 1975 S. C. Acts 692, § 1 (the Home Rule Act).

The Home Rule amendment further provides by general law for the "powers, duties, functions, and the responsibilities of counties." *See* S.C. Const. art. VIII §§ 7 and 9; *see also Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992); Act No. 283, 1975 S. C. Acts 692, § 1.

The home rule amendments of article VIII were not self-executing. Instead, article VIII left it up to the General Assembly to decide what powers local governments should

have. *Hospitality Ass'n of S.C.*, 320 S.C. at 225-226, 464 S.E.2d at 117-118. In response, the General Assembly enacted what is commonly referred to as the "Home Rule Act" ("HRA"), codified at S.C. Code Ann. §§ 4-9-10 through -1230 (1986 & Supp. 2010). *Graham v. Creel*, 289 S.C. 165, 345 S.E.2d 717 (1986).

Article VIII effectively abolished Dillon's Rule by mandating the following rule of construction:

The provisions of this Constitution and all laws concerning local government *shall be liberally construed in their favor*. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law *shall include those fairly implied and not prohibited* by this Constitution.

S.C. Const. art. VIII, § 17 (emphasis added); *Hospitality Ass'n of S.C.*, 320 S.C. at 225 n. 4, 464 S.E.2d at 117 n. 4.

Anderson County eventually chose the "council-administrator" form of government. *Bradshaw v. Anderson County*, 388 S.C. 257, 695 S.E.2d 842 (2010); *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008). Under this form of government, the HRA provides:

The council shall employ an administrator who shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control. He shall be employed with regard to his executive and administrative qualifications only, and need not be a resident of the county at the time of his employment. The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the administrator for a definite term. If the council determines to remove the county administrator, he shall be given a written statement of the reasons alleged for the proposed removal and the right to a hearing thereon at a public meeting of the council. Within five days after the notice of removal is delivered to the administrator he may file with the council a written request for a public hearing. This hearing shall be held at a council

meeting not earlier than twenty days nor later than thirty days after the request is filed. The administrator may file with the council a written reply not later than five days before the hearing. The removal shall be stayed pending the decision at the public hearing.

S.C. Code Ann. § 4-9-620 (emphasis added). The General Assembly also enacted Section 4-9-25, which provides:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (1986 & Supp. 2010) (emphasis added). See *Hospitality Ass'n of S.C.*, 320 S.C. at 226, 464 S.E.2d at 118 (discussing § 4-9-25). Pursuant to these statutes, Anderson County enacted the following ordinance:

No employed official other than the administrator will be appointed to a "term" of office or have a contract of employment, formal or informal or by operation of law, establishing such a "term" of office. No "terms of employment" will be construed as a contract of employment for a "term" of office, except in the case of the county administrator. Every county employee other than the administrator is an employee "at will" of the county and will serve until terminated under policies promulgated by county council or by state law, which policies shall not be written or interpreted so as to create a contractual relationship for a "term" of office. Personnel policies adopted by county council will be consistent with this standard.

Anderson County Ordinance No. 00-014, § 2-136(b)(3) (4-18-00).

As noted above, the HRA abolished Dillon's Rule in South Carolina with the intent to restore autonomy to local government, including counties. *Williams*, 311 S.C. at 422, 429 S.E.2d at 805; *Hospitality Ass'n of S.C.*, 320 S.C. at 225 n. 4, 464 S.E.2d at 117

n. 4. The HRA did not, however, affect special purpose districts, such as the one at issue in *Cowart*. See *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) (“Home Rule applies only to counties and municipalities, not special purpose districts.”). In fact, the *Evins* Court noted dicta in *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997), which applied Home Rule to special purpose districts, and held “[t]o the extent that *D.W. Flowe* can be read to apply Home Rule to special purpose districts, it is overruled.” *Id.*, at n. 7.

The principles underlying South Carolina Constitution article VIII, the HRA, and Anderson County’s Code were not at issue in *Cowart* or the other case the circuit court cited, *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 480 S.E.2d 728 (1997) (case involving water and sewer authority). See also S.C. Code Ann. § 4-9-80 (1986 & Supp. 2010) (the HRA “shall not be construed to devolve any additional powers upon county councils with regard to public service districts, special purpose districts, water and sewer authorities, or other political subdivisions....”). Thus, the circuit court should not have followed *Cowart* but should have been guided solely by the constitutional and statutory provisions that apply in this case.

Accordingly, this Court should reverse the circuit court’s order inasmuch as it is bottomed on a misapplication of *Cowart* and an effective resurrection of Dillon’s Rule in the context of this case.

2. Even If *Cowart* Applied to this Case, the HRA Supplies the Necessary Authority to Contract under the *Newman* Exception

The circuit court held that S.C. Code Ann. § 4-9-620 did not “clearly authorize the local governing body to make a contract extending beyond its members’ own terms.” The court relied upon a recitation of Dillon’s Rule from *Newman* and the rule set forth in *Cowart* to support its analysis. This Court should reject the circuit court’s holding.

The special legislation authorizing the employment of the administrator in *Cowart* is materially different from the legislation through which Anderson County hired Mr. Cunningham. In *Cowart*, Act No. 1839 of 1972 amended Act No. 389 of 1955, and provided in part: “[T]he commission...may...[s]elect and employ a fire chief or equivalent official...” Act No. 1839 § 4(h), 1972 S.C. Acts 3655. The administrator in *Cowart* was originally hired as the fire chief and his title was later changed to administrator. (R.p.277).

In this case, the HRA expressly authorizes administrator contracts “for a definite term....” S.C. Code Ann. § 4-9-620. The General Assembly granted no such authority to special purpose districts like the one in *Cowart*. Thus, even if the circuit court was correct that Dillon’s Rule applied, the exception recognized in *Newman* and described in *Cowart* would also apply so that the County’s agreement with Mr. Cunningham is valid and enforceable. See *Cowart*, 324 S.C. at 241, 478 S.E.2d at 838 (“*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members’ own terms.”).

Although the HRA does not contain language providing that a contract can extend beyond the term of a particular council, such express language is not necessary in these

circumstances. Prior to Home Rule, there was no need for a legislative authority to hire someone only for the term of the members of the governing body. Thus, if Section 4-9-620 were read as limiting any appointment to the terms of the members of the governing body, then the language would be superfluous. The courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 661 S.E.2d 349 (2008) (in construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing).

A limiting interpretation of Section 4-9-620 also violates both the constitutional and statutory requirements that grants of power to Anderson County be interpreted as broadly as possible to include any fairly implied powers. S.C. Const. art. VIII, § 17; S.C. Code Ann. § 4-9-25.

Finally, any requirement that such words are necessary would essentially graft words of limitation onto the statute (i.e., “as long as such term does not exceed the length of the term of individual council members”). This is a matter for the legislature, not the courts. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (rejecting implied additional requirements to annexation powers where statute did not contain words of limitation).

The circuit court expressed the concern that if Mr. Cunningham was correct in his argument under the HRA, a council could enter into a contract for 10, 20 or even 50 years, and force successor councils to accept the contract or pay whatever severance is set forth therein. (R.p.9). The extreme examples set forth in the order are not the facts of this

case; the agreement in this case was for a term of three (3) years, and the severance was based upon service, but capped at 36 months. Furthermore, if there is truly a risk that a county could saddle itself with an overly burdensome agreement, that is a matter that is best dealt with by the legislative process – either by amendment to the statute, or by change of the decision makers at the ballot box. It is not the province of the court to second-guess the wisdom of a municipality in the terms it agrees to when it employs its administrator pursuant to an existing statutory scheme.

Accordingly, the circuit court erred in finding *Cowart* applied so as to resurrect Dillon's Rule in this matter. Further, even if Dillon's Rule applied, the County's authority to enter into the agreement with Mr. Cunningham existed pursuant to the exception as set forth in *Newman*. This Court should reverse the circuit court's order granting summary judgment to the County and should remand the matter for further proceedings.

3. Payment of Severance under the Agreement is Proprietary, not a Governmental Function

Even under the common-law principles (which do not apply), one council was permitted to enter into a contract beyond the terms of the members for proprietary matters. The agreement in this case involves the payment of a severance when Mr. Cunningham was terminated so long as the termination was not for "cause" as defined in the agreement.

The general rule is that if a contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was

entered into, it was fair and reasonable and necessary or advantageous to the municipality. *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 480 S.E.2d 728 (1997). However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils. *Id.*

For purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be “whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.” *Id.* at 179-180, 480 S.E.2d at 731.

Here, the contract spelled out the payments due to Mr. Cunningham unless his termination was for cause. The provision did not require any discretion by a successor body, and insofar as it did, public policy should require the Council to abide by these terms.

Therefore, even if Dillon’s Rule applied (which it does not), and even if the *Newman* exception did not apply (which it would, if Dillon’s Rule applied), then the circuit court’s order is still erroneous in light of the fact that Mr. Cunningham was seeking enforcement of a proprietary act and not a governmental act.

For the reasons stated, this Court should reverse the circuit court’s order and find that under the HRA, Anderson County’s agreement with Mr. Cunningham was valid and enforceable. The Court should remand the matter to the circuit court for further proceedings consistent with this ruling.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S CLAIM FOR WRONGFUL DISCHARGE BASED UPON THE COURT'S RULING THAT THE PUBLIC POLICY EXCEPTION TO TERMINATION OF EMPLOYMENT WAS NOT AVAILABLE BECAUSE CUNNINGHAM WAS NOT AN "AT WILL" EMPLOYEE

The circuit court held the County was entitled to summary judgment on Mr. Cunningham's claim for wrongful discharge because the public policy exception to termination of employment only applies to "at-will" employees, and Mr. Cunningham was never an at-will employee because he was employed under the Contract with the County. The court held Mr. Cunningham therefore cannot claim the protection of the public policy exception. This Court should reverse this ruling.

First, a retaliatory discharge claim based upon a violation of public policy is not limited to employment at-will situations. The doctrine also applies where an employee has a contract that provides for at-will status along with a notice provision, such as the agreement in this case. *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999). As previously noted, Mr. Cunningham's Contract provided in part:

The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(R.p.235, Section 2(A)) (emphasis added). Therefore, although the contract was for a three-year term, the parties themselves contractually provided that the only limitation on the County's right to terminate Mr. Cunningham was the requirement that the County abide by the severance provisions. Mr. Cunningham still faced termination for any reason, including a reason that violates public policy.

Furthermore, even though the parties had a written employment contract, nothing

in that agreement limited the reasons for which the County could fire Mr. Cunningham. He was still, therefore, employed “at-will.” See *Cape v. Greenville County School Dist.*, 365 S.C. 316, 618 S.E.2d 881 (2005) (finding employment contract, while for definite term, was terminable at will). Rather than limiting the reasons for which Mr. Cunningham could be fired, the Contract provided a severance package only if the termination was not for cause as defined therein. Nothing precluded the County’s ability to terminate the agreement at any time, for any reason, for no reason, or even for improper reason.

Finally, the County should not be permitted to argue on the one hand that the Contract was void and unenforceable, but then rely upon the existence of the written Contract to deflect tort liability for wrongful discharge in violation of public policy. The trial court’s ruling permits the County to unilaterally void the agreement the County’s Council entered while still using the agreement as a defense to tort liability. It is either a binding employment contract or it is not.

This Court should reverse the circuit court’s ruling and should remand this matter for further proceedings consistent with this Court’s ruling.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S WAGE PAYMENT CLAIM BASED UPON THE COURT'S RULING THAT THE ACCRUED VACATION AND SICK LEAVE WERE NOT "WAGES" UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT

The circuit court ruled that Mr. Cunningham could not bring a claim under the South Carolina Payment of Wages Act for the County's refusal to compensate him for accrued sick leave upon his termination. The court ruled that the payments were part of "severance," and severance was specifically deleted from the definition of wages under the Act in 1990. This Court should reverse this ruling.

The South Carolina Payment of Wages Act defines "wages" as follows:

"Wages" means all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10 (2) (1986 & Supp. 2010). The sick leave payments were due to Mr. Cunningham under the Contract so long as it was "earned sick leave...." (R.p.237, Section 3, ¶ (B)). It was a benefit that was already earned and was in addition to the severance package payable upon termination. The Contract states Mr. Cunningham would be paid for benefits accrued as well as "additional severance pay" based upon a formula set forth in the agreement. Section 41-10-10(2) expressly includes this benefit under "wages" for purposes of the Act. The trial court's holding to the contrary is erroneous as a matter of law.

Next, the County assumed the obligation to compensate Mr. Cunningham for his sick leave under the Contract during the term of Council in which the parties entered the Contract. Assuming Mr. Cunningham is correct in argument that the Contract is not void

as violative of Dillon's Rule, then the trial court's ruling that he "is not entitled to any payment of severance resulting from the termination of a void contract" (R.p.12) is legally incorrect.

Furthermore, payment for the accrued sick leave does not in any way "hamstring" a subsequent council with an administrator who is not of its choosing. The Council is free to terminate the administrator's employment, but the Council must uphold the obligation it assumed when it entered into the Contract. There is no requirement that a subsequent council employ Mr. Cunningham, and there is nothing that prevents a subsequent council from hiring the administrator of its choice.

The agreement also contains a severability provision that separates the payment for accrued leave from any other issue under the Contract. The Contract provides:

If any provision, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed severable, shall not be affected thereby, and shall remain in full force and effect. It is the intent of the parties to this Agreement that the Agreement be applied, executed, and enforced to the maximum extent possible, at any time, consistent with State law as then in effect, to the benefit of the Administrator. The Administrator shall receive the maximum benefit of each and every provision of this Agreement as may be permitted by law or the Constitution at any point in time.

(R.pp.241242, ¶ 17(D)). Therefore the provision that the County compensate Mr. Cunningham for accrued sick leave stands on its own and is enforceable under the Payment of Wages Act even if any other part of the agreement is declared void.

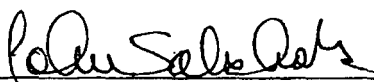
This Court should reverse the circuit court's order granting the County summary judgment as to Mr. Cunningham's claim under the Payment of Wages Act, and should remand the matter for further proceedings consistent with this Court's ruling.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand the matter for further proceedings.

Respectfully submitted,

December 19, 2011



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-1693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

- I. Did the circuit court correctly rule that the contract Cunningham seeks to enforce is void as a matter of public policy?
- II. Did the circuit court correctly rule Cunningham cannot bring a claim for wrongful discharge because the contract did not create an at-will employment relationship?
- III. Did the circuit court correctly reject Cunningham's claim under the Wage Payment Act?

FACTS

Anderson County operates under the Council-Administrator form of government. County Council members are elected for two-year, non-staggered terms. All seven members of the Council stand for election in November of every even-numbered year, and a new term of the County Council begins in January of every odd-numbered year. This litigation concerns the actions of the lame-duck Council that served from 2007-2008 ("the 2007 Council") and the response of the succeeding Council ("the 2009 Council").

Five of the seven members of the 2007 Council comprised an informal voting bloc. Three of these members were voted out of office in the election of November 2008. At that time, the County Administrator was Joey Preston and Cunningham was the Assistant Administrator. Preston had become a controversial figure but was supported by the voting bloc.

The County Council held its regular business meeting on November 18, 2008. The agenda for the meeting was published in advance, as required by state law and county ordinance. (R. pp. 160-61.) At the mid-point of the meeting, a member of the voting bloc moved to amend the published agenda to add a discussion of "personnel issues." In short order, and over the vociferous protests of the two remaining members of the Council,¹ the voting bloc (1) approved a severance package for Preston worth over \$1 million, based upon what was labeled the County's "anticipatory breach" of Preston's employment contract, and (2) entered into an employment agreement ("the Contract") with Cunningham naming him as the new County Administrator. (R. pp. 214-32.) The meeting was adjourned immediately following these actions, without reaching the remaining ten items on the agenda. (R. p. 232.)

¹ A video of the relevant portion of the November 18, 2008 meeting is included in the Record on Appeal. The County urges the Court to review this video.

The Contract set forth an initial term of employment of three years, beginning December 1, 2008 and ending November 30, 2011. It automatically renewed each year beginning December 1, 2009, for “a new term consisting of the term then remaining ... plus an additional period of one (1) year,” creating a perpetual, rolling three-year term. (Contract § 2(C), R. p. 235.) Either party could elect not to renew the Contract by providing written notice at least 90 days before the next renewal date, in which case Cunningham would still be employed for the remaining two years of his term. (*Id.*)

The Contract further provided that the County could terminate Cunningham only for cause, defined as “the conviction of the Administrator of any crime involving personal gain to himself, any crime involving moral turpitude (as defined in South Carolina state law) or the refusal of the Administrator to perform the duties of this office.” (Contract § 3(A), R. p. 236.) Termination in any other manner was deemed to be “without cause” and entitled Cunningham to severance pay as follows:

- “[A]ll pay and financial benefits remaining on his contract for the balance of the contract period”;
- “[A]ll earned sick leave, vacation, holidays, compensatory time and other accrued benefits to date, calculated at the rate of pay in effect upon termination”;
- “[A]dditional severance pay ... computed at the rate of one month aggregate compensation for every two years of service [from] 1998”;
- “[A]ll life, health, dental, and disability insurance and all other County provided benefits ... for a period of six (6) months or until similar coverage is provided ... by a subsequent employer.”

(Contract § 3(B), R. p. 237.) Total severance was capped at 36 months “aggregate compensation,” which included at least Cunningham’s salary (\$125,000 in 2008, plus an annual increase of at least two percent), 401k matching (\$5,000 per year), and a vehicle allowance (\$700 per month) — a total of more than \$400,000.

(Contract §§ 4, 6, R. p. 238.)

In sum, the Contract between Cunningham and the lame-duck 2007

Council established Cunningham as the County Administrator for the entirety of the 2009 Council's term and for at least half of the 2011 Council's term. This was so even if the 2009 Council gave notice of non-renewal at the earliest opportunity (90 days before December 1, 2009), because the Contract provided that Cunningham could complete the remaining two years of the employment term. The only way for the 2009 Council to select an administrator of its own choosing would be to terminate Cunningham without cause, thereby incurring a huge liability for the severance payment.

The term of newly elected County Council began on January 4, 2009. At its first business meeting on January 6, 2009, the Council passed a resolution condemning the manner in which Cunningham was hired as the County Administrator by the previous County Council. (R. pp. 248-49.) Thereafter, the Personnel Committee met with Cunningham and offered him an at-will employment agreement, which Cunningham rejected. (R. pp. 265.) Cunningham also rejected a subsequent offer of employment as Assistant County Administrator while retaining his County Administrator salary. (R. p. 266.) At the County Council meeting of February 3, 2009, the Personnel Committee recommended that Cunningham be terminated and an interim County Administrator appointed. As was his right under state law, Cunningham requested a hearing on his termination. See S.C. Code Ann. § 4-9-620 (1986). That hearing was conducted on March 2, 2009, and at its conclusion the Council passed a resolution finalizing Cunningham's termination on the basis that the Contract was invalid. (R. pp. 272-75.)

Cunningham thereafter filed this action, claiming the County breached the Master Employment Agreement by terminating him without cause (Count I); the County wrongfully discharged him in violation of public policy (Count II); and the County violated the Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*

(Supp. 2010) (Count III).

The parties engaged in discovery, following which Cunningham moved for summary judgment as to liability on Count I. The County opposed this motion and filed its own motion seeking summary judgment on all counts of the Complaint. Cunningham then filed a second summary judgment motion, seeking summary judgment as to liability on Count III. The parties thoroughly briefed both motions. The Court conducted a hearing on March 10, 2011, and ruled in Anderson County's favor on all counts on May 13, 2011.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is proper when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP; *see Se. Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 693 S.E.2d 33, 35 (S.C. Ct. App. 2010) (“On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP.”). “Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*.” *Town of Summerville v. City of N. Charleston*, 662 S.E.2d 40, 41 (S.C. 2008).

II. CUNNINGHAM CANNOT PREVAIL ON A BREACH OF CONTRACT THEORY BECAUSE HE CANNOT ENFORCE A CONTRACT THAT IS VOID AS AGAINST PUBLIC POLICY.

“The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.” *White v. J.M. Brown Amusement Co.*, 601 S.E.2d 342, 345 (S.C. 2004). Because an illegal contract is not enforceable, neither party to the contract may bring an action for its breach. *See Ward v. West Oil Co.*, 692 S.E.2d 516, 519 (S.C. 2010). Here, the circuit court correctly determined that the Contract between Cunningham and the 2007 Council violated public policy, and thus was unenforceable, because it purported to bind successor councils in the exercise of governmental functions.

A. The Contract violates public policy because it impairs the right of the 2009 Council to appoint a County Administrator of its choosing.

An elected body must be free to perform its governmental duties in the

manner it determines is most beneficial to the public. *Piedmont Pub. Serv. Dist. v. Cowart*, 459 S.E.2d 876, 882 (S.C. Ct. App. 1995), *affirmed*, 478 S.E.2d 836 (S.C. 1996). A county council has the power “to exercise legislative or governmental functions ... as often as may be found needful or politic,” but “the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.” *Newman v. McCullough*, 46 S.E.2d 252, 255 (S.C. 1948). For this reason, a municipal government may not restrict its successors’ exercise of governmental (as opposed to proprietary) powers by entering into a contract that extends beyond the current term:

The general rule is that, if the contract involves the exercise of the municipal corporation’s business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.

Cowart, 459 S.E.2d at 880. “Last-minute contracts intended to bind a successor constitute a particularly egregious violation of public policy.” *State Street Bank & Trust Co. v. Pennsylvania*, 712 A.2d 811, 815 (Pa. Commw. Ct. 1998).²

The South Carolina Supreme Court recognized in *Cowart* that “the appointment and removal of public officers is a governmental function.” *Cowart*, 459 S.E.2d at 881. The appointment of a county administrator is unquestionably a governmental function. See *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) (“[T]he appointment of a county manager is precisely and unmistakably a governmental matter with the ... purview” of the rule that one county legislature cannot bind its successors.). Under the council-administrator form of

² *Cowart* forecloses Cunningham’s argument that the Contract is not binding because the County could terminate him at any time, and for any reason, if it paid the required severance. *Cowart*, 459 S.E.2d at 881 n.4.

government, the administrator “shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control.” S.C. Code Ann. § 4-9-620. The administrator’s duties include “execut[ing] the policies, directives and legislative actions *of the council*” and “perform[ing] such other duties as may be required *by the council*.” S.C. Code § 4-9-630 (1986) (emphasis added). In short, the county administrator’s job is to administer county government *as directed by the elected members of the county council*. When “the nature of an office or employment is such that it requires a municipal board or officer to exercise supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment constitutes exercise of a governmental function, and such contracts must not be extended beyond the life of the board.” 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29:102 (“McQuillin”).

B. The Home Rule Act does not permit a county council to force its choice of administrator upon a successor council.

Cunningham asserts that the common law rule against binding successor councils did not survive the advent of home rule in South Carolina. First, Cunningham argues generally that liberal construction of a county’s powers, as required under home rule, requires a conclusion that a county council has the power to bind its successor councils. Second, Cunningham argues specifically that the statutory grant of authority to employ a county administrator for a definite term must be construed as including the power to employ an administrator for a term exceeding the council’s own term. Cunningham is wrong on both counts.

1. *The abolition of Dillon's Rule did not affect the common law rule that a county council cannot control its successors' exercise of governmental powers.*

Historically, the powers of local governments (including counties) have been strictly construed under "Dillon's Rule," which provided:

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 804 (S.C. 1993).³ Dillon's Rule was abolished in South Carolina by the 1973 adoption of the Home Rule Amendment to our Constitution, under which the "Constitution and all laws concerning local government shall be liberally construed in their favor." S.C. Const. Art. VIII § 17. Under home rule, the powers of local government are not limited to those expressly granted but rather "include those fairly implied and not prohibited by this Constitution." *Id.* The constitutional mandate is echoed by the Home Rule Act of 1975, which provides in part, "The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." S.C. Code Ann. § 4-9-25 (Supp. 2010).

Dillon's Rule still applies to special purpose districts, such as the one at issue in *Cowart*. See *Evins v. Richland Cty. Historic Pres. Comm'n*, 532 S.E.2d 876, 878 & n.7 (S.C. 2000). Cunningham reasons that because Dillon's Rule no longer applies to counties, neither does the common law rule binding successor councils. But the two are apples and oranges. Dillon's Rule is a tenet of statutory

³ The rule is eponymously credited to Judge John F. Dillon, who first articulated it in his treatise on municipal corporations. *Id.* at 804 n.1 (citing John F. Dillon, *Commentaries on the Law of Municipal Corporations* (5th ed.) § 237 (1911).).

construction. See 2 McQuillin § 4:11; *S.C. State Ports Auth. v. Jasper Cty.*, 629 S.E.2d 624, 629 n.7 (S.C. 2006). The prohibition against binding successor governing bodies is not one of statutory construction; it protects the authority of democratically elected bodies to govern according to the mandate of the electorate.

2. *Liberal construction of the Home Rule Act favors the County's position, not Cunningham's.*

The Home Rule Act requires liberal construction of "[t]he powers of a county." S.C. Stat. Ann. § 4-9-25 (emphasis added). This provision reflects the basic concept that home rule counties "possess the full power of self government and look to the legislature not for grants of power, but only for limitations on their power." *Nelson v. City of Dallas*, 278 S.W.3d 90, 95 (Tex. Ct. App. 2009); see 1 McQuillin § 1:31 ("[U]nder home rule, counties have full power in the affairs of local self-government.")⁴ Home rule concerns the relationship between a county and the state; it says nothing about the relationship between one county council and its successors.

If the liberal-construction rule applies to this case at all, it favors the County's position, not Cunningham's. In Cunningham's view, this Court must broadly construe the 2007 Council's power in a way that correspondingly

⁴ Before home rule, county governments were largely controlled by the slow-moving and highly political state legislative delegations, which were ill-equipped to react to the rapid growth of unincorporated areas outside city lines. See generally James Lowell Underwood, *The Constitution of South Carolina, Volume II: The Journey Toward Local Self-Government* at 105-15 (1989). The Home Rule Amendment diminished the role of these delegations and gave county governments more policy-making flexibility, but it did not change the rule that local governments do not have inherent powers. *Id.* at 179.

Thus, the liberal construction of county powers under the Home Rule Act was intended to provide flexibility to local governments – not to permit outgoing county council members to force their own policy desires down the throats of their successors.

narrows the power of the 2009 Council. This cannot be what the Legislature intended in enacting § 4-9-25. See *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 670 S.E.2d 371, 373 (S.C. 2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). It is one thing to liberally construe a local government's powers *vis-à-vis* the Legislature, but quite another to expand the powers of one governing body in a way that diminishes the power of its successor. The 2009 Council's decision to exercise its common law authority to declare the Contract void is entitled to the same judicial deference as any other act of a county council.

3. *The statutory authority to employ an administrator for a definite term does not abrogate the common law rule against binding successor councils.*

Statutory language must be construed "in the light of common law rules"; such rules remain in full force and effect in South Carolina unless the legislature clearly indicates an intention to overrule them. *Coakley v. Tidewater Constr. Corp.*, 9 S.E.2d 724, 726 (S.C. 1940). It is presumed that the Legislature did not intend to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject. *Nuckolls v. Great Atlantic & Pacific Tea Co.*, 5 S.E.2d 862, 864 (S.C. 1939). This presumption is overcome only by clear and unambiguous language expressing the Legislature's intent to abrogate common law. *Coakley*, 9 S.E.2d at 726.

Section 4-9-620 does not unambiguously express the Legislature's intent to abrogate the common law rule that one county council may not bind its successor in the performance of governmental functions. Cf. *Morin*, 380 N.E.2d at 220 (holding that county charter abrogated common law rule by "specifically provid[ing] for appointment of the manager to a four-year term"). To the contrary, the statute and the common law are readily harmonized: A county

council may employ its chosen administrator for a definite term, so long as the term does not exceed that of the council. This harmonization of the statute and the common law comports with common sense; there is no reason why the Anderson County Administrator should be entitled to more job security than the members of the Anderson County Council, who must seek reelection every two years.

In contrast, Cunningham's interpretation of § 4-9-620 poses significant policy problems. Under his reading, § 4-9-620 gives a county council authority to employ a county administrator for a definite term of 5, 10, or even 20 years. In this case, Cunningham asserts the authority of the 2007 Council, "voted out of office and in its final hours," to establish him as the Anderson County Administrator for a minimum term encompassing the entirety of the newly-elected 2009 Council and the first year of the 2011 Council. *Falls Twp. v. McManamon*, 537 A.2d 946, 947-48 (Pa. Commw. Ct. 1988) (declaring invalid as against public policy a three-year contract between lame-duck township supervisors and police chief). Because "the authority of our elected officials to make changes mandated by the electorate" is a critical component of democratic government, § 4-9-620 should not be construed to eliminate "[t]he ability of incoming officials to change policies, procedures, and even key personnel of their predecessors." *Figuly v. City of Douglas*, 853 F. Supp. 381, 384 (D. Wyo. 1994), *affirmed*, 76 F.3d 1137 (10th Cir. 1996).

C. Cunningham's argument that payment of severance is a "proprietary function" is not preserved for appellate review.

Cunningham's argument that payment of severance is a proprietary function rather than a governmental one, Appellant's Br. at 17-18, is not preserved for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial

judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 497 S.E.2d 731, 733 (S.C. 1998) (emphasis added). Although Cunningham raised the proprietary-function argument to the circuit court, the court did not address this argument in its order. “When the issue was raised but not ruled upon, it became incumbent upon [Cunningham] to raise the issue in a Rule 59(e) motion.” *Chastain v. Hiltabidle*, 673 S.E.2d 826, 830 (S.C. Ct. App. 2009); see Rule 59(e), SCRCF. Cunningham did not file a Rule 59(e) motion asking the court to rule upon the issue. Because Cunningham has failed “to give the trial court a fair opportunity to rule on the issues,” he has not provided this Court with “a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 628 S.E.2d 902, 919 (S.C. Ct. App. 2006). Accordingly, the argument is not preserved.

Even if it were properly before the court, the argument is without merit. Cunningham cannot parse out the severance provision from the remainder of the Contract. Because the agreement to employ Cunningham is void and unenforceable, so too is any agreement to pay severance upon termination of employment.

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM’S WRONGFUL DISCHARGE CLAIM.

In the absence of an employment contract, employment in South Carolina is presumptively at-will. *Barron v. Labor Finders of S.C.*, 713 S.E.2d 634, 636 (S.C. 2011). “The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace.” *Grant v. Mount Vernon Mills, Inc.*, 634 S.E.2d 15, 19 (S.C. Ct. App. 2006). The doctrine applies broadly, entitling an employer to terminate an employee “for arbitrary, irrational, or no reason.” *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 215 (S.C. 1985); see *id.* at 214 (noting that under employment at-will, “the employer may discharge

employees for good cause, no cause, or even cause morally wrong"). South Carolina has recognized a narrow exception to the at-will employment doctrine: "[A]n at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination ... employee in violation of a clear mandate of public policy." *Barron*, 713 S.E.2d at 637; *Grant*, 634 S.E.2d at 19 (describing exceptions to at-will employment doctrine as "narrow").

Count II of Cunningham's complaint alleged that his termination violated public policy. The circuit court correctly granted summary judgment to the County because Cunningham has never claimed that he was an at-will employee, and therefore he cannot invoke the public policy exception. Additionally, the facts alleged by Cunningham are facially insufficient to establish a violation of public policy.

A. Only an at-will employee can maintain an action for wrongful discharge.

South Carolina law distinguishes between employment at-will, which may be terminated at any time, and employment for a definite term, which may be terminated only for cause. *See Stiles v. Am. Gen. Life Ins. Co.*, 516 S.E.2d 449, 451-52 (S.C. 1999) (Toal, J., concurring). An employee for a definite term cannot invoke the public policy exception because he has a remedy in the form of a breach of contract claim if he is terminated without cause. *See Epps v. Clarendon Cty.*, 405 S.E.2d 386, 387 (S.C. 1991) (holding that a wrongful discharge claim is not available to an employee who has an alternate remedy); *King v. Charleston Cty. Sch. Dist.*, 664 F. Supp. 2d 571, 584 (D.S.C. 2009) (holding that an employee for a definite term could bring a breach of contract action and therefore could not claim wrongful discharge).

Relying on *Stiles*, Cunningham asserts that he can bring a wrongful discharge claim even though the Contract provided for a definite term. *Stiles*

involved a wrongful discharge claim by a former employee whose contract “allowed either party to terminate ‘for any reason’ by giving 30 days written notice” but did not otherwise set a definite term of employment. *Stiles*, 516 S.E.2d at 450. The question for the South Carolina Supreme Court was, “Does the public policy exception ... apply to an at-will employment contract with a notice provision?” *Id.* The Court answered this question affirmatively, reasoning that “[t]he employee with a notice provision is in the same position as an at-will employee with the only difference being that the employer is required to give the employee notice prior to terminating employment.” *Id.* at 452. In her concurrence, then-Justice Toal articulated the critical difference between an at-will-with-notice employment contract and a definite-term employment contract:

[A]n employment agreement with a notice provision is basically an at-will agreement that, subject to a contingency, may become a contract for a definite term. Unlike the usual contract for a definite term, the worker is not guaranteed a specific term of employment, only that at a minimum he will have work for the term of the notice provision. ...

...

... Under a contract for a definite term the employee can only be fired for cause, whereas the at-will employee with a notice provision can quickly find himself jobless even if he is a model employee.

Stiles, 516 S.E.2d at 452-53 (Toal, J., concurring).

Ignoring the Contract’s plain terms, Cunningham maintains that the Contract is nothing more than an agreement for at-will employment with a notice provision, under which the County was free to terminate Cunningham for any reason or no reason, as long as it paid severance. Appellant’s Br. at 19. Cunningham relies on *Cape v. Greenville County School District*, 618 S.E.2d 881, 883 (S.C. 2005), in which the court held that “an express contract provision” can overcome “the presumption that employment for a definite term is terminable

only upon just cause.”

Cunningham’s Contract is nothing like the contract at issue in *Cape*, which was for a defined term (the 2001-02 school year) but provided, in all capital letters:

THIS IS AN AT-WILL EMPLOYMENT CONTRACT. IT MAY BE TERMINATED AT ANY TIME FOR ANY REASON OR FOR NO REASON EMPLOYEE AGREES THAT THERE EXISTS NO RIGHT TO CHALLENGE TERMINATION OF THIS CONTRACT BY EMPLOYER.

Cape, 618 S.E.2d at 882. In contrast, Cunningham’s Contract contains no express provision for termination at-will; in fact it plainly provides that Cunningham may be terminated only for cause. Section 2(A) of the Contract states that “[t]he Administrator serves at the pleasure of Council” but explicitly subjects the Council’s authority to terminate Cunningham “to the provisions set forth in Section 3, Paragraphs A, B, and C.” (Contract § 2(A), R. p. 235.) Section 3(A) sets forth “[g]rounds for termination with cause,” and § 3(B) provides that termination for any other reason is without cause, entitling Cunningham to severance. (Contract § 3(A), (B), R. pp. 236-37.). Additionally, the only notice provision in the Contract relates to its *nonrenewal* (in which case Cunningham would be entitled to serve the remaining two years of the employment term), not to termination. (Contract § 2(D), R. p. 237.)

Cunningham complains that it is improper for the County to challenge the validity of the Contract while simultaneously relying on its terms to oppose the wrongful discharge claim. If there is a problem, it is one of Cunningham’s own making. Cunningham could have asserted his wrongful discharge claim as an *alternative* to his breach of contract claim, *i.e.*, he could have alleged that if the Contract was void, then he was an at-will employee entitled to bring a wrongful discharge claim. Cunningham elected not to do so. Instead, he has always maintained that *the terms of the Contract* allow him to maintain both a breach of

contract claim and a wrongful discharge claim. (R. p. 147 (“[J]ust because you have a contract doesn’t mean you give up the right to sue in court.... *It’s not alternative causes of action.*” (emphasis added).) Since Cunningham has chosen to base his wrongful discharge claim on the language of the Contract, the County is entitled to establish that the Contract does not say what Cunningham claims it does.

B. Even if Cunningham could invoke the public policy exception, the facts he alleges would not entitle him to relief.

To establish a wrongful discharge claim, Cunningham must prove that his discharge was a retaliatory act that violated a “*clear mandate of public policy.*” *Barron*, 713 S.E.2d at 637 (emphasis added). Termination of an at-will employee violates public policy when “the employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law,” but the exception is not limited to these situations. *Id.* The question of what constitutes public policy is one of law for the court to decide. *Id.* at 638. “The primary source of the declaration of the public policy of the state is the General Assembly.” *Citizens’ Bank v. Heyward*, 133 S.E. 709, 713 (S.C. 1925).

As a matter of law, the facts alleged by Cunningham do not establish a violation of public policy. During his deposition, Cunningham testified that his wrongful discharge claim was based on the following events:

1. In November or December 2008, a council member-elect asked Cunningham, “If I were to give you a list of employees to fire, would you get rid of them?” Cunningham responded that doing so would be improper and described the process for terminating employees. Cunningham never saw the alleged list.

2. In November 2008, while Preston was still the county administrator, a contract was awarded to demolish the old Broadway Lake Community Center and erect a new building. In December 2008, Cunningham was contacted regarding the project separately by one council member-elect and two sitting council members, with two of the three asking for demolition to be delayed

so that concerns about the bidding process could be investigated, and the third asking for demolition to proceed.

3. In January 2009, a council member asked Cunningham to "help him find a crook."

(R. pp. 333-40.)

None of these alleged actions, even if proven true, violates public policy. As to the hypothetical question about terminating unidentified employees, a county administrator's responsibility for personnel matters, S.C. Code Ann. § 4-9-630(7), (8), does not prohibit council members from discussing personnel matters with the administrator. *Cf. Antley v. Shepherd*, 532 S.E.2d 294, 298 (S.C. Ct. App.), *affirmed*, 564 S.E.2d 116 (S.C. 2002) (holding that county administrator's directives to county tax assessor not to file certain appeals did not violate public policy because the statutory provisions giving her authority to appeal did not give her sole discretion; therefore, the administrator or county council could adopt policies regarding which matters should not be appealed). As to the comments regarding the Broadway Lake project, Cunningham's evidence at best proves that he *believed* a directive to stop work on the project (if such a directive was given) would violate the law regarding the relationship between the county council and the administrator. A mere belief that an order violates the law or public policy, however, is not sufficient to state a claim for wrongful discharge. *See Antley*, 532 S.E.2d at 298. Finally, it cannot possibly be against public policy for a county administrator to be asked to lend assistance in ferreting out malfeasance.

In his complaint, Cunningham alleged that a council member stated that he "would need to do exactly what council members told him to do in order to remain employed." (R. p. 16.) Of course, doing what the county council directs him to do is a key duty of the county administrator. S.C. Code Ann. § 4-9-630(2) (providing that the duties of the county administrator include executing the

"policies, directives and legislative actions of the council"). Therefore, any council member is free to state his or her expectations to the administrator. Whether they are realistic expectations or not, merely stating them cannot possibly violate a clear mandate of public policy.

IV. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S WAGE PAYMENT CLAIM.

The South Carolina Payment of Wages Act requires an employer to "pay all wages due to the employee" no later than 30 days after separation. S.C. Code Ann. § 41-10-50 (Supp. 2010). The Act defines wages as "all amounts at which labor is recompensed ... and includes vacation holiday and sick leave payments which are due to an employee under any employment policy or employment contract." S.C. Code Ann. § 41-10-10(2) (Supp. 2010). In 1990, the Legislature amended the Act to remove "severance" from the definition of wages. *See* S.C. Code Ann. § 41-10-10 note ("Effect of Amendment").

Cunningham initially claimed that the County had violated the Act by failing to pay him accrued vacation and sick leave. (R. p. 21.) During discovery, Cunningham admitted that the County paid him all of his accrued vacation pay (R. pp. 326-27) but continued to claim that he was entitled to accrued sick leave. (R. pp. 327-28.) Cunningham acknowledged that county employees are not paid for unused sick leave when they leave county employment, and he agreed that "any claim ... for sick leave would be based on the severance provisions" of the Contract. (R. p. 330; *see* R. p. 331.)

The circuit court granted summary judgment to the County on the basis that the claim for sick leave rested on the severance provision of the Contract, and (1) Cunningham could not enforce the severance provision of a void contract, and (2) severance is not "wages" under the Wage Payment Act. The court did not address Cunningham's argument that the Contract's severability

provision (Contract § 17(D), R. pp. 241-42) somehow salvaged his claim for payment of sick leave.

A. Cunningham's Wage Payment claim fails because his claim for sick leave is based on the severance provision of the Contract, but severance is excluded from the definition of "wages."

Cunningham argues that payment for accrued sick leave "was a benefit ... in addition to the severance package." Appellant's Br. at 21. This argument rests on a gross misreading of the Contract, which unambiguously includes payment of accrued sick leave as part of Cunningham's severance:

[If Cunningham is terminated without cause, he] shall be entitled to all pay and financial benefits remaining on his contract for the balance of the contract period ... *as severance pay* for such termination without cause. *In addition*, the Administrator shall also be compensated for all earned sick leave, vacation, holidays, compensatory time and other accrued benefits to date The Administrator shall receive *additional severance pay under this paragraph*, based upon the length of his total service to the County.

(Contract § 3(B), R. p. 237 (emphasis added).) Section 3(B) further provides for continued medical and life insurance coverage, concluding, "Coverage under COBRA shall begin on the date all coverage extended *under the severance provisions herein* expire." (*Id.* (emphasis added).)

Cunningham does not claim that the Contract is ambiguous. "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 373 S.E.2d 584, 586 (S.C. 1988). The court should not consider any part of it in isolation but rather "should construe the contract as a whole, and read together different provisions dealing with the same subject matter." *Buice v. WMA Securities, Inc.*, 668 S.E.2d 430, 434 (S.C. Ct. App. 2008); cf. *Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 542 (S.C. Ct. App. 2008) ("In determining as a

matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways.”).

The Contract plainly provides for payment for accrued sick leave as part of severance for termination without cause. The sentence regarding payment for accrued sick leave appears between two sentences identifying certain items as “severance pay,” and it states that payment for accrued sick leave is “[i]n addition to” the first item of severance. In its ordinary and popular sense, § 3(B) is solely concerned with severance pay. This is all the more clear in light of § 17(C) of the Contract, which provides that the Administrator receives the same sick leave and vacation benefits as other county department heads, “including provisions governing payment therefore on termination of employment,” except as provided elsewhere in the Contract. (Contract § 17(C), R. p. 241.)

Cunningham cannot enforce the severance provision of a contract that is void as against public policy. Additionally, and regardless of the Contract’s invalidity, payment for sick leave benefits was unambiguously part of the Contract’s severance provision. Because severance is not included in wages under the Wage Payment Act, the circuit court properly granted summary judgment to the County on Cunningham’s wage payment claim.

B. Cunningham failed to preserve his argument that the Contract’s severability provision rescues his Wage Payment claim.

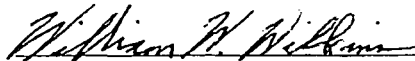
Cunningham argues that the severability provision of the Contract preserves his claim to accrued leave. Appellant’s Br. at 22. Although Cunningham raised this argument to the circuit court, the court did not address severability in its order. Because Cunningham did not raise the issue in a Rule 59(e) motion, it is not preserved for appellate review. See *Wilder Corp.*, 497 S.E.2d at 733 (“It is axiomatic that an issue cannot be raised for the first time on appeal,

but must have been raised to *and ruled upon* by the trial judge to be preserved for appellate review." (emphasis added)); *Chastain*, 673 S.E.2d at 830 ("When the issue was raised but not ruled upon, it became incumbent upon [Appellant] to raise the issue in a Rule 59(e) motion.").

CONCLUSION

For the reasons set forth above, the County asks this Court to affirm the circuit court's decision granting summary judgment to the County on all claims.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-1693

Michael Cunningham, ... Appellant,

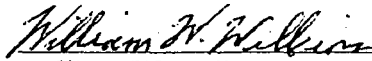
v.

Anderson County, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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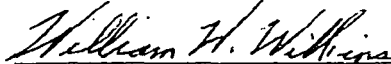
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with South Carolina Supreme Court's August 13, 2007 Order.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Anderson County, South Carolina

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing Final Brief of Respondent on Appellant by depositing a copy of same in the United States Mail, postage prepaid, on December 20, 2011, addressed to his attorneys of record as follows:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

2009-CP-04-01693

Michael Cunningham, ... Appellant,

v.

Anderson County, ... Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

Mr. Cunningham adheres to the arguments he made in his Brief of Appellant. However, Mr. Cunningham files this Reply to respond to assertions and arguments Anderson County made in its Brief of Respondent.

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S CLAIM FOR BREACH OF CONTRACT ON THE GROUND THAT THE CONTRACT WAS INVALID AS A MATTER OF LAW

Mr. Cunningham challenges the trial court's ruling that his contract with the County was void and unenforceable in violation of the "term limits" rule as set forth in *Newman v. McCullough*, 212 S.C. 17, 46 S.E.2d 252 (1948) and *Piedmont Public Service Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996) ("*Cowart II*"). Mr. Cunningham would like to address, however, several arguments the County sets forth in support of the trial court's order.

In its Brief, Anderson County asserts:

The Contract further provided that the County could terminate [Mr.] Cunningham only for cause, defined as "the conviction of the Administrator of any crime involving personal gain to himself, any crime involving moral turpitude (as defined in South Carolina state law) or the refusal of the Administrator to perform the duties of this office." (Contract § 3(A)).

(Respondent's Brief p. 3) (underline added). The County also contends the Contract "established [Mr.] Cunningham as the County Administrator for the entirety of the 2009 Council's term and for at least half of the 2011 Council's term." (Respondent's Brief p. 4). These statements mischaracterize the actual terms of the Contract.

The Contract actually provided in part:

The Administrator serves at the pleasure of Council, and nothing in

this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, Paragraphs A, B, and C of this Agreement [i.e., the severance provisions].

(R.p.235). Therefore Mr. Cunningham's employment was still "at will," and did not outline the "only reasons" for which the County could terminate his employment.

Rather than limiting the reasons for which Mr. Cunningham could be fired, the Contract provided for severance if Mr. Cunningham was terminated for reasons that did not constitute "cause," which the Contract limited to serious matters such as criminal convictions and refusal to perform the duties of Administrator. (R.p.236, Sections 3(A) and 3(B)). Nothing precluded the County's ability to terminate the agreement at any time, for any reason, for no reason, or even for improper reason. The County concedes as much when it admits it could terminate Mr. Cunningham without cause, although it would incur liability for the severance payment it agreed to pay. (Respondent's Brief p. 4)..

The County asserts in a footnote that "*Cowart* forecloses [Mr.] Cunningham's argument that the Contract is not binding because the County could terminate him at any time, and for any reason, if it paid the required severance. *Cowart*, 459 S.E.2d at 881 n. 4." What the Court of Appeals actually stated in footnote 4 was "[w]hile the employment agreement between *Cowart* and the District allows the District to terminate *Cowart* for any reason, the five year notice and severance provisions foreclose any argument that the agreement in fact does not tie the hands of the District." The agreement in *Cowart* mandated payment of severance for five years no matter the reason for termination, even if Mr. *Cowart* breached the employment agreement (i.e., was terminated for cause). Furthermore, the Court of Appeals cited to no authority for this statement in a footnote,

and the Supreme Court certainly did not adopt this reasoning in its version of *Cowart*.

The County cites to *State Street Bank & Trust Co. v. Commonwealth of Pennsylvania*, 712 A.2d 811 (Pa. Commw. Ct. 1998) for the rule that “last minute contracts intended to bind a successor constitute a particularly egregious violation of public policy.” (Respondent’s Brief p. 7). *State Street*, however, is meaningfully distinguishable from this case. There, the Pennsylvania Commonwealth Court essentially applied Dillon’s Rule, which has been abrogated for municipalities in South Carolina.

Furthermore, unlike the case before this Court, the parties in *State Street* agreed that neither party could unilaterally terminate either agreement. The Court in *State Street* found “[t]he intent of the amendments [to existing agreements] was to extend the agreements beyond the predecessor’s term and to prevent the Treasurer Hafer from terminating the agreements for the duration of her term of office.” 712 A.2d at 815. That is, the agreements in *State Street* actually prevented the government from terminating the agreement for any reason, whereas in this case the County maintained the right to terminate Mr. Cunningham at will at any time.

The County also cites to several older cases in South Carolina that stand for the proposition that common law rules remain in full force and effect unless the legislature clearly indicates an intention to overrule them. (Respondent’s Brief p. 11). The County effectively argues that the Home Rule provisions did not expressly overrule application of Dillon’s Rule to county governments. (Respondent’s Brief pp. 11-12). The Supreme Court has stated, however, that general rules of construction will not be applied where they would have the effect of resurrecting Dillon’s Rule, a common law rule that was overruled by Home Rule. *South Carolina State Ports Authority v. Jasper County*, 368

S.C. 388, 399 n 7, 629 S.E.2d 624, 629 n 7 (2006).

The County contends its “council may employ its chosen administrator for a definite term, so long as the term does not exceed that of the council.” (Respondent’s Brief pp. 11-12). This argument ignores Mr. Cunningham’s contention that while he serves at the pleasure of the council and may be terminated at any time for any reason, the severance provisions to which the County’s council agreed are binding and enforceable so long as Mr. Cunningham was not terminated for cause as defined in the agreement.

The County also contends Mr. Cunningham’s argument that the payment of severance was a proprietary function rather than a governmental function is not preserved for appellate review. (Respondent’s Brief pp. 11-12). This Court should reject this argument.

The County concedes Mr. Cunningham made this argument to the trial court but contends the court did not address the argument in its order. (Respondent’s Brief p. 13). In fact, the trial court stated “[a]mong the most important responsibilities of a County Council is the appointment of the County Administrator.” (R.p.6). The trial court outlined what it perceived were the duties of an administrator and added, “[f]or all of these reasons, the appointment of a county administrator is undoubtedly a governmental function.” (R.p.7). In rejecting Mr. Cunningham’s argument that even if Dillon’s Rule applied, the *Newman* exception validated the contract, the court pointed to the following language from that case:

[N]o power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must

transmit them unimpaired to their successors. * * * As a general rule, the appointment and removal of public officers is a governmental function, and a municipal council cannot engage a public officer by contract for a term extending beyond that of its own members, so as to impair the right of their successors to remove such officer and to appoint another in his place.'

Newman, 212 S.C. at 23, 46 S.E.2d at 255 (underline added). (R.p.8). Thus, contrary to the County's argument, the trial court did, in fact, reject Mr. Cunningham's contention that what he sought was actually the proprietary function of paying his severance, not the governmental function of hiring an administrator.

For the reasons stated in Mr. Cunningham's Brief of Appellant and this Reply, the Court should rule that the Contract the County entered into with him was valid under either Home Rule or the *Newman* exception to Dillon's Rule and the severance provisions therein were enforceable. The Court should reverse the trial court's grant of summary judgment to the County, and remand the matter for further proceedings consistent with this Court's mandate.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S CLAIM FOR WRONGFUL DISCHARGE BASED UPON THE COURT'S RULING THAT THE PUBLIC POLICY EXCEPTION TO TERMINATION OF EMPLOYMENT WAS NOT AVAILABLE BECAUSE CUNNINGHAM WAS NOT AN "AT WILL" EMPLOYEE

Mr. Cunningham adheres to his arguments that (1) the public policy exception is not limited to employment at-will situations, (2) the existence of the written employment Contract in this case did not prevent Mr. Cunningham from remaining an at-will employee, and (3) the County should not be permitted to argue that the Contract is void and unenforceable but then use the Contract's existence to defeat Mr. Cunningham's wrongful discharge claim. Mr. Cunningham responds, however, to several assertions the County has made in its brief.

First, Mr. Cunningham would note that in Part II of its Argument, the County notes "[b]ecause an illegal contract is not enforceable, neither party to the contract may bring an action for its breach." (Respondent's Brief p. 6). This statement alone is a contention by the County that there is an "absence of an employment contract" in this matter. And without an enforceable employment contract, Mr. Cunningham's status was that of an at-will employee. See *Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 713 S.E.2d 634 (2011) (in South Carolina, employment at-will is presumed absent the creation of a specific contract of employment).

Incredibly the County then contends that Mr. Cunningham may not "invoke the public policy exception because he has a remedy in the form of a breach of contract claim if he is terminated without cause." (Respondent's Brief p. 14).

So which is it? Either he has an enforceable Contract under which he can sue for breach, or he has a void Contract rendering him at-will and able to "invoke the public

policy exception.” The County’s entire argument under this subsection is premised upon the terms of the very Contract the County (and the trial court) view as void and unenforceable. The County backtracks here, however, by stating “if there is a problem, it is one of [Mr.] Cunningham’s own making” because of Mr. Cunningham’s assertion that he can allege both breach of the Contract and recovery under the public policy exception to employment at-will (since he was still at-will under the Contract); the County asserts it may then “establish that the Contract [which the County claims is void] does not say what [Mr.] Cunningham claims it does.”

This Court should not permit the County to avoid its obligations to Mr. Cunningham by engaging in such double-speak. The County attacked the enforceability of the Contract, and the trial court agreed and granted the County summary judgment on that basis. Although Mr. Cunningham disagrees that the public policy exception may not apply in light of the existence of the written Contract, Mr. Cunningham also contends he should be able to pursue claims under the public policy exception under the facts of this case.

Finally, the County contends that the facts Mr. Cunningham alleged would not entitle him to relief even if the public policy exception applied. To begin with, the sole ground the County asserted in support of its motion for summary judgment on this count of the complaint was that the claim was unavailable as a matter of law. This was also the only ground the parties argued, and the court ruled upon.

Furthermore, this matter is before this Court on review of a grant of summary judgment, which requires this Court to give all deference to Mr. Cunningham when reviewing whether there exists a mere scintilla of evidence to withstand the motion. *Bass*

v. *GOPAL, Inc.*, Op. No. 27054 (S.C. Sup. Ct. filed Oct. 10, 2011) (Shearouse Adv. Sh. No. 35 at 45) (in determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party; where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment).

Here, Mr. Cunningham asserted the County improperly conditioned his continued employment on his agreement to implement directives of individual council members, including those that violate actions directed by the body itself, and to engage in acts that would violate S.C. Code Ann. § 16-17-560 (Supp. 2010) (creating a misdemeanor for intimidating a citizen for political beliefs or exercising political rights and privileges). (R.p.20, ¶¶ 31-33). This included a council member-elect telling Mr. Cunningham he had a list of employees he wanted Mr. Cunningham to “get rid of” without following proper procedure, two members directed Mr. Cunningham to interfere with an existing contract to demolish the old Broadway Lake Community Center building, and another council member who asked Mr. Cunningham to “help him find a crook.” (R.pp.333-340).

Mr. Cunningham’s claims fall within the reach of the public policy exception as recently expressed by the Supreme Court. See *Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 713 S.E.2d 634 (2011) (while 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, the public policy exception is not limited to these situations).

Accordingly, the Court should reverse the trial court's ruling and remand this matter for further proceedings.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON CUNNINGHAM'S WAGE PAYMENT CLAIM BASED UPON THE COURT'S RULING THAT THE ACCRUED VACATION AND SICK LEAVE WERE NOT "WAGES" UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT

Mr. Cunningham stands on the arguments he made in his Brief of Appellant.

However, Mr. Cunningham would reply to the County's claim that Mr. Cunningham's argument regarding the severability provision was not preserved. (Respondent's Brief pp. 21-22).

The County concedes that Mr. Cunningham raised this point to the circuit court, but asserts the circuit court did not address it. In fact, the circuit court first held Mr. Cunningham could not recover under any portion of the severance owed "resulting from the termination of a void contract." (R.p.12). The trial court held the contract included payment for accrued leave as a portion of severance so that payment was not "wages" under the Payment of Wages Act. (R.pp.12-13). There is no dispute that the trial court viewed the Contract in its entirety was void and not enforceable. It was not incumbent upon Mr. Cunningham to parade this point back before the trial court where to do so would have been a futile act. *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000).

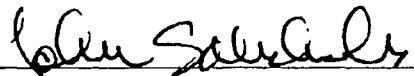
This Court should reject the County's argument, reverse the trial court's grant of summary judgment for the County on this claim, and remand the matter for further proceedings consistent with this Court's directive.

CONCLUSION

For the reasons stated in the Brief of Appellant and this Reply Brief, the Court should reverse the judgment of the circuit court and remand the matter for further proceedings.

Respectfully submitted,

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