THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-26-8261
Appeal No. 2017-000015

Wylie Neil Doyle, Timothy Lee, Anthony J. Mottola, III, and David Todd..........................Appellants,

v.

Horry County d/b/a Horry County Fire Rescue .... Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER OR NOT THE STATUTE OF LIMITATIONS ON A SOUTH CAROLINA PAYMENT OF WAGES CLAIM, AND RELATED PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT CLAIMS, CONTINUES TO ACCRUE WITH EACH NEW UNDERPAYMENT?

II. WHETHER OR NOT THE STATUTE OF LIMITATIONS WAS EQUITABLY TOLLED WHERE APPELLANT-EMPLOYEES BROUGHT PAY CONCERNS UP THE CHAIN OF COMMAND AND THERE WAS TESTIMONY THAT THE RESPONDENT-EMPLOYER EXPRESSED THAT IT WAS ANALYZING, AND DID ANALYZE, THE UNDERPAYMENT AT ISSUE UNTIL JULY 3, 2014?

III. WHETHER OR NOT THE RESPONDENT-EMPLOYER IS EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AS A BAR TO APPELLANT-EMPLOYEES CLAIMS WHERE TESTIMONY INDICATED THAT THE RESPONDENT EXPRESSED TO APPELLANT-EMPLOYEES THAT IT WAS WORKING ON THEIR INTERNAL PAY COMPLAINTS UNTIL JULY 3, 2014.

STATEMENT OF THE CASE

Appellants Wylie Neal Doyle, Timothy Lee, Anthony J. Mottola, III, and David Todd ("Appellant-Employees") are veteran cross-trained firefighter paramedics ("Firefighter/Paramedic") with nearly 100 years in combined service to Respondent Horry County ("Respondent-Employer")[1]. (R. p. 19, ¶¶ 5-6). Appellant-Employees' claims arose out of the implementation of a pay scheme adjustment01 to Firefighter/Paramedics called "propay". That pay adjustment occurred on March 29, 2008, and was followed by employee complaints and years of intra-employer discussion about whether or not pro-pay was properly implemented. This lawsuit was preceded by an announcement by the Respondent-Employer's fire chief on July 3, 2014 that the propay system was properly implemented.

This is an appeal from a directed verdict granted to the Respondent-Employer on September 21, 2016 after two days of trial, and the December 9, 2016 denial of a timely motion for reconsideration and a new trial. (R. pp. 1-10). Appellant-Employees filed this case on December 11, 2014 alleging: (1) violation of the South Carolina Payment of Wages Act (S.C. Code Ann. 41-10-10 *et seq.*), (2) promissory estoppel, and (3) unjust enrichment. (Complaint). Respondent-Employer answered on January 15, 2015. No dispositive motions were filed prior to trial.

This case was tried on Tuesday September 20, 2016 and September 21, 2016. The Trial featured the testimony of: each of the Appellant-Employees (R. pp. 48-107, 143-185, 206-238); Matthew Smith, a Battalion Chief who was involved in the implementation and later review of propay (R. pp. 107-140); Dennis R. Gibbins, Jr., a Firefighter/Paramedic who experienced the same pay issues as Appellant-Employees, and Fred Crosby, the Respondent-Employer's Fire Chief from 2013-2015 (R. pp. 193-206). Respondent-Employer, after the close of Appellant-Employees' case-in-chief, principally argued that it was entitled to a directed verdict on the basis that the statute of limitations

[1] Appellant Mottola was promoted to Lieutenant/Paramedic in 2013.

had run. (R. pp. 238-266). Appellant-Employees argued that the statute of limitations was subject to continuous accrual, was equitably tolled, and that the Respondent-Employer was equitably estopped from asserting it. (*Id.*). The Court ruled that the Statute of Limitations barred each of the Appellant-Employees' claims. (R. pp. 266-267). The Trial Court affirmed its holding in denying Appellant-Employees' motion for reconsideration and a new trial. (R. pp. 1-8).

Appellant-Employees' timely filed this notice of appeal on January 5, 2017.

STATEMENT OF THE FACTS

Appellant-Employee Neil Doyle began working for the Respondent-Employer immediately after high school and then again in 1993. (R. pp. 48-49). Doyle was hired as an Emergency Medical Technician (EMT) in 1993. (R p. 50). Doyle became a Paramedic in 1995, and a cross-trained Firefighter/Paramedic in 2001. (R. pp. 51-52). Appellant-Employee Timothy Lee began working for the Respondent-Employer as an EMT in 1997. (R. pp. 223-224). Lee was promoted to Firefighter/Paramedic in 2007. (R p. 224). Appellant Employee Anthony Mottola began working for the Respondent-Employer in 2000 as a Firefighter/EMT. (R. p. 144). Mottola became a Firefighter/Paramedic in 2007. (R. p. 145). Appellant-Employee David Todd began working for the Respondent-Employer in 1989, as a EMT, immediately following his honorable discharge from the Navy. (R pp. 207-208). Todd became a Firefighter/Paramedic in 2001. (R. p. 209).

Appellant-Employees were paid, throughout their employment, on a paygrade step process; whereby, employees would be placed into a grade (comprising of a salary range) based on their job title and given steps within that grade (that corresponded to positions within the grade's salary range) based on their years of experience. (R. p. 51, 280-285). Appellant-Employees were in paygrade 17 as Firefighter/Paramedics until the implementation of pro-pay in 2008. (R p. 53). Appellant-Employees received consistent annual step increases to their pay each year they were employed until 2008. (R. p.

54). After the implementation of pro-pay in 2008, step increases were frozen and there were no across the board increases in pay until across the board 2% raises in 2015 and 2016. (R. p. 84).

Respondent-Employer changed the way cross-trained personnel, including Appellant-Employees who were Firefighter/Paramedics, were classified through what it referred to as propay on March 29, 2008. (R. pp. 72-73). Appellant-Employees received a letter from their fire chief, contemporaneous with pro-pay implementation, which described pro-pay for Firefighter/Paramedics as follows:

> All Firefighter/Paramedics have been regraded from a Grade 17 to a grade 15 in whatever step you were currently in. A grade 17 step 4 would now be a grade 15 step 4. After the regrading, Propay of $7,500.00 was added back into the Firefighter Paramedic's salary. An example would be:
>
> A new hire paramedic, as a grade 17 was making $33,666.55 a year.
>
> Now, a new hire paramedic at grade 15 will make $30,968.83 a year with an additional $7,500.00 in Propay for a yearly total of $38,468.83. That is an increase of $4,802.28.
>
> Another example for Propay in reference to Firefighter/Paramedics is:
>
> Grade 17 step 4 is = $36,359.87
> Grade 15 step with Propay is = $40,946.35

(R. pp. 271-272). Battalion Chief Matthew Smith, an employee of the Respondent-Employer since 1993, was placed on a committee by the Respondent-Employer's Assistant Administrator Paul Whitten in 2006 to review the pay structure in the County's Public Safety Division; propay arose from that committee. (R. pp. 107-108). Battalion Chief Smith testified that propay should have been implemented as follows:

> Q: On Exhibit Nine, would you have explained to Timothy Lee the formula you used to calculate propay?
> A: Yes, Sir.
> Q: And how did you explain it?
> A: That an employee was placed in Grade 15, their number of years were calculated into steps, and beyond that there was an additional $7,500 added to their salary as propay.

> Q: Is that still your understanding sitting here today of how propay was supposed to work?
> A: Yes, Sir.

(R. pp. 126:25-127:9, 290[2]).

However, when propay was implemented, the Appellant-Employees, and other senior firefighter/paramedics, were not given full credit for their years of service (step) when moved from Grade 17 to Grade 15 causing their pay to be less than expected, and their earning capacity to decrease considerably. (R. pp. 75, 280-285). Specifically, after propay:

- Appellant-Employee Neil Doyle, based on his years of experience, would have been in grade 17, step 16 when propay was initiated on March 29, 2008. (R. p. 57). Instead, Appellant-Employee Doyle was paid $44,809.08 consistent with a grade 15, step 10 base pay of $37,398; whereas, according to his years of experience he should have been paid $48,378, with a base pay of $40,878[3] consistent with grade 15, step 16; resulting in a difference of $3,568.92 per year. (R. pp. 85-89, Plaintiff 286).
- Appellant-Employee Lee, based on his years of experience, would have been between grade 17, step 9-10 when propay was initiated on March 29, 2008. (R. p. 229). Instead, Appellant-Employee Lee was paid $41,428.19 consistent with a grade 15, step 4 base pay of $33,928.19; whereas, according to his years of experience he should have been paid approximately $44,662.60 with a base pay of $37,162.60 consistent with grade 15, step 10; resulting in a difference of $3,234.14 per year. (R. pp. 229-231; 302).

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[2] Battalion Chief Smith, in his email to Appellant-Employee Lee, explained propay calculation as follows:

> We take your date of hire. Place you in Grade 15 with your steps for the number of years you've been here, and add $7,500 for Pro[p]ay. There are some inherent issues. I'm dealing with at this point as to the 4 years of suspended steps and such but it should actually be the easiest thing to figure out if it's just plugged in and left alone.

(R. p. 290).

[3] To ascertain an employee's step after propay, the $7,500.00 is subtracted from an employee's post-propay salary arriving at the employee's base salary or step within Grade 15. (R. p. 86-87).

- Appellant-Employee Mottola, based on his years of experience, would have been between grade 17, step 7-8 when propay was initiated on March 29, 2008. (R. p. 169). Instead, Appellant-Employee Mottola was paid $39,562.38 consistent with a grade 15, step 1 base pay of $32,162.38; whereas, according to his years of experience he should have been paid approximately $43,423.84 with a base pay of $35,923.84 consistent with grade 15, step 8; resulting in a difference of $3,861.46 per year. (R. pp. 168-171, 294). Mottola, as a result of the alleged propay inequity, received less than the standard raise for his promotion to Lieutenant; he received a 1.6% increase whereas the standard is at least 5%. (R. p. 150-151; *See also*, R. pp. 295-297[4]).
- Appellant-Employee Todd, based on his years of experience, would have been between grade 17, step 18 when propay was initiated on March 29, 2008. (R p. 215). Instead, Appellant-Employee Todd was paid $46,143.71 consistent with a grade 15, step 12 base pay of $38,643.71; whereas, according to his years of experience he should have been paid approximately $49,617.61 with a base pay of $42,117.61 consistent with grade 15, step 10; resulting in a difference of $3,473.90 per year. (R. pp. 214-216, 301).

Appellant-Employees ultimately reported to the Fire Chief as Firefighter/Paramedics. (R. pp. 56-57). Appellant-Employees first raised concerns to the Fire Chief regarding the pay inequity between what they expected to receive and what they received. (R. p. 75). Appellant-Employee Lee described the process by which he and other Firefighter/Paramedics raised concerns about their pay was to follow the chain of command:

> Q: Was your base pay to propay – was your base pay propay on par with your years of experience?

[4] Plaintiff's Exhibit 12, an email chain wherein top Fire Department officials describe the pay inequity caused by Appellant-Employee Mottola's promotion, was not admitted into evidence on the basis of asserted prejudice. (R. pp. 151-163). Appellant-Employee's contend that ruling was error and that the exhibit is not unduly prejudicial and is probative of Appellant-Employee Mottola's attempts to properly address his pay concerns up the chain of command and demonstrative of the extended pay inequity he encountered when he was promoted.

> A: No, no, it wasn't.
> Q: Tell me what you did about that.
> A: Several of us communicated and realized, hey, something's not right about our pay, went through our chain of command to let them know something was wrong and we'd like to have somebody look at it and from thereon, I don't know what happened to it.

(R. p. 226:7-15; *see also* pp. 149-150, and 212 (Appellant-Employees Mottola and Todd discussing taking their concerns up the chain of command)). Appellant-Employees eventually received feedback from the Fire Chief that the propay implementation was being reviewed for errors and would be "fixed." (R. p. 77-78). In fact, via Staff Meeting minutes posted department-wide, the Fire Rescue Department administration declared on November 11, 2013:

> The issue of pro pay and the way it was applied to long term employees has been clouded and inconsistent and was on the to do list from early on. We are still working on this issue especially for those that have topped out in the pay grade and we had a meeting with finance yesterday and believe we have an agreement on fixing this issue. They are researching with Sally who is actually affected and hopefully those in the situation will see a fix in their paychecks in the next month or so.
>
> I think this issue was brought to me in February or March of last year, it has taken longer than I wanted to get to this point I do want people to know that we don't forget and we are still working on these things even though some seem to take forever to get fixed.

(R. pp. 273-274). Fred Crosby, then the Fire-Chief, posted an E-blast to all Fire Department personnel on December 19, 2013 stating "All FF Paramedics have been reconciled[] [c]ost to fix is 33K+ per year . . .." (R. pp. 275-276)[5]. Despite these assurances, Chief Crosby announced on July 3, 2014, that propay was implemented correctly except for three Firefighter/Paramedics who were overpaid and one Lieutenant/Paramedic who was underpaid due to a promotion.[6] (R. p. 80). Chief Crosby made this proclamation based on a conclusion given to him by the Respondent-Employer's Human

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[5] Additionally, Appellant-Employee Todd was told by two separate Battalion Chiefs that he should be expecting an increase to his pay due to the improper implementation of propay. (R. p. 213).

[6] The Lieutenant/Paramedic referred to was Appellant-Employee Mottola; however, no changes were made to his pay; even though, the pay of the alleged overpaid employees was taken back. (R. pp. 79-80).

Resources and Finance Departments, but testified that Human Resources and Finance did not explain the basis of their conclusion or "show their work." (R. pp. 200, 205).

Chief Crosby, after announcing that the propay analysis would not result in a broad correction to compensation, directed employees to ask any questions to human resources that they had regarding the propay analysis. (R. p. 80). Appellant-Employees raised concerns with Human Resources, but received little to no response. (R. p. 75). Appellant-Employee Doyle sent a written inquiry to human resources, but received no response. (R. pp. 80-81, 277-279). Appellant-Employee Lee was placed on a list by a Human Resources Official to meet with Human Resources Director Patrick Owens about propay, but Owens never met with him. (R. p. 227). Owens did meet with Appellant-Employee Mottola, but did not explain why Mottola's pay was correct. (R. pp. 166-167).

Testimony revealed that a propay review committee reached a different conclusion than Human Resources and Finances' conclusion announced by Chief Crosby on July 3, 2014. Battalion Chief Smith, who was on the original propay committee, was assigned by Interim Chief Kenneth Beans and later Chief Crosby to analyze the implementation of propay along with employees in the Respondent-Employer's Finance Department, due to pay concerns raised by a number of Firefighter/Paramedics. (R. pp. 111-112). Battalion Chief Smith, in this post-propay analysis, prepared a document showing that, based on his understanding of how propay should have been implemented, Appellant-Employees Doyle, Lee, and Todd were underpaid between $7,535.17 per year and $4,546.98 per year. (R. pp. 123-125, 289). Smith's analysis did not include Appellant-Employee Mottola, who had already been promoted to Lieutenant; because, Smith was solely reviewing Firefighter/Paramedics at the time he generated his spreadsheet. (R. p. 124). Smith, regarding Appellant-Employees Doyle, Lee, and Todd, testified:

> Q: Did you determine that David Todd had appropriately received his full propay?
> A: No, Sir.

Q: What was the difference in what he received in total and what he should have received?
A: $7,535.17 annually.
Q: Neil Doyle, had he received his total due?
A: No, Sir.
Q: What was the difference and what was he due?
A: $4,546.98 annually.
Q: Timothy Lee, had he received his total due?
A: No, Sir.
Q: What was his total due?
A: $6,258.38.

(R. p. 125:6-19). Chief Crosby testified that, based on Smith's analysis, he believed Appellant-Employees' salaries were due to be increased. (R. p. 199).

Appellant-Employees filed this lawsuit less than six months after Chief Crosby's July 3, 2014 announcement that the review of propay was completed, and their pay would not be adjusted.

STANDARD OF REVIEW

This is an appeal from an order granting a Rule 50(a), SCRCP directed verdict, and the denial of Appellant-Employees' Rule 59(a),(e), SCRCP motion for reconsideration and a new trial.

"On appeal from an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the party against whom the directed verdict was granted." *Mullinax v. J.M. Brown Amusement Co.*, 326 S.C. 453, 456, 485 S.E.2d 103, 105 (Ct. App. 1997), *aff'd*, 333 S.C. 89, 508 S.E.2d 848 (1998); *citing*, *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct.App.1991); *Unlimited Services, Inc. v. Macklen Enter., Inc.*, 303 S.C. 384, 401 S.E.2d 153 (1991). The Trial Court in ruling on a motion for a directed verdict: "must eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest." *Mullinax v. J.M. Brown Amusement Co.*, 326 S.C. 453, 456, 485 S.E.2d 103, 105 (Ct. App. 1997), *aff'd*, 333 S.C. 89, 508 S.E.2d 848 (1998); *citing*, *Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc.*, 296 S.C. 219, 371 S.E.2d 539 (Ct.App.1988).

This case involves actions at law and in equity. "When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006); *citing*, *Blackmon v. Weaver*, 366 S.C. 245, 248-49, 621 S.E.2d 42, 44 (Ct.App.2005); *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct.App.2000) (citations omitted). "When reviewing a motion for directed verdict [at law] or JNOV, an appellate court must employ the same standard as the trial court." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). "When reviewing a motion for directed verdict [in equity] or JNOV, an appellate court must employ the same standard as the trial court. *Wright*, 372 640 S.E.2d at 495.

ARGUMENT

The Trial Court held that Appellant-Employees' claims were barred by the statute of limitations. (R pp. 265-266); (Order on Directed Verdict 9/21/16). Appellant-Employees contend: (1) that the statute of limitations on their claims is subject to continuous accrual, (2) that the statute of limitations was equitably tolled, and (3) that the Respondent-Employer is equitably estopped from raising the statute of limitations as a defense.

I. THE STATUTE OF LIMITATIONS IN A PAY CASE CONTINUOUSLY ACCRUES UPON EACH UNDERPAYMENT.

The Trial Court rejected Appellant-Employees' continuous accrual argument in accord with *Maher v. Titex Corp.* 331 S.C. 371, 500 S.E2d 201 (Ct. App. 1998). The Trial Court reasoned: "this argument was previously considered by the South Carolina Court of Appeals in *Maher* . . . and it was rejected." The Court of Appeals did not consider the application of continuous accrual to a statutory wage payment action. In fact, the *Maher* Court specifically remanded the Maher's case so that he could elect to pursue his available remedies under the South Carolina Payment of Wages Act:

> At trial, the jury returned verdicts on both the breach of contract claim and the Wage Payment Act claim. Maher then elected to recover on his breach of contract claim. Since we have reversed that claim based on the statute of limitations, we remand to the trial court for proceedings consistent with this opinion. *Cf. Lancaster v. Smithco, Inc.*, 241 S.C. 451, 128 S.E.2d 915 (1962) (party was not barred from bringing action for breach of general warranty, even though Supreme Court, on the basis of legally insufficient evidence to raise a factual issue, overturned prior fraud and deceit judgment based in same facts); *Green v. Carder*, 276 Ark 591, 637 S.W.2d 594, 595 (1982) ("[T]he election of a remedy which did not exist was no election at all."); *Rolf's Marina v. Rescue Serv. & Repair, Inc.*, 398 So.2d 842 (Fla.Dist.Ct.App.1981) (remanded case to allow appellant to proceed with formerly abandoned position, after appellant initially elected a remedy that ultimately proved to be legally unavailable after evidence developed at trial).

Maher, 500 S.E.2d 204, 211. The *Maher* Court determined that the statute of limitations in a breach of contract action commenced when Maher discovered the breach not upon each subsequent underpayment that constituted a continuation of the initial breach of his contract. *Maher*, 500 S.E.2d 207-209. This, a Payment of Wages Act claim (and associated equitable actions) is different.

Payment of Wages Act claims are statutorily governed by the provisions of the South Carolina Payment of Wages Act. S.C. Code Ann. § 41-10-10 et. seq. The Payment of Wages Act explicitly applies to public employers. S.C. Code Ann. § 41-10-10(1) ("'Employer' means every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State."). This action arose under S.C. Code Ann. §§ 41-10-40 and 41-10-80(C). This action alleges that the Respondent-Employer did not pay the Appellant-Employees all wages due with respect to a pay change that occurred in 2008 and continued thereafter. The Statute of Limitations on a wage payment claim is statutorily set: "[a]ny civil action for the recovery of wages must be commenced within three years after the wages become due." S.C. Code Ann. § 41-10-80(C). Section 41-10-40(A) provides: "every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday." S.C. Code Ann. § 41-10-40. Thus,

each time an employer does not pay all wages due to an employee on the date of the employee's payday, the Payment of Wages Act has been violated. A clear reading of S.C. Code Ann. § 41-10-80(C) in conjunction with § 41-10-40(A) dictates the application of the continuous accrual doctrine to wage payment claims. Thus (without respect to Appellant-Employees' equitable arguments below) a new actionable statute of limitations arose each time Plaintiff's received a bi-weekly pay check, cut-short due to the propay implementation errors underlying this case, for the three years preceding this action's filing (December 11, 2014) and after. The clear language of the South Carolina Payment of Wages Act permits Appellant-Employees' statutory claim without the necessity of an in depth analysis of the continuous accrual doctrine.

Nevertheless, the continuous accrual doctrine allows for the statute of limitations to continuously accrue on Appellant-Employees' payment of wages act and equitable claims. The continuous accrual doctrine applies where a wrong continues and is abatable. *See, State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.* 414 S.C. 33, 77, 777 S.E.2d 176, 199 (2015), *reh'g granted* (July 8, 2015), *cert. denied sub nom. Ortho-McNeil-Janssen Pharm., Inc. v. S. Carolina ex rel. Wilson*, 136 S. Ct. 824, 193 L. Ed. 2d 766 (U.S.S.C. 2016) ("Janssen assumes, wrongly so, that its ability to successfully invoke the statute of limitations to bar the labeling claim prior to January 24, 2004, ends the labeling claim altogether."); see also, *Estate of Livingston v. Livingston*, 404 S.C. 137, 147, 744 S.E.2d 203, 209 (Ct. App. 2013) ("The supreme court has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of the original intrusion on the property and cannot be a complete bar."); *and, Cutchin v. S.C. Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split; however, if the cause of the injury is abatable, each injury gives rise to a new cause of action). A wage underpayment is abatable each time an employee is underpaid; thus each underpayment gives rise to a new cause of action.

The Continuous Accrual doctrine, respective of employment claims, has been applied by other courts elsewhere in the employment law context. Specifically the Fourth Circuit Court of Appeals has held:

> Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment.

Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980). Moreover, the Fifth Circuit Court of Appeals has held:

> We agree with the district court that the sheriff's repeated garnishment of Jackson's wages created a continuing violation of Jackson's due process rights under § 1983. As we said in *Perez v. Laredo Junior College*: If ... the statutory violation does not occur at a single moment but in a series of separate acts and if the same alleged violation was continued at the time of each act, then the limitations period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed.

Jackson v. Galan, 868 F.2d 165, 168 (5th Cir. 1989).

The Trial Court did not rely on, and the Respondent-Employer has not cited to any governing case law which would preclude Appellant-Employees' claims in accord with the statute of limitations. A clear reading of the Payment of Wages Act allows for a continuous accrual of the statute of limitations each time an employee is underpaid; furthermore, the continuous accrual doctrine would apply to each of the Appellant-Employees' claims because the harm they alleged is continuous and abatable. Appellant-Employees therefore respectfully request that this Court reverse the lower court's directed verdict and order a new trial.

II. THERE IS SUFFICIENT RECORD EVIDENCE OF EQUITABLE TOLLING.

The Trial Court should not have rejected Appellant-Employees' equitable tolling arguments on directed verdict. "A determination in equity is not proper for a directed verdict motion insofar as

determining what matters should be submitted to the jury." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 76, 777 S.E.2d 176, 199 (2015), *reh'g granted* (July 8, 2015), *cert. denied sub nom. Ortho-McNeil-Janssen Pharm., Inc. v. S.C. ex rel. Wilson*, 136 S. Ct. 824, 193 L. Ed. 2d 766 (2016). A directed verdict is only appropriate in the absence of questions or fact. *See,* Rule 50(a), SCRCP ("When upon a trial the case presents only questions or law the judge may direct a verdict.") Further on a Rule 50 motion: "The trial court must eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest." *Mullinax v.JB Brown Amusement;* 326 S.C. 453, 485 S.E.2d 103, 105 (Ct. App. 1997) *affirmed* 333 S.C. 89, 508 S.E.2d 848 (1998).

Appellant-Employees argued that the statute of limitations in their case was equitably tolled because:

a. They each worked actively with the Respondent-Employer, pursuant to the chain of command, to resolve their alleged underpayment, (R. pp. 75, 149-150, 212, and 226);
b. They were told by their Fire-Chief and other top-level Fire Department administrators in writing and verbally that their pay was being reconciled, (R. pp. 77-78, 175, 273-276, 290-291, 295-297); and,
c. The Appellant-Employees reasonably believed that the Respondent-Employer was going to resolve their alleged underpayment based on its representations.[7] (R. pp. 77-78, 149-150, 212-213, 226).

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[7] Employer-Respondent, based on prior arguments in this case, is expected to assert that Appellant-Employees were unreasonable in relying on and bringing their issues pay issues before their supervisors; because, it argues that the County Administrator and Human Resources Offices are, without delegation, the sole personnel authorized by Employer-Respondent to discuss compensation matters. Viewing the facts in the light most favorable to the Appellant-Employees, there is, at worst, a fact issue about whether or not Appellant-Employees had the right to rely on their supervisors and whether or not those supervisors possessed at least apparent authority. *See,* (R. p. 206) (Wherein Chief Crosby testifies that he often acted as a liaison between County Administration and the Fire Department, and that his firefighters should trust and rely on his statements). "Concomitantly, the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *R & G Const.,*

Appellant-Employees did the right thing—attempting to resolve an issue with their employer before resorting to litigation. Applying equitable tolling here is appropriate, to not do so engenders a litigious policy. "In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'" *Id.* at 736 (citation omitted). *See also, Kaplan v. Morgan Stanley & Co.*, 186 Vt. 605, --, 987 A.2d 258, 264 (2009) (2009 WL 2401952) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.") (citing *Beecher v. Stratton Corp.*, 170 Vt. 137, 743 A.2d 1093, 1098 (1999)); *Cf, Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla.1988) (stating the doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits).

Unlike equitable estoppel, equitable tolling does not require a showing that a defendant made a misrepresentation to a plaintiff. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012); *citing, Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009) ("Equitable tolling is judicially created; it stems from

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Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000); *See also, Id.* at 118 ("Generally, agency is a question of fact.").

the judiciary's inherent power to formulate rules of procedure where justice demands it."). Here the Appellant-Employees put forth ample evidence indicating that the statute of limitations as to all their claims should be equitably tolled. That is, because Appellant-Employees engaged in commendable pre-litigation efforts to resolve their alleged underpayment, and were encouraged to do so by the Respondent-Employer, the statute of limitations should be equitably tolled.

III. THERE IS SUFFICIENT RECORD EVIDENCE THAT RESPONDENT-EMPLOYER IS EQUITABLY ESTOPPED FROM RAISING THE STATUTE OF LIMITATIONS AS A DEFENSE.

Similarly, the conduct of the Employer-Respondent in encouraging Appellant-Employees that their underpayment would be "fixed" makes it equitably untenable for Employer-Respondent to now assert the statute of limitations. (R pp. 77-78, 213, 273-276, 290-291, 295-297). Employer-Respondent's reliance on the statute of limitations in this context fosters an unjust result; however, the Court has "the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dible*, 279 S.C. 592, 595-96, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983). Therefore, even if the statute of limitations was not subject to continuous accrual or equitable tolling, Employer-Respondent is estopped from asserting it as a defense in this matter.

Equitable Estoppel has two sets of elements applicable to the party raising estoppel and the party against whom estoppel is sought. First, where a party manifests: "(1) conduct which amounts to a false representation, or conduct calculated to convey the impression that the facts are otherwise, (2) the intention that such conduct shall be acted upon by the other party, and (3) knowledge of the facts" the party may be estopped from arguing a point that contravenes their prior actions, intention, and knowledge. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (S.C. Ct. App. 1994). Second, where the party seeking estoppel shows: "(1) a lack of knowledge or the means of knowledge of truth as to facts in question, (2) justifiable reliance upon the conduct of the party estopped; and (3) prejudicial change in [] position" that party may assert estoppel. *Walton v. Walton*,

282 S.C. 165, 168, 318 S.E.2d 14, 16 (1984). Here Appellant-Employee's justifiably relied, in the absence of information available to them that was available to the Respondent-Employer, on representations by the Respondent-Employer that their pay was in the process of being reconciled. The Appellant-Employees are now prejudiced by the application of the statute of limitations due to their reasonable reliance. The Respondent-Employer should be estopped from asserting the statute of limitations as a defense based on the evidence presented at trial.

CONCLUSION

Appellants Wylie Neil Doyle, Timothy Lee, Anthony Mottola and David Todd respectfully asks this Honorable Court to Reverse the holding of the Circuit Court, directed verdict, and Remand this case for a new trial.

Respectfully Submitted,

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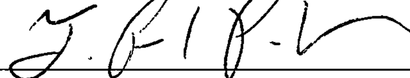

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July 26, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-26-8261
Appeal No. 2017-000015

Wylie Neil Doyle, Timothy Lee, Anthony J. Mottola, III, and David Todd..........................Appellants,

v.

Horry County d/b/a Horry County Fire Rescue .... Respondent.

CERTIFICATE OF COUNSEL

I hereby certify, as counsel of record in the above-captioned case, that the Appellants' Final Brief submitted herewith contains no matter which is irrelevant to the appeal as required by Rule 209(c), SCACR.

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