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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE COURT OF APPEALS

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Appellate Case No. 2019-000374

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Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, Petitioners,

v.

City of Columbia, Respondent.

and

Larry Strickland, Denious L. Dimery and Bailey G. McClinton, Petitioners,

v.

City of Columbia, Respondent.

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# PETITIONERS' PETITION FOR CERTIORARI

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## CERTIFICATION

Undersigned counsel hereby certifies that Petitioners filed a Petition for Rehearing with the Court of Appeals on August 29, 2022. On September 22, 2022, the Court of Appeals issued an Order denying Petitioners' Petition for Rehearing.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision conflicts with previous decisions of this Court regarding the significance of fraud in promissory estoppel claims.
2. Whether a promise not alleged to be ambiguous at the time it is made can be kept for 20 years and then after-the-fact determined to be ambiguous, is a novel issue of law in this State.
3. Whether the Court of Appeals exceeded its appellate review authority when it ignored the Lower Court's findings of fact regarding reasonable reliance and failed to make its own findings of fact regarding this issue based on a preponderance of evidence.
4. Whether the Court of Appeals decision conflicts with its previous holding in Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013).

## STATEMENT OF THE CASE

The ten (10) Petitioners in this combined action are retired City of Columbia firefighters. Each Petitioner began working for the Respondent City of Columbia in the 1960s through 1980s. (R. pp. 708-710.) Petitioners allege that when they were hired, and during their employment as firefighters, various officials with the City of Columbia (City Managers, Human Resources officials, and Fire Department Chiefs) promised them that if they remained employed with the City for a certain number of years they would be provided free health insurance for life when they retired. (R. p. 711.) The promise of free retiree health insurance was repeatedly made to Petitioners over

decades of employment. (R. pp. 500-01, 512, 521, 525, 546, 577.) Petitioners knew co-workers and relatives who had received the promised free health insurance. (R. pp. 570, 611-12) Some Petitioners were required as part of their job to tell recruits they should work for Respondent because even though they would not be paid much, they would get free health insurance when they retired. (R. pp. 568-69, 580, 597-98.) All of the Petitioners received free retiree health insurance when they retired, some for more than 20 years. (R. pp. 515, 567-68, 611-12, 708-711.)

In 2009, Respondent decided to start making retirees under age 65 contribute to the cost of their retiree health insurance. The Petitioners under age 65 at the time filed a lawsuit captioned Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013) on August 10, 2009. On September 13, 2010, Judge Barber granted Respondent summary judgment on all claims. (R. p. 1.) On appeal from summary judgment, on January 23, 2013, the Court of Appeals reversed summary judgment as to Petitioners' promissory estoppel claim and remanded the case for trial.

While the Bishop case was pending in the Court of Appeals, in 2013, Respondent began requiring its retirees over age 65 pay the cost of their Medicare supplement plans, which Respondent had previously provided at no cost. In response, a group of retirees over age 65 filed a promissory estoppel lawsuit on August 27, 2013. The two (2) cases were consolidated on August 18, 2018 and a non-jury trial was held December 19 - 20, 2018 before Judge R. Scott Sprouse. Judge Sprouse issued a Trial Order on January 29, 2019 finding Petitioners had proven the elements of their promissory estoppel claim but were not entitled to any damages as they had not proven detrimental reliance. (R. p. 36.)

A Motion for Rehearing was filed by Petitioners on February 6, 2019 (R. pp. 460-472) and denied on February 19, 2019. (R. pp. 39-41.) Petitioners appealed to the Court of Appeals and the Court of Appeals heard the case on February 10, 2022. The Court of Appeals issued an

Opinion denying Petitioners' Appeal on August 3, 2022 holding that although detrimental damages are not an element of promissory estoppel, the promise at issue was ambiguous and it was unreasonable to rely on an ambiguous promise. A Motion for Rehearing was timely filed and denied by the Court of Appeals on September 22, 2022. Petitioners are timely filing this Petition for Writ of Certiorari.

## LEGAL ARGUMENTS

1. **The Court of Appeals has misconstrued this Court's holdings in Higgins Construction Co. v. Southern Bell Telephone & Telegraph Co., 276 S.C. 663, 281 S.E.2d 469 (1981) and North American Rescue Products, Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015) regarding the significance of fraud in promissory estoppel claims.**

In its opinion, the Court of Appeals held, "promissory estoppel is only invoked when the failure to find it would essentially result in a fraud." Cruz v. City of Columbia, 437 S.C. 204, 877 S.E.2d 479, 486 (Ct. App. 2022), reh'g denied (Sept. 22, 2022). The Court of Appeals then held that there was "no intent on the part of [Respondent] to defraud [Petitioners]" inferring that the absence of an intent to defraud, a cause of action for promissory estoppel must fail. (Id.) This is not a correct statement of the law or of the elements necessary to prove promissory estoppel. As this Court has held, there are only four (4) elements necessary to prove promissory estoppel and fraud is not one of them. "The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance." Davis v. Greenwood School District 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005).

While fraud is not an element of promissory estoppel, courts have found the doctrine of promissory estoppel can be applied by a court to avoid sanctioning the perpetration of a fraud or

if the failure to apply the doctrine would result in other injustice. Therefore, the terms fraud and injustice are not elements of a promissory estoppel claim but explain when a court should exercise its powers of equity. Besides avoiding the *sanctioning* of fraud, this Court permits the application of promissory estoppel to avoid "other injustice." See, e.g., Higgins Construction Co. v. Southern Bell Telephone & Telegraph Co., 276 S.C. 663, 665, 281 S.E.2d 469, 470 (1981) ("an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud *or would result in other injustice.*") (emphasis added); North American Rescue Products, Inc. v. Richardson, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) ("Courts have used the doctrine where the refusal to apply it would be virtually to sanction the perpetration of a fraud *or would result in other injustice.*") (emphasis added). In Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 309-310 322 S.E. 2d 30, 35 (Ct. App. 2004), the Court of Appeals acknowledged fraud's limited role in a promissory estoppel claim and held the mention of fraud in a jury instruction was "inapplicable to the pleadings and evidence" but resulted in no prejudice to the complaining party.

This Court has never required evidence of an intent by a party to defraud someone in a promissory estoppel claim. The Court of Appeals' emphasis on a party's intent to defraud is misplaced. In promissory estoppel claims the word "fraud" has only been used as another word for "injustice" and only in the context of the Court's use of promissory estoppel as an equitable solution to avoid the *sanctioning* of fraud or injustice; there is no requirement that a party prove an intent to defraud by another party. There is a difference between a court not sanctioning fraud and injustice, and a party in a case intending to defraud another party. The Court of Appeals has erred by focusing on Respondent's intent to defraud as such an additional requirement is not

relevant in a promissory estoppel case. Here, Petitioners have never alleged Respondent intended to defraud them. Rather, Petitioners assert that Respondent's decision to break a promise it had kept for over 20 years merely because Respondent wanted to spend money on something else, is an injustice.

This Court has never added fraud as a necessary element in a promissory estoppel claim; it has only held courts should not sanction fraud or injustice. The Court of Appeals' decision confuses the established law regarding the elements of promissory estoppel and for this reason, Petitioners' request for a Writ of Certiorari should be granted to clarify an intent to defraud is irrelevant to a promissory estoppel claim and Petitioners met the elements of a promissory estoppel claim because they were not required to prove Respondent intended to defraud them.

**2. It is a novel issue of law whether the ambiguity of a promise is determined based on the facts existing at the time the promise is made or if the issue of ambiguity can be reviewed anew after the promise has been kept for 20 years.**

It is a novel issue of law as to whether a promise kept for decades and obviously unambiguous to both parties, can nevertheless be found ambiguous by a court in hindsight. Respondent's promise, as stated previously by the Court of Appeals was simple: "retiree health insurance would continue to be free throughout retirement." Bishop v. City of Columbia, 401 S.C. 651, 666–67, 738 S.E.2d 255, 263 (Ct. App. 2013). Details such as which company would provide the insurance, or what the co-pays might be year to year, were not material to the promise and such details Respondent could not possibly have known in advance. Nevertheless, Respondent kept its promise of free retiree health insurance for decades. Petitioners never complained about which entity was providing health care or that the co-pays changed over time. They expected to receive health insurance similar to what they had received while employed (R. pp. 492-493). During the decades Respondent provided free retiree health insurance, not a single

Petitioner ever brought suit challenging the adequacy of the health insurance they received. Respondent never promised to contract with a certain provider or negotiate a specific co-pay and Petitioners never required Respondent to contract with a certain provider or maintain a specific co-pay. This attempt to create ambiguity where none existed is demonstrated by the fact that for over two (2) decades Respondent never claimed its promise was too ambiguous to keep or that it did not know how to keep its promise.

When both parties understand and act for many years according to a promise, it is inappropriate for a court after the fact to conclude the promise is ambiguous and can be broken without consequences. Although a promise involving the exchange of money or property may need to be precise as to details, the promise of free health insurance for retirees is unambiguous. A promise that is ambiguous is one that is hard to keep or incapable of being kept due to uncertainty as to what is required. Here, there was no uncertainty; Petitioners were certain of the number of years they had to work to receive free health insurance when they retired, and Respondent knew it had to provide free health insurance to retirees who worked the requisite number of years, and it did.

Cases that have considered the issue of ambiguity in the context of promissory estoppel have focused on the original promise; the issue is always whether the promise is so ambiguous that that reliance on the uncertain promise is unreasonable. In a case considered the first to recognize the theory of promissory estoppel,[1] although not using that term, a promise to contribute to a charitable institution was upheld on the basis:

[1] In 1981, this Court explained, "while this Court has never used the term 'promissory estoppel,' it has applied the doctrine in Furman University v. Waller, 124 S.C. 68, 117 S.E. 356 (1922)" Higgins Constr. Co. v. S. Bell Tel. & Tel. Co., 276 S.C. 663, 665, 281 S.E.2d 469, 470 (1981)

> ...[M]utual promises are in legal sense simultaneous when the continuing promise of one is met by, and is the inducement for, the reciprocal promise of the other....Where, in the absence of a formal acceptance or promise or covenant on the part of the promisee to assume the performance of an enforceable obligation, the promisee or beneficiary on the faith of the subscription and before its withdrawal has expended money or incurred liabilities in furtherance of the enterprise or undertaking that the promisor intended to promote, the reciprocal promise or covenant on the part of the promisee required to supply the element of consideration will be implied, or the expense incurred or liabilities assumed will be regarded as in the nature of an executed consideration induced by the request impliedly contained in the subscription offer.

Furman University v. Waller, 124 S.C. 68, 117 S.E. 356, 362 (1923).

The importance of the Furman case is the recognition that liability assumed on the basis of a promise (in this case, continuing to work for Respondent for a certain period of time) induced by a reciprocal promise (free retiree health insurance) is sufficient to support what the courts later referred to as promissory estoppel. In this case, the Court of Appeals created a forced emphasis on ambiguity and did not emphasize what the original promise was but, rather, focused on how the promise would be kept. No case in South Carolina has ever held promises performed for 20 years are ambiguous based on the fact that the parties did not know over time exactly how the promise would be kept. The courts' analyses have always focused on whether a promise is too vague or ambiguous to enforce.

For example, in North American Rescue Products, Inc. v. Richardson, 411 S.C. at 380, 769 S.E.2d at 241–42 (2015), there was only the offer of a promise so this Court held, "While there is evidence Castellani made subsequent assurances to Richardson-for instance, Castellani wrote in an e-mail that "nothing has changed in my mind about getting this done for you and [your family]"—none of these statements rise to the level of an unambiguous promise." In Rushing v. McKinney, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006), whether the

money promised was a loan or capital contribution, the amount of the money to be paid and how the parties would treat the money were all unknown issues so the Court of Appeals held the promise was too vague to carry out: "Rushing could not clearly articulate the terms of the alleged oral contract, including whether the money would be treated as a loan or capital contribution, how much money would ultimately be forwarded to Pentaura, or how Respondents would "settle up." In Satcher v. Satcher, 351 S.C. 477, 487, 570 S.E.2d 535, 540 (Ct. App. 2002), there were no witnesses to the alleged promise and even the promisee did not know how much land he believed he was promised so the Court of Appeals held, "Thus, even Chip was unclear as to the details of the promise. In addition, no other witness testified to any specific promises by Grandfather other than those relating to Slide Hill. Therefore, Chip has not shown by clear and convincing evidence that there was an unambiguous promise that he would receive the property he actively farmed." Finally, in Woods v. State, there was not even an allegation of a promise. The Court of Appeals held, "Woods did not allege or produce evidence of the presence of a promise unambiguous in its terms." 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993).

All that is required is that a promise be clear and sufficiently specific "that the judiciary can understand the obligation assumed and enforce the promise according to its terms." Barnes v. Johnson, 402 S.C. 458, 471-72, 742 S.E.2d 6, 12 (Ct. App. 2013)(citing 28 Am.Jur.2d *Estoppel and Waiver* § 52 (2011)). There is no doubt here that the promise at issue can be enforced by a court by simply directing Respondent to continue providing free retiree health insurance to Petitioners as it had for 20 years.

Importantly, in 2013, in Bishop v. City of Columbia, the Court of Appeals never expressed concern regarding any ambiguity of the City's promise to its retirees. The Court of Appeals stated the promise at issue succinctly: "retiree health insurance would continue to be free throughout

retirement." 401 S.C. 651, 666–67, 738 S.E.2d 255, 263 (Ct. App. 2013). What was promised was clear and unambiguous; how Respondent would keep its promise through the decades is not relevant to the issue of whether the original promise was ambiguous, which it was not.

Here, the Court of Appeals erred by failing to use promissory estoppel as a flexible doctrine used to achieve equitable results and provide a remedy where contract law cannot. The Court of Appeals' conclusion that there is "ambiguity inherent in such a general promise" cannot stand in light of its earlier decision in Bishop. Additionally, the holding is in error as there is not always ambiguity inherent in general promises, and the Court of Appeals neither defines the term "general promises" not cites to any law to support this holding.

The Court of Appeals also erred in analyzing the terms of this simple promise by comparing it to the terms necessary for an oral contract. When a promise has been kept for more than 20 years with no complaint by either the promisor or promisee, the Court of Appeals should have focused on equitable, not contract issues. Instead, the Court of Appeals justified its determination of ambiguity on the basis its finding was "Consistent with this balancing of interests and the lack of a contract specifically defining the agreement, an inability "*to clearly articulate the terms* of [an] alleged oral contract." Cruz v. City of Columbia, 437 S.C. 204, 877 S.E.2d at 485.

Yet, promissory estoppel is not a contract claim.

> The circumstances which may trigger the application of promissory estoppel in this case cannot be tortured into the requisite elements of a traditional contract. A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.

Thomerson v. DeVito, 430 S.C. 246, 256, 844 S.E.2d 378, 383–84 (2020) (citing Duke Power Co. v. S.C. Public Service Comm'n, 284 S.C. 81, 100–01, 326 S.E.2d 395, 406 (1985) (citation

omitted)); see also Link v. School District of Pickens County, 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) ("Promissory estoppel and contract are separate and distinct causes of action.")

The Court of Appeals' ambiguity analysis is more of a contract analysis and should not be determinative of the ambiguity of a promise kept for 20 years, which are the undisputed facts in this case. This Court should issue a Writ of Certiorari to clarify the issue of ambiguity in the context of a promissory estoppel claim and reverse the Court of Appeals' holding that Respondent's promise was ambiguous.

3. **The Court of Appeals exceeded its appellate review authority when it ignored the Lower Court's findings of fact regarding reasonable reliance and then failed to make its own findings of fact based on a preponderance of evidence, resulting in a decision that contradicts the Court of Appeals' earlier decision in Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013).**

The Court of Appeals' 2022 decision states in error, "The circuit court did not address any other elements of the promissory estoppel claim except damages." Cruz v. City of Columbia, 437 S.C. 204, 877 S.E.2d at 479, 484–85. In fact, the Lower Court found facts in its Order regarding the element of reliance: "Plaintiffs testified they relied upon verbal and written promises of post-employment group health insurance without charge and observed other retirees receiving benefits over a period of many years." (R. p. 32.) The Lower Court also stated in its Order, "..[S]ome Plaintiffs testified that they could have pursued or accepted other employment if informed that they may be charged for health insurance in the future" and "Other Plaintiffs testified that they may have postponed their retirement dates had they known that after July 1, 2009 retirees would be required to pay…for individual group health coverage." (R. p. 34.) The Court also expressed "no doubt regarding the sincerity and honesty of their testimony." (R. p. 33.)

Here, after determining the promise was ambiguous, the Court of Appeals merely held "the ambiguity of the promise renders its reliability questionable." Cruz v. City of Columbia, 437 S.C.

204, 877 S.E.2d at 486. "The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury." Unlimited Services, Inc., v. Macklen Enterprises, Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991); see also, Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (question of whether buyers could reasonably rely on the statement at issue is for a jury, not the court, to determine). An appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, an appellate court should still afford deference to the Lower Court as it was in the best position to judge the witnesses' credibility. Lewis v. Lewis, 392 S.C. 381, 391, 709 S.E.2d 650, 655 (2011).

Here, the Court of Appeals did not find by a preponderance of evidence Petitioners were not justified in relying on Respondent's promise. The Court of Appeals' opinion fails to acknowledge the Lower Court was in the best position to determine the reasonableness of Petitioners' reliance. "[I]ssues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts." McLaughlin v. Williams, 379 S.C. 451, 457, 665 S.E.2d 667, 670–71 (Ct. App. 2008) (quoting Unlimited Services, Inc. v. Macklen Enterprises, Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991)).

The Bishop case was remanded for trial in 2013 because "Retirees provided a scintilla of evidence that they reasonably relied upon the representations and promises of the City's human resource employees…[who]were authorized to inform Retirees about their insurance benefits." 401 S.C. at 667, 738 S.E.2d at 263. Here, the Court of Appeals' analysis of the element of reasonable reliance was not based on a preponderance of evidence, but rather, appears to rest

entirely on its holding that the promise at issue was ambiguous, which conflicts with its earlier decision in Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013).

Finally, the Court of Appeals presented no facts, much less a preponderance of evidence, to support its changed view of the element of reliance. "In equitable actions like promissory estoppel, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." S.C. Department of Transportation v. Horry County, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011) (citing Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010)). The Court of Appeals has issued conflicting opinions based on the same set of facts and overruled the Lower Court's findings of fact without a preponderance of evidence, so for this additional reason a Writ of Certiorari should be granted.

## CONCLUSION

Petitioners respectfully request this Court grant their Petition for Certiorari as the Court of Appeals' opinion in this case conflicts with prior decisions of this Court (specifically, Higgins Construction Co. and North American Rescue Products); it is a novel question of law whether a promise repeatedly kept by the promisor over the course of 20 years can be considered after-the-fact to be ambiguous; and the Court's decision regarding the reasonableness of Petitioners' reliance contradicts its previous decision in the case of Bishop v. City of Columbia.

Respectfully submitted,

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