IN THE COURT OF APPEALS
STATE OF GEORGIA

GARY ERWIN,

Plaintiff-Appellant,

v.

CONYERS HOUSING AUTHORITY,

Defendant-Appellee.

Case No. A23A0652

(On appeal from Superior Court of Rockdale County Case No. 2021-CV-1614)

ORAL ARGUMENT REQUESTED

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff-Appellant Gary Erwin brought an action against his former employer, Defendant-Appellee Conyers Housing Authority ("CHA"). As the Executive Director of CHA, Mr. Erwin prioritized the interests of Rockdale County's less fortunate citizens over the interests of a powerful few who sought to use CHA's coffers for personal gain. Mr. Erwin's willingness to speak truth to power cost him his job. CHA manufactured flimsy reasons for Mr. Erwin's termination and then hastily pushed him out the door before he could respond to the allegations. Mr. Erwin filed a lawsuit, alleging that he was terminated on pretextual grounds and in violation of his employment contract.

Before any discovery had taken place, CHA moved for judgment on the pleadings. CHA advanced two arguments for why Mr. Erwin's lawsuit supposedly failed as a matter of law, and the trial court agreed with both.

First, the trial court held that Mr. Erwin's employment contract (the "Employment Contract") contains no enforceable promise of future compensation. This was error, as CHA had framed the issue incorrectly under Georgia law. The question is not whether the Employment Contract alone contains an enforceable promise of future compensation, but whether the record as a whole—the contract, emails, testimony, the parties' post-contract conduct—establishes that CHA made an enforceable promise of future compensation to Mr. Erwin. The trial court erred

by dismissing Mr. Erwin's action before the record could be developed on this issue.

Second, CHA argued that the Employment Contract was void when signed because Georgia law supposedly prohibits housing authorities from entering into multi-year employment contracts. No such prohibition exists in Georgia. City and county governments in Georgia are generally barred from restricting their successor administrations through onerous, long-term legislation or contracts. But no court has applied this rule to a housing authority. Rather, the limited case law on this issue instructs courts to *not* extend this limited prohibition to housing authorities. The trial court ignored this instruction and committed reversible error.

Finally, the trial court errored by awarding CHA attorney's fees under a contract that the court had already found was void. This violated the contract, the law, and basic notions of fairness.

The Court of Appeals' scrutiny is particularly important in this case, where the trial court adopted CHA's proposed order verbatim. The trial court apparently employed no discretion that might warrant this Court's deference. The trial court rubber-stamped CHA's proposed order and committed itself to the erroneous findings and misstatements of Georgia law that CHA proposed.

I. STATEMENT OF PROCEEDINGS BELOW AND MATERIAL FACTS

(1) Mr. Erwin seeks the reversal of a May 16, 2022 order entered by the Rockdale County Superior Court granting CHA's Motion for Judgment on the Pleadings pursuant to O.C.G.A. § 9-11-12(c). **Record, Volume 2 ("R. Vol. 2") at 167-181** (Final Merits Order).[1]

(2) Mr. Erwin also seeks the reversal of an October 18, 2022 order of the same court awarding costs and attorneys' fees to CHA. **Supp. Record, Volume 2 ("S.R. Vol. 2") at 114-115** (Final Fees Order).

(3) On March 22, 2007, CHA hired Mr. Erwin to serve as its Assistant Executive Director. **R. Vol. 2 at 4** (Compl. ¶ 2).

(4) On July 1, 2009, Mr. Erwin and CHA entered into an employment contract which provided for Mr. Erwin's promotion to Executive Director and appointment as the Secretary/Treasurer of CHA's Board of Commissioners (the "Board"). **R. Vol. 2 at 4** (Compl. ¶ 2).

(5) In his role as Executive Director, Mr. Erwin acted as CHA's Chief Financial Officer. **R. Vol. 2 at 8** (Compl. ¶ 17).

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[1] Citations to the Record docketed in connection with Mr. Erwin's June 16, 2022 Notice of Appeal are cited as "**R.**" Citations to the Supplemental Record docketed in connection with Mr. Erwin's November 14, 2022 Notice of Appeal are cited as "**S.R.**"

(6) In 2014, and again in 2016 and 2019, CHA renewed Mr. Erwin's employment through new employment contracts, each with a 5-year term. **R. Vol. 2 at 5** (Compl. ¶ 3).

(7) On November 17, 2019, approximately 6 months into Mr. Erwin's most recent 5-year employment term, the Board sent Mr. Erwin a Notice of Administrative Leave with Pay ("Leave Notice"). The Leave Notice alleged that Mr. Erwin failed to ensure the accuracy of CHA's financial statements that were prepared by an outside accounting firm. **R. Vol. 2 at 5** (Compl. ¶ 4).

(8) On December 22, 2020 CHA terminated Mr. Erwin's employment via letter (the "Termination Notice"), in light of the supposedly inaccurate financial statements, and on the additional grounds that Mr. Erwin allegedly (i) failed to ensure the accuracy of CHA's internally-kept ledgers, (ii) improperly held himself out to be the owner of CHA property, and (iii) was insubordinate when asked to respond to the Leave Notice. **R. Vol. 2 at 5** (Compl. ¶ 5).

(9) On May 7, 2021, Mr. Erwin filed his Complaint in Rockdale County Superior Court, seeking monetary relief from CHA. **R. Vol. 2 at 4-48**.

(10) In the Complaint, Mr. Erwin refuted the pretextual grounds for termination that CHA asserted in the Leave and Termination Notices. *See* **R. Vol. 2 at 8-12** (Compl. ¶¶ 15-31).

(11) CHA timely answered the Complaint, **R. Vol. 2 at 51-68**, and then filed its Motion for Judgment on the Pleadings on October 21, 2021, nearly six months after Mr. Erwin filed his Complaint. **R. Vol. 2 at 79-125** ("Motion").

(12) On November 22, 2021, Plaintiff filed his Opposition to CHA's Motion ("Opposition"). **R. Vol. 2 at 126-139**.

(13) On February 4, 2022, CHA filed its Reply Brief in support of its Motion ("Reply"). **R. Vol. 2 at 153-166**.

(14) Oral argument on the Motion was held on February 11, 2022. *See* **R. Vol. 4 at 1-55**.

(15) The trial court emailed the parties on March 1, 2022, stating that the court would grant the Motion on the grounds put forth by CHA, and requesting that CHA prepare a proposed order for the court's review.

(16) On April 15, 2022, CHA submitted a proposed order (the "Proposed Order"). **S.R. Vol. 2 at 16-30**.

(17) On May 16, 2022, the trial court entered the Final Merits Order, which is a verbatim adoption of the Proposed Order.

(18) On June 16, 2022, Mr. Erwin filed his initial Notice of Appeal. **R. Vol. 2 at 1-3**.

(19) The original record was docketed in the Court of Appeals on July 12, 2022.

(20) On August 4, 2022, the Court of Appeals dismissed Mr. Erwin's appeal on the basis that appellate jurisdiction was lacking until the trial court determined the amount of costs and attorneys' fees owed to CHA. **S.R. Vol. 2 at 77-78**.

(21) On September 9, 2022, the trial court held a hearing on CHA's request for costs and attorney's fees. *See* **S.R. Vol. 4 at 1-23**.

(22) On October 18, 2022, the trial court issued its Final Fees Order. **S.R. Vol. 2 at 114-115**.

(23) On November 14, 2022, Mr. Erwin re-filed his Notice of Appeal. **S.R. Vol. 2 at 1-3**.

(24) The supplemental record was then docketed in the Court of Appeals.

II. JURISDICTION AND ENUMERATIONS OF ERROR

A. Jurisdiction

The Court of Appeals has jurisdiction over this direct appeal pursuant to the Constitution of Georgia (Ga. Const. art. VI, § 5, ¶ 3; § 6, ¶¶ 2, 3) and O.C.G.A. § 15-3-3.1(6) (Court of Appeals has appellate jurisdiction over "cases not reserved to the Supreme Court or conferred on other courts").

B. Enumerations of Error

(1) The trial court erred by granting CHA's Motion for Judgment on the Pleadings on the basis that Mr. Erwin's Employment Contract supposedly does not contain an enforceable promise of future compensation. **Part III(C)**. Preserved at **R. Vol. 2 at 130-132**; **R. Vol. 4 at 24:17-31:10**.

(2) The trial court erred by granting CHA's Motion for Judgment on the Pleadings on the basis that Mr. Erwin's Complaint failed to state a claim for breach of contract because housing authorities are prohibited from entering into multi-year employment contracts. **Part III(D)**. Preserved at **R. Vol. 2 at 133-136**; **R. Vol. 4 at 32:14-38:3**.

(3) The trial court erred by awarding CHA its attorney's fees and expenses under a contract the trial court had determined was *ultra vires* and void. **Part III(E)**. Preserved at **R. Vol. 2 at 137**; **R. Vol. 4 at 39:12-40:11; S.R. Vol. 4 at 4:15-8:5**.

III. ARGUMENT AND CITATION TO AUTHORITIES

A. Standard of Review

The Court of Appeals "review[s] de novo the trial court's decision on a motion for judgment on the pleadings, and [] construe[s] the complaint in a light most favorable to the appellant, drawing all reasonable inferences in his favor." *Hewell v. Walton Cnty.*, 292 Ga. App. 510, 510–11 (2008); *Williams v. DeKalb Cnty.*, Case No. A22A0508, 2022 WL 2383696, at *5 (Ga. Ct. App. July 1, 2022) (on appeal, the Court of Appeals determines "whether the *undisputed* facts appearing from the pleadings entitle the movant to judgment as a matter of law" (emphasis in original)).

"The grant of a motion for judgment on the pleadings under OCGA § 9-11-12(c) is proper only where there is a complete failure to state a cause of action or defense." *Id.* Where, as here:

> [T]he party moving for judgment on the pleadings does not introduce affidavits, depositions, or interrogatories in support of his motion, such motion is the equivalent of a motion to dismiss the complaint for failure to state a claim upon which relief can be granted…. The plaintiff is entitled to the most favorable inferences that can reasonably be drawn from the complaint, even if contrary inferences are also possible. The motion to dismiss should not be granted unless the averments in the complaint disclose **with certainty** that the plaintiff would not be entitled to relief under **any state of facts** which could be proved in support of his claim."

Snooty Fox, Inc. v. First Am. Inv. Corp., 144 Ga. App. 264, 265 (1977) (emphasis added); *see also Sherman v. Fulton Cnty. Bd. of Assessors*, 288 Ga. 88, 89 (2010) ("all doubts regarding [the] pleadings must be resolved in the filing party's favor.")

Where "there are factual questions … it [i]s improper for the trial court to resolve these disputed facts on a motion for judgment on the pleadings." *CoreVest Am. Fin. Lender LLC v. Stewart Title Guar. Co.*, 358 Ga. App. 596, 854 S.E.2d 381, 385 (2021) (reversing trial court's grant of motion for judgment on the pleadings); *see also Snooty Fox, Inc.*, 144 Ga. App. 264, at 265 (same).

Accordingly, a motion for judgment on the pleadings should "be granted only if ... the moving party is **clearly** entitled to judgment." *Sherman*, 288 Ga. at 90 (emphasis added). This is a substantial burden; one that CHA did not carry.

B. The Final Merits Order is a Verbatim Adoption of CHA's Erroneous Proposed Order

As a threshold matter, this Court should reverse the Final Merits Order because the trial court adopted CHA's "Proposed Order" verbatim, without conducting an appropriate legal and factual analysis. *Compare* **R. Vol. 2 at 167-181** (Final Merit Order) and **S.R. Vol. 2 at 17-30** (Proposed Order). This led to an erroneous Final Merits Order filled with factual inaccuracies and irreconcilable legal tensions.

"[C]are … must be taken by the bench and bar when relying in counsel for the parties to draft orders on behalf of the trial court." *Beyond Meat, Inc. v. Don*

Lee Farms, 358 Ga. App. 77, 79 (2021). "[W]hen the trial court adopts verbatim the proposed findings and conclusions of the prevailing party the adequacy of the findings is more apt to be questioned, the losing party may forfeit his undeniable right to be assured that his position has been thoroughly considered, and the independence of the trial court's thought process may be cast in doubt." *Outdoor Advert. Ass'n of Ga., Inc. v. Dep't of Transp.*, 186 Ga. App. 550, 550 (1988).

That "thought process" is "cast in doubt" here, where the CHA-created Proposed Order contained clearly erroneous findings of fact and misapplications of Georgia law. *See, e.g.*, *Alexander Props. Grp. Inc.*, 280 Ga. 306, 308 (2006) ("deference owed the trial court's exercise of discretion is diminished when the trial court has misapplied the law to some degree or has clearly erred in its finding of facts").

For example, by adopting CHA's Proposed Order, the trial court accepted CHA's proposed "Factual Background" in whole, apparently determining that Mr. Erwin's Employment Contract "purports to guarantee Mr. Erwin four additional years of employment after he receives notice that the Housing Authority no longer requires his services." **R. Vol. 2 at 168** (Final Merits Order). This "factual finding" is based on an incomplete and mistaken interpretation of the contract. *See Knott v. Knott*, 277 Ga. 380, 381 (2003) ("Contractual interpretation is generally

a matter of law to be decided by the court, and [Georgia appellate courts] subject[] a lower court's conclusions with respect to matters of law to de novo review.").

It is true that Article I of the Employment Contract provides that the term of Mr. Erwin's employment shall be five years. **R. Vol. 2 at 19** (Employment Contract). Article VIII of the Employment Contract, however, unambiguously provides that, "**notwithstanding the term provided under Article I of this contract**, the Employer reserves the right to terminate the subject Employee prior to the expiration of the term of this Contract of Employment, in the event the Employee" is terminated for cause. **R. Vol. 2 at 22** (Employment Contract) (emphasis added). Thus, according to the plain terms of the Employment Contract, there is no guaranteed term of employment when the employee is terminated for cause. *See* **R. Vol. 2 at 169** ("the contract (*if not earlier terminated by notice of either party as described herein*) shall always have a remaining four-year term.") (emphasis added).

The trial court missed this because the Proposed Order drew the trial court's attention to an irrelevant part of Article I, which relates only to a party's notice of termination of the Employment Contract's *automatic one-year extension*. **R. Vol. 2 at 168-169** (Final Merits Order). These passages that the Proposed Order and Final Merits Order each underlined (*see* **R. Vol. 2 at 168-169** and **S.R. Vol. 2 at**

18-19) are expressly not related to shortening the contract's five-year term *at all*, whether for cause or otherwise.

This mistake was not harmless. The Final Merits Order used this dubious reading of the Employment Contract to conclude that "Mr. Erwin's proffered construction of Article I" of the Employment Contract "would render it cost prohibitive for [CHA] to terminate and replace him." *See* **R. Vol. 2 at 176** (Final Merits Order).

This poisoned the Final Merits Order in at least two ways. First, without any basis, the trial court attributed CHA's reading of the Employment Contract to Mr. Erwin. The construction of Article I in the Final Merits Order has never been "proffered" by Mr. Erwin. In accepting CHA's erroneous spin on Mr. Erwin's allegations, the trial court has functionally accepted CHA's denials of Mr. Erwin's allegations. *See Sherman*, 288 Ga. at 90 ("For the purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false").

Second, the trial court made the legal determination that the Employment Contract is too onerous to enforce based in part on a mistaken reading of the Employment Contract's plain terms. The trial court's legal conclusions on this issue, based on erroneous findings, are therefore defective. *See Beyond Meat*, 358

Ga. App. at 80 (trial court's verbatim adoption of erroneous facts was not harmless where the trial court's "legal conclusion … relies on a supposed finding … unsupported" by the record). Mr. Erwin flagged this problem at oral argument. **R. Vol. 4 at 31:17-32:13**.

C. The Trial Court Erred by Granting CHA's Motion on the Basis that Mr. Erwin's Employment Contract Does Not Contain an Enforceable Promise of Future Compensation

CHA moved for dismissal of Mr. Erwin's action on the basis that CHA supposedly did not make an enforceable promise to Mr. Erwin regarding future compensation. **R. Vol. 2 at 92-94**. Before any discovery had occurred, the trial court determined the issue of future compensation on the basis of the Employment Contract alone. **R. Vol. 2 at 175-177** (Final Merits Order). It appears that no Georgia court has done this before, and for good reason.

1. Whether CHA Made an Enforceable Promise of Future Compensation Is a Fact-Intensive Inquiry That Can Only Be Determined on a Fully Developed Record

Under Georgia law, "a promise of future compensation must be for an exact amount or based upon a formula or method for determining the exact amount of the payment." **R. Vol. 2 at 173** (Final Merits Order) (citing *Phillips v. Adams, Jordan & Herrington, P.C.*, 350 Ga. App. 184, 186-87 (2019)). A promise of future compensation is enforceable if found anywhere in a fully developed record—in party communications, credible deposition or trial testimony, evidence

of a pattern of practice, etc. *See Arby's Inc. v. Cooper*, 265 Ga. 240, 242 (1995). For this reason, a plaintiff is not required to prove the existence and enforceability of that promise at the pleading stage.

The Final Merits Order relies on three Georgia Court of Appeals decisions on this issue, *Phillips*, *VanRan*, and *Dye*. In its Motion, at oral argument, and in its Proposed Order, CHA relied on these same cases. *See* **R. Vol. 2 at 92-94**; **R. Vol. 4 at 51:2-52:11**; **S.R. Vol. 2 at 22-24**. For the relevant proposition of Georgia law, these cases each depend on the Georgia Supreme Court's *Arby's* decision.

Together, *Arby's*, *Phillips*, *VanRan*, and *Dye* establish that it was error for the trial court to dismiss Mr. Erwin's action prior to discovery. Each of these cases was decided after either summary judgment or trial, and only upon the fully developed record was the court able to determine whether an enforceable promise of future compensation had been made. *See* **R. Vol. 4 at 25:15-27:9**.

In *Arby's*, a former employee of the restaurant, Cooper, brought suit to recover unpaid annual bonuses. 265 Ga. at 240. A jury ruled for Cooper and the Supreme Court reversed the verdict, finding that "the evidence" from the full trial record demonstrated that the amount of Cooper's annual bonuses was ultimately too indefinite to be enforced. *Id.* at 241. Among the evidence the Supreme Court considered was the parties' **post-contract** compensation meetings at the end of every year. *Id.* at 241-42. The Supreme Court explained that, unlike other cases:

> **[T]he original indefiniteness in the arrangement in this case has not been obviated by performance…. The parties to this case neither paid nor accepted bonuses in such a way as to make an enforceable contract out of an agreement to agree.** (*Id*. at 242.)

With this language, the Supreme Court established a clear, fact-based inquiry that courts are to follow in determining whether a promise of future compensation is enforceable. A court is to look to the alleged arrangement containing a promise of future compensation. If there is any indefiniteness in that arrangement, then the court is to look to the record to determine whether the course of the parties' performance to determine whether that "original indefiniteness" has been "obviated." *Id.*

This is the fact-sensitive inquiry Georgia courts have followed. In *Phillips*, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of defendant employer. 350 Ga. App. 184 (cited at **R. Vol. 2 at 173** (Final Merits Order)). In accordance with the *Arby's* decision, the Court of Appeals in *Phillips* began with a review of the written agreements that Phillips claimed contained an enforceable promise of future compensation. *Id.* at 185-86. The Court then proceeded to examine, in great detail, the documents and deposition testimony. *Id.* at 187. Among other evidence, the Court carefully parsed Phillips' own testimony, in which he admitted that he had understood that his future compensation would be "fairly determined" by his employer untethered to any particular formula,

percentage, minimum, or past practice. *Id.* Only after this fact-intensive inquiry did the Court reach its conclusion.

If, as CHA argued (**R. Vol. 2 at 92**) and the trial court held (**R. Vol. 2 at 174** (Final Merits Order)), the alleged promise of future compensation must be deemed enforceable or unenforceable solely by reference to the four corners of the contract, why walk through the documents and deposition testimony, as the Court did in *Phillips*? The answer is that the *Phillips* Court dutifully followed *Arby's*, in which the Supreme Court made clear that "the original indefiniteness in [a compensation] arrangement [can be] obviated by performance." *Arby's*, 265 Ga. at 242.

The story was the same in *VanRan Communications Services, Inc. v. Vanderford*, 313 Ga. App. 497 (2021) (cited at **R. Vol. 2 at 172-73** (Final Merits Order)). The relevant issue in *VanRan* was whether defendant employer VanRan was entitled to summary judgment on its former employee Vanderford's claim for an unpaid bonus. *Id.* at 497. Vanderford "was employed by VanRan from 1988 through 2008 [and] [i]n addition to a salary, in some years of his employment Vanderford received a bonus from VanRan." *Id.* Vanderford was fired in 2009, and the board of directors "decided not to pay Vanderford a bonus for 2008." *Id.* Vanderford had no employment agreement with VanRan and he based his claim for an unpaid bonus on a "buy-sell agreement [that] contained no provision related to the payment of employee bonuses." *Id.* at 498.

Notably, despite the absence of a written agreement mentioning bonuses, the Court of Appeals took up Vanderford's argument that the informal arrangement to pay him a bonus "became definite and enforceable through the subsequent words and conduct of the parties." *Id.* at 499. The Court of Appeals did not state that the subsequent words and conduct of the parties are irrelevant. The Court did not, as the trial court did here, hold that, on this issue, "the terms of the agreement are controlling and [the] court should look no further to determine the intention of the parties." *See* **R. Vol. 2 at 174** (Final Merits Order). Instead, in accordance with *Arby's*, the *VanRan* Court rejected Vanderford's argument in light of certain facts "Vanderford admitted on deposition" regarding the parties' conduct. 313 Ga. App. at 499. The record, fully developed through discovery, was the determining factor.

In *Dye v. Mechanical Enterprises, Inc.*, 308 Ga. App. 311 (2011), the Court of Appeals reversed the trial court's grant of summary judgment in favor of employer defendant. It was undisputed that plaintiff employee Dye's employment contract "did not contain a formula to compute the commission" Dye claimed he was owed. *Id*. at 313. According to the reasoning of CHA and the trial court here, that should have been the end of the inquiry. In accordance with *Arby's*, however, that was not the end of the inquiry for the *Dye* Court, which held that the trial court erred, and summary judgment was precluded, because there was a genuine factual dispute concerning how Dye's "commissions would be computed" and because

"the evidence was in conflict concerning how the parties agreed the commission would be calculated under the terms of the agreement." *Id.* at 314.

Mr. Erwin is entitled to the same opportunity as the plaintiffs in *Phillips*, *VanRan*, and *Dye*—the opportunity to engage in discovery and then try to prove his case. Mr. Erwin is entitled to the opportunity to prove that he did, in fact, obtain an enforceable promise of future compensation from CHA.[2]

2. Fact-Intensive Issues Are Not Appropriate for Motions for Judgment on the Pleadings

The Georgia Supreme Court has recognized that fact-intensive issues like this one "rarely" can be resolved at the earliest stages of litigation. *See Sherman*, 288 Ga. at 91. In *Sherman*, Appellees had prevailed at the trial level on a motion for judgment on the pleadings. In seeking affirmance of their victory below, Appellees cited only cases in which their favored position had won the day on summary judgment or following trial, *i.e.*, on a full factual record. *Id.*

[2] At oral argument, CHA's counsel misconstrued the holding of *Dye*. **R. Vol. 4 at 51:22-52:11**. Counsel represented that Dye was permitted to go forward with his case because the contract allowed for "no element of discretion" regarding how to calculate Dye's commission. **R. Vol. 4 at 52:6-8**. The *Phillips* decision appears to include the same misreading of *Dye*. *See Phillips*, 350 Ga. App. at 188 (describing the holding of *Dye* as: "contract enforceable where it contained no element of discretion concerning whether plaintiff would be paid a commission or how it would be computed"). This turns *Dye* on its head. The employment contract in *Dye* "did not contain a formula to compute the commission." *Dye*, 308 Ga. App. 313. That missing formula (*i.e.* the *lack* of contractual clarity on "how the parties agreed [Dye's] commissions would be calculated"), was the factual dispute that *precluded* summary judgment. *Id*. at 314.

The Georgia Supreme Court rejected the relevance of these authorities because "neither of those cases involved a motion to dismiss or for judgment on the pleadings." *Id.* at 92. The Court explained that the determination at issue in the *Sherman* case was fact-intensive and, therefore, "can rarely be made under the more stringent standards applicable to motions to dismiss for failure to state a claim and motions for judgment on the pleadings." *Id.* at 91. Cases resolved on summary judgment or after trial could not help Appellees show that they were "clearly entitled to judgment and that no evidence may be introduced sufficient to grant the relief sought by Sherman." *Id.* at 90. As Appellees had failed to make this critical showing in their motion for judgment on the pleadings, the Supreme Court reversed.

Here, the trial court likewise should have required that CHA establish that the issue of future compensation can be resolved on Mr. Erwin's pleadings alone (it cannot). *See* **R. Vol. 4 at 25:13-14, 30:2-5**.

3. Mr. Erwin Can Introduce Evidence Within the Framework of His Complaint to Show that CHA Made an Enforceable Promise of Future Compensation

As the *Sherman* court recognized, fact-intensive issues *rarely* (but not necessarily *never*) can be resolved at the pleading stage. Mr. Erwin concedes that there may be a rare set of circumstances under which a court could properly dismiss a complaint as a matter of law on the basis that the plaintiff "could not

possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought" regarding an alleged promise of future compensation. *See Austin v. Clark*, 294 Ga. 773, 774 (2014). For example, if a plaintiff has conceded that the express language of her employment contract contains all evidence of the alleged promise of future compensation, then the trial court may be able to dispose of that issue prior to discovery.

This is not that rare case. Mr. Erwin made clear to the trial court that he planned to introduce evidence sufficient to show that any "original indefiniteness" in his Employment Contract regarding future compensation was "obviated by performance" (*Arby's*, 265 Ga. at 242) over the course of more than ten years. *See* **R. Vol. 4 at 28:1-18**. Mr. Erwin planned to show, through documents and testimony, that he and CHA "paid [and Mr. Erwin] accepted [compensation] in such a way as to make an enforceable contract." *Arby's*, 265 Ga. at 242; *see also* **R. Vol. 2 at 131**.

Within the framework of his Complaint, Mr. Erwin could also introduce documents and testimony showing that CHA, which is federally funded and federally regulated, hired and paid its Executive Directors in compliance with HUD guidelines concerning Housing Authority Executive Directors, and that these guidelines informed the parties' understanding of Mr. Erwin's compensation arrangement. *See* **R. Vol. 4 at 28:13-18**.

While Mr. Erwin is confident that discovery would reveal ample evidence on these points, he need not establish the existence of such evidence at this time—it is enough that the evidence could possibly exist. In the Final Merits Order, the trial court did not reject this factual possibility. The court instead committed reversible legal error by holding that whether Mr. Erwin obtained an enforceable promise of future compensation is never "a question of fact to be decided by a jury." **R. Vol. 2 at 174** (Final Merits Order). Per the express language and clear logic of *Arby's* and its progeny, Mr. Erwin is entitled to have a jury resolve these factual disputes.

Like Appellees in *Sherman*, CHA utterly failed to establish that the plaintiff could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. The trial court, in turn, erred when it granted CHA's Motion.

D. The Trial Court Erred When It Concluded That Conyers Housing Authority is Prohibited from Entering into Multi-Year Employment Contracts

The trial court further erred when it granted CHA's Motion on the additional basis that CHA is supposedly prohibited from entering into multi-year employment contracts. **R. Vol. 2 at 175** (Final Merits Order).

The express language of the Employment Contract provides that "[t]his Contract of Employment shall insure to and be binding upon the successors and

assigns of the Employer *including specifically any subsequent appointment to the Board of Commissioners*." **R. Vol. 2 at 23** (Employment Contract) at Art. XIII (emphasis added). Despite this language, CHA argued, and the trial court agreed, that CHA never had the authority to enter into a multi-year employment contract with Mr. Erwin that binds the current and future members of the CHA Board of Directors. **R. Vol. 2 at 175-177** (Final Merits Order).

The trial court relied on an obscure statute, O.C.G.A. § 36-30-3(a), and various cases citing this statute, to support its holding that "public officials do not have the general legal authority to enter into multi-year employment contracts under terms that would render it cost prohibitive for the successive public officials to terminate and replace such employees at will." **R. Vol. 2 at 175** (Final Merits Order). For the reasons that follow, this was clear error.

1. The Trial Court Erred by Finding in Favor of CHA on Both the Future Compensation Issue and the *Ultra Vires* Contract Issue

As explained above, the trial court held that the Employment Contract *does not* entitle Mr. Erwin to future compensation, because that contract "reserves discretion to the Housing Authority Board of Commissioners in determining Mr. Erwin's future compensation on an ongoing basis." **R. Vol. 2 at 173** (Final Merits Order); *see also* **R. Vol. 2 at 174** (Final Merits Order) (finding that "Mr. Erwin's salary was not guaranteed; it was subject to being reduced or eliminated" at the unfettered discretion of the Board) (emphasis added). In other words, the trial

court concluded *as a matter of law*, that CHA was never contractually bound to pay Mr. Erwin any future compensation.

In the next breath, the trial court held that the Employment Contract is unenforceable because it *requires* that Mr. Erwin receive "a minimum of $109,219.62" per year, which impermissibly binds the discretion of CHA's Board of Commissioners by making it "cost prohibitive" to terminate and replace Mr. Erwin. **R. Vol. 2 at 176** (Final Merits Order). These two legal conclusions by the trial court ((1) no enforceable promise of future compensation because Board has full discretion, and (2) Employment Contract illegally binds the Board to paying Mr. Erwin future compensation), are incompatible.

The Proposed Order correctly flagged for the trial court that CHA's two grounds for dismissing the Complaint were "alternative" grounds. *See* **S.R. Vol. 2 at 6** (Proposed Order) and **R. Vol. 2 at 172** (Final Merits Order). But CHA also drafted the Proposed Order to invite the trial court to somehow "agree with the Housing Authority on each point" and that is what the trial court did. **R. Vol. 2 at 172** (Final Merits Order). In doing so, the trial court failed to choose between the alternative and incompatible interpretations of the Employment Contract. This is further indication that the trial court abdicated its responsibility to give "serious consideration to and review the proposed findings and conclusions eventually adopted." *Outdoor Advert.*, 186 Ga. App. at 551.

On this basis, the Final Merits Order should be reversed. *See Floyd v. Gibson*, 337 Ga. App. 474, 478 (2016) (vacating trial court order and explaining that incompatible statements in trial court's ruling made it "entirely unclear what findings the trial court actually made. This lack of clarity is due in large part to the court's verbatim adoption of a proposed order").

2. O.C.G.A. § 36-30-3(a) Applies to City and County Governments

In addition to being internally inconsistent, the trial court's determination that CHA is prohibited from entering into multi-year employment contracts was also incorrect.

The Georgia Code, at O.C.G.A. § 36-30-3(a), provides that "[o]ne council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government." As the trial court noted, courts have extended § 36-30-3(a) beyond "municipal governments" and beyond "ordinances." **R. Vol. 2 at 175-176** (Final Merits Order). That extension, however, has been limited, deliberate, and principled.

As the trial court explained, the prohibition in § 36-30-3(a) "is not of statutory origin." **R. Vol. 2 at 175** (Final Merits Order). Rather, it is the codification of the holding of *Williams v. City Council of West Point*, 68 Ga. 816 (1882). *See* R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95 (1989).

The *Williams* Court "nullified an ordinance purporting to freeze the municipal charge for retail liquor licenses." *Id*. (citing *Williams*, 68 Ga. at 816). The Supreme Court reasoned that, while the government may enter into "any contract it has the right to make under its charter," it cannot "bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government." *Williams*, 68 Ga. at 816. In 1895, the holding of *Williams* became statutory law when the Georgia legislature added it to the Georgia Code. *See* Sentell, 24 GA. L. REV. at 96 n.4.

Georgia courts soon extended the *Williams* prohibition from ordinances to contracts. *See, e.g.*, *Horkan v. City of Moultrie*, 136 Ga. 561 (1911) (reasoning that, if a prohibited action "could not be done by an ordinance, of course it could not be done by a contract.").

Georgia courts have also long applied this rule not just to municipal governments, but also to county governments. *See* Sentell, 24 GA. L. REV. at 97-98 (explaining that the Georgia Supreme Court "applie[s] the proscription to municipalities and counties interchangeably."). These extensions of the *Williams* prohibition to counties was necessary in order for the underlying public policy to reach "both of the primary entities of local government" (*i.e*. cities and counties). *Id*. at 98. "The judicial evolution" of § 36-30-3(a) "stood for the very point that no

logical reason existed for distinguishing between municipalities and counties in respect to the policy expressed by the statute." *Id*. at 102.

3. O.C.G.A. § 36-30-3(a) Does Not Apply to Housing Authorities

By contrast, there is ample reason to distinguish between elected city and county governments, on one hand, and housing authorities, on the other. City and county governments are placed in office by voters, who cast their votes on the basis of many issues, including how the government should spend its limited resources (resources that largely come from the taxpayers themselves). The will of those voters could be thwarted if officials could freely commit those resources beyond their own terms in office, into their successors' terms.

CHA's Board of Commissioners, however, is not elected by the citizens of Conyers. While Conyers' Mayor appoints the members of the CHA Board, the City of Conyers and its taxpayers have "no further accountability for the Authority."[3] CHA's funding does not come from Conyers' taxpayers. **R. Vol. 4 at 33:22-34:24**. It is difficult to imagine how honoring Mr. Erwin's Employment Contract could undermine the will of Conyers' voters.

[3] *See* City of Conyers, Comprehensive Annual Financial Report for Year Ending June 30, 2018 at Notes to Financial Statements, Note N. Publicly available at https://www.conyersga.com/home/showpublisheddocument/4670/636789865478570000

It makes sense, then, that no Court has ever extended § 36-30-3(a) to housing authorities. Indeed, "there is no basis for the assertion that [O.C.G.A. § 36-30-3(a)] applies to authorities." *See City of Jonesboro v. Clayton Cty. Water Auth*., 136 Ga. App. 768, 775 (1975).[4] *City of Jonesboro* concerned two thirty-year contracts (one for water, one for sewage) entered into by the Clayton County Water Authority (the "Authority"). *Id*. at 768. The Authority sought to revise the water and sewage rates upward, and argued that, because "one council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government" the water and sewage "contracts must be considered ultra vires and void." *Id*. at 769-70. The Court of Appeals disagreed:

> We do not regard [OCGA 36-30-3(a)] as prohibiting authorities … from entering long term contracts…. A corporation may be designated as a municipal corporation for the purposes of one statute and not for another. McQuillin, Municipal Corporations s 2.27a. Thus the fact that authorities were granted the same status as municipal corporations by the Revenue Bond Law (Code Ann. s 87-801 et seq.), does not mean that authorities have 'municipal dignity' for all legislative enactments…. There is no basis for the assertion that [O.C.G.A. § 36-30-3(a)] applies to authorities.

Id. at 774-75. Put differently, the *City of Jonesboro* Court refused to read authorities into O.C.G.A. § 36-30-3(a) simply because authorities perform certain

[4] *City of Jonesboro*, and some of the authorities relied upon by the trial court (*e.g.*, *Aven v. Steiner Cancer Hosp*.), refer to § 69-202, the predecessor law to § 36-30-3(a). Sections 69-202 and 36-30-3(a) are textually and functionally identical.

government-like functions or because authorities are placed on the same footing as the actual government in *other* parts of the Georgia Code.

To drive home this point, the *City of Jonesboro* Court cited the example of housing authorities. *Id*. at 775 (citing *Stegall v. Southwest Ga. Housing Authority*, 197 Ga. 571 (1944)). *Stegall* concerned a challenge to the Georgia housing authorities laws. *Id*. at 585. Among other arguments, plaintiff alleged that the contracts, notes, and bonds to be issued by the defendant housing authority violated a Georgia constitutional provision that "no county, municipality, or political division shall incur any debt without the assent of two-thirds of the qualified voters." *Id*. at 588. The Supreme Court of Georgia held that a housing authority:

> [I]s not … a county, municipality, or political subdivision, within the purview of that provision…. While it has been held by some courts that housing authorities … are municipal corporations in the broad sense that their property might be treated as public property for the purpose of tax exemption, the regional authority here could not be correctly classified as a municipal corporation within the meaning of the foregoing debt clause of our constitution. (*Id.*)

Applying reasoning similar to that of plaintiff in *Stegall*, the Final Merits Order stated that, because housing authorities are "public corporations" that perform certain "essential government functions" and are "exempt from taxation," housing authorities must also be prohibited by § 36-30-3(a) from entering into long term contracts. **R. Vol. 2 at 177 and n.2** (Final Merits Order). Under *Stegall*, this

reasoning was a mistake. Statutory prohibitions do not apply vaguely by analogy; there has to be more. With no language in O.C.G.A. § 36-30-3(a) referring to housing authorities, no indication of legislative intent to include housing authorities within O.C.G.A. § 36-30-3(a), and no court decisions providing any reasoning or guidance supporting the inclusion of housing authorities within O.C.G.A. § 36-30-3(a), it was clear legal error for the trial court to declare that § 36-30-3(a) now applies to housing authorities.

4. *City of Jonesboro* is Good and Binding Law

City of Jonesboro is the only Court of Appeals decision on this issue on the issue of whether O.C.G.A. § 36-30-3(a) applies to housing authorities. Appellant is aware of no cases on this issue from the Georgia Supreme Court.

The trial court declined to follow *City of Jonesboro* because it adopted CHA's erroneous assertion that, in *Madden v. Bellew*, the Georgia Supreme Court "overruled" *City of Jonesboro* and determined that O.C.G.A. § 36-30-3(a) applies to all government "bodies," without regard to whether those bodies are the actual, elected government (*e.g.*, city council, mayor), or merely bodies that perform some government-like functions (*e.g.*, housing authorities). *See* **R. Vol. 2 at 177** (Final Merits Order) (citing *Madden v. Bellew*, 260 Ga. 530 (1990)).

Madden says nothing of the sort. *Madden* related to the chairman of the Madison County Board of Commissioners, an elected government official, and the

Court held only that § 36-30-3(a) "applies to counties as fully as it applies to municipalities." *Id. at* 531. But, by 1990, this was already a well-established rule across the courts of Georgia, including in the Georgia Supreme Court. *See* Sentell, 24 GA. L. REV. at 97-98.[5] As the *Madden* Court itself explained, it was merely affirming this principle, not creating it. *Madden*, 260 Ga. at 530-31.

This is important, because the Proposed Order and Final Merits Order were only able to sidestep *City of Jonesboro* by mischaracterizing *Madden* as some kind of sea change in this area of law. *See* **R. Vol. 2 at 177** (Final Merits Order). In fact, *Madden* made no changes and overturned no cases in this area of law. *Madden* makes no mention of *City of Jonesboro* and the *Madden* Court had no occasion to decide whether housing authorities (or any other unelected, quasi-governmental organizations) fall within the purview of § 36-30-3(a). *City of Jonesboro* is fully compatible with *Madden*, it remains good law, it remains the only case on point, and the trial court was required to follow its clear guidance.

5. In the Alternative, the Employment Contract Falls Within an Exception to O.C.G.A. § 36-30-3(a)

Even if the trial court were correct that § 36-30-3(a) reaches housing authorities, the trial court still erred. Courts in Georgia routinely conclude that

[5] Citing pre-1990 cases applying the prohibition to counties, including *Barton v. Atkinson*, 228 Ga. 733 (1972); *DeKalb County v. Georgia Paperstock Co*., 226 Ga. 369 (1970); and *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850 (1960).

challenged ordinances and contracts fall within one or more of the many exceptions to § 36-30-3(a). *See* Sentell, 24 GA. L. REV. at 105 (collecting cases). As Mr. Erwin argued below (**R. Vol. 2 at 136**), his Employment Contract falls within one such broad exception that "contracts within the charter powers of the [agency] are binding and not violative of … OCGA § 36–30–3(a)." *City of Athens v. McGahee*, 178 Ga. App. 76, 78–79 (1986).[6]

Georgia housing authorities have the express power to "execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority." O.C.G.A. § 8-3-30(a)(1). The Georgia Court of Appeals has previously held that nearly identical language applicable to water authorities is sufficient to trigger the "express authority exception" exception to § 36-30-3(a). As discussed above, the *City of Jonesboro* Court determined that § 36-30-3(a) does not apply to authorities. But the Court made an alternative ruling, too: even if § 36-30-3(a) generally applies, the water authority could still enter into contracts related to its core operations, because the Authority's charter gave it the "power to contract" and authorized it to "do all things necessary or convenient for the operation of" its core operations. 136 Ga. App. at 774.

[6] This "express authority exception" exception to § 36-30-3(a) is in accord with black-letter Georgia law that "a specific statute will prevail over a general statute, absent any indication of contrary legislative intent." *GMC Grp., Inc. v. Harsco Corp.*, 293 Ga. App. 707, 709 (2008).

As a practical matter, the Executive Director position at CHA is critical to its core operations. As Executive Director, Mr. Erwin was CFO, Secretary, real estate developer, and whatever else was asked of him. *See* **R. Vol. 4 at 37:9-17**. Mr. Erwin's responsibilities went to the heart of CHA's mission. The Executive Director position is also "necessary" under CHA's own bylaws, which state that "the officers of the Authority shall be a Chairman, a Vice Chairman, and a Secretary who shall be Executive Director."

CHA was free not only to hire and pay an Executive Director, but also to structure the employment contract so as to attract the best candidates. To do so, CHA, like many housing authorities, used a template obtained at a housing authorities conference that included a default 5-year term for Executive Directors. *See* **R. Vol. 4 at 36:24-37:3**. This was the standard contract in the industry and it was certainly "convenient," if not "necessary," to attract and retain Executive Directors by using that standard contract. O.C.G.A. § 8-3-30(a)(1).

On this point, *City of Athens* is instructive. 178 Ga. App. 76. There, the Court of Appeals "agree[d] with [the trial court's] finding that in view of the charter provisions conferring broad authority upon the city," contracts designed to "stimulate" the "faithful career services of" the city's employees "clearly fell into the express authority exception." *Id*. at 79; *see also id*. ("vested and contractual rights [] may not be taken from the employee entitled thereto in an indiscriminate

or arbitrary manner, and it is the duty of the courts in an appropriate case to protect those rights.").

6. Conclusion on § 36-30-3(a)

Neither the letter nor spirit of § 36-30-3(a) prohibits housing authorities from entering into binding employment contracts, and even if that statute reaches housing authorities, more specific provisions of Georgia law govern the issue at hand.

CHA, like nearly all entities and individuals in the State of Georgia, is subject to the benefits and obligations that come along with making written promises. *See City of Jonesboro*, 136 Ga. App. at 771 (contracts entered into by authority "are governed by basic contract principles applicable to the contracts of private persons"). CHA was permitted to, and did, enter into a binding contract with Mr. Erwin. The trial court erred in holding otherwise.

E. The Trial Court Erred in Awarding CHA Its Attorney's Fees Under a Contract the Trial Court Found to Be Ultra Vires and Void.

Another consequence of the trial court's blind adoption of CHA's Proposed Order was the improper award of CHA's attorney's fees.

The severability clause in the Contract provides that, "if any provision" in the Contract is held to be invalid, void or unreasonable, the remaining provisions" continue in full force. **R. Vol. 2 at 23** (Employment Contract) at Art. XII (emphasis added).

"A severability clause indicates the intent of the parties where the remainder of the contract can exist without the void portion." *Capricorn Sys., Inc. v. Pednekar*, 248 Ga. App. 424, 428 (2001) (emphasis added). This is a two-step inquiry: do the parties have a severability clause and can the remainder of the contract exist without the void portion. Indeed, even CHA's counsel acknowledged that, "if the entire contract is void then obviously the severability clause would not matter." **S.R. Vol. 4 at 9:6-8.**

The court identified the severability clause in the Employment Contract (**R. Vol. 2 at 179-180** (Final Merits Order) but then prematurely ended the inquiry. *See, e.g., Nat. Consults., Inc. v. Burt*, 186 Ga. App. 27 (1988) (presence of "severability clause … is not *per se* dispositive of the severability issue."). The trial court failed to determine whether there are actually any "remaining provisions" in this contact following the court's other rulings. There are at least two reasons the trial court should have found that there are no remaining provisions.

First, the Employment Contract consists of a just a handful of interdependent clauses, all of which relate to the fundamental bargain that Mr. Erwin would perform his duties in exchange for a promise of a five-year term and a minimum compensation level during that term. As CHA conceded, once you invalidate the

promises made to Mr. Erwin, there is nothing left of the contract. **R. Vol. 4 at 21:21-22:2**.

Second, the trial court dismissed Mr. Erwin's claims on the basis of § 36-30-3(a), which has been consistently applied for more than 100 years to mean that "a contract which restricts governmental or legislative functions … [is] a nullity, ultra vires and void." *See Brown v. City of E. Point*, 246 Ga. 144, 144 (1980). That is, the trial court necessarily found that CHA never had authority to enter into the entire Employment Contract. **R. Vol. 2 at 175** (Final Merits Order).[7]

Ultimately, the Final Merits Order awarded CHA its attorney's fees pursuant to a provision in that same "void" contract. This was error.

What we are left with is this: CHA admittedly made promises to induce Mr. Erwin to sign the Employment Contract, pulled the rug out from under him by disclaiming the authority to make those promises, and now seeks to punish him by using that same Employment Contract as a sword.

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[7] Apparently recognizing this issue, CHA was less than candid about its theory of the contract. At the September 9, 2022 hearing on attorneys' fees, counsel for CHA represented to the Court that it has "***never*** been the position of the Housing Authority" that "the contract was *ultra vires* and void[.]" **S.R. Vol. 4 at 8:23-25** (emphasis added).

On cross-examination, however, CHA's counsel was shown the Termination Letter he authored and sent to Mr. Erwin which states, in relevant part, that because the Employment "Contract purports to bind subsequent Boards of the Authority, it is *ultra vires* and void as a matter of law and public policy." **S.R. Vol. 4 at 20:12-25** (discussing Exhibit 3 to the Complaint, **R. Vol. 2 at 31**).

CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate and reverse the Final Merits Order with instructions that Mr. Erwin's matter may proceed to discovery.

Respectfully submitted, this 30th day of December 2022.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a copy of the within and foregoing ***Opening Brief of Appellant*** by filing the same using the Court's electronic filing system and by depositing a copy of same in the United States Mail, in a properly addressed envelope, with adequate postage affixed thereon and via electronic mail to ensure delivery to:

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This 30th day of December 2022.

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