STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

APPELLATE CASE NO. 2015-002533

TRIAL CASE NO. 12-CP-26-4852

Jacklyn J. Donevant . .....Respondent

v.

Town of Surfside Beach. ..... Petitioner

PETITIONER'S REPLY BRIEF TO THE SUPREME COURT

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Donevant is trying to avoid the fact that she is, in fact, asking the court to dramatically expand the public policy exception to at-will employment

Donevant's Responsive Brief is a study in misdirection. The only question that needs to be examined is whether Donevant's authority to issue a stop work order was discretionary. If it is, then *Antley v. Shepherd* applies and Donevant cannot assert a public policy discharge claim. 349 S.C. 600, 532 S.E.2d 294, 297 (2000). The Town ordinance authorizing stop work orders states that the Building Official "is authorized" to issue stop work orders. That language is discretionary and, therefore, Donevant has no public policy claim. All of Donevant's discussion of evidence suggesting (1) she needed to issue the stop work order, (2) she would have been disciplined had she not issued the order, (3) she was the only one with authority to issue the order, and (4) other provisions of the building code required her, as a general principle, to enforce the building codes, is simply irrelevant. Once this court focuses on the only relevant question (what the stop work ordinance states) the decision is clear.

The court should also not be swayed by Donevant's implied entreaty asking the court to prohibit governments from interfering with duties given by law to employees. Government, as employer, cannot function without the ability to control how an employee executes duties authorized by law. This court has already made clear that a government does have that right if the duty is discretionary. To rule to the contrary is to make every governmental employee with some duty authorized by law unanswerable for their actions. In this case, the court of appeals has created a large class of government employees immune from oversight. This is a tremendous erosion of the at-will employment rule and will give rise to despotic bureaucracy which neither the government nor the people can regulate.

Donevant continues to raise the straw-man argument that the Town falsely asserts that the public-policy exception has been expressly limited to certain situations by this court. This is simply incorrect. This argument is a straw-man because Donevant thinks that, by knocking it down, she proves that the tort has been applied and approved for fact situations beyond those in which (1) the employer requires the employee to violate criminal law, or (2) the reason for the employee's termination itself is a violation of criminal law. The truth is that the Town has repeatedly acknowledged that this court has held the tort is not limited to these situations. Donevant has, however, repeatedly ignored the fact that the tort has not been expressly applied beyond these two situations. This case is the first one in which the court must decide if the tort is to be applied outside the above two circumstances.

As the Town has acknowledged, this court, and the court of appeals, have held, that the public policy exception to the at-will employment rule has not been limited to the above two situations. However, these courts did not expand the exception. This court has only held that dismissal of unique public policy discharge arguments (not involving criminal penalties) on 12(b)(6) motions was premature and that the tort has not yet been limited to the above two circumstances. *Garner v. Morrison Knudsen Corp.* 318 S.C. 223, 456 S.E.2d 907 (1995) and *Keiger v. Citgo Coastal Petroleum*, 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997); *Barron v. Labor Finders*, 393 S.C. 609, 713 S.E.2d 634 (2011).

In *Garner*, the plaintiff alleged termination in retaliation for reporting radioactive contamination and, in *Keiger*, the employee alleged termination in retaliation for reporting wage payment concerns to the South Carolina Department of Labor. Neither of these situations fit within the two prongs identified in *Ludwick* and other cases. The appeal courts reversed dismissals based on S.C. R. Civ. P. 12(b)(6) only because the courts felt the issues were novel

and required development through discovery. These courts specifically held that they were not expanding the tort of public policy discharge.

> Because the facts of this case have not been fully developed, we do not address the ultimate question whether the public policy exception to the employment at-will doctrine is applicable in this case.

Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907, 910 (1995).

> The Barron court found the public policy exception is not limited to these two situations; however, the exception has not yet been extended beyond them.

McNeil v. S. Carolina Dep't of Corr., 404 S.C. 186, 743 S.E.2d 843, 846 (Ct. App. 2013), reh'g denied (June 25, 2013).

In *Baron*, the employee alleged retaliation for making a complaint about compensation in violation of the public policy expressed in the Fair Labor Standards Act. Donevant argues that this case clearly expanded wrongful discharge beyond the two original limitations. It is true that this court held that the court of appeals erred in holding that wrongful discharge was limited to the two limitations. However, the court upheld the court of appeals on other grounds and did not actually hold that Baron could assert wrongful discharge. The court specifically held that Baron only "may" have a cause of action.

Donevant also argues that *Culler v. Blue Ridge Elec. Co-op., Inc.*, stands for the proposition that wrongful discharge has already been expanded beyond the original two limitations. 309 S.C. 243, 422 S.E.2d 91 (1992). In that case, Culler argued he was fired for refusing to contribute to a political fund. However, the court noted that S.C. Code § 16-17-560 specifically made it a crime to discharge a person because of political beliefs. Therefore, Culler's actions fit within the second original limitation. In any event, this court affirmed the decision against Culler on the trial court's finding that Culler's refusal to contribute to the

political fund was not why he was terminated. Once again, therefore, the tort was not actually expanded in that case.

So, although it is true that the tort has not been expressly limited to the above two exceptions, neither has it been applied beyond them. If this court affirms the verdict in this case, then the exception, for the first time, will be expressly expanded.

What Donevant seeks to avoid stating is that she is asking this court to expand the public policy exception to at-will employment far beyond how it has been applied to date. Unlike in *Garner* and *Keiger*, Donevant's public policy theory went to trial. Unlike in *Barron*, the trial court incorrectly upheld the wrongful discharge claim. To affirm, this court must, for the first time, expand the exception. In this case, that means expanding it to give an exception to at-will employment to every bureaucrat in the state who has some statutory or regulatory authority. The court should decline this invitation.

This case cannot be distinguished from *Antley v. Shepherd*

In *Antley v. Shepherd*, this court held that the public policy exception does not apply to government employees just because they have a legal "right" to exercise some duty. *Antley v. Shepherd*, 340 S.C. 541, 532 S.E.2d 294, 297 (2000) (aff'd as modified 564 S.E.2d 116 (2002)). Donevant is trying to distinguish herself from *Antley* in several ways. First, Donevant argues that she had an "unfettered" right to issue a stop work order whereas Antley's right to pursue tax appeals was discretionary. A quick view of the sources of Antley's and Donevant's authority clearly shows this argument is untenable.

Antley's Authority to Pursue Tax Appeals

> The assessor is responsible for the operations of his office and **shall . . . have the right of appeal** from a disapproval of or modification of an appraisal made by him . . ..[1]

Donevant's Authority to Issue a Stop Work Order

> Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.[2] [3]

Donevant had no greater leeway to issue a stop work order than Antley had to pursue appeals. In fact, the statutory expression of Antley's duty as a "right" is far stronger than the regulatory expression that Donevant "is authorized" to issue a stop work order.

Donevant cites testimony of some co-workers, and her expert, to support the argument that her authority was unfettered. Even if the testimony could be construed that way, the scope of her authority is a legal question—not a fact question. It is one for the court to decide. *See, e.g., Rauton v. Pullman Co.,* 183 S.C. 495, 191 S.E. 416, 420 (1937) ("any evidence by an expert as to the meaning of these statutes would be incompetent."); *Kirkland v. Peoples Gas Co.,* 269 S.C. 431, 237 S.E.2d 772 (1977) (an expert is not allowed to interpret regulations of the

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[1] S.C. Code Ann. § 12-37-90. (emphasis added).

[2] Donevant points out that the correct version of the Building Code is the 2006 version. This is true. It appears, however, from the numbering, that the 2012 version was used at trial. The section numbering, of at least some exhibits used at trial, are consistent with the 2012 version. (R. 423). Fortunately, there does not appear to be any difference in the language of the 2006 versus 2012 versions of any section relevant to this case.

[3] (R. 423) From Section 115 of the International Building Code adopted by the Town of Surfside Beach. (emphasis added).

Department of Transportation) ; *Narruhn v. Alea London Ltd.,* 404 S.C. 337, 745 S.E.2d 90, 93 (2013) ("court is obligated to follow and to enforce the stated meaning [of the statute]"); *Barth v. Barth*, 360 S.E.2d 309, 311 (S.C. 1987) (It is the right and duty of this court to interpret statutes . . .."); *Benat v. State Farm Mut. Ins. Co.,* 286 S.C. 132, 333 S.E.2d 57, 58 (1985) ("It is the duty of this court to interpret the [statutory] law.").

Donevant argues that the Town did not preserve the argument that the court incorrectly cited her expert's testimony on the meaning of Section 115. This issue, however, has been preserved. It was specifically raised during trial at the time the expert testified (R. 130), in the Directed Verdict Motion (R. 257), upon renewal of the Directed Verdict Motion (R. 356), in the Town's brief to the court of appeals (p. 14), in the Town's Petition for Rehearing (p. 13), and in the Town's Petition for Writ (p. 13). The point was a subset of the Town's overall argument that the court should not expand wrongful discharge beyond the circumstances in which the employee might be subject to a penalty imposed by law. The expert's testimony that the law would impose such a penalty is clearly encompassed within this issue. A party is not required to list all the arguments "fairly encompassed" in an Issue on Appeal. See *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.") (cited by *Brown v. Spring Valley Homeowners Ass'n, Inc.*, No. 2014-002587, 2016 WL 3595791, at *1 (S.C. Ct. App. June 29, 2016) (unpublished)). Furthermore, "[Even] where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments." *Henson v. Int'l Paper Co.,* 358 S.C. 133, 141, 594 S.E.2d 499, 503 (Ct. App. 2004), aff'd as modified sub nom. *Henson ex rel. Hunt*

v. Int'l Paper Co., 374 S.C. 375, 650 S.E.2d 74 (2007) (citing Toal, Vafai, and Muckenfuss, *Appellate Practice In South Carolina* 75 (2d ed.2002)).

What matters, as in *Antley*, is what the ordinance states regarding Donenvant's authority. The ordinance manifestly makes the issuance of a stop work order discretionary.

> Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.

(R. 423) (P. Ex. 26) (emphasis added).

The inquiry as to the nature of Donevant's authority ends with the wording of this ordinance. It simply does not matter whether her authority was "unfettered" or if she might be subjected to discipline if she failed to issue a stop work order.

Donevant's authority to issue a stop work order was not unfettered

As stated above, it only matters whether or not Donevant was required by the ordinance to issue a stop work order. Clearly, according to the ordinance, the stop work order was discretionary. Donevant seeks to confuse this issue by arguing her authority was "unfettered." In other words, that no one else had authority to second-guess her or override her decision. As a matter of law, this is untrue. There is nothing in the building code that prevents the government (The Town) from reversing Donevant's stop work order. There is no language surrendering the Town's authority to govern employees. A government does not surrender its right to regulate an employee by granting that employee certain authority. That is the lesson of *Antley*. In fact, it is even clearer here because Donevant's authority came from the Town's ordinances and not higher statutes issued by the State. Additionally, Donevant ignores the fact that her situation at the Town was unique. Most Municipal building departments have more than one building official

and would have a supervisor with authority to overrule his or her subordinates. Donevant was in the unusual situation of being the only Surfside building official. Finally, the Town's ordinances provided for an appeal panel that could reverse Donevant's decisions. Section 113.1[4] of the building code provides:

> In order to hear and decide appeals of orders, decisions or determinations made by the *building official* relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals. The board of appeals shall be appointed by the applicable governing authority and shall hold office at its pleasure. The board shall adopt rules of procedure for conducting its business.[5]

The board of appeals could decide that Donevant was simply wrong in issuing a stop work order and overturn that decision.

For these reasons it is clear Donevant's discretion to issue a stop work order was not unfettered. Of course, once again, this question is really irrelevant to the appeal. What matters, under *Antley*, is whether or not the law required Donevant to issue a stop work order and the law (Town Ordinance) made such orders discretionary.

The public policy in favor of building codes and enforcement of those codes is not relevant to this case

Donevant argues at length that there is a strong public policy in favor of having, and enforcing, building codes. She refers to building codes being required of municipalities and of the strong "public policy" in favor of code implementation and enforcement.

The public policy in favor of building codes, and the enforcement of them, cannot be disputed. But the point is without purpose. The question is whether Donevant was required by law to issue a stop-work order. Even broadening the issue, would she be required to issue a stop-

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[4] Renumbered from section 112 in the 2006 code. The language is the same. See Appendix to Respondent's Brief. P. 8

[5] http://publicecodes.cyberregs.com/icod/ibc/2012/icod_ibc_2012_1_sec015.htm

work order to effectively enforce the building codes? The answer to that question is clearly no. Even Donevant admitted she had discretion when to issue stop-work orders and did not do so every time the building code was violated. (R. 122). Her replacement also testified that he used his discretion and did not always issue stop work orders. (R. 250-252).

The general public policy supporting the codes is simply not in question.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals on Donevant's claim that she was terminated in violation of public policy should be reversed.

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June 21, 2017

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PROOF OF SERVICE

The foregoing Petitioner's Reply Brief was served on Respondent, via first class mail, postage prepaid and addressed to Plaintiff's counsel of record:

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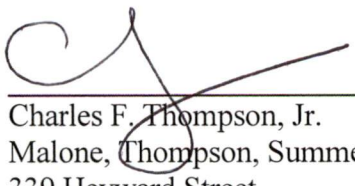

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