THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Circuit Court Judge R. Scott Sprouse

Consolidated Cases 2009-CP-40-05680 and 2013-CP-40-05097

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
Bailey G. McClinton, Appellants,

v.

City of Columbia, Respondent.

INITIAL BRIEF OF APPELLANTS

BLOODGOOD & SANDERS, LLC
Nancy Bloodgood, SC Bar No.: 6459
Lucy C. Sanders, SC Bar No.: 78169
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Telephone: (843) 972-0313
Email: nbloodgood@bloodgoodsanders.com
lsanders@bloodgoodsanders.com

YARBOROUGH APPLEGATE, LLC
Christopher Bryant, SC Bar No.: 101681
291 East Bay Street, Floor 2
Charleston, SC 29401
Telephone: (843) 972-0150
Email: chris@yarboroughapplegate.com

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
Susan K. Dunn, SC Bar No.: 1798
PO Box 20998
Charleston, SC 29413-0098
Telephone: (843) 282-7953
Emil: sdunn@aclusc.org

Attorneys for the Appellants

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STATEMENT THE ISSUE ON APPEAL

In this promissory estoppel bench trial, the Plaintiffs-Appellants—10 retired municipal firefighters—claimed that they suffered an injury when the defendant—the City of Columbia—stopped paying their health insurance premiums in retirement.

The plaintiffs demonstrated, by a preponderance of the evidence, that

> (1) the defendant's agents made an unambiguous promise (no-charge health insurance coverage upon retirement until death);
>
> (2) the plaintiffs reasonably relied upon the promise (each plaintiff received no-cost health insurance for some period of time in retirement, and each plaintiff had seen others receive the same promise until death);
>
> (3) the defendant expected the plaintiffs to rely on the promise (health insurance benefits were touted as compensation for low pay and reasons to stay in the job); and
>
> (4) but for defendant's inconsistent disposition of the promise, the loss of no-cost health insurance coverage would not have happened.

Did the trial court err when it held that Plaintiffs-Appellants' promissory estoppel claims failed because they failed to demonstrate an injury in reliance, which is the fourth element of promissory estoppel? Did the trial court err when it held that Plaintiffs-Appellants' out-of-pocket and future health insurance costs were not "compensable injuries?"

STATEMENT OF THE CASE

The basic facts of these consolidated case are not seriously in dispute. Indeed, the parties have stipulated to many of the key facts. Plaintiffs-Appellants began working for the City of Columbia as firefighters in the 1960s, 1970s, and 1980s. They claim that various City of Columbia officials represented to them that they would receive no-cost, single coverage healthcare from the time of their retirement until the time of their death. And the City of Columbia did, in fact, provide the firefighters with no-cost single coverage healthcare from the dates of their retirement until July 2009 (for individuals under 65) or 2013 (for individuals over 65). Plaintiff-Appellant Denious "D.L." Dimery's experience illustrates this last point—Dimery retired in 1991 and received no-cost, single coverage healthcare for over 20 years before the City of Columbia began requiring him to pay the premium for the same coverage.

This is the second time that this Court has been asked to address legal issues related to this case. In Bishop v. City of Columbia, this Court affirmed the dismissal of Plaintiffs-Appellants' contract claims and promissory estoppel claims based on the employee handbook and benefits booklet, but it reversed the dismissal of Plaintiffs-Appellants' promissory estoppel claims based upon "representations made by their supervisors and the City's human resource personnel." 401 S.C. 651, 667–668, 738 S.E.2d 255, 263 (Ct. App. 2013).

This most recent appeal results from a two-day promissory estoppel bench trial in December 2018. During the bench trial, Plaintiffs-Appellants articulated specific instances throughout their careers when Chiefs, City Managers, and Human Resources officials represented to them that they would receive no-cost, single coverage healthcare from the time of their retirement until the time of their death. Plaintiffs-Appellants testified to the out-of-pocket costs that they have incurred since the City of Columbia stopped providing no-cost, single

coverage healthcare; they also testified that they expected to continue to incur out-of-pocked expenses for healthcare for the remainder of their lives.

On January 28, 2019, the trial court rendered judgment for the City of Columbia. In its Order, the trial court held that "[Appellants] relied on the representations made by the City through its agents and the City's official policy over the years," but "[Appellants] failed to demonstrate that they incurred damages as a result of their reliance." Order Granting Judgment to Defendant at 8. The trial court also held that "[Appellants] failed to establish compensable injuries," id. at 5, and that they "offered no measure of loss beyond premiums charged for their insurance," id. at 6.

On February 6, 2019, Appellants filed a motion to alter or amend the Order Granting Judgment to Defendant. Plaintiffs' Motion to Alter or Amend. On February 19, 2019, the trial court issued an order denying Plaintiffs-Appellants' Motion to Alter or Amend, holding that it was "unable to discover any material fact or principle of law that either has been overlooked or disregarded and further [found] no error of law or fact not appropriately considered." Order Denying Plaintiffs' Motion to Alter or Amend the Judgment.

Plaintiffs-Appellants subsequently appealed the trial court's Order Granting Judgment to Defendant-Respondent.

STANDARDS OF REVIEW

Appellate courts determine questions of law *de novo*. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008).

"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. Dep't of Transp. v. Horry Cty., 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)).

SUMMARY OF THE ARGUMENT

The trial court erred when it granted judgment in favor of Defendant-Respondent because it used the incorrect standard to determine whether Plaintiffs-Appellants had established the fourth element of their promissory estoppel claims.

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. To establish the fourth element—that is, an injury in reliance—a plaintiff need only establish that but for the promisor's inconsistent disposition of the promise, the complained-of injury would not have occurred.

Here, the trial court required Plaintiffs-Appellants to demonstrate that they "would have been better off" to establish the fourth element of promissory estoppel. This new "would have been better off" standard has no basis in case law or public policy. And because Plaintiffs-Appellants presented stipulated and uncontroverted evidence that their injuries—that is, the loss of no-charge health insurance coverage until death—would not have occurred but-for the City of Columbia's inconsistent disposition of the promise, Plaintiffs-Appellants established the fourth element of their promissory estoppel claims.

In addition, the trial court's insistence that Plaintiffs-Appellants' complained-of injuries—that is, the present and future out-of-pocket expenses related to the unexpected need to purchase health insurance coverage—are non-compensable is without merit. A court sitting in equity has the power to provide relief in the form of expectation damages, and expectation damages are an appropriate form of relief in situations such as this.

This Court should (1) reverse the lower court's Order; (2) hold that Plaintiffs-Appellants have established their promissory estoppel claims by a preponderance of the evidence; (3) award Plaintiffs-Appellants make-whole relief; and (4) remand the case for the sole purpose of calculating damages.

ARGUMENT

In this case, the trial court required the Plaintiffs-Appellants to demonstrate that they "would have been better off" to establish the fourth element of promissory estoppel—injury in reliance. This is the incorrect standard to determine whether a plaintiff has established the fourth element of promissory estoppel. Under the proper "but-for" standard, Plaintiffs-Appellants demonstrated the fourth element of promissory estoppel by a preponderance the evidence. With respect to damages, the trial court erred when it held that Plaintiffs-Appellants failed to demonstrate "compensable injuries." Plaintiffs-Appellants' out-of-pocket and future expenses are sufficient and appropriate measures of damages.

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS FAILED TO DEMONSTRATE THE FOURTH ELEMENT OF PROMISSORY ESTOPPEL—"AN INJURY IN RELIANCE"—BY A PREPONDERANCE OF THE EVIDENCE.

"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." N. Am. Rescue Prod., Inc. v. Richardson, 411 S.C. 371, 379–80, 769 S.E.2d 237, 241 (2015). To establish the fourth element—that is, an injury in reliance—a promissory estoppel plaintiff "must show, but for the promisor's inconsistent disposition, the complained-of injury would not have otherwise resulted." Barnes v. Johnson, 402 S.C. 458, 474, 742 S.E.2d 6, 14 (Ct. App. 2013). Here, the trial court imposed an incorrect, more onerous standard upon Plaintiffs-Appellants than the "but-for" standard discussed in Barnes. This "better off" standard has no support in South Carolina's promissory estoppel case law. Under the proper, but-for standard, Plaintiffs-Appellants established the fourth element of promissory estoppel and are entitled to damages.

A. **The Trial Court Applied the Incorrect Standard for the Fourth Element of Promissory Estoppel When it Required Plaintiffs to Demonstrate That They "Would Have Been Better Off" Instead of Determining Whether the Complained-Of Injury Would Have Occurred But For the City of Columbia's Inconsistent Disposition.**

The fourth element of promissory estoppel requires the person to whom the promise is made to have suffered "injury in reliance on the promise." Craft v. S.C. Comm'n for Blind, 385 S.C. 560, 565, 685 S.E.2d 625, 627 (Ct. App. 2009). In its Order Granting Judgment to Defendant, the trial court made the following statement of law: "To prove the detrimental reliance element necessary to obtain relief on promissory estoppel, a plaintiff must demonstrate that he would have been better off if he had not relied upon a promise." Order Granting Judgment to Defendant at 6. This is an inaccurate statement of the law for at least two reasons.

First, there is no "detrimental reliance element" in promissory estoppel. A Westlaw search of the entire South Carolina catalog of cases does not produce a single instance where the terms "detrimental reliance" and "promissory estoppel" are used in the same case. As discussed above, Plaintiffs need only demonstrate an injury in reliance on the promise—that is, an injury that would not have occurred but for the City of Columbia's reneging on the promise of post-retirement, no-cost single coverage healthcare for life.

Second, there is no support for the statement that "a plaintiff must demonstrate that he would have been better off if he had not relied upon a promise." As in all of Defendant's briefing throughout the life of this case where similar assertions were made, there is no citation to supporting case law. This is because this "requirement" is made from whole cloth and inconsistent with the law on promissory estoppel in South Carolina and the principles that underpin promissory estoppel. The assertions that Plaintiffs-Appellants "experienced substantial increases in pay during employment, obtained significant promotions, enjoyed personal gratification and continue to receive valuable pension benefits as a result of their employment with the City," Order Granting Judgment

to Defendant at 6, have no bearing on whether Plaintiffs-Appellants have demonstrated an injury in reliance, as required by South Carolina promissory estoppel case law.

An analysis of the case law establishes that "injury in reliance" requires only that Plaintiffs-Appellants demonstrate a causal relationship between the broken promise and the complained-of injury: "In order to demonstrate that the injury was sustained in reliance upon an alleged promise, the promisee must show, *but for the promisor's inconsistent disposition*, the complained-of injury would not have otherwise resulted." Barnes v. Johnson, 402 S.C. 458, 742 S.E.2d 6, 14 (Ct. App. 2013) (emphasis added). This is underscored by the two leading cases on promissory estoppel, which the trial court cited in its Order Granting Judgment to Defendant: Craft and Barnes. A faithful application of the legal analyses and holdings of these cases does not support the trial court's "would have been better off" standard for demonstrating an injury in reliance.

In Craft v. South Carolina Commission for the Blind, the plaintiff quit his job on December 29, 2005 based on a promise that another job would be available. The other job never materialized, and the plaintiff was unable to go to back to the old job because the job site was permanently closed on December 31, 2005. Plaintiff failed to present any evidence regarding why the job site was closed, and the Court held that plaintiff failed to demonstrate that he had sustained the claimed injury of loss of current employment by quitting his job in reliance on the defendant's promise. Even if plaintiff had quit his job on reliance of the promised job, he would have been out of a job in two days because the job site was permanently closed. Barnes v. Johnson, 402 S.C. 458, 475, 742 S.E.2d 6, 14 (Ct. App. 2013) (noting that the merchant in Craft "could no longer work there for reasons beyond the Commission's control, and, thus, his unemployed status was not due to the Commission's inconsistent disposition.").

Similarly, in Barnes v. Johnson, the Court held that the plaintiff could not maintain a cause of action for promissory estoppel because he "failed to demonstrate . . . an injury sustained in reliance [on] a promise." 402 S.C. at 476, 742 S.E.2d at 15–16. In Barnes, the plaintiff asserted a promissory estoppel cause of action related to alleged agreements related to various improvements to a house. The house at issue ultimately burned down due to "an act of nature," and the Court of Appeals held that "the fire caused [the plaintiff's] injury," not the actions of the promisor. 402 S.C. at 475, 742 S.E.2d at 15–16. The plaintiff suffered an unfortunate set of circumstances, but the injury was not causally related to the broken promise; it was caused by the house burning down.

From a public policy perspective, requiring a plaintiff to show that he or she would have done better elsewhere runs counter to the equitable principles of fairness that underpin the cause of action. Adopting an "I would have done better" standard will allow future promise breakers to take advantage of the loyalty engendered by their promises; if a promisee believes the promise of future benefits and that promise induces the desired result (that is, staying put), the promisee will rarely, if ever, have the ability to say that he or she would have done better.

The fact that the doctrine of promissory estoppel applies in areas outside the arena of promises related to employment also cuts against adopting a new "would have done better" standard, because it would oftentimes make no sense. See, e.g., Powers Const. Co. v. Salem Carpets, Inc., 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984) ("Because promissory estoppel is a recognized doctrine in South Carolina, we have no doubt that the doctrine can support an action brought in this state by a contractor who has submitted a prime bid in reliance upon a subcontractor's bid." (internal citation omitted)); see also Furman University v. Waller, 124 S.C. 68, 117 S.E. 356 (1922) (applying the concept of promissory estoppel—although not by name—to a

situation where a university relied on a pledged donation to build a dormitory); Higgins Const. Co. v. S. Bell Tel. & Tel. Co., 276 S.C. 663, 665–66, 281 S.E.2d 469, 470 (1981) (recognizing that Waller was a promissory estoppel case and holding that the doctrine is not restricted to cases involving charities).

In sum, the fourth element of promissory estoppel does not require plaintiffs to demonstrate that they "would have been better off."

B. Plaintiffs Demonstrated the Fourth Element of Promissory Estoppel—Injury in Reliance on the Promise—by a Preponderance of the Evidence

Plaintiffs-Appellants have demonstrated that the complained-of injury—that is, the loss of no-charge health insurance coverage until death—would not have occurred but for the City of Columbia's inconsistent disposition of maintaining the promise of no-charge health insurance coverage until death. In fact, the stipulated facts show that (1) all 10 Plaintiffs-Appellants received no-charge, single coverage health insurance in their retirements for periods ranging from 21 years to 9 months, and (2) this coverage ended when the City of Columbia ended its longstanding practice of providing such coverage to retirees until death. Finally, Plaintiffs-Appellants presented unrebutted testimony that they had incurred out-of-pocket expenses when the City of Columbia ended its practice of providing no-charge health insurance coverage until death; this logically leads to continued expenses until death.

- Cam Gillam began paying $33.00 monthly health insurance premiums in 2009 and had paid $4,108 out of pocket as of the time of the trial. (Tr., pp. 46–47.) Mr. Gillam testified that when he turns 65 he will have to pay for a Medicare Supplement policy and his premiums would then go up dramatically. (Id. at 47–48.).

- Larry Strickland testified that from 2013 to the date of the trial he had paid a total of $19,000 out of pocket for Medicare Supplement policies, and he expected to incur similar costs for the rest of his life. (Id. at 88.)

- Bailey George McClinton testified the out of pocket costs for his health insurance premiums since 2009 totaled $18,815.90 and that he expected to incur similar costs for the rest of his life. (Id. at 111–12.)

- Charles Morris testified from 2009 to the date of the trial he had paid $13,000 out of pocket for health insurance premiums. (Id. at 131–32.)

- Alma Carson Hill testified he had paid $8,124.00 out of pocket for health insurance premiums since 2009. (Id. at. 151.)

- Joseph Floyd testified he had paid $8,400 out of pocket for health insurance premiums from 2009 until the date of the trial. (Id. at 252.)

- Rusty Smith testified he paid $8,200 out of pocket for health insurance premiums from 2009 until the date of the trial. (Id. at 283-284.)

- Frank Cruz testified he paid between $7,000 and $9,000 from 2009 to the date of the trial out of pocket for health insurance and expects to have substantially higher costs for the rest of his life. (Id. at 311-312.)

- Barry Martin testified he paid $5,400.00 out of pocket from 2009 to the date of trial for health insurance premiums. (Id. at 332.)

- Denious Dimery testified that since 2013 he had paid almost $20,000 out of pocket for insurance premiums for Medicare Supplement policies. (Id. at 348.)

Here, Unlike the Craft and Barnes plaintiffs, there is a crystal-clear but-for connection between the promise (no-charge health insurance coverage until death), the inconsistent disposition (the termination of the practice of providing no-charge health insurance coverage until death), and the injury (the loss of no-charge health insurance coverage until death). Accordingly, Plaintiffs-Appellants have established the fourth element of their promissory estoppel claim, and the trial court's judgment for Defendant-Respondent should be reversed.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT PLAINTIFFS "FAILED TO ESTABLISH COMPENSABLE INJURIES"

In finding for the City of Columbia, the Court stated that "Plaintiffs failed to establish compensable injuries incurred in reliance upon representations regarding the availability of individual health insurance without charge throughout their retirements." Order Granting Judgment

to Defendant at 5. This appears to suggest that even though Plaintiffs-Appellants demonstrated injuries in the form of present and future out-of-pocket costs, they are not the type of injuries for which a court sitting in equity can provide a remedy.[1] This cannot be the law.

Promissory estoppel is an equitable remedy; it "is a flexible doctrine that aims to achieve equitable results." Barnes v. Johnson, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013). A court sitting in equity has the authority to determine the proper measure of damages—expectation, reliance, or restitution—on a case-by-case basis to ensure a fair result.

By working for the City of Columbia for substantial periods of time at reduced pay (as compared to the private sector) but with the expectation of no-charge, single coverage healthcare until death, Plaintiffs-Appellants conferred a bargained-for benefit upon the City of Columbia. Expectation damages are the appropriate measure of damages in situations such as this, where Plaintiffs-Appellants' restitution interests have been violated. In other words, the equitable, fair thing to do is to provide the value of the promise that was broken.

This is consistent with the simplified Circuit Court jury charge on Promissory Estoppel, which provides, in relevant part "If you find promissory estoppel, the promise must be enforced." An award of expectation damages is also consistent with the weight of the authority on promissory estoppel damages; "courts routinely award expectation damages unless those damages are too speculative, indefinite, or otherwise unavailable under traditional contract rules." Mary E. Becker, Promissory Estoppel Damages, 16 Hofstra Law Review 131, 135 (1987).[2]

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[1] For example, the trial court's Order states that "[e]ach Plaintiff's specific costs of their post-retirement health insurance once the policy changes went into effect go toward the now dismissed breach of contract cause of action, not promissory estoppel." This statement of law is uncited and unsubstantiated.

[2] For a comprehensive discussion of damages available in promissory estoppel cases, see Mary E. Becker's informative article, Promissory Estoppel Damages, 16 Hofstra Law Review 131 (1987) (Ex. 1 to Plaintiffs' Post-trial Brief.)

As noted above, Plaintiffs-Appellants all testified to a dollar amount that they had spent out of pocket to the date of the trial. There is no question that Plaintiffs should receive these amounts as damages for expenses already incurred. And although calculating future damages presents a more complicated task, it is no more speculative than the task of estimating future damages for medical needs, which occurs in courtrooms around the state on a regular basis. Plaintiffs-Appellants presented the trial court with two method of calculating damages—(1) using testimony regarding expected future costs and life expectancy tables to derive compensation for Plaintiffs-Appellants; or (2) take the path of Judge Nicholson in the North Charleston firefighter case and reopen the trial for the sole purpose of hearing from experts from each party on future damages. See Rissanen v. City of North Charleston, Case No. 2013-CP-10-3210.

In sum, the trial court's belief that Plaintiffs-Appellants' damages are non-compensable or otherwise "dependent upon speculation," Order Granting Judgment to Defendant at 6, is simply incorrect.

CONCLUSION

In its conclusion, the trial court's Order Granting Judgment to Defendant focuses on Plaintiffs-Appellants' failure to demonstrate that they would have done better elsewhere. As discussed above, this standard is inapplicable to the elements of promissory estoppel. Individuals such as Plaintiffs-Appellants who remain employed will never be able to say, with any degree of certainty, that they would have done better elsewhere or what their retirement healthcare costs would have been in another setting because they do not have a crystal ball. But Plaintiffs-Appellants *can* say that they dutifully worked for the City of Columbia and did so until their retirement, and that they expected to receive no-charge health insurance coverage until their deaths.

If an individual's loyalty and reasonable belief that a promise would be maintained were to somehow prevent this Court from fully exercising its equitable powers, the City of Columbia will be

the beneficiary of an unfair bargain, and every governmental employee in South Carolina should express a healthy amount of skepticism regarding any promise of compensation that is not in the form of an immediate paycheck.

Plaintiffs-Appellants have established all four elements of their promissory estoppel claims by a preponderance of the evidence. The For the abovementioned reasons, Plaintiffs-Appellants ask this Court to (1) reverse the lower court's Order; (2) hold that Plaintiffs-Appellants have established their promissory estoppel claims by a preponderance of the evidence; (3) award Plaintiffs-Appellants make-whole relief, including payment for their out-of-pocket health insurance expenses, future health insurance expenses, and attorney's fees pursuant to S.C. Code Ann. § 15-77-300; and (4) remand the case for the sole purpose of calculating damages, either (a) through the use of stipulated evidence, evidence presented in court regarding costs, and stipulated life tables, or (b) evidence presented in court regarding out-of-pocket costs and reports and testimony from experts for Appellants and Respondent on future damages.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

BLOODGOOD & SANDERS, LLC

Nancy Bloodgood

Nancy Bloodgood, SC Bar No.: 6459
Lucy C. Sanders, SC Bar No.: 78169
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Telephone: (843) 972-0313
Email: nbloodgood@bloodgoodsanders.com
lsanders@bloodgoodsanders.com

YARBOROUGH APPLEGATE, LLC
Christopher Bryant, SC Bar No.: 101681
291 East Bay Street, Floor 2
Charleston, SC 29401
Telephone: (843) 972-0150
Email: chris@yarboroughapplegate.com

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
Susan K. Dunn, SC Bar No.: 1798
PO Box 20998
Charleston, SC 29413-0098
Telephone: (843) 282-7953
Emil: sdunn@aclusc.org

Attorneys for the Appellants

Charleston, South Carolina

Date: May 30, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Circuit Court Judge R. Scott Sprouse

Consolidated Cases 2009-CP-40-05680 and 2013-CP-40-05097

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 Bailey G. McClinton, Appellants,

v.

City of Columbia, Respondent.

APPELLANTS' PROOF OF SERVICE OF INITIAL BRIEF

I hereby certify that on May 30, 2019 I served a copy of Appellants' Initial Brief on the following:

W. Allen Nickles, III, Esquire
Nickles Law Firm, LLC
4430 Ivy Hall Drive
Columbia, S.C. 29206

Attorneys for the Respondent

by placing a copy of said documents in the United States mail with sufficient postage thereon.

BLOODGOOD & SANDERS, LLC

Nancy Bloodgood

Nancy Bloodgood, SC Bar No.: 6459
Lucy C. Sanders, SC Bar No.: 78169
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Telephone: (843) 972-0313
Email: nbloodgood@bloodgoodsanders.com
lsanders@bloodgoodsanders.com

YARBOROUGH APPLEGATE, LLC
Christopher Bryant, SC Bar No.: 101681
291 East Bay Street, Floor 2
Charleston, SC 29401
Telephone: (843) 972-0150
Email: chris@yarboroughapplegate.com

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
Susan K. Dunn, SC Bar No.: 1798
PO Box 20998
Charleston, SC 29413-0098
Telephone: (843) 282-7953
Emil: sdunn@aclusc.org

Attorneys for the Appellants

Charleston, South Carolina

Date: May 30, 2019

BLOODGOOD & SANDERS, LLC

May 30, 2019

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Basilides F. Cruz et al.v. City of Columbia*
Appellate Case No. 2019-000374

Dear Ms. Kitchings,

Enclosed for filing are the original and one copy each of the following:

1) Appellants' Designation of Matter to be Included in the Record on Appeal;
2) Certificate of Counsel re Appellants' Designation of Matter to be Included in Record on Appeal;
3) Proof of Service of Appellants' Designation of Matter to be Included in the Record on Appeal;
4) Appellants' Initial Brief; and
5) Proof of Service of Appellants' Initial Brief.

With kindest regards, I am,

Sincerely,

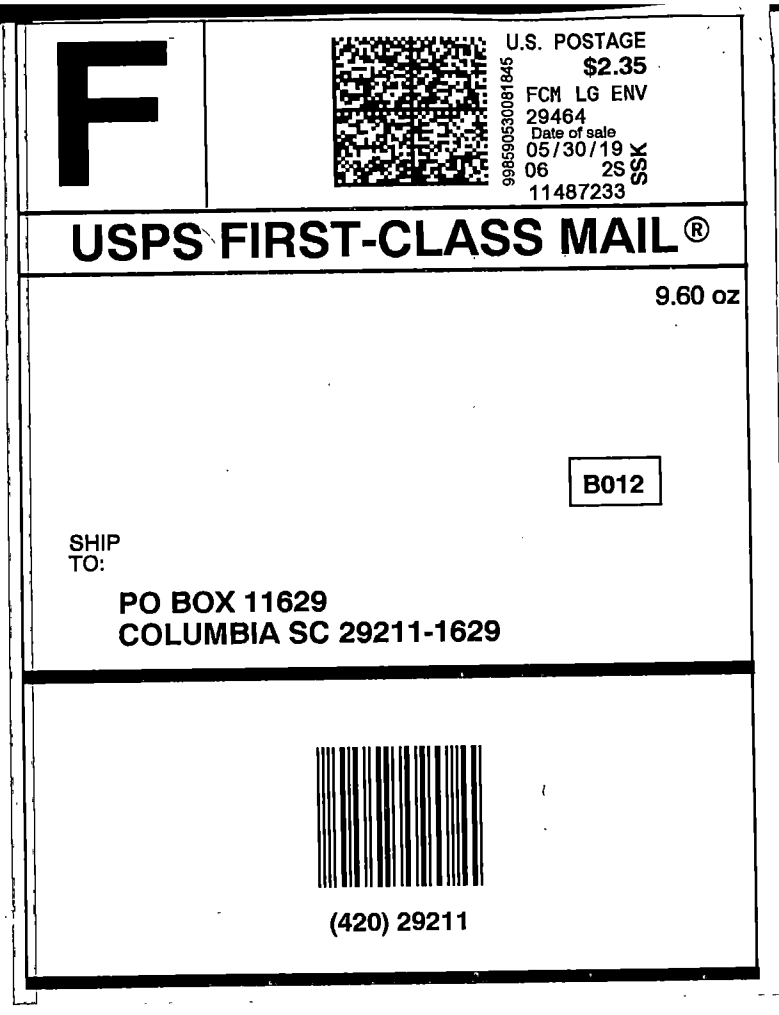
Nancy Bloodgood

Nancy Bloodgood

Enclosures

cc: Al Nickles, Esquire

895 Island Park Drive, Suite 202 • Charleston, South Carolina 29492
(t): 843-972-0313 • (f): 843-377-8997
(e) nbloodgood@bloodgoodsanders.com • lsanders@bloodgoodsanders.com



Bloodgood & Sanders, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, S.C. 29464

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211