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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2019-000374

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, ... Appellants.

v.

City of Columbia ..... Respondent.

and

Larry Strickland, Denious L. Dimery and Baily G. McClinton, ... Appellants

v.

City of Columbia ..... Respondent.

RESPONDENT CITY OF COLUMBIA'S PETITION FOR REHEARING

Respondent City of Columbia ("City") files this Petition for Rehearing for the purpose of reconsideration and clarification of the Court's August 3, 2022 Opinion, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules.

PROCEDURAL POSTURE

In an Opinion filed August 3, 2022, this Court correctly determined that Appellants, former City of Columbia employees, failed to produce at trial any unambiguous representation that could support reasonable reliance on their claims of entitlement to free health insurance for their

lifetimes. *Cruz v. City of Columbia*, Op. No. 5932 (S.C. Ct. App. filed Aug. 3, 2022) (Howard Adv.Sh. No. 27 at 110). This Court also properly observed that the record does not contain evidence that the relief sought by Appellants was necessary to avoid a fraudulent outcome. Accordingly, the Court reached the correct conclusion that Appellants failed to establish by clear and convincing evidence the elements necessary to prevail on promissory estoppel, the sole issue preserved for review.

The City agrees with the findings by the Court in holding relief unavailable to Appellants. However, because the Court also addressed Appellants' damages argument in a manner that could encourage costly and disruptive misunderstandings potentially resulting in unnecessary litigation against public entities in this State, the City respectfully requests rehearing and reconsideration of findings by the Court that trial judge erred in holding Appellants failed to satisfy the "damages" element of their promissory estoppel claim for the following reasons.

FACTUAL BACKGROUND

The Opinion under review accurately sets forth the controlling facts.

LEGAL ARGUMENT

1. The Opinion under review misapplies the law in addressing the evidence necessary to establish the damages element of Appellants' estoppel claim.

Contrary to the Court's finding, mere "expectation" is insufficient to sustain a promissory estoppel cause of action. Instead, the essential elements for obtaining relief on promissory estoppel grounds are: (1) a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relies on it; (3) the reliance is expected and foreseeable by the party who makes the promise; (4) and the party to whom the promise is made "**must sustain injury in reliance on the promise**." *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (*emphasis added*).

The Opinion under review alters the analysis of promissory estoppel claims in a fundamental fashion. Most significantly, the opinion shifts the damages element of promissory estoppel from assessing the **cost** of reliance to projecting the **value** of the alleged promise. This unprecedented conversion of "promissory estoppel" into "promissory enforcement" relieves Appellants (and future claimants) from the responsibility of demonstrating any injury or prejudicial change of position.

As recognized in the Opinion, Appellants identified no element of loss apart from their (unreasonable) expectation that ambiguous representations, inconsistent with published and known reservations of authority by City Council, guaranteed free health benefits for their lifetimes. Unlike the cases cited by the Court, there is no evidence that Appellants performed any additional work (*Higgins Construction Company*), spent any additional funds *(Furman University v. Waller*), abstained from any available opportunity (*Satcher*) or suffered any prejudicial change of position (*Powers Construction Company*) sufficient to establish "expectation damages," if such a basis for relief were available.

The Court's suggestion that "specific performance" is an available remedy in promissory estoppel actions dangerously blurs the line separating contract (requiring a meeting of the minds) and equity (available only in the absence of an agreement). Contract and promissory estoppel have been recognized by this Court and our Supreme Court as two separate and distinct legal theories. They "are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." *Satcher v. Satcher*, 331 S.C. 447, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (quoting *Duke Power Co. v. S.C. Pub. Serv. Comm'n.*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985)). Whereas contract requires a meeting of the minds and consideration, promissory estoppel looks at a promise and its effect on (rather than expectation of) the promissee. *Id.* The complications and confusion occasioned by merging contract and estoppel concepts long

recognized as incompatible would open a box of mischief that would render Pandora envious. Accordingly, the City respectfully requests reconsideration of the damages analysis in the Opinion under review.

2. The Opinion under review overlooks and misapplies controlling precedent in finding that Appellants can maintain estoppel claims.

The Opinion issued by this Court fails to apply the binding precedent of *Health Promotion Specialists, LLC v. S.C. Board of Dentistry*, 403 S.C. 623, 635-637, 743 S.E.2d 808, 814-815 (2013) (public entities are immune from liability on the basis of decisions to fund or impose costs for liabilities); *see, also Tenney v. Brand Hove*, 341 U.S. 367, 376-378 (1951) (exercise of discretion in selecting projects for public funding is not a matter of judicial review).

A resolution duly adopted by a municipal council "is a legislative enactment and presumed to be constitutional." *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 460, 716 S.E.2d 280, 284 (2011), *quoting Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010). (a duly adopted resolution is a legislative enactment and presumed to be constitutional); S.C. Const., art. X, § 14 (public subdivisions barred from incurring public indebtedness beyond revenue production). These legal principals establish the reach and limits of governmental authority in matters involving expenditure of public funds. Because the relief requested by Appellants was not available, even had they satisfied all elements of their estoppel claim, the Court's examination of their damages claims erroneous and unnecessary.

3. The Opinion under review overlooks and misapplies controlling precedent in holding that Appellants can maintain estoppel claims.

The Opinion issued by this Court fails to address binding precedent declared in *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). Unlike the authorities relied upon by the Court, the facts presented in *Ahrens* are strikingly similar to this case. In *Ahrens*, a group of retirees brought suit against the State seeking to bar withholding of contributions to the South Carolina Retirement

Systems ("SCRS"). When the *Ahrens* plaintiffs retired, state law did not require post-retirement contributions by working retirees. The retirees further asserted that SCRS representatives had informed them verbally and in writing that post-retirement employment by a covered employer would not require such contributions.

Following an amendment to the Retirement Act requiring contributions to the System by working retirees, the *Ahrens* plaintiffs brought suit to prohibit the State from withholding contributions, asserting that the previous statute and SCRS forms created enforceable contract rights and that the State was estopped from withholding contributions under the new statute. The trial court found no contract, but ruled in favor of the plaintiffs on equitable grounds.

On appeal, our Supreme Court affirmed that neither the statute nor the language used in retirement forms created a contract between the State and the working retiree plaintiffs. *Id.* at 348-352, 58-60. The Court stated that even if the forms were binding contracts, "we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature." *Id*. at 351, 59. The Court cautioned that "[a]ny other holding would permit an executive agency to usurp the essentially legislative function of amending laws by binding the legislature through contract where it had no intention of being bound." *Id*. at 351, 60.

In reversing the trial court's award of relief on estoppel grounds, the Court held that the State could not be estopped by written or verbal representations of SCRS staff. Specifically, the Court stated that "because this Court has ruled that the Working Retiree statute did not create a binding contractual right, estoppel cannot lie against the state . . ." *Id*. at 353, 61. This ruling makes it clear that even unambiguous statements made by government employees made within the scope of their employment, cannot bind the government without a supporting statutory or contractual foundation.

Although absence of authority alone was sufficient to reverse, the Court proceeded "for the

purpose of clarifying the necessary elements to prove estoppel against the government…" to find that the *Ahrens* plaintiffs failed to establish other elements of their estoppel claims. Citing *Grant v. City of Folly Beach*, 346 S.C. 74, 80-81, 551 S.E.2d 229, 232 (2001), the Court stated: "To prove estoppel against the government, the relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) **a prejudicial change in position**." (*emphasis added*). The Court found "it is difficult for [plaintiffs] to claim they did not know, or had no means of knowing that these terms would ever change." *Ahrens* at 354, 61. The Court went on to find that plaintiffs could not establish either the second or third elements of estoppel because of disclaimers included in the Retirement Systems' materials and plaintiffs' knowledge that laws are subject to change. *Id*. Accordingly, the Court should have found the absence of authority to enter contracts or interfere with legislative functions fatal to Appellants' estoppel claim. This holding would have rendered analysis of the "difficult" damages issue unnecessary.[1]

CONCLUSION

In summary, the Court erred in addressing the "complicated issue" of reliance damages available in promissory estoppel claims. In addition, the suggestion that specific performance may be ordered on the basis of disappointed expectation alone was erroneous and unnecessary in view of the City's established immunity as well as findings by the Court that Appellants did not satisfy the "unambiguous promise" or corresponding "reasonable reliance" grounds required for relief. For these reasons, the City respectfully requests that the Court reconsider that portion of its Opinion addressing damages which might potentially sustain a cause of action for promissory estoppel.

[1] This Court reiterated that caution that must be taken in addressing equitable claims involving governmental entities in *Dewberry 334 Meeting Street v. City of Charleston*, Op. No. 2021-UP-360, 2021 WL 4891824 (S.C. Ct. App. filed Oct. 20, 2021) (unpublished opinion).

Respectfully submitted,

s/Jacqueline M. Pavlicek

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August 29, 2022

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, the undersigned, hereby certify that I have caused a copy of the following document(s) identified herein to be served upon the parties' counsel of record indicated herein by transmitting such document(s) via e-mail to the attorneys' primary e-mail address listed in the Attorney Information System as follows:

DOCUMENT(S) SERVED: **RESPONDENT CITY OF COLUMBIA'S PETITION FOR REHEARING**

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s/Jacqueline M. Pavlicek
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August 29, 2022

Columbia, South Carolina

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Subject: Cruz v. City of Columbia, No. 2019-000374 - City's Petition for Rehearing 8-29-2022
Attachments: Cruz. JMP Ltr to COA filing City PFR and Proof of Service (8.29.22).pdf; Cruz. PFR-City (8.29.2022).pdf; Cruz. Proof of Service (PFR - City) 8-29-2022.pdf

Good morning, counsel.

I hope each of you had a safe and restful weekend.

Attached are copies of the City's Petition for Rehearing, Proof of Service, and correspondence to the Court of Appeals in the above-referenced appeal that will be filed momentarily with the Court of Appeals.

Sincerely,

Jax Pavlicek
8-29-2022

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OFFICE OF THE CITY ATTORNEY

August 29, 2022

Honorable Jenny Abbott Kitchings
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RE: Cruz v. City of Columbia
Appellate Case No. 2019-000374

Dear Ms. Kitchings,

Enclosed for filing is Respondent City of Columbia's Petition for Rehearing in the above-referenced appellate matter, along with a Proof of Service.

A check covering the filing fee will be transmitted to the Court under a separate cover letter.

Please let me know if you have any questions or concerns.

With kind regards,

Sincerely,

Jacqueline M. Pavlicek

JMP/jw
Enclosure(s): As stated

cc: W. Allen Nickles, III, Esq. (via e-mail)
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