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EMPLOYMENT LAW

I. COURT OF APPEALS RECOGNIZES ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN EMPLOYMENT CONTRACT

In *Shelton v. Oscar Mayer Foods Corp.*¹ the South Carolina Court of Appeals recognized a cause of action for breach of the implied covenant of good faith and fair dealing in an employment contract. Specifically, the court held that if a plaintiff-former employee can show that some “contract” has altered his employment-at-will status, then he may also state a cause of action for breach of the implied covenant of good faith and fair dealing.² This decision will have a substantial impact on employer liability in “employment handbook” cases.³

Julian Shelton was an employee at the Louis Rich processing plant in Newberry. He received the company’s 1979 employee handbook when he was hired. The handbook contained guidelines and procedures that the company claimed to follow in firing employees. Louis Rich amended the handbook in 1983 and inserted a disclaimer stating that the handbook did not form an employment contract between the company and its employees.⁴ Except for inserting the disclaimer in the newly issued handbook, the company did not inform its employees of the changes. In 1987, a Louis Rich security guard reported that he had observed Shelton and a co-worker smoking marijuana in the co-worker’s van that was parked in the company lot. Relying on this report, Louis Rich fired Shelton.⁵ Shelton sued, claiming that Louis Rich failed to ensure enforcement of its rules and policies “fairly and equally with regard to all employees.”⁶

1. ___ S.C. ___, 459 S.E.2d 851 (Ct. App. 1995), *cert. granted*, Davis Adv. Sheets No. 2312 (Apr. 4, 1996).

2. *Id.* at ___, 459 S.E.2d at 857.

3. South Carolina first recognized this exception to the general employment-at-will rule in *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 453 (1987). Many employers provide their employees with policy manuals or handbooks outlining company rules and procedures. The typical “employee handbook” case arises when a fired employee sues — claiming the employer did not follow its procedures in terminating the employee. Many courts, including the *Springs* court, have concluded that it is unjust for an employer “to couch a handbook, bulletin, or other similar material in mandatory terms” and then “ignore these very policies.” *Id.* at 485, 357 S.E.2d at 455. In order to rectify this “gross inequality,” the court held that a handbook can alter the at-will employment status. *Id.* For further discussion of this doctrine, see Thomas R. Haggard, *Employee Handbooks—Still Evolving in South Carolina Law*, 5 S.C. LAW. SEPT./OCT. 1993, at 23.

4. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 853.

5. *Id.* at ___, 459 S.E.2d at 853.

6. *Id.* at ___, 459 S.E.2d at 854 (quoting the employee handbook).

Shelton's suit raised several claims: breach of contract, breach of contract accompanied by a fraudulent act, fraudulent misrepresentation, and breach of the covenant of good faith and fair dealing.⁷ He also claimed that Louis Rich was collaterally estopped from relitigating factual issues decided by the South Carolina Employment Security Commission (ESC) during a contested hearing.⁸ The trial court granted Louis Rich's motion for a directed verdict on the breach of contract claim and disposed of the remaining claims on motions to dismiss and for summary judgment.⁹ Shelton appealed.

The court of appeals addressed Shelton's collateral estoppel argument directly by announcing a clear rule as to the estoppel effect of ESC fact-finding.¹⁰ After considering the purpose of the unemployment compensation statute,¹¹ the court held that ESC findings would not estop relitigation in a subsequent trial because such an estoppel would frustrate the primary purpose of ESC proceedings—to provide benefits to an employee as quickly as possible.¹² Furthermore, the court decided that administrative hearings should not have estoppel effect because the usually small stakes are less likely to encourage full and fair litigation.¹³ The ruling leaves parties free to pursue any claims and defenses in the circuit court and does not hamper the more expedient administrative process.

The court of appeals then reversed the trial court's decision on the breach of contract claim.¹⁴ The court relied on *Small v. Springs Industries, Inc.*¹⁵

7. *Id.* at ___, 459 S.E.2d at 853.

8. *Id.* at ___, 459 S.E.2d at 854.

9. *Id.* at ___, 459 S.E.2d at 853.

10. *Id.* at ___, 459 S.E.2d at 855.

11. See S.C. CODE ANN. § 41-27-20 (Law. Co-op. 1986) (providing for the "compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own").

12. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 855. The court also relied on several cases from other jurisdictions. *Id.* at ___, 459 S.E.2d at 855 & n.2. Most explicitly, the court gave weight to *California Department of Human Resources Development v. Java*, 402 U.S. 121, 135 (1971), in which the Supreme Court stated that the purpose of employment security hearings was to get money to an employee as soon as possible. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 854.

13. *Shelton*, ___ S.C. at ___, 459 S.E.2d 855. In its first footnote, the court distinguished *Bennett v. South Carolina Department of Corrections*, 305 S.C. 310, 312-13, 408 S.E.2d 230, 231-32 (1991), in which the supreme court held that collateral estoppel does apply to facts litigated before the State Employee Grievance Committee. The *Shelton* court distinguished *Bennett* on a number of factors. First, the court noted that when attacking a discharge decision, state employees are required to bring their claims before the grievance committee; however, state employees go before the ESC only to determine unemployment benefits. Second, the grievance committee hearings are more in the nature of a full evidentiary hearing, but ESC proceedings are more in the nature of a "summary proceeding." *Shelton*, ___ S.C. at ___, 459 S.E.2d at 854 n.1. Third, *Bennett*, the discharged employee, did not appeal the grievance committee's findings of fact, and because he did not take the administrative process to its full conclusion, he was estopped from relitigating identical factual issues in the circuit court.

14. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 856.

and its progeny to hold that the Louis Rich's 1979 handbook could have been an employment contract and that the trial court should have submitted the issue to the jury.¹⁶ The court focused on the language of the 1979 handbook and found that Louis Rich wrote it in mandatory terms.¹⁷ In the court's opinion, this was "not a case where the employer ha[d] merely made general, gratuitous assurances of fair dealing Rather, it [wa]s a case where the employer, by inserting mandatory language in its employee handbook, ha[d] expressly guaranteed its employees that it [would] implement and adhere to the rules outlined in the handbook."¹⁸

The court then addressed an issue that the trial court did not reach because of its dismissal of the breach of the contract claim: whether the disclaimer in the 1983 amended handbook effectively modified the 1979 version and whether Shelton had notice of the change.¹⁹ Relying on *Fleming v. Borden, Inc.*,²⁰ the court declined to hold, as a matter of law, that Shelton had "actual notice" of the disclaimer.²¹ *Fleming* permits an employer to alter the employment relationship through a handbook modification so long as each affected employee has "reasonable notice of the modification" which, in the employment context, means "actual notice."²² The court of appeals, noting that there was "no evidence that [Shelton] read and understood the disclaimer,"²³ remanded the case for a new trial on this issue.²⁴

The court affirmed the trial court's decision on Shelton's two fraud claims. Judge Goolsby, writing for the court, noted that there was "no

15. 292 S.C. 481, 357 S.E.2d 452 (1987).

16. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 855-56.

17. *Id.* at ___, 459 S.E.2d at 856. The court quoted the following language: "These rules are a fair way to protect everyone and the company will [e]nsure that these rules will be enforced fairly and equally with regard to all employees." *Id.* at ___, 459 S.E.2d at 856.

18. *Id.* at ___, 459 S.E.2d at 856. The employer, in its petition for certiorari, argued that the language in the handbook is not mandatory and cited *Mills v. Leath*, 709 F. Supp. 671 (D.S.C. 1988), as support for this proposition. Petition for Writ of Cert. of Petitioner/Respondent at 6-7. In *Mills*, there was language similar to that involved in *Shelton*; however, the district court held that it was not mandatory enough to create an employment contract and alter the employee's at-will status. See *Mills*, 709 F. Supp. at 674.

19. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 856-57. The disclaimer in the 1983 handbook read: "[I]t should also be recognized that the language used in this handbook is not intended to create a contract of employment and that employment is terminable at the will of either the employee or the employer." *Id.* at ___, 459 S.E.2d at 856.

20. 316 S.C. 452, 450 S.E.2d 589 (1994).

21. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 857.

22. *Fleming*, 316 S.C. at 463, 450 S.E.2d at 595-96.

23. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 857. Louis Rich, in its Petition for Certiorari, argued that the court of appeals misconstrued the holding of *Fleming* by requiring that an employee *understand* the disclaimer. Petition for Writ of Cert. of Petitioner/Respondent at 10 & n.1.

24. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 857.

evidence Louis Rich had any intent to defraud Shelton.”²⁵ The alleged fraudulent act, the 1983 amendment, was too remote in time from Shelton’s 1987 discharge and was “not a closely connected dishonest act sufficient to support Shelton’s claim.”²⁶

The court’s final holding was its most significant. The court reversed the trial court’s grant of a directed verdict on Shelton’s cause of action for breach of the implied covenant of good faith and fair dealing.²⁷ Judge Goolsby remarked:

Under South Carolina law, there exists in *every* contract an implied covenant of good faith and fair dealing. Further, we find no authoritative case law holding the implied covenant of good faith and fair dealing is not applicable to employment contracts that alter the employee’s at-will status. If, therefore, the jury finds the handbook issued to Shelton created an employment contract that altered his at-will status, then the question of whether Louis Rich breached an implied covenant of good faith and fair dealing based on an employment contract is for the jury to decide.²⁸

This short paragraph at the end of the opinion has the potential effect of vastly expanding employer liability by giving employees a new, broader cause of action. Unfortunately, the court of appeals did not discuss the ramifications particular to this cause of action in the employment context. South Carolina recognizes such a cause of action in the insurance contract context as a tort. Thus, the question arises, will this new action be one in tort or in contract? An examination of how this state has dealt with the implied covenant doctrine overall, and how other jurisdictions have dealt with it in the employment context, may give the practitioner some insight on the final import of this decision.

The South Carolina Supreme Court first recognized the implied covenant of good faith and fair dealing in *Commercial Credit Corp. v. Nelson Motors, Inc.*²⁹ Justice Brailsford stated “that noncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it, and that there exists in every contract an implied covenant of good faith and fair dealing.”³⁰ The South Carolina Supreme Court in *Tharpe v. G.E. Moore Co.*³¹ and *Parker v. Byrd*³² further endorsed

25. *Id.* at ___, 459 S.E.2d at 857.

26. *Id.* at ___, 459 S.E.2d at 857.

27. *Id.* at ___, 459 S.E.2d at 857.

28. *Id.* at ___, 459 S.E.2d at 857 (citation omitted).

29. 247 S.C. 360, 147 S.E.2d 481 (1966).

30. *Id.* at 366-67, 147 S.E.2d at 484.

31. 254 S.C. 196, 174 S.E.2d 397 (1970).

32. 309 S.C. 189, 420 S.E.2d 850 (1992).

the covenant in all contracts. The South Carolina version of the Uniform Commercial Code contains the covenant,³³ as does the Restatement (Second) of Contracts.³⁴ In the commercial context, the covenant serves as an additional term of the contract that can, without more, result in a breach of contract action.³⁵

Although the covenant had its genesis in commercial contracts, it is used with greater effectiveness in insurance contracts.³⁶ The seminal case of *Nichols v. State Farm Mutual Automobile Insurance Co.*³⁷ changed the law of insurance contracts in South Carolina. Relying on the California case of *Gruenberg v. Aetna Insurance Co.*³⁸ the *Nichols* court held that “if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.”³⁹ The court additionally held that if the insured can show that the insurer acted willfully or “in reckless disregard of the insured’s rights, he can recover punitive damages.”⁴⁰

Although the *Nichols* decision sounded in tort, subsequent decisions of the court of appeals described the action as one in contract.⁴¹ In *Brown v. South Carolina Insurance Co.* Judge Bell analyzed why the cause of action sounded in contract rather than in tort. He noted:

The principal theoretical objection to treating the *Nichols* cause of action as sounding in contract is that the covenant of good faith and fair dealing is nonconsensual, *i.e.*, it does not result from a bargained

33. S.C. CODE ANN. § 36-1-203 (Law. Co-op. 1976).

34. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). For a discussion of when the covenant applies to contracts generally, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980), and Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

35. See *Hooton v. Carolina Treatment Ctr.*, 300 S.C. 37, 386 S.E.2d 287 (Ct. App. 1989); *Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1987).

36. See Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 23 (1984) (noting that the doctrine of good faith has been used most widely in the insurance context).

37. 279 S.C. 336, 306 S.E.2d 616 (1983).

38. 510 P.2d 1032 (Cal. 1973).

39. 279 S.C. at 340, 306 S.E.2d at 619.

40. *Id.*

41. See *Bartlett v. Nationwide Mut. Fire Ins. Co.*, 290 S.C. 154, 348 S.E.2d 530 (Ct. App. 1986), *appeal dismissed*, 297 S.C. 73, 374 S.E.2d 897 (1989), *overruled by* *Charleston County School Dist. v. State Budget & Control Bd.*, 313 S.C.1, 437 S.E.2d 6 (1993); *Brown v. South Carolina Ins. Co.*, 284 S.C. 47, 324 S.E.2d 641 (Ct. App. 1984), *cert. granted in part*, 285 S.C. 456, 329 S.E.2d 768, *and appeal dismissed*, 290 S.C. 154, 348 S.E.2d 530 (1985), *overruled by* *Charleston County School Dist. v. State Budget & Control Bd.*, 313 S.C.1, 437 S.E.2d 6 (1993).

agreement of the parties but is implied as a matter of law. This objection loses much of its force in the context of insurance contracts. Few, if any, terms in an insurance policy are bargained. . . . It is not anomalous, therefore, to treat the cause of action for breach of the implied covenant of good faith and fair dealing in an insurance contract as an action in contract rather than tort. . . . The true significance of *Nichols* is that it expands the contractual remedy available to an insured who can prove bad faith refusal to pay a valid claim under the contract.⁴²

Charleston County School District v. State Budget & Control Board,⁴³ however, overruled *Brown* and a similar holding, *Bartlett v. Nationwide Mutual Fire Insurance Co.*,⁴⁴ to the extent that those cases held that the bad faith insurance action is in contract, clearly stating that the action for breach of the implied covenant of good faith and fair dealing on an insurance contract is in tort.⁴⁵ Therefore, *Nichols* did not create a new cause of action but expanded the “Tyger River Doctrine” under which an insured can bring a bad faith claim against an insurer for refusal to settle a claim within policy limits.⁴⁶ In summary, an insured’s action against an insurer for breach of the covenant of good faith and fair dealing is in tort.

With few exceptions, the doctrine was not applied to employment contracts in this state until *Shelton*.⁴⁷ Moreover, some courts have expressly rejected the doctrine in the employment at-will setting.⁴⁸ For example, in *Satterfield v. Lockheed Missiles & Space Co.*, Judge Hawkins stated that “the concept of at-will employee/employer relations, with the attendant right to quit or to fire at any time, for any reason or for no reason at all, is antithetical to the concept of an implied covenant of good faith and fair dealing.”⁴⁹

42. *Brown*, 284 S.C. at 55 n.4, 324 S.E.2d at 646-47 n.4.

43. 313 S.C. 1, 437 S.E.2d 6 (1993).

44. 290 S.C. at 154, 348 S.E.2d at 530.

45. 313 S.C. at 7-8, 437 S.E.2d at 9 (“In *Nichols*, we clearly held the cause of action was a tort. To the extent *Bartlett* and *Brown* hold otherwise they are hereby overruled.” (citation omitted)).

46. *Id.* at 8, 437 S.E.2d at 10; see *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

47. See *Shivers v. John H. Harland Co.*, 310 S.C. 217, 423 S.E.2d 105 (1992) (employee was wrongfully discharged for cause in violation of employment agreement with specified duration); *Martin v. Southern Ry.*, 224 S.C. 315, 136 S.E.2d 907 (1964) (applying bad faith principles to collective bargaining agreement).

48. See *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985); *Allan v. Sunbelt Coca-Cola Bottling Co.*, 4 Individual Empl. Rts. Cas. (BNA) 1453 (S.C.C.P., Dorchester County, Aug. 15, 1989) (relying on *Satterfield*).

49. *Satterfield*, 617 F. Supp. at 1363-64 (citations omitted). One commentator recently conducted a survey of the various jurisdictions and how the covenant is applied in the employment context. See Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233,

The holding in *Shelton* is consistent with *Satterfield*. The consistency stems from the distinction between employment-at-will and employment contracts for a definite term.⁵⁰ That is, *Shelton* guides South Carolina courts to imply the covenant of good faith and fair dealing only in employment contracts that alter an employee's at-will status.⁵¹ With this holding South Carolina joins fifteen other jurisdictions that recognize the implied covenant of good faith and fair dealing in employment contracts.⁵²

The major remaining question is whether the action will lie in tort or contract. *Shelton* does not answer this question, and persuasive authority exists on both sides. However, most other jurisdictions conform to a contract approach.⁵³

The most careful treatment of the issue is found in *Foley v. Interactive Data Corp.*, in which the California Supreme Court analyzed the reasons for the tort exception for breach of the covenant in an insurance contract.⁵⁴

1262 (1992). According to Professor Lillard's research, the following states have refused to exercise the covenant in the employment context: Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Professor Lillard had included South Carolina in this category. *Id.* at 1294.

50. See *Small v. Springs Indus., Inc.*, 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987) (holding that there can be an implied employment contract altering the at-will status and creating a distinction between the employment at-will and employment by contract).

51. See *Shelton v. Oscar Mayer Foods Corp.*, ___ S.C. ___, ___, 459 S.E.2d 851, 857 (Ct. App. 1995).

52. Currently, only one other state, Nevada, recognizes the cause of action as a tort. See *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987) (allowing breach of duty of good faith and fair dealing to give rise to tort liability in "rare and exceptional cases"), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). The Montana Supreme Court recognized the tort action in *Gates v. Life of Montana Insurance Co.*, 668 P.2d 213 (Mont. 1983); however, the Montana Legislature subsequently passed the Wrongful Discharge From Employment Act, creating a statutory action for discharge without cause and abolishing all common law employment actions. MONT. CODE ANN. §§ 39-2-901 to -914 (1996). See also Steve R. Burford, Note, *The Present Trend Toward a Good Faith Exception to the Employment At-Will Doctrine*, 13 AM. J. TRIAL ADVOC. 715, 722-25 & nn.70-74 (1989) (comparing the jurisdictions that recognize the action as one in tort and one in contract.). The remaining jurisdictions that recognize the covenant permit it as a contract action: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Kansas, Louisiana, Massachusetts, Oregon, and Tennessee. See Lillard, *supra* note 49, at 1262.

53. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 391-92 n.26 (Cal. 1988) (en banc).

54. *Id.* at 390. Discussing some of the policies, the court noted that "[t]he insured in [an insurance contract] does not seek to obtain a commercial advantage by purchasing the policy—rather, he seeks protection against calamity." *Id.* (quoting *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 145 (Cal. 1979) (en banc), *cert. denied*, 445 U.S. 912 (1980)). The court went on to state that the insurance company's obligations are "quasi-public" in nature and that the insured needs greater protection than contract remedy can provide. *Id.* "[T]he relationship

Relying on those policy reasons and on models from several commentators, the court discussed whether it should apply the tort action to the employment context. One model that the court discussed suggested extension of the tort of bad faith to other contracts only if four characteristics of insurance bad-faith actions are present:

(1) one of the parties to the contract enjoys a superior bargaining position to the extent that it is able to dictate the terms of the contract; (2) the purpose of the weaker party in entering into the contract is not primarily to profit but rather to secure an essential service or product, financial security or peace of mind; (3) the relationship of the parties is such that the weaker party places its trust and confidence in the larger entity; and (4) there is conduct on the part of the defendant indicating an intent to frustrate the weaker party's enjoyment of the contract rights.⁵⁵

Using this test the *Foley* court held that employment contracts are not sufficiently analogous to insurance contracts to warrant extension of the tort of bad faith:

[W]e are not convinced that a "special relationship" analogous to that between insurer and insured should be deemed to exist in the usual employment relationship which would warrant recognition of a tort action for breach of the implied covenant. . . . [A] breach in the employment context does not place the employee in the same economic dilemma that an insured faces when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits. . . .

. . . [T]here is a fundamental difference between insurance and employment relationships. In the insurance relationship, the insurer's and the insured's interest are financially at odds. . . .

. . . [A]s a general rule it is to the employer's economic benefit to retain good employees. The interests of employer and employee are most frequently in alignment. . . . [T]he special relationship model in the form of judicially created relief of the kind sought here is less compelling.⁵⁶

of insurer and insured is inherently unbalanced: the adhesive nature of insurance contracts places the insurer in a superior bargaining position." *Id.* (quoting *Egan*, 620 P.2d at 146).

55. *Id.* at 394 (quoting Charles M. Louderback & Thomas W. Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F. L. REV. 187, 227 (1982)).

56. *Id.* at 395-96. Justice Broussard, in a vigorous dissent, derided the majority for disregarding existing California law that recognized the tort in the employment context. *Id.* at 403-04 (Broussard, J., dissenting). He went on to note that the California Court of Appeals decisions distinguished by the majority were a strong foundation for recognizing the tort in the employment context. *Id.* at 404. He further argued that changing existing law is better left to the legislature than the court. *Id.* at 410-12.

South Carolina courts will face a similar problem in dealing with this issue. As noted above, this state recognizes the *tort* of bad faith in the insurance contract context.⁵⁷ Yet most jurisdictions recognize the cause of action in the employment setting as one in contract.⁵⁸ This is the better course. One jurisdiction that originally recognized a cause of action for bad faith has severely limited the action.⁵⁹ Another comment from the *Foley* court stresses the importance of making the action one in contract:

An allegation of breach of the implied covenant of good faith and fair dealing is an allegation of breach of an “ex contractu” obligation, namely one arising out of the contract itself. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purposes. The insurance cases thus were a major departure from traditional principles of contract law.⁶⁰

Adopting the cause as one in contract will also fulfill the expectations of the parties. If either an express or implied contract alters the employment-at-will relationship, then the parties have expectations arising out of this new relationship. The covenant of good faith and fair dealing serves to protect those expectations (“ex contractu”). The doctrine, in this context, is not imposed on society as a whole but on the parties to the contract.⁶¹ The damages resulting from a breach would be typical expectation damages. If there is an egregious breach of the covenant (typically by the employer), or if there is evidence of fraud by the employer, then punitive damages as discussed by Judge Bell in *Brown* would be an adequate remedy.⁶² This would be an acceptable way to protect employees while still limiting the employer’s liability to the employment contract.

South Carolina is at a decisive point regarding the implied covenant of good faith and fair dealing in the employment contract. *Shelton* clearly states

57. See *supra* note 43 and accompanying text.

58. See *Foley*, 765 P.2d at 391-92 n.26 (and cases cited therein); Burford, *supra* note 52, at 725.

59. Compare *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) (first court to recognize a bad faith exception to the employment-at-will agreement), with *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980) (limiting *Monge* to cases in which employers’ actions contravene public policy).

60. *Foley*, 765 P.2d at 394.

61. *Id.* at 389.

62. “Our law has long recognized that a breach of contract with fraudulent intent and accompanied by a fraudulent act will give rise to a claim for punitive damages in contract.” *Brown v. South Carolina Ins. Co.*, 284 S.C. 47, 56, 324 S.E.2d 641, 647 (Ct. App. 1984); see also *Ross v. American Income Life Ins. Co.*, 232 S.C. 433, 102 S.E.2d 743 (1958) (ruling that an action for breach of contract accompanied by fraudulent act is ex contractu).

that the covenant applies only when a contract alters the employment-at-will status.⁶³ Certainty ends there. South Carolina should join the majority of jurisdictions that permit the action as one in contract and not in tort. The tort of bad faith should remain the extreme exception, not the rule, and should apply only to breaches of the covenant in the insurance contract setting.

*Anthony W. Livoti**

63. *Shelton*, ___ S.C. at ___, 459 S.E.2d at 857.

* The author wishes to thank Professor Dennis R. Nolan for his advice and comments on earlier drafts.

II. PUBLIC POLICY EXCEPTION OPEN TO POSSIBLE EXPANSION IN EMPLOYMENT-AT-WILL SITUATIONS

In *Garner v. Morrison Knudsen Corp.*¹ the South Carolina Supreme Court held that the public policy exception to the employment-at-will doctrine is not strictly limited to instances when an employer requires an employee to violate a criminal law or when the termination of the employee is itself a violation of the law.² As a result, it appears that South Carolina's formally conservative approach to the public policy exception is now open to expansion.

The plaintiff, Cliff Garner, worked for four and one-half years as a pipe-fitter for M-K Ferguson, a subcontractor owned by defendant Morrison Knudsen Corporation (Morrison Knudsen).³ Garner claimed that as he was taking apart pipes he was sprayed with radioactive water.⁴ He allegedly reported his concerns about unsafe working conditions and possible regulatory violations to his supervisor. When he received an inadequate response, he spoke to the press.⁵ Eventually, Garner also testified before the Defense Nuclear Facilities Safety Board,⁶ and in his complaint he alleged that Morrison Knudsen terminated his employment in retaliation for these disclosures.⁷

Garner sued Morrison Knudsen for wrongful discharge based on the public policy exception to employment at-will. The trial court granted the employer's motion to dismiss on the ground that the complaint failed to state facts sufficient to constitute a cause of action.⁸ Garner argued on appeal that the scope of the public policy exception "encompass[es] protection of employees from retaliation by their employers for reporting nuclear safety violations."⁹ Because the supreme court did not specifically address the merits of Garner's claim, it did not conclusively rule out application of the public policy exception in this context.¹⁰

1. ___ S.C. ___, 456 S.E.2d 907 (1995).

2. *Id.* at ___, 456 S.E.2d at 909.

3. *Id.* at ___, 456 S.E.2d at 908.

4. Brief of Respondent at 4.

5. *Id.*

6. *Garner*, ___ S.C. at ___, 456 S.E.2d at 908.

7. *Id.* at ___, 456 S.E.2d at 908.

8. *Id.* at ___, 456 S.E.2d at 908.

9. Brief of Appellant at 4.

10. Indeed, the opinion circumvents any and all discussion of appellant's citations in support. Appellant raised *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 377 (Ill. 1985), and *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1153 (1st Cir. 1989) (applying Massachusetts law), to buttress his position that individuals raising concerns about the hazards

South Carolina has recognized the employment-at-will doctrine since 1936.¹¹ The doctrine unequivocally allows either party to terminate an at-will relationship “at any time for any reason or no reason at all.”¹² South Carolina also recognizes two limited exceptions to the employment-at-will doctrine.¹³ The first exception applies when an employee’s at-will status is altered by terms in an employee handbook. In such a situation, the termination of the employee gives rise to a claim for breach of contract.¹⁴ The second exception applies when the employee’s discharge violates “a clear mandate of public policy.”¹⁵ South Carolina courts historically have given narrow construction to the public policy exception.¹⁶ The resulting appearance is one of wanting to separate ordinary disputes between employers and employees from those that truly involve issues of public concern. A claimant’s difficult burden of proof evidences this state’s pattern of strict construction. The public policy exception requires that an employee prove that his discharge contravenes “a clear mandate of public policy.”¹⁷ Beyond this brief statement of definition, the contextual public policy has been left largely without form. The practitioner is left only with the general precept: Public policy concerns are substantial and important or compelling, and they affect the people of the state collectively.

The supreme court in *Ludwick* held that the exception is “invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law.”¹⁸ Ms. Ludwick was a seamstress. She was discharged after having refused her supervisors’ instructions to disobey a subpoena issued by the South Carolina Employment Security Commission.¹⁹ The supreme court found that Ms. Ludrick’s retaliatory discharge violated

of nuclear material fall within the protection of the public policy exception. Brief of Appellant at 11. Previously, when considering exceptions to the employment-at-will doctrine, the court has looked at emerging law in other jurisdictions. *See e.g.*, *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 222, 337 S.E.2d 213, 214-15 (1985) (citing cases from other jurisdictions that recognize the public policy exception).

11. *See* Shealy v. Fowler, 182 S.C. 81, 89, 188 S.E. 499, 503 (1936).

12. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 289, 278 S.E.2d 607, 609 (1981); *accord Ludwick*, 287 S.C. at 221, 337 S.E.2d at 214.

13. *Small v. Springs Indus., Inc.*, 300 S.C. 481, 484, 388 S.E.2d 808, 810 (1990).

14. *Id.*

15. *Id.*; *Ludwick*, 287 S.C. at 223, 337 S.E.2d at 215.

16. *See, e.g.*, *Dockins v. Ingles Markets, Inc.* 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992); *Epps v. Clarendon County*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991). In both *Dockins* and *Epps* the court deferred to existing statutory remedies rather than expand the public policy exception.

17. *Ludwick*, 287 S.C. at 223, 337 S.E.2d at 215.

18. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216.

19. *Id.* at 220-21, 337 S.E.2d at 213-14.

public policy.²⁰ Because South Carolina law required the employee to respond to the subpoena, it would be contrary to the state's interest to allow an employer to force the employee to choose between retaining her employment or exposing herself to criminal liability.²¹

In adopting the public policy exception to the employment-at-will doctrine, the supreme court was cautious.²² The court acknowledged the "peril that an outpouring of vexatious and frivolous litigation [might] be spawned by modification of the [employment-at-will] doctrine."²³ The employee's chance of success improves considerably if the discharge violated a well-established state policy as articulated in a statute, legislative pronouncement, or administrative rule.²⁴ However, if a statute creates its own substantive rights and provides remedies for infringement of those rights, the employee is limited to the statutory remedy.²⁵

Statutory protection of certain employees, such as through the popularly named Whistleblower Act,²⁶ has given South Carolina courts further justification for moving cautiously in broadening judicial recognition of abusive discharge. One South Carolina court has stated: "To permit [the employee] to pursue his own remedy at common law would be both redundant and an inappropriate intrusion into the legislative prerogative . . ."²⁷ By dint of argument and ten years of decisions articulating what is *not* public policy, the supreme court in *Garner* corrected the restrictive interpretation of its past holdings.

The state courts of South Carolina have been more precise in ruling what is not public policy than in giving meaning to the definition in *Ludwick*. For example, in *Miller v. Fairfield Communities, Inc.*,²⁸ the plaintiff alleged that

20. *Id.* at 225, 337 S.E.2d at 216.

21. *Id.* The *Ludwick* court relied primarily upon decisions from other jurisdictions that had also held that it is against a state's public policy to allow employers to fire employees who refuse to obey directions to violate the criminal law. *Id.* at 222, 337 S.E.2d at 214-15. *See e.g.* *Petermann v. International Bd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959) (denying employer the right to fire employee for refusing employer's demand to commit perjury); *Sides v. Duke Univ.*, 328 S.E.2d 818 (N.C. Ct. App. 1985).

22. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216.

23. *Id.* at 225, 337 S.E.2d at 216.

24. *See e.g.*, *Culler v. Blue Ridge Elec. Coop.*, 309 S.C. 243, 246, 422 S.E.2d 91, 92-93 (1992) (recognizing that a clear mandate of public policy incorporates state statute defining crimes that violate public policy).

25. *E.g.*, *Dockins v. Ingles Markets, Inc.* 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992).

26. S.C. CODE ANN. §§ 8-27-10 to -50 (Law. Co-op. Supp. 1995) (providing remedy to an employee of a public body who is retaliated against for reporting or testifying about wrongdoing by the public body).

27. *Plaumann v. Action Container Corp.*, No. 94-CP-40-3616, 1995 WL 722863, at *4 (S.C.C.P. Aug. 15, 1995) (at will employee alleged wrongful discharge after his refusal to violate O.S.H.A. and environmental regulations).

28. 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989), *cert. dismissed*, 302 S.C. 518, 397 S.E.2d

his employer demanded that plaintiff's wife, a real estate agent for a competitor of the employer, leave her job.²⁹ If she refused, the plaintiff would have to resign his employment. Plaintiff resigned and sued the employer for wrongful discharge and violation of the Unfair Trade Practices Act.³⁰ The court of appeals held that the scope of the public policy exception was limited only to those situations in which "an employer requires an at-will employee to violate the law as a condition of retaining his employment."³¹ The court in *Miller* further commented that by limiting the claim for abusive discharge "to situations involving the actual refusal to engage in illegal activity, or the intention to fulfill a statutorily prescribed duty," such claims could be tied down to "a manageable and clear standard."³²

The next treatment of the public policy doctrine by the South Carolina Supreme Court also illustrated a determination to focus more on what is not covered by the exception. In *Epps v. Clarendon County*³³ an employee of the Clarendon County Department of Public Works alleged that his termination violated an implied employment contract created by an employee handbook.³⁴ He also claimed that his political association with the former director of the Department prompted his discharge.³⁵ The court declined to extend the public policy exception, concluding that Mr. Epps had "an existing remedy for a discharge which allegedly violates rights other than the right to the employment itself."³⁶

The court's decision in *Dockins v. Ingles Markets*³⁷ was in lock step with *Epps*. In *Dockins* the employee claimed his wrongful discharge was in retaliation for filing a complaint against his employer for violations of the Fair Labor Standards Act.³⁸ The court reiterated that the "public policy exception to the termination of at-will employees has not been extended beyond situations where the termination is in retaliation for an employee's refusal to violate the law at the direction of his employer."³⁹ Concluding that the federal act

377 (1990).

29. *Id.* at 24-25, 382 S.E.2d at 17-18.

30. *Id.* at 25, 382 S.E.2d at 18.

31. *Id.* at 26, 382 S.E.2d at 18.

32. *Id.* at 27, 382 S.E.2d at 19 (quoting *Adler v. American Standard Corp.*, 830 F.2d 1303, 1307 (4th Cir. 1987)). The reasoning in *Adler* was followed by the lower court in *Garner* as precedent for judicial limitation of application of the public policy exception. Record at 16.

33. 304 S.C. 424, 405 S.E.2d 386 (1991) (per curiam).

34. *Id.* at 425, 405 S.E.2d at 386.

35. *Id.* at 426, 405 S.E.2d at 387.

36. *Id.* Mr. Epps also claimed that his constitutional rights of free speech and association had been infringed. As the court noted, Title 42 U.S.C. § 1983 (1982) provided Mr. Epps with a civil cause of action. *Id.*

37. 306 S.C. 496, 413 S.E.2d 18 (1992).

38. *Id.* at 497, 413 S.E.2d at 18.

39. *Id.*

precluded the employee's state tort claim, the court held that "[w]hen a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy."⁴⁰

The first case to evidence any tendency towards expansion, *Culler v. Blue Ridge Electric Cooperative*,⁴¹ laid ambiguity on the evolution of the public policy exception. The employee in *Culler* claimed that he was terminated for his refusal to contribute money to a political action fund.⁴² Although the court upheld the finding that Culler had not been fired for such a reason, it noted that a state statute made it a crime to discharge employees for their political beliefs and that an employee so discharged would have a cause of action under the public policy exception.⁴³ The court also stated that the court of appeals' earlier interpretation in *Miller v. Fairfield Communities, Inc.*⁴⁴ of the public policy exception was too limited and that *Ludwick* "extends to 'violation of a clear mandate of public policy.'"⁴⁵

This rejection of the restricted and mechanical application of the exception was underscored in *Garner*. The lower court in *Garner* erred in finding that because the plaintiff's complaint neither alleged that his employer compelled him to choose between violating South Carolina's criminal laws or being fired nor alleged the existence of a South Carolina law that made the employee's discharge illegal, Garner had not stated a claim under the public policy exception.⁴⁶ On appeal, Garner argued two theories supporting coverage of his claim under the clear-mandate-of-public-policy standard. First, he argued that concerns about possible radioactive contamination of the environment constitute a compelling public policy.⁴⁷ Second, he contended that an employee should be free from employer retaliation when the employee provides testimony to government agencies about nuclear safety issues.⁴⁸

Because the clear-mandate-of-public-policy standard is a judicially recognized exception, there is no requirement that the state legislature must have enacted a statute creating a right to sue. However, plaintiffs asserting a claim of wrongful discharge often look to statutes to find expressions of public policy. Garner argued that his concerns about possible violations at the

40. *Id.* at 498, 413 S.E.2d at 19.

41. 309 S.C. 243, 422 S.E.2d 91 (1992).

42. *Id.* at 245, 422 S.E.2d at 92.

43. *Id.* at 246, 422 S.E.2d at 93. See S.C. CODE ANN. § 16-17-560 (Law. Co-op. Supp. 1995) (making it a misdemeanor to fire someone for their political views). The section is one of several listed "Crimes Against Public Policy" defined by the statute.

44. 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989).

45. *Id.* at 246, 422 S.E.2d at 92. The court, however, refused to comment further on the ultimate result in *Miller*. *Id.* at 246 n.1, 422 S.E.2d at 92 n.1.

46. *Garner*, ___ S.C. at ___, 456 S.E.2d at 909.

47. Reply Brief of Appellant at 1-2.

48. *Id.* at 2.

Savannah River Site were precisely the hazards that the South Carolina General Assembly had declared to be of importance to the public safety.⁴⁹ The supreme court would not have been alone had it chosen to address explicitly whether public policy is violated when an employer discharges an employee who reports regulatory violations in the nuclear industry. Courts in other jurisdictions have held that an employee may not be terminated for reporting safety problems at a nuclear power plant when the employee was statutorily required to do so⁵⁰ or when the employee reports a good faith belief that records concerning the construction of nuclear facilities are being falsified or maintained in violation of federal regulations.⁵¹

Garner's second theory, regarding discharge in retaliation for testifying before the Defense Nuclear Facilities Safety Board, is analogous to pleading under a whistleblower statute. Numerous cases establish that a state's public policy favors employees coming forward and aiding the judicial and administrative processes.⁵²

The supreme court in *Garner* wisely avoided discussing what was essentially a factual dispute between the parties concerning questions of federal pre-emption and exhaustion of existing mechanisms for addressing employee complaints. The court simply examined its earlier holdings and concluded that it had never prescribed the limits of what constitutes a clear mandate of public policy. The opinion is unclear as to which of the two theories presented by Garner the court found more compelling. The "novel issue"⁵³ will for the time being remain open. The parties reached a settlement after the decision, and Department of Energy amendments may have precluded the appearance of similar causes of action.⁵⁴

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49. *Id.* at 4. The Atomic Energy and Radiation Control Act, S.C. CODE ANN. §§ 13-7-10 to -1020 (Law. Co-op. 1976 & Supp. 1995), is a statutory scheme that regulates the safe use and handling of nuclear materials.

50. *See* *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989).

51. *See* *Howard v. Zack Co.*, 637 N.E.2d 1183 (Ill. App. Ct. 1994).

52. *See* *Gantt v. Sentry Ins.*, 824 P.2d 680 (Cal. 1992) (allowing a cause of action for wrongful discharge when an employee was terminated in retaliation for supporting a co-worker's sexual harassment claim); *Flesner v. Technical Communications Corp.*, 575 N.E.2d 1107 (Mass. 1991) (employee wrongfully discharged in retaliation for cooperating with Customs officials' investigation of employer).

53. *Garner*, ___ S.C. at ___, 456 S.E.2d at 909.

54. *See* Energy Reorganization Act, 42 U.S.C. § 5851(2)(D) (1995) (allowing for the inclusion of D.O.E. contractor employees within anti-retaliation provisions). *But see* *English v. General Elec. Co.*, 496 U.S. 72, 86 (1990) (stating that tort actions were not meant to be preempted by the federal nuclear whistleblower act).