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

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 REPLY BRIEF OF APPELLANT

J. Paul Porter (SC Bar No. #100723)
1418 Laurel Street, Suite A (29201)
Post Office Box 11675
Columbia, South Carolina 29211
Phone: 803-799-9530
Fax: 803-799-9533
Email: paul@cbphlaw.com
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

This is an appeal from the Circuit Court's grant of a directed verdict on September 21, 2017, and denial of a motion to reconsider and motion for a new trial thereafter.

Respondent-Employer filed a response brief to the Appellant-Employees initial brief on May 30, 2017. There Respondent-Employer maintains (1) that the statute of limitations bars Appellant-Employees claims in accord with *Maher v. Titex Corp.*; (2) that the statute of limitations is not subject to equitable tolling or equitable estoppel; and (3) that Appellant-Employees, as an additional sustaining ground, did not establish the elements of their claims alleging a violation of the South Carolina Payment of Wages Act, promissory estoppel, and quantum meruit. Plaintiff replies to those arguments and would show the Court that:

1. The Statute of Limitations and the *Maher* case do not bar Appellant-Employees' claims,
2. The record supports the application of equitable tolling and estoppel,
3. The record sufficiently establishes Appellant-Employees' claims, and
4. The Respondent-Employer misstates the facts within the applicable standard of review

Appellant-Employees therefore ask this Court to remand this case to be re-tried.

1. The Statute of Limitations and the *Maher* case do not bar Appellant-Employees' claims.

The Respondent-Employer maintains that the continuous accrual doctrine does not apply because of this Court's decision in *Maher*. (Respondent Brief pp. 9-16). However, Respondent-Employer cannot reasonably suggest that the *Maher* court rejected the application of the continuous accrual in a payment of wage context when (a) that question was not before the Court, and (b) the Court specifically remanded *Maher* to allow Maher to pursue his remedies under the 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 Sem. & 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 v. Titex Corp. 331 S.C. 371, 500 S.E.2d 201 (Ct. App. 1998). Respondent-Employer cannot analogize this Court's holding in *Maher* that breach of contract was "a single wrong with continuing effects" to this case. *Maher*, 500 S.E.2d at 211. Such a result does not coincide with the statutory framework of a wage payment claim (or related equitable claims) concerning repeat underpayments over time.

The elements of a breach of contract contemplate "a single wrong:" "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015); *citing, S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct.App.2012). Breach of contract contemplates a single breach, one wrong. Whereas a statutory payment of wages claim arises each time that employee is underpaid, allowing multiple wrongs. S.C. Code Ann. § 41-10-80(C) ("In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due."); S.C. Code Ann. § 41-10-40(a) ("(A) 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.")

A common sense reading of the Payment of Wages Act contemplates that the act is violated each time an employer fails to pay all wages due on an employee's payday. Thus, even absent the application of estoppel or equitable tolling, a new statute of limitations continuously accrues each time an employee does not receive all wages he is due on a payday. The Respondent-Employer argues that the Appellant-Employees have not preserved the ability to argue the interpretation and application of the statutory language of Payment of Wages Act. (Respondent Brief p. 15). That argument is as confounding as it is wrong. *See*, (R. pp. 238-266). A new statute of limitations for Appellant-Employees' claims arose each payday they were underpaid, and to the extent an argument about the interpretation of the statute underlying one of Appellant-Employees' claims needed to be preserved, the argument is preserved.

The result sought by Appellant-Employees is consistent with how the Court has previously applied the continuous accrual doctrine. 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). The Court applied the continuous accrual doctrine, in *Orth-McNeil-Janssen*, where multiple violations of the South Carolina Unfair Trade Practices

Act occurred, each violation giving rise to its own potential cause of action. *Ortho-McNeil-Janssen Pharm, Inc.* 777 S.E. 2d at 199; ("Nevertheless, the labeling claim presents ongoing violations of SCUTPA that continued after January 24, 2004 and during the three-year-period prior to the tolling agreement."); *citing, Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 151 Cal.Rptr.3d 827, 292 P.3d 871, 880 (2013) (distinguishing the continuous accrual doctrine from the continuing violation doctrine, which involves a single injury that is the product of a series of small harms, any one of which is not actionable on its own). Similarly, in *Silvester v. Spring Valley Country Club*, this Court recognized that when a nuisance is continuing and is abatable "a new statute of limitations begins to run after each separate invasion of the property." *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001). A repetitive wage underpayment action, like these situations, involves abatable or divisible harms and wrongs each time an employee is underpaid, and each underpayment gives rise to a new cause of action.

The Trial Court ultimately rejected Appellant-Employees' continuous accrual argument in accord with *Maher*, reasoning: "this argument was previously considered by the South Carolina Court of Appeals in *Maher* . . . and it was rejected." That reasoning is facially incorrect as acknowledged by Respondent-Employer: "The Court clearly would have conducted the same analysis if analyzing the claim under the Wage Act." (Respondent Brief p. 14). Respondent-Employer's argument overlooks the differences between a breach of contract claim and a statutory wage act claim, as well as Appellant-Employees' associated claims, and how the doctrine of continuous accrual applies to those differences. Here, the continuous accrual doctrine legally applies to Appellant-Employees' claims rendering those claims actionable for the three years prior to the initiation of this action, without regard to the equitable arguments below.

Respondent-Employer, while acknowledging that an entirely different claim was considered in *Maher*, solely relies on *Maher* to support its position.[1] (Respondent Brief pp. 9-11, 12-14). Respondent-Employer then asks the Court to shift the burden stating: "In their brief, Appellants argue, without citation to any authority, that the result in *Maher* would have been different had the Court of Appeals analyzed the facts under the Wage Act." (Respondent Brief p. 13). Contrary to Respondent-Employer's assertion, *Maher* itself and the law of this Court applying the continuous accrual doctrine to similar claims supports reversal. The *Maher* Court specifically remanded Maher's case so that he could elect to pursue his available remedies under the South Carolina Payment of Wages Act. This Court should similarly remand.

2. The record supports the application of equitable tolling and estoppel.

Appellant-Employees ask the Court to apply the equitable doctrines of tolling and estoppel to prevent the application of the statute of limitations from punishing them for doing the right thing—attempting to resolve their dispute (respectfully through the chain of command and with encouragement from those within the chain of command) rather than automatically resorting to litigation. Respondent-Employer's argument to the contrary is a litigious prospect. As an introductory matter, "[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) Equitable Tolling

"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

[1] Respondent-Employer does spend a great deal of its argument discussing the discovery rule (Respondent Brief p. 11) and various unpublished cases about the purpose of the Payment of Wages Act (Respondent Brief p. 13). Such discussion is filler, impertinent to and not effecting whether the continuous accrual doctrine applies to Appellant-Employees' claims.

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). 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 the judiciary's inherent power to formulate rules of procedure where justice demands it."). *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).

Respondent-Employer's argument against the application of equitable tolling is entirely fact-driven. Respondent-Employer avers "Appellants point to no evidence demonstrating the County actively misled or prevented them from timely filing suit within the limitations period" and "[t]he Propay issue was dormant from . . . April 2008 until 2013." (Respondent Brief p. 17). However, "[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). Appellant-Employees presented evidence that 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). Appellant-Employees testimony also indicates that their pursuit of this matter up the chain of command began immediately upon Propay's implementation. (R. pp. 149-150, 212, 226:7-15). Further, Appellant-Employees were encouraged to continue pursuing their Propay dispute, outside of litigation, as 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). The Appellant-Employees testified that they believed that the Respondent-Employer was going to resolve their alleged underpayment based on its representations. (R. pp. 77-78, 149-150, 211-212, 226). 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). Because Appellant-Employees engaged in, and were encouraged to engage in, commendable pre-litigation efforts to resolve their alleged underpayment the statute of limitations should be equitably tolled.

(b) Equitable Estoppel

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).

The record evidence outlined above: that Appellant-Employees 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; and that Appellant-Employees are now prejudiced by the application of the statute of limitations indicates that Respondent-Employer should be equitably estopped from asserting the statute of limitations as a defense to their claims. Respondent-Employer makes two arguments to avoid equitable estoppel: (1) that equitable estoppel was not preserved, and (2) factually loaded arguments that Appellant-Employees did not timely raise their concerns, and could not reasonably rely on the statements of their fire chief. (Respondent Brief p. 19). Equitable Estoppel was preserved before the trial court. (R. pp. 238-266). Additionally, there is sufficient evidence that Appellant-Employees began raising their concerns about Propay soon after its implementation. (R. pp. 75, 149-150, 212, and 226). Last, authority is a fact controlled concept and whether Appellant-Employees could reasonably rely on statements by their department supervisor, the Fire Chief, is a jury question. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117-118 (Ct. App. 2000) "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. . . Generally, agency is a question of fact."). The Respondent-Employer's arguments with respect to equitable estoppel are undermined by the record, and should be rejected.

3. The record sufficiently establishes Appellant-Employees' claims.

Respondent-Employer last argues that the record does not establish Appellant-Employees' claims. Respondent-Employer argues (1) that Appellant-Employees' Payment of Wages Act claim is not viable because Appellant-Employees' wages conformed with their statement of wages forms; (2) that Appellant Employee's promissory estoppel claim fails due to the lack of an unambiguous promise and justifiable reliance; (3) that Appellant-Employees did not establish a wrongfully retained benefit with respect to quantum meruit. Appellant-Employees would show the Court that the record sufficiently establishes their claims.

(a) Payment of Wages Act

Respondent-Employer argues that Appellant-Employees' Wage Act claims fail because they were paid the amount on their statement of wages act form. (Respondent Brief pp. 21-26). Here there is a factual conflict between the amount Appellant-Employees were paid pursuant to their statement of wages forms and the amount they allege they should have been paid pursuant to verbal statements by and written documentation from their supervisors. The Respondent-Employer attempts to argue that the Payment of Wages Act contains a safe-harbor provision that protects employers anytime a proper statement of wages form is used. The Act is absent such a provision. *See*, S.C. Code Ann. § 41-10-10 *et. seq.*

Respondent-Employer bases this argument on a broadened interpretation of this Court's decision in *Carolina All. for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation.* (Respondent Brief pp. 21-22); *citing, Fair Employment*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). Respondent-Employer's desired interpretation is based on three lines from the *Fair Employment* decision: "The statute is a notice statute. It is intended to provide the employee with the information requisite to make an educated decision whether or not to accept employment. The wages, hours, and time and place of payment must be stated." *Id.* Respondent-Employer leaves out that *Fair Employment* was a declaratory judgment action concerning only S.C. Code Ann. § 41-10-30, one of three grounds for

claims within the Payment of Wages Act: "Stern and CAFE seek a declaration of the meaning of S.C. Code Ann. § 41–10–30(A)." *Id.* 523 S.E. 2d at 801. The holding in *Fair Employment* was entirely confined to whether a temporary staffing agency that posts a minimum wage has complied with the Payment of Wages Act:

> We believe it necessary to eliminate the confusion surrounding S.C. Code Ann. § 41–10–30(A) (Supp.1998) and provide future guidance to the Department and temporary agencies. We rule the posting recommended by the Department for use in temporary agencies, and the one utilized by Adecco, satisfy the requirements of the statute as a matter of law.

Id., 523 S.E.2d at 803–04.

South Carolina Code Ann. § 41-10-30 gives rise to the potential for penal action by the South Carolina Department of Labor, Licensing and Regulation for failure to give proper notice of an employee's wages or changes thereto. S.C. Code Ann. § 41-10-80(A). *Fair Employment* relates to this provision. *Fair Employment*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). Appellant-Employees' claim for wages arises under S.C. Code Ann. § 41-10-40(A) for a failure to "pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday." That violation gives rise to a civil action distinct from a notice claim. S.C. Code Ann. § 41-10-80(C). The *Fair Employment* decision has no bearing on Appellant-Employees' claims and the Respondent-Employers' attempt to create a safe harbor provision is absent statutory support.[2]

Respondent-Employer, in conjunction with its notice provision argument, asserts that three distinguishable cases support its desired result. (Respondent Brief pp. 22-24); *citing Meisner v.*

---

[2] "It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question." *Smith v. Tiffany*, No. 2015-001159, 2017 WL 1489053, at *3 (S.C. Apr. 26, 2017); *citing, Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning."); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) ("The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.") (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Here, the Payment of Wages Act does not state that use of and compliance with an acceptable notice form overcomes an alleged failure to pay the actual wages due; and Respondent-Employer's argument to the contrary should be rejected.

Zymogenetics, Inc., No. 3:12-CV-00684-CMC, 2014 WL 6686791, (D.S.C. Nov. 25, 2014), aff'd, 612 F. App'x 182 (4th Cir. 2015); *Rice v. Multimedia Inc.* 318 S.C. 95, 456 S.E.2d 381 (1995); and *Baugh v. Columbia Heart Clinic P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013). *Meisner*, an unpublished District Court case, involved, among a myriad of claims, a determination that the plaintiff's payment of wages act claim failed because she was paid in accord with a long-standing policy. *Meisner v. Zymogenetics, Inc.*, No. 3:12-CV-00684-CMC, 2014 WL 4721680, at *12 (D.S.C. Sept. 22, 2014) ("Meisner was not entitled to the claimed sums under the clear terms of the long-standing written policy governing this aspect of her pay.") Here, no long-standing policy overcomes Appellant-Employees' entitlement to wages; in fact, the record's assertions about the wages resolve either in Appellant-Employees' favor or are, at worst, in conflict. *Rice* concerned whether an agreement that commissions would only be paid for sales consummated while an employee remained employed was enforceable and amounted to lawful "wages due" under S.C. Code Ann. § 41-10-40(A). *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) ("Multimedia's departure policy establishes the manner in which it will pay sales commissions. It is not arbitrary nor does not violate any law."). Similarly, *Baugh* concerned whether former employees, who had a contract containing a forfeiture provision cutting off certain payments upon termination of the contract, precluded the employees right to the wages they had contractually forfeited. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 29, 738 S.E.2d 480, 495 (Ct. App. 2013) ("Here, because the forfeiture in Article 4 is enforceable and Respondents have forfeited their rights to compensation under that article, no evidence indicates the defined shares of accounts receivable, unpaid draws, and director's fees are "due" to them under the Agreements."). The amount of wages due is a fact issue here, and this case does not involve the interpretation of an unambiguous compensation agreement as in *Baugh* and *Rice*.

Appellant-Employees presented evidence that they were informed verbally and in writing that Propay would be implemented in a way different from how it was implemented. (R. pp. 85-89, 168-

171, 214-216, 229-231, 271-272, 286, 294, 301-302). Appellant-Employees presented evidence that their Fire Chief and other top-level officials acknowledged they were not properly paid, and were in the process of remedying their underpayment. (R. p. 77-78, 213, 273-276). A fire department Battalion Chief Matthew Smith, who was intricately involved in the implementation and later review of Propay, testified explicitly that a three of the Appellant-Employees were underpaid:

> 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)[3]. This evidence indicates a viable Payment of Wages Act claim, not subject to judgment as a matter of law. Respondent-Employer's request that this Court ignore all evidence in conflict with Appellant-Employees statement of wages, and expand the significance of this Court's notice-focused holding in *Fair Employment* should be rejected.

(b) Promissory Estoppel

Promissory estoppel arises where the refusal to enforce a promise "would be virtually to sanction fraud or would result in other injustice." *Higgins Construction Co. Inc. v. Southern Bell Telephone & Telegraph Co.*, 276 S.C. 663, 281 S.E.2d 469, 470 (1981). Promissory estoppel requires: (1) a promise unambiguous in its terms, (2) reasonable reliance on the promise by the plaintiff, (3) the reliance is

[3] Smith did not address Appellant-Employee Mottola because Mottola was a Lieutenant when Smith conducted his review. (*Id.*).

expected and foreseeable by the party who made the promise, and (4) injury in reliance on the promise. *Powers Construction Co., Inc. v. Salem Carpets, Inc.*, 283 S.C. 302, 322 S.E.2d 698 (Ct. App. 1984).

Here, Respondent-Employer argues that there is no evidence of an unambiguous promise or justifiable reliance. (Respondent Brief pp. 26-30). Respondent-Employer argues that Appellant-Employees' written promise of higher wages was subject to the amount provided on their statement of wages sheets. (Respondent Brief pp. 26-29). Respondent-Employer argues that Appellant-Employees were unreasonable in relying on the statements of their Fire Chief and other supervisors because it avers that those employees were not authorized to discuss wages on behalf of the County. (Respondent Brief pp. 29). The former argument is contradicted by the record evidence, and the latter argument requires determinations of fact.

Appellant-Employees presented evidence of clear and unambiguous promises (verbal and written) that their wages, as stated on their continuation of wages sheet and as paid thereafter, were wrong and were to be increased. (R. pp. 77-78, 85-89, 168-171, 213-216, 229-231, 271-276, 286, 294, 301-302). Respondent-Employer's request that the sheer existence of Appellant-Employees' statement of wages forms trump the representations Appellant-Employees were given relies on the Court improperly construing the facts Respondent-Employer's favor. "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).

Respondent-Employer's reliance on *Davis v. Greenwood Sch. Dist.* in support of its argument is misplaced. (Respondent Brief p. 28); *citing, Davis* 365 S.C. 62, 620 S.E.2d 65 (2005). *Davis* dealt with a

promise for increased pay contingent on school board approval. This Court in *Bishop* distinguished *Davis* on the basis that it dealt with a contingent promise:

> Lastly, a case holds that the plaintiffs could not rely upon representations by a governmental employee where the employee explicitly said his assertions were subject to the school board's approval. *See Davis v. Greenwood School Dist.*, 365 S.C. 629, 634–35, 620 S.E.2d 65, 67–68 (2005).
>
> None of the above cases answer whether a private party may rely on the representations of municipal employees for estoppel claims when the authority to make those representations *can* be traced back to the legislation that granted the municipal authority.

Bishop v. City of Columbia, 401 S.C. 651, 666, 738 S.E.2d 255, 262–63 (Ct. App. 2013). Here, unlike *Davis*, Appellant-Employees were promised certain pay that they did not see, and the record indicates that the promise was not contingent on further approval. Thus, the record evidences an enforceable unambiguous promise.

Respondent-Employer's reliance argument entirely turns on a fact determination as to apparent authority and agency. (Respondent Brief p. 29). Respondent's argument that Appellant-Employees could not rely on the representations of their supervisors and Fire Chief is undermined by Chief Crosby's testimony that he often acted as a liaison between administration and the Fire Department, and that his employees should rely on his statements. (R. p. 206). "[A] principal is bound by the acts of his agent, acting within the scope of his actual or apparent authority." *See, Swift & Co. v. Callaham*, 133 S.C. 353, 368, 131 S.E. 146, 152 (S.C. 1926) *citing, Thompson v. Shaw Motor Co.*, 128 S.C. 171; 122 S.E. 669 (1924); *see also, R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 118 (Ct. App. 2000); ("Generally, agency is a question of fact."). The record reflects that the Appellant-Employees reasonably relied upon their Fire Chief, and the Appellant-Employees promissory estoppel claim is legally tenable.[4]

[4] Respondent-Employer last argues that Appellant-Employees' claim for promissory estoppel fails because they cannot demonstrate the lack of their knowledge and means of knowledge of the truth or facts in question. (Respondent Brief p.

(c) Quantum Meruit

Quantum Meruit requires "(1) [a] benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Respondent-Employer's argument only address the third element, retention. (Respondent Brief p. 30). Respondent-Employer argues that because the Appellant-Employees were paid the amount on their statement of wages form Respondent-Employer has not wrongfully retained a benefit. (*Id.*). This argument is undercut by the record which creates at least an issue of fact as to whether the Appellant-Employees were appropriately paid. (R. p. 125:6-19). Respondent-Employer's argument against Appellant-Employees' quantum merit claim hinges on fact issues and is an improper basis for a directed verdict.

4. The Respondent-Employer misstates the facts within the applicable review standard.

Respondent-Employer asks the Court to turn the standard of review against the Appellant-Employees, the non-movants below. Respondent-Employer, beginning with its statement of the facts, attempts to paint the picture that because according to it the ultimate authority of setting wages rested with the County Administrator that therefore department leaders, such as the Fire Chief, had no authority, apparent or otherwise, to comment about those wages. (Respondent Brief pp. 3-4). The inference the Respondent-Employer requests, asks the Court to ignore apparent authority and to assume the County Administrator does not delegate any task. That desired inference is rebuffed by

---

29). That argument is not supported by the record evidence outlined above. Moreover, the caselaw Respondent-Employer relies on to establish this as an element of promissory estoppel, *S.C. DOT v. Horry Cty.*, concerns estoppel as a defensive mechanism in claims involving the government not the claim of promissory estoppel; that is, Respondent-Employer wrongly argues that "lack of knowledge" or "means of knowledge" is an element of promissory estoppel. *See, S.C. Dep't of Transp. v. Horry Cty.*, 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011) ("As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.")

the record where Chief Crosby testified that he was often called upon to act as a liaison between County Administration and his employees. (R. p. 206). Apparent authority arises here, where the Appellant-Employees can cite to competent record evidence showing that they reasonably relied on their supervisors. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 118 (Ct. App. 2000) "Generally, agency is a question of fact.").

Respondent-Employer continues by asserting that Appellant-Employees' witnesses failed to review the County's policy on Propay before making statements about Appellant-Employees' compensation. (Respondent Brief p. 4). The document Respondent-Employer refers to as a policy is facially not a policy, but rather a broad, undetailed outline of the County's proposed pay plan for 2008. (R. pp. 378-383). The best record evidence, viewing the facts within the standard of review, of how Propay was to be implemented is the explanation given by Matthew Smith, and the Alderman Letter. (R. pp. 271-272, 290-291) ("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"); *see also, Rice*, 456 SE.2d at 384 ("It is well settled that in considering a motion for directed verdict, the trial court must view evidence and all reasonable inferences in the light most favorable to the non-moving party."). Respondent-Employer also asserts, as discussed above, that the issue of Propay was "dormant from April 2008 until 2013." (Respondent Brief p. 6). That assertion is contradicted by the testimony. (R. pp. 75, 149-150, 212, 226). Respondent-Employer further mischaracterizes the record when it asserts that Matthew Smith did not use the County's Propay formula when calculating Propay. (Respondent Brief p. 7). However, there is no record evidence of what this asserted County formula actually is. Moreover, Smith, who worked with Propay before it was implemented and who reviewed its implementation

thereafter, testified to the formula he believed was in place which indicated that each of the Appellant-Employees were underpaid.[5] (R. pp. 125:6-19, 290-291).

This Court has reasoned:

> When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must employ the same standard as the trial court-that is, we must consider the evidence in the light most favorable to the non-moving party. Neither a directed verdict nor judgment notwithstanding the verdict should be granted unless only one reasonable inference can be drawn from the evidence. When considering the motions, neither this Court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence.

Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 504–05 (Ct. App. 1997). The Respondent-Employer, within this context, is not entitled to spin the facts in its favor or request favorable inferences where inferences for the non-movant exist. Directed verdict, when viewed within the framework of the proper standard of review, should not have been granted, and Appellant-Employees respectfully request that this Court reverse the Trial Court's decision.

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.

[5] Respondent-Employer further states that, human resources did not meet with Appellant-Employees, when they questioned their pay, because of this lawsuit; however, that assertion is discredited by the amount of time between when Appellant-Employees went to human resources and when this lawsuit was filed. (R. pp. 75, 80-81, 227, 277-279).

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

J. Paul Porter, Esquire (#100723)
1418 Laurel Street, Ste. A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Appellants

Columbia, South Carolina
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

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

RECEIVED
JUL 27 2017
SC Court of Appeals

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 Reply Brief submitted herewith contains no matter which is irrelevant to the appeal as required by Rule 209(c), SCACR.

CROMER BABB PORTER & HICKS, LLC

BY: _____

J. Paul Porter, Esquire (#100723)
1418 Laurel Street, Suite A (29201)
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorney for Appellants

July 27, 2017
Columbia, South Carolina