

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Charleston County

Case No. 2013-CP-10-03210
Appellate Case No. 2019-000332

RECEIVED

SEP 27 2019

SC Court of Appeals

Alvar R. Rissanen, Michael H. Baxley, Clifford W. Forner
and Willie L. Hood Respondents,

v.

City of North Charleston.....Appellant.

FINAL BRIEF OF APPELLANT

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Emmanuel J. Ferguson
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court error in concluding the City was equitably estopped from asserting the applicable three-year statute of limitations as an affirmative defense?
2. Did the Circuit Court error in concluding the City failed to comply with an unambiguous, enforceable promise to provide Respondents with a Medicare supplement and, as a result, Respondents suffered reliance damages?
3. Did the Circuit Court error in awarding Respondents attorneys' fees and costs pursuant to S.C. Code Ann. § 300 (1976) *et seq.*?
4. Did the Circuit Court error in the type and amount of damages and the amount of attorneys' fees and costs awarded to Respondents?
5. Did the Circuit Court error in awarding inconsistent and ambiguous damages to each Respondent?
6. Did the Circuit Court error in concluding the City's promise to provide Respondents a Medicare supplement constituted a failure to pay "wages" to Respondents?

STATEMENT OF THE CASE

This is an appeal from a bench trial in the Circuit Court, and the Circuit Court's related Orders, awarding Respondents monetary relief, attorneys' fees and costs. The parties tried the case before the Circuit Court on October 18 and 19, 2017. (R. pp. 108 – 398.) On February 6, 2018, the Circuit Court issued an Order (the "First Order") containing findings and conclusions regarding the October 2017 trial. (R. pp. 1 - 16.) On February 13, 2018, the City received written notice of the First Order. Thereafter, on February 23, 2018, the City filed a Motion to Alter or Amend the First Order (the "First Motion"), pursuant to Rules 52(b) and 59(e), SCRCp. (R. pp. 436 – 444.)

On March 28, 2018, the Circuit Court held a hearing regarding the First Motion. (R. pp. 759 – 796.) Consequently, the Circuit Court reopened the trial, allowing Respondents to retain an expert witness, designate the expert witness and present opinions from the expert witness as to, generally, the cost for each Respondent to purchase a Medicare supplement for the remainder of their expected lives. (The Circuit Court never ruled on the First Motion. Instead, the Circuit Court reopened the trial and allowed additional evidence, including expert testimony.) Correspondingly, and consequently, the Circuit Court allowed the City to identify an expert who could offer testimony on the same issue and present the expert's opinions.

Thereafter, on November 8, 2018, the Circuit Court reopened the trial and accepted testimony from Respondents' and the City's respective expert witnesses. (R. pp. 797 - 842.) Correspondingly, the Circuit Court accepted additional documentary evidence from Respondents' and the City's respective experts. (R. pp. 797 - 842.)

Subsequently, on November 9, 2018, the Circuit Court issued an Order (the “Second Order”) containing new findings and new conclusions regarding the October 2017/November 2018 trial. (R. pp. 17 - 35.) On November 16, 2018, the City received written notice of the Second Order. The City, on November 26, 2018, filed and served a new Motion to Alter or Amend the Second Order (the “Second Motion”), pursuant to Rules 52(b) and 59(e), SCRCP. (R. pp. 889 - 902.)

On February 5, 2019, the Circuit Court issued an Order denying the City’s Second Motion. (R. p. 36.) The City received notice of the filing of the Second Order on February 6, 2019. Subsequently, on February 22, 2019, the Circuit Court filed a Consent Order Allowing Deposit of Judgment with Court. (R. pp. 37 - 40.)

Thereafter, on February 26, 2019, the City served its Notice of Appeal. (R. pp. 81 - 107.) The City subsequently filed its Notice of Appeal on February 27, 2019. (R. pp. 81 - 107.)

FACTS

This is a promissory estoppel case. Respondents Alvar R. Rissanen (“Rissanen”), Michael H. Baxley (“Baxley”), Willie L. Hood (“Hood”) and Clifford W. Forner (“Forner”) (collectively, the “Respondents”), assert a single cause of action against the City for promissory estoppel. (R. pp. 53 – 64.) Respondents contend the City breached a promise to provide each with a Medicare supplement upon reaching age sixty-five. (R. pp. 53 - 64.)

1984 Ordinance Providing Access to Post-Retirement Healthcare Benefits

The City was established in or about June 1972. (R. p. 155, line 23 – p. 156, line 1.) The City, at times relevant to this case, provided a self-funded health insurance plan for

its employees and retirees. (R. p. 308, lines 15 - 23.) The City continues to provide a self-funded health insurance plan for its employees and retirees. (R. p. 308, lines 15 - 23.)

In 1984, City Council approved an ordinance (the "Ordinance") that, for the first time, allowed City retirees to access healthcare benefits through the City's self-funded healthcare plan. (R. pp. 495 - 496.) The Ordinance required a participating retiree pay the full cost of healthcare benefits provided by the City. (R. pp. 495 - 496.) The Ordinance contained the following statement: "Coverage will terminate upon failure of the retiree to make the required advance payment, upon termination of the City's group plan, or when determined to be in the best interest of the City." (R. pp. 495 - 496.) From 1984 to July 1, 2010, the City provided retirees with access to City healthcare benefits in a manner consistent with the Ordinance.

1998 Modifications to Post-Retirement Healthcare Benefits

R. Keith Summey ("Mayor Summey") began his first term as Mayor in 1994. (R. p. 334, lines 7-9.) In 1998, Mayor Summey recommended the City do more than allow retirees to access the City's healthcare benefits. Mayor Summey recommended the City begin sharing the cost of healthcare benefits for the retiree only, instead of requiring a retiree pay the full cost for their participation. (R. p. 457.) In other words, in addition to allowing a retiree to participate in the City health insurance plan as the City allowed beginning with the Ordinance, the Mayor recommended the City pay a portion of the cost for the retiree to participate in the City's self-funded healthcare plan.

Mayor Summey recommended the change, along with corresponding modifications, in a memorandum to the City Council Finance Committee in May 1998. (R.

p. 457.) Subsequently, the City Council Finance Committee, on or about May 15, 1998, partially approved Mayor Summey's recommendation. (R. p. 485.)

City Council, thereafter, approved its 1998-1999 budget, including the commitment of funds for cost-sharing healthcare plan participation with retirees. (R. p. 307, line 17 – p. 330, line 21; p. 485.) City Council, in subsequent years, continued to approve City budgets providing funds for cost-sharing healthcare plan participation with retirees. (R. p. 307, line 17 – p. 330, line 21.)

According to Respondents, Mayor Summey, beginning in or about May 1998, made verbal statements to them, and other employees of the City's fire department, that, in general, the City would provide access to the City healthcare plan to them, and their eligible dependents, for so long as each retiree was alive and otherwise eligible. (R. p. 159, line 14 – p. 165, line 21; p. 239, line 23 – p. 242, line 7; p. 275, line 2 – p. 276, line 18; p. 292, line 3 – p. 293, line 23.) Respondents claim Mayor Summey's alleged statements made then, and during subsequent years, constituted binding promises by the City.

Beginning in 1998, because of the modifications recommended by Mayor Summey and approved by City Council, and continuing until July 1, 2010, a City retiree was eligible to participate in the City's healthcare plan and participating retirees were allowed to keep their eligible dependents covered through the City's healthcare plan. Although, the retirees were required to pay the full share of the cost for dependent healthcare plan participation; the City did not share costs for eligible dependents.

Further, during this time, a participating retiree was allowed to maintain participation in the City's healthcare plan, including participation by eligible dependents, beyond the retiree becoming eligible for Medicare benefits at age sixty-five. The City never

implemented a program or approved funding to provide and/or pay for a Medicare supplement for retirees upon becoming eligible for Medicare benefits at age sixty-five. (R. p. 325, lines 4 - 10.)

2004 Executive Order

In 2004, Mayor Summey issued Executive Order No. 2004-1. (R. pp. 520 - 548.) In Section C.6, access to post-retirement healthcare benefits for City retirees is explained. In addition to other information in Section C.6, and like the Ordinance, the following statement appears: "Coverage will terminate upon failure of the retiree to make the required advance payment, upon termination of the city's group plan, or when determined to be in the best interest of the city." The City made Executive Order No. 2004-1 available to all employees, including Respondents, who were each employed by the City until at least 2005. (R. pp. 520 - 548.)

2009/2010 Modifications to Retiree Access to Post-Retirement Healthcare Benefits

The City, like other municipalities in South Carolina, follows the accounting standards established by the Governmental Accounting Standards Board ("GASB"). (R. p. 307, line 17 – p. 330, line 21.) Prior to July 1, 2008, and what is commonly known as "GASB 45," the City accounted for its retiree healthcare obligations on a "pay-as-you-go" basis. (R. p. 307, line 17 – p. 330, line 21.) GASB 45, however, required the City begin accounting for retiree healthcare obligations on an accrual basis. (R. p. 307, line 17 – p. 330, line 21.)

In response to GASB 45, the City changed how it accounted for retiree healthcare benefits. (R. p. 307, line 17 – p. 330, line 21; pp. 557 - 585.) Correspondingly, the City changed the eligibility standard for retiree healthcare plan participation. (R. p. 307, line 17

– p. 330, line 21; pp. 557 - 585.) First, City retirees who retired and elected to participate prior to July 1, 2009, could remain in the existing retiree healthcare benefit plan, but their eligibility (including dependent eligibility) ceased upon the retiree becoming eligible for Medicare benefits. (R. p. 458.) The noted change became effective July 1, 2010. (R. p. 458.)

Second, City employees retiring on or after July 1, 2009, were required to meet new eligibility requirements and subject to new, increased shared cost for post-retirement healthcare benefits. (R. p. 458.) Additionally, like those retiring prior to July 1, 2009, their eligibility (including dependent eligibility) ceased upon the retiree becoming eligible for Medicare benefits. (R. p. 458.)

On or about May 4, 2009, the City sent a letter to its current employees and retirees, including Respondents, noting the changes to City healthcare benefits. (R. p. 458.) The City implemented the changes to retiree healthcare benefits beginning in July 2009. On or about June 16, 2010, the City sent each retiree, including each Respondent, a letter notifying them of changes to retiree healthcare benefits, including rates, effective July 1, 2010. (R. p. 589.)

Individual Respondents

Respondent Hood

The City first employed Hood in or about June 1972. Hood later retired from his employment with the City in or about May 2005. Hood, at the time he retired, held the rank of Assistant Fire Chief. Hood was fifty-nine years of age when he retired. (R. p. 290, line 23 – p. 291, line 7.)

Subsequent to retirement, Hood participated in the City's healthcare plan until he reached age sixty-five in January 2011, and he became eligible for Medicare benefits. Upon reaching age sixty-five, and becoming eligible for Medicare benefits, Hood was no longer allowed to obtain healthcare benefits through the City. Hood, thereafter, obtained Medicare benefits and, additionally, Hood purchased a supplemental Medicare insurance policy. According to Hood, he continually purchased the supplemental Medicare insurance policy/coverage from in or about January 2011 through trial. (R. p. 295, line 9 – p. 297, line 1.)

Between June 1972, when the City hired Hood, and Hood's retirement in 2005, he only worked for the City's fire department. Hood, moreover, did not apply to work for any other fire department between June 1972 and his retirement from the City in 2005. Further, Hood did not consider or reject offers of employment by any other fire department between June 1972 and 2005. (R. p. 303, lines 19 – 25.)

According to Hood, prior to his retirement in 2005, the City made promises to him regarding access to post-retirement health care benefits. First, Hood claims Mayor Summey, in or about May 1998, made verbal promises to him. Second, Hood asserts Mayor Summey, in or about May 1998, made a written promise to him. (R. p. 292, line 3 – p. 293, line 23.) Hood claims he relied on the City's promises in deciding to remain employed by the City for over thirty years. Hood correspondingly claims by relying on the City's alleged promises, he gave up the opportunity to earn higher wages with another employer(s).

Respondent Forner

The City first employed Forner in or about January 1982. Forner later retired from his employment with the City in June 2009. Forner, at the time he retired, held the rank of Battalion Chief. Forner was fifty years of age when he retired. (R. p. 274, lines 6 – 15.)

After retiring, Forner participated in the City's healthcare plan, and he continues to currently receive healthcare benefits through the City. Upon reaching age sixty-five, and becoming eligible for Medicare benefits in February 2024, Forner, based upon the City's current healthcare plan, will no longer be allowed to obtain healthcare benefits through the City.

Between January 1982 and his retirement in 2009, Forner only worked for the City's fire department. Forner, moreover, did not apply to work for any other fire department between January 1982 and his retirement from the City in 2009. Further, Forner did not consider or reject offers of employment by other fire departments between January 1982 and 2009. (R. p. 284, lines 8 - 23.)

According to Forner, prior to his retirement in 2009, the City made promises to him regarding post-retirement healthcare benefits. First, Forner claims Mayor Summey, in or about May 1998, and on various occasions in following years, made verbal promises to him. Second, Forner asserts Mayor Summey, in or about May 1998, made a written promise to him. (R. p. 275, line 2 – p. 276, line 18.)

Forner claims he relied on the City's promises in deciding to remain employed by the City for over twenty-seven years. Forner correspondingly claims that by relying on the City's alleged promises, he gave up the opportunity to earn higher wages with another employer(s). Finally, Forner claims but for statements contained in a letter he received

from the City in 2009 regarding post-retirement healthcare benefits, he would have continued to work at least two more years for the City.

Respondent Rissanen

The City first employed Rissanen in or about June 1972. Rissanen later retired from his employment with the City in or about June 2005. Rissanen, at the time he retired, held the rank of Fire Chief, the City's highest-ranking fire department official. Rissanen was fifty-six years of age when he retired. (R. p. 155, line 5 – p. 156, line 1.)

After retiring, Rissanen participated in the City's healthcare plan until he reached age sixty-five in March 2016, and he started receiving Medicare benefits. Upon reaching age sixty-five, and becoming eligible for Medicare benefits, Rissanen was no longer eligible to obtain health benefits through the City, including healthcare benefits for his spouse.

Between June 1972 and his retirement in 2005, Rissanen only worked for the City's fire department. Rissanen, moreover, did not apply to work for any other fire department between June 1972 and his retirement from the City in 2005. Further, Rissanen did not consider or reject offers of employment by other fire departments between June 1972 and 2005. (R. p. 204, line 20 – p. 205, line 3.)

According to Rissanen, prior to his retirement in 2005, the City made promises to him regarding post-retirement healthcare benefits. First, Rissanen claims Mayor Summey, in or about May 1998, and on various occasions in following years, made verbal promises to him. Second, Rissanen asserts Mayor Summey, in or about May 1998, made a written promise to him. Third, Rissanen asserts the City's former director of human resources, Robert Connella ("Connella"), made representations to him about the City's post-

retirement healthcare benefits in 2005 that caused him to retire at that time, instead of continuing work for the City. (R. p. 159, line 14 – p. 65, line 21.) Rissanen claims he relied on the City's promises in deciding to remain employed by the City for over thirty years.

Respondent Baxley

The City first employed Baxley in or about June 1972.¹ Baxley later retired from his employment with the City in June 2005. Baxley, at the time he retired, held the rank of Assistant Chief. Baxley was fifty-four years of age when he retired. (R. p. 236, lines 11 - 22.)

Subsequent to retirement, Baxley participated in the City's healthcare plan. Baxley reached age sixty-five in June 2016. Upon reaching age sixty-five, and becoming eligible for Medicare benefits, Baxley was no longer eligible for health benefits through the City, including healthcare benefits for his spouse.

Between June 1972 and his retirement in June 2005, Baxley primarily worked for the City's fire department. Baxley, moreover, did not apply to work for any other fire department, or other employer, between June 1972 and his retirement from the City in 2005. Further, Baxley did not consider or reject offers of employment by other fire departments between June 1972 and 2005. (R. p. 268, line 11 – p. 270, line 2.)

According to Baxley, prior to his retirement in 2005, the City made promises to him regarding post-retirement healthcare benefits. First, Baxley claims Mayor Summey, in

¹ Respondents acknowledge the City made no promises to them regarding post-retirement healthcare benefits from 1972 to 1998. Consequently, to the extent each Respondent relied on an alleged promise made by the City, he only relied on it during the last, approximately, seven years of employment – from 1998 to 2005 (2009 as to Forner). Moreover, it was not until 1998 that the City agreed to pay for any portion of retiree post-retirement healthcare benefits.

or about May 1998, and on various occasions in following years, made verbal promises to him. Second, Baxley asserts Mayor Summey, in or about May 1998, made a written promise to him. Third, Baxley asserts the City's former director of human resources, Connella, made representations to him about the City's post-retirement healthcare benefits in 2005 that caused him to retire at that time, instead of continuing work for the City. (R. p. 239, line 23 – p. 242, line 7.) Baxley claims he relied on the City's promises in deciding to remain employed by the City for over thirty years.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

A. Promissory Estoppel – Equitable Claim Tried By Circuit Court Judge Alone

Respondents' sole cause of action for promissory estoppel is an equitable claim. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006). Respondents' promissory estoppel claim was tried by the Circuit Court judge alone.

"The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence." Horry Cty. v. Ray, 382 S.C. 76, 80, 674 S.E.2d 519, 522 (Ct. App. 2009). Moreover, "[i]n an action in equity, tried by the judge alone, without a reference, on appeal the [appellate court] has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citing Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965)).

B. Attorneys' Fees and Costs

"On appeal, the trial court's decision regarding an award of attorney's fees under S.C. Code Ann. 15-77-300 (Supp. 2003) will not be disturbed absent an abuse of

discretion.” Video Gaming Consultants, Inc. v. S. C. Dep’t. of Revenue, 358 S.C. 647, 649, 595 S.E.2d 890, 891 (Ct. App. 2004).

II. RESPONDENTS’ PROMISSORY ESTOPPEL CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS AND THE CIRCUIT COURT ERRED IN APPLYING DOCTRINE OF EQUITABLE ESTOPPEL

The Circuit Court concluded, and Respondents do not contest, the statute of limitations expired before Respondents Hood, Baxley and Rissanen filed the Complaint and before Respondent Forner joined in the case by way of Respondents’ Amended Complaint. (R. p. 25.) Consequently, Respondents’ claim is barred by the statute of limitations.

Despite Respondents’ filing their respective claims too late, the Circuit Court concluded the actions of the City caused each Respondent to delay filing his action and, as a result, the Circuit Court concluded the City is equitably estopped from asserting the statute of limitations as an affirmative defense. The Circuit Court, as acknowledged by Respondents, is correct as to the application and expiration of the statute of limitations. (R. p. 25; p. 770, lines 3 - 105.) However, the Circuit Court erred in concluding the City is equitably estopped from asserting the statute of limitations as an affirmative defense.

A. Applicable Three-Year Statute of Limitations Bars Respondents’ Claim

In or about May 2009, Respondents each received a letter from the City notifying each of the changes affecting their access, as well as their dependents’ access, to post-retirement healthcare benefits with the City. (R. p. 458.) Respondents Rissanen, Baxley and Hood filed their Complaint on May 31, 2013. (R. pp. 41 – 52.) Respondent Forner did not join the lawsuit, by way of the Amended Complaint, until June 28, 2013. (R. pp. 53 - 64.)

The applicable statute of limitations for Respondents' promissory estoppel claim is contained in S.C. Code 15-3-530(1) (1976): "Within three years: (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in 15-3-520" Although it does appear South Carolina appellate courts have ever expressly applied 15-3-520(1) to a claim for promissory estoppel, it is clear promissory estoppel fits with the term "obligation" and/or "liability."

Respondents received notification of the City modifying its retiree healthcare benefits in May 2009. As recognized by the Circuit Court, the statute of limitations accrued as to Respondents' claim when the City sent each Respondent a letter in May 2009: "Absent the City's continued promises that the Plaintiffs would be grandfathered into the former retirement system, the statute [of limitations] would in fact begin to run on the date of the City's [May 2009] letter." (R. p. 25.) Moreover, as conceded by Respondents, the statute of limitations expired as to each of their claims before May 2013. (R. p. 770, lines 3-10.) Consequently, Respondents filed the Complaint and Amended Complaint some twelve months too late. Respondents' claims, as found by the Circuit Court, are time-barred.

B. Circuit Court Erred in Applying Doctrine of Equitable Estoppel to City's Affirmative Defense Asserting the Statute of Limitations

The Circuit Court concludes the doctrine of equitable estoppel precludes the City from asserting, or otherwise claiming, the statute of limitations as an affirmative defense. (R. p. 32.) In general, the Circuit Court concluded equitable estoppel prevents the City from asserting the expiration of the statute of limitation as a defense because Respondents "had many discussions with Mayor and HR personnel after receiving the Mayor's letter in 2009" and these discussions caused Respondents to delay filing a lawsuit. (R. p. 32.) The Circuit

Court, in this regard, erred in regard to the facts in the record and the application of the law of equitable estoppel to those facts.

Each Respondent, evaluated individually, must establish all the elements of equitable estoppel. Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991). Therefore, Respondents must each show he: (1) lacked the knowledge and means of obtaining knowledge of the truth of the facts in questions; and (2) relied on the conduct of the City. Additionally, Respondents must each prove the City: (1) acted in a way amounting to false representation or concealment of the facts in question; (2) intended such conduct to be acted on by the Respondent; and, (3) possessed knowledge, either actual or constructive, of the true facts. Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000). Contrary to the findings and conclusions of the Circuit Court, no Respondent, based upon the record, presented evidence meeting any of the necessary elements to show equitable estoppel.

“In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit.” Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001) *cert. denied as improvidently granted*, 588 S.E.2d 598 (2003). “An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary.” Id. An intentional misrepresentation is not required for the application of equitable estoppel. Id. at 361, 559 S.E.2d at 339. “It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire.” Id.

There is no evidence in the record the City, including its representatives, made any representation a claim by any Respondent would be settled or resolved without litigation. Moreover, there is no evidence in the record the City, including its representatives, participated in any other conduct suggesting a lawsuit was not necessary in order to obtain a fully paid Medicare supplement. Consequently, the Circuit Court's application of equitable estoppel was improper because there is no evidence in the record of City conduct warranting estoppel.

The Circuit Court specifically found the following: "Between 2009 and 2011, the Mayor met with Plaintiffs [Respondents] Rissanen and Baxley and Plaintiffs [Respondents] Rissanen and Baxley were assured by the Mayor . . . they would not be treated differently as they had already retired so they were grandfathered in [to the previous retiree health plan]. Plaintiffs Rissanen and Baxley relayed this information to the other Plaintiffs [Respondents] and retirees." (R. p. 24.) The Circuit Court's finding is contrary to the record, including the testimony of Respondents.

First, the Mayor met with Respondents Baxley and Rissanen, not Hood or Forner, on a single occasion "between 2009 and 2011." (R. p. 185, line 15 – p. 186, line 12; p. 246, line 8 – p. 247, line 10.) Second, and according to the record, during this single meeting with Rissanen and Baxley, the Mayor did not make any statements consistent with the findings of the Circuit Court. (R. p. 185, line 15 – p. 186, line 12; p. 246, line 8 – p. 247, line 10.) Third, the Circuit Court's finding Respondents Rissanen and Baxley "relayed information" about their single meeting with Mayor Summey to Respondents Hood and Forner finds no support in the record.

The Circuit Court also found “[b]etween 2009 and 2011 . . .” Plaintiff “[Respondent] Baxley were [was] assured by . . . City Council members [Rhonda Jerome (“Jerome”) and Bob King (“King”)], and HR personnel that they [he] would not be treated differently as they [he] had already retired so they [he] were [was] grandfathered in [to the previous retiree health plan].” (R. p. 24.) Plaintiff Baxley “relayed this information to the other Plaintiffs [Respondents] and retirees.” (R. p. 24.) The Circuit Court’s finding is not supported by the record, including the testimony of Respondents.

First, according to the record, neither Jerome nor King made any statements to Baxley consistent with the findings of the Circuit Court. (R. p. 175, line 9 – p. 176, line 9; 241, line 6; p. 176, line 22 – 178, line 1.) Second, the Circuit Court’s finding Respondent Baxley “relayed information” about conversations with King or Jerome to Respondents Hood and Forner finds no support in the record.

Additionally, the Circuit Court also found “[b]etween 2009 and 2011 . . .” Plaintiff “[Respondent] Rissanen were [was] assured by . . . City Council members [Rhonda Jerome (“Jerome”) and Bob King (“King”)], and HR personnel that they [he] would not be treated differently as they [he] had already retired so they [he] were [was] grandfathered in [to the previous retiree health plan].” (R. p. 24.) Plaintiff Rissanen “relayed this information to the other Plaintiffs [Respondents] and retirees.” (R. p. 24.) The Circuit Court’s finding is not supported by the record, including the testimony of Respondents.

First, according to the record, neither Jerome nor King made any statements to Rissanen consistent with the findings of the Circuit Court. (R. p. 175, line 9 – p. 176, line 9; p. 241, line 6; p. 176, line 22 – p. 178, line 1.) Second, the Circuit Court’s finding

Respondents Rissanen “relayed information” about conversations with King or Jerome to Respondents Hood and Forner finds no support in the record.

Finally, the Circuit Court makes the following finding: “[b]etween 2009 and 2011 . . .” Plaintiff “[Respondent] Rissanen . . . were [was] assured by . . . City Council members and HR personnel [Robert Connella (“Connella”) that they [he] would not be treated differently as they [he] had already retired so they [he] were [was] grandfathered in [to the previous retiree health plan].” (R. p. 24.) Plaintiff Rissanen “relayed this information to the other Plaintiffs [Respondents] and retirees.” (R. p. 24.) The Circuit Court’s finding is not supported by the record, including the testimony of Respondents.

First, according to the record, no City human resource personnel, particularly Connella, made statements consistent with the findings of the Circuit Court between 2009 and 2011. Second, the Circuit Court’s finding Respondents Rissanen and Baxley “relayed information” about conversations with City human resource personnel, including conversations with Connella, to Respondents Hood and Forner during the 2009 to 2011 time period finds no support in the record.

The Circuit Court erred in concluding the City is estopped from asserting the statute of limitations as an affirmative defense. First, there is no evidence in the record any City representative, including City Council members, human resource representatives or the Mayor, made any representations to Forner after he received the May 2009 letter from the City. Second, there is no evidence in the record of alleged statements made by any City representative, including City Council members, human resource representatives or the Mayor, made any representations to Rissanen, Baxley or Hood that would result in the City being equitably estopped from asserting the statute of limitations as a defense. Finally,

there is no evidence in the record any Respondent believed he had a claim and/or contemplated bringing an action against the City but did not do so based upon alleged representations attributable to City representatives.

III. THE CIRCUIT COURT INCORRECTLY FOUND RESPONDENTS PROVED ALL ELEMENTS OF THEIR PROMISSORY ESTOPPEL CLAIM

The Circuit Court erred in concluding each Respondent proved all elements of their promissory estoppel claim. Contrary to the Circuit Court's findings and conclusions, there is insufficient evidence in the record to prove any Respondent's promissory estoppel claim.

"Promissory estoppel is a quasi-contract remedy." North American Rescue Products, Inc. v. Richardson, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015). "Courts have used the doctrine where the refusal to apply it 'would be virtually to sanction the perpetration of a fraud or would result in other injustice.'" Id. at 379, 769 S.E.2d at 241 (quoting Satcher v. Satcher, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002)).

"A contract and promissory estoppel are two separate and distinct legal theories. They 'are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.'" Satcher at 484, 570 S.E.2d at 538 (quoting Duke Power Co. v. S.C. Pub. Serv. Comm'n, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985)). "Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property [or inconsistent act]." Id. at 484, 570 S.E.2d at 538-39.

"Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations." Barnes v. Johnson, 402 S.C. 458,

469, 742 S.E.2d 6, 11 (Ct. App. 2013). "Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped." *Id.*

"To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition [act] by the promisor." *Id.* at 469-70, 742 S.E.2d at 11 (emphasis added). "Thus, promissory estoppel has broad applicability to prevent injustice, but where a promise is unclear or the alleged harms are unconnected to the inconsistent disposition [inconsistent act], the doctrine does not risk imposing its own inequity against the party sought to be estopped." *Id.*

"The elements of promissory estoppel are (1) a promise unambiguous in its terms is present; (2) the party to whom the promise is made reasonably relies on it; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise." 7 S.C. Jur. Estoppel and Waiver § 14.1 (citing *Woods v. State*, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993)). *See also* *Bishop v. City of Columbia*, 401 S.C. 661, 664, 738 S.E.2d 255, 261 (Ct. App. 2013) (listing elements necessary to prove promissory estoppel); *Richardson* at 379, 769 S.E.2d at 241 (listing elements necessary to prove promissory estoppel).

A. Respondents Did Not Present Evidence the City Promised to Provide Post-Retirement Healthcare Benefits to Respondents, Including a Medicare Supplement

To the extent Respondents assert the City, Mayor Summey, or any other City representative made written promises about post-retirement healthcare benefits, Respondents' claim is unsupportable. For example, the Ordinance and Executive Order No.

2004-1 both expressly state the City can terminate all post-retirement healthcare benefits if determined to be in the best interest of the City. (R. pp. 495 – 496; pp. 520 – 548.)

Moreover, Respondents' reliance on Mayor Summey's 1998 memorandum to the City Council Finance Committee is likewise lacking any promissory language. (R. pp. 483 – 484.) To the contrary, the memorandum includes the following language: “one of my aspirations,” “I would propose for committee consideration,” “I hope you are all inspired to support this proposal.” (emphasis added.)

Respondents also rely upon alleged oral promises made to them by Mayor Summey and the former director of human resources for the City, Robert Connella (“Connella”). However, to the extent Respondents presented material evidence of such oral “promises,” Respondents' claims nonetheless fail for the reasons discussed below.

B. Respondents Did Not Present Evidence of an “Unambiguous” Promise to Provide Post-Retirement Healthcare Benefits to Respondents, In Particular a Medicare Supplement

The Circuit Court made no finding as to what type of Medicare supplement Respondents were allegedly promised by the City. (R. pp. 17 – 35.) However, the uncontradicted evidence presented at trial, by way of the City’s expert, combined with the clear statutory mandates, shows Medicare supplement plans are of several types and consist of varying benefit levels. (R. pp. 820 – 841.) See 42 U.S.C. § 1395ss. Although all Respondents testified the City promised to provide them a Medicare supplement beginning at age sixty-five, each correspondingly testified the City’s alleged promise was not specific as to the type of Medicare supplement plan. (R. p. 215, lines 2 – 10; p. 255, lines 9 – 18; p. 305, lines 16 – 24.)

Indeed, the record is also uncontradicted and clear that of the three Respondents (Rissanen, Baxley and Hood) who currently purchase a Medicare supplement, each purchases a different Medicare supplement, each plan consisting of varying and different coverages and cost. (R. pp. 797 - 841; pp. 923 - 1031.) Consequently, the Circuit Court concluded each Respondent was promised a different Medicare supplement by the City. (R. p. 34.)

Moreover, the Circuit Court concluded Forner was promised a Medicare supplement that will not be available in 2024, the year Forner is eligible for Medicare. (R. p. 34.) The award to Forner by the Circuit Court is based upon him, looking prospectively into the year 2024, presumably purchasing Medicare supplement – Plan F. (R. p. 811, lines 1 - 25.) However, it is uncontradicted Medicare supplement – Plan F will not be available in 2024. (R. p. 830, lines 15 - 17.) *See* Public Law 114-10-Apr. 16, 2015; 129 Stat. 87. Congressional Record, Vol. 161 (2015) (providing for the elimination of Plan F for those purchasing a Medicare supplement in 2020 and beyond). Even if the City did promise to pay for Forner to obtain Medicare supplement – Plan F beginning in 2024, as the Circuit Court concluded, Congress, not the City, modified federal law and eliminated Medicare supplement – Plan F beginning in 2020. *See Craft v. S.C. Commission for Blind*, 385 S.C. 560, 568, 685 S.E.2d 625, 629 (Ct. App. 2009) (promissory estoppel claim fails where source or cause of failure to comply with promise is independent of promisor).

The Circuit Court made no express finding pertaining to the level and/or scope of Medicare supplement coverage the City allegedly promised each Respondent. (R. pp. 17 - 35.) The law in regard to promissory estoppel in South Carolina is well-established in one, particular respect: the alleged promise must be “unambiguous.” *See Barnes* at 471, 742

S.E.2d at 12 (“promise must be unambiguous in its terms” and collecting cases holding likewise).

C. Respondents’ Reliance Upon Any Statements Made by the City Regarding Post-Retirement Healthcare Benefits, Including a Medicare Supplement, Was Unreasonable

Each Respondent was an active City employee in 2004 when the City approved Executive Order No. 2004-1. Upon the approval and implementation of both the Ordinance and Executive Order No. 2004-1, each Respondent received unequivocal notice of the following regarding their access to post-retirement healthcare benefits through the City: access to coverage would terminate if determined to be in the best interest of the City. (R. p. 320, line 17 – p. 325, line 25; p. 257, line 23 – p. 263, line 10; p. 285, lines 2 – 22; p. 299, line 17 – p. 300, line 10; p. 302, line 25 – p. 303, line 18; pp. 557 - 585.) In 2009, the City decided it was in the best interest of the City to change access to post-retirement benefits upon the retiree reaching age sixty-five. (R. p. 320, line 17 – p. 325, line 25; pp. 557 - 585.)

Each Respondent had access to the City’s policies and ordinances while employed. Moreover, each Respondent knew how to locate, identify and review City policies and ordinances. (R. p. 199, l. 22 – p. 204, l. 6; p. 262, line 4 – p. 156; line 10; p. 285, line 2 – 22; p. 299, line 17 – p. 300, line 10.) For these reasons, Respondents’ alleged reliance on alleged written and/or verbal promises by Mayor Summey, or any other City employee or representative, was unreasonable, unexpected and unforeseeable by the City.

The City is allowed to make prospective modifications to the healthcare benefits it offers. In Alston v. City of Camden, 322 S.C. 38, 48, 471 S.E.2d 174, 179 (1996), the South Carolina Supreme Court held that health insurance is a fringe benefit subject to prospective

modification and there can be no reasonable expectation that the terms of such benefits will remain unchanged. Correspondingly, the Alston court held a city must have the ability to alter its benefits to meet changing circumstances. Id. at 48-49, 471 S.E.2d at 180.

Additionally, in Ahrens v. State, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011), the South Carolina Supreme Court recognized "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests." In this instance, City Council, the only entity that could provide for and fund healthcare benefits for City retirees, did not have authority to bind future councils in respect to retiree healthcare benefits, including the funding of those benefits. *See* Wright v. City of Florence, 229 S.C. 419, 424-25, 93 S.E.2d 215, 218 (1956); S.C. Code Ann. § 5-9-40 (1976). *But see* Bishop at 664, 738 S.E.2d at 261 (holding "trial court erred in granting summary judgment against retirees on their estoppel claims based upon representations made by their supervisors and the City's human resource personnel.")

D. Promise for Future Benefits is an Unenforceable Violation of Public Policy

The City operates under a mayor-council form of government. Under the City's mayor-council form of government, Mayor Summey has certain administrative responsibilities and powers. S.C. Code Ann. § 5-9-30 (1976). However, City legislative powers, including the adoption of an annual budget, by way of a budget ordinance, and associated committal and expenditure of City funds, are vested with City Council. S.C. Code Ann. § 5-9-40 (1976) ("The council shall adopt an annual budget for the operation of the municipality and capital improvements.").

"One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government." Wright at 424-25, 93 S.E.2d at 218

(emphasis added). Second, "a council may not by contract bind its successors to forego or to exercise their legislative functions." Newman v. McCullough, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) (quotations and citations omitted).

The funds the City utilizes to provide healthcare benefits to employees and retirees come from the yearly budget appropriations approved by City Council. City Council's yearly appropriation of funds for healthcare benefits, by way of a budget ordinance, is a legislative function. Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992); S.C. Code Ann § 5-9-40. *See also* Piedmont Public Service Dist. v. Cowart, 319 S.C. 124, 13, 459 S.E.2d 876, 880 (Ct. App. 1995) ("If the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils."); Cunningham v. Anderson County, 402 S.C. 434, 441-450, 741 S.E.2d 545, 549-553 (Ct. App. 2013) *aff'd* 414 S.C. 298, 299, 778 S.E.2d 884, 885 (2015) (County council cannot enter into a contract binding successor councils).

The City's adoption of an ordinance or resolution, including the yearly budget ordinance, "is a legislative enactment and presumed to be constitutional." Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 460, 716 S.E.2d 280, 284 (2011) (quoting Aakjer v. City of Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010)). In considering whether a City ordinance is constitutional, the City's "powers . . . should be liberally construed." *Id.* (citing S.C. Const. art. VIII, § 17.) *See also* Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) (separation of powers doctrine expressed in S.C. Const. art. I, § 8 prohibits judicial interference in legislative functions); Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 121-122, 691 S.E.2d 453, 460-461

(2010) (challenge to the “wisdom, policy or expediency of an [legislative] act” presents a “nonjusticiable political question”).

“The primary purpose in interpreting statutes [ordinances] is to ascertain and effectuate the intent of the legislature [City Council].” Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E. 2d 465, 468 (2010) (citing Cain v. Nationwide Prop. and Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008)). “Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute.” Id. (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Id. (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) (internal quotations omitted)).

The City’s legislative actions, including the passage of yearly budget ordinances, are “harmonious.” In short, the City, by approval of its lawful, mandated, budget ordinances (i.e. by legislative action), chose to either fund or not fund retiree access to the City’s self-funded healthcare plan. (R. p. 320, line 17 – p. 325, line 25; pp. 557 - 585.) By legislative action, including the passage of the 2009-2010 budget ordinance, the City lawfully changed retiree access to the City’s healthcare plan, including the costs to City retirees. (R. p. 320, line 17 – p. 325, line 25; pp. 557 - 585.)

The City’s legislative actions are consistent with the history of the Ordinance and the subsequent City budget ordinances. Moreover, the City’s actions neither provide a basis for Respondents’ allegation of a “promise” by the City nor their assertion that their alleged reliance was either justifiable or foreseeable. *See Alston* at 48, 471 S.E.2d at 179 (health

insurance is a fringe benefit subject to prospective modification and there can be no reasonable expectation that the terms of such benefits will remain unchanged.)

Finally, the Circuit Court's Order is contrary to the South Carolina Constitution. First, the Circuit Court's conclusions, findings and Order constitute a violation of S.C. Const. art. I, § 8.—judicial interference in a legislative function of the City. S.C. Const. art. I, § 8 prohibits interference by the judiciary in a matter that is solely a legislative function of the City's Council, whose members are elected by and serve at the pleasure of the City's residents.

Second, S.C. Const., art. X, § 14, entitled "Bonded Indebtedness of Political Subdivisions" controls the City incurring debt. For instance, section 2 of the article states the following:

[s]uch political subdivisions shall have the power to incur indebtedness in the following categories and no other: (a) General obligation of debt; and (b) Indebtedness payable only from a revenue-producing project or from a special source as provided in subsection (10) of this section [i.e., revenue bonds and tax increment financing bonds].

(emphasis added.)

The City can only obtain general obligation debt "upon such terms and conditions as the General Assembly shall prescribe by law" and must involve the delivery of "a schedule showing the date and the principal and interest payments to become due" See art. X, § 14 (2) and (5). Consequently, the City is expressly prohibited by the South Carolina Constitution from incurring an undefined obligation for future payments on behalf of former employees, including to Respondents, for a Medicare supplement or otherwise.

E. Respondents Rissanen, Baxley and Hood Presented No Evidence of Reliance Damages, and Respondent Forner Presented No Evidence of an Injury or Reliance Damages

"The final element of promissory estoppel requires demonstrating that the reasonably relying promisee [Respondents] sustains injury due to a disposition [act] inconsistent with alleged promise." Barnes at 474, 742 S.E.2d at 14. "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 [act], the complained-of injury would not have otherwise resulted." Id. "Promissory estoppel . . . always requires some reliance on the promise which leads to injury." Prescott v. Farmers Telephone Cooperative, Inc., 328 S.C. 379, 396, 491 S.E.2d 698, 706, n.8 (Ct. App. 1997), *rev'd on other grounds*, 335 S.C. 330, 516 S.E.2d 923 (1999) (emphasis added).

In addition to Respondents showing a connection between their reliance on a promise(s) and any injury, Respondents must show "the existence or amount of damages cannot be left to conjecture, guess or speculation." Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968). "As a general rule, the evidence [of damages] should be such as to enable the court or jury to determine the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established. Proof of the amount of loss with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent on the consideration of contingent events. So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and

which will permit a reasonably close estimate of the loss.” Id. (quoting 25A C.J.S. Damages § 162(2), p. 80.)

1. Respondent Forner

After retiring, Forner requested and received healthcare benefits through the City, and he continues to receive healthcare benefits through the City. (R. p. 281, line 16 – p. 282, line 15.) Unlike the other Respondents, Forner will not reach age sixty-five, and become eligible for Medicare benefits, including a Medicare supplement, until February 2024. Consequently, Forner has suffered no injury.

Despite Forner suffering no injury, and in direct contradiction to the well-established case law requiring he incur an injury, the Circuit Court concluded Forner was entitled to damages; damages for a prospective injury that has not occurred. Moreover, in awarding Forner damages, the Circuit Court based its damage calculation on the prospective cost of a Medicare supplement plan – Medicare Supplement Plan F – that, as a matter of law, will not exist in 2024.

Moreover, between January 1982 and his retirement in 2009, Forner only worked for the City’s fire department. Forner, moreover, did not apply to work for any other fire department between January 1982 and his retirement from the City in 2009. Further, Forner did not consider or reject offers of employment by other fire departments between January 1982 and 2009. (R. p. 284, lines 8 -23.)

In summary, the Circuit Court erred in finding Forner suffered a compensable injury. Moreover, the Circuit Court further erred in awarding Forner prospective damages based upon a Medicare supplement plan that will not exist in 2024 when Forner can no

longer participate in the City's healthcare plan and he becomes eligible for Medicare benefits. Finally, Forner suffered no reliance damages.

2. Respondent Hood

Between June 1972, when the City hired Hood, and Hood's retirement in 2005, he only worked for the City's fire department. Hood, moreover, did not apply to work for any other fire department between June 1972 and his retirement from the City in 2005. Further, Hood did not consider or reject offers of employment by any other fire department, or other employer, between June 1972 and 2005. (R. p. 303, lines 19 – 25.) Hood suffered no reliance damages.

3. Respondent Baxley

Between June 1972 and his retirement in June 2005, Baxley primarily worked for the City's fire department. Baxley, moreover, did not apply to work for any other fire department, or other employer, between June 1972 and his retirement from the City in 2005. Further, Baxley did not consider or reject offers of employment by other fire departments between June 1972 and 2005. (R. p. 268, line 11 – p. 270, line 2.) Baxley suffered no reliance damages.

4. Respondent Rissanen

Between June 1972 and his retirement in 2005, Rissanen only worked for the City's fire department. Rissanen, moreover, did not apply to work for any other fire department between June 1972 and his retirement from the City in 2005.² Further, Rissanen did not

² No Respondent made effort to seek or apply for other employment before and after Mayor Summey made alleged promises regarding a fully paid Medicare supplement beginning in May 1998. Respondents, in other words, did not stop looking for and/or stop applying for positions other than with City after the Mayor's alleged promises beginning in May 1998.

consider or reject offers of employment by other fire departments between June 1972 and 2005. (R. p. 204, line 20 – p. 205, line 3.) Rissanen suffered no reliance damages.

F. The Circuit Court Relied Upon Inadmissible Evidence

1. Rissanen Testimony Related to Salaries and/or Wages Paid to Employees of Other Fire Departments

Despite the City's objection, the Circuit Court allowed Rissanen to testify about the wages and salaries allegedly paid to firefighting personnel at other fire departments. (R. p. 168, line 3 – p. 172, line 6; p. 226, line 12 – p. 227, line 19.) The Circuit Court then relied upon Rissanen's testimony to conclude Respondents, in reliance on the City's promise regarding a Medicare supplement, accepted lower wages from the City in comparison to what each could have earned elsewhere. (R. p. 28.)

The Circuit Court erred, and abused its discretion, in allowing Rissanen to provide testimony regarding wages earned by firefighters with other employers pursuant to South Carolina Rule of Evidence 612. (R. p. 168, line 3 – p. 172, line 6; p. 226, line 12 – p. 227, line 19.) The Circuit Court erred in allowing Rissanen to testify about the contents of a document – a document not admitted into evidence and that Rissanen did not make or prepare – lacking any adequate foundation. In short, despite the City's objection to the admission of document and Rissanen's testimony regarding the information in it, the Circuit Court effectively allowed Rissanen to provide hearsay testimony in violation of Rule 801, SCRE.

(R. p. 284, lines 8 - 23; p. 204, line 20 – p. 205, line 3; p. 268, line 11 – p. 270, line 2; p. 303, lines 19 – 25.)

G. The Circuit Court Relied Upon Irrelevant Evidence

1. Cost for City to Maintain Post-Retirement Healthcare Benefits

The Circuit Court finds, and then relies upon, the following in finding Respondents proved their promissory estoppel claim: “The cost to the City of paying for these four (4) Plaintiffs’ [Respondents’] Medicare Supplement Policies . . . is an extremely small percentage of the City’s budget.” In short, the Circuit Court concludes the City’s “ability to pay” is a proper consideration as to Respondents’ promissory estoppel claim. However, the Circuit Court’s reliance on this finding is not supported by the applicable law as to promissory estoppel. The Circuit Court’s reliance on the City’s “ability to pay” constitutes error.

H. The Circuit Court Relied Upon Evidence Not in the Record or Evidence Contrary to the Record

1. Mayor Summey’s 1998 Memorandum

In the Second Order, the Circuit Court makes numerous findings contrary to the record, including findings related to Mayor Summey’s 1998 Memorandum to the City Council’s Finance Committee: 1) the 1998 Memorandum “delineated a plan to provide retirees with free retiree health insurance;” 2) pursuant to the 1998 Memorandum “the City would pay the cost of a Medicare Supplement Policy for them so their health insurance would continue to be free;” 3) the 1998 Memorandum acknowledged Respondents, and other City retirees, “would receive” various health insurance benefits; and, 4) “[t]he City implemented the Mayor’s 1998 interpretation of the Ordinance from 1998 until 2009.” (R. pp. 21 – 22.) The fundamental error made by the Circuit Court in regard to the 1998 Memorandum is the Circuit Court ignored the following: the 1998 Memorandum contains

nothing more than recommendations by Mayor Summey to the City Council Finance Committee in May 1998.

There is no evidence in the record that the 1998 Memorandum made any promise to City employees, including Respondents, or that it was Mayor Summey's "interpretation" of Ordinance 1984-23. To the contrary, the record is clear and the 1998 Memorandum is clear it was nothing more than Mayor Summey making a written recommendation to City Council's Finance Committee to change then existing City policy. (R. p. 457.) To the extent the Circuit Court found and/or concluded the 1998 Memorandum constituted a "promise" by the City or Mayor Summey's "interpretation" of City Ordinance 1984-23, the Circuit Court's findings/conclusions are contrary to the record and in error.

**2. Statements to Rissanen and Baxley By City Representatives
Between 2009 and 2011**

a. Statements by Mayor Summey

The Circuit Court found the following: "Between 2009 and 2011, the Mayor met with Plaintiffs [Respondents] Rissanen and Baxley and Plaintiffs [Respondents] Rissanen and Baxley were assured by the Mayor . . . they would not be treated differently as they had already retired so they were grandfathered in [to the previous retiree health plan]. Plaintiffs Rissanen and Baxley relayed this information to the other Plaintiffs [Respondents] and retirees." (R. p. 24.) The Circuit Court's finding is contrary to the record, including the testimony of Respondents.

First, the Mayor met with Respondents Baxley and Rissanen on a single occasion "between 2009 and 2011." (R. p. 185, line 15 – p. 186, line 12; p. 246, line 8 – p. 247, line 10.) Second, and according to the record, during this single meeting, the Mayor did not make any statements consistent with the findings of the Circuit Court. (R. p. 185, line 15 –

p. 186, line 12; p. 246, line 8 – p. 247, line 10.) Third, the Circuit Court’s finding Respondents Rissanen and Baxley “relayed information” about their single meeting with Mayor Summey to Respondents Hood and Forner finds no support in the record.

b. Statements by City Council Members

The Circuit Court also finds that “[b]etween 2009 and 2011 . . .” Plaintiff “[Respondent] Baxley were [was] assured by . . . City Council members [Rhonda Jerome (“Jerome”) and Bob King (“King”)], and HR personnel that they [he] would not be treated differently as they [he] had already retired so they [he] were [was] grandfathered in [to the previous retiree health plan].” (R. p. 24.) Plaintiff Baxley “relayed this information to the other Plaintiffs [Respondents] and retirees.” (R. p. 24.) The Circuit Court’s finding is not supported by the record, including the testimony of Respondents.

First, according to the record, neither Jerome nor King made any statements consistent with the findings of the Circuit Court. (R. p. 175, line 9 – p. 176, line 9; p. 241, line 6; p. 176, line 22 – p. 178, line 1.) Second, the Circuit Court’s finding Respondents Rissanen and Baxley “relayed information” about conversations with King or Jerome to Respondents Hood and Forner finds no support in the record. (R. pp. 108 - 398.)

c. Statements by City Human Resource Personnel

Finally, the Circuit Court makes the following finding: “[b]etween 2009 and 2011 . . . Rissanen . . . were [was] assured by . . . City Council members and HR personnel [Connella] that they [he] would not be treated differently as they [he] had already retired so they [he] were [was] grandfathered in [to the previous retiree health plan].” (R. p. 24.) Plaintiff Rissanen “relayed this information to the other Plaintiffs [Respondents] and

retirees.” (R. p. 24.) The Circuit Court’s finding is not supported by the record, including the testimony of Respondents.

First, there is no support in the record for the conclusion City human resource personnel, particularly Connella, made statements consistent with the findings of the Circuit Court between 2009 and 2011. (R. pp. 108 - 398.) Second, the Circuit Court’s finding Respondents Rissanen and Baxley “relayed information” about conversations with City human resource personnel, including conversations with Connella, to Respondents Hood and Forner during the 2009 to 2011 time period finds no support in the record. (R. pp. 108 - 398.)

3. Acceptance of Lower Wages

The Circuit Court concludes Respondents “accepted lower wages,” in comparison to other employment each could have obtained, in reliance on the City’s promise to provide a Medicare supplement. (R. p. 28.) The Circuit Court’s finding in this respect is contrary to the record, including testimony of Respondents who all denied rejecting other job offers while employed by the City. (R. p. 284, lines 8 - 23; p. 204, line 20 – p. 205, line 3; p. 268, line 11 – p. 270, line 2; p. 303, lines 19 – 25.) The Circuit Court’s findings and conclusions in this regard are contrary to the record and made in error.

4. Rejected Employment Offers

The Circuit Court, in its Second Order, finds Respondents “turned down job offers” in reliance on the City’s promise to provide a Medicare supplement. (R. p. 28.) The Circuit Court’s finding in this respect is contrary to the record, including testimony of Respondents who all denied rejecting other job offers. (R. p. 284, lines 8 - 23; p. 204, line 20 – p. 205,

line 3; p. 268, line 11 – p. 270, line 2; p. 303, lines 19 – 25.) The Circuit Court’s findings and conclusions in this regard are contrary to the record and made in error.

5. Did Not Pursue Other Employment with Higher Earning Potential

The Circuit Court states the following as evidence Respondents relied on the City’s promise to provide a Medicare supplement: Respondents “did not fully pursue jobs with higher earning potential.” (R. p. 28.) However, the Circuit Court’s finding is contrary to the record, including testimony of Respondents who all denied applying for other employment while employed by the City. (R. p. 284, lines 8 - 23; p. 204, line 20 – p. 205, line 3; p. 268, line 11 – p. 270, line 2; p. 303, lines 19 – 25.) The Circuit Court’s finding is also contrary to the record in that the record contains no evidence any Respondent could have pursued other employment “with higher earning potential.” (R. pp. 108 - 398.) The Circuit Court’s findings and conclusions in this regard are contrary to the record and made in error.

IV. CIRCUIT COURT ERRED IN AWARDING ATTORNEYS’ FEES AND COSTS

The Circuit Court awarded Respondents attorneys’ fees and costs pursuant to S.C. Code Ann. § 15-77-300 (1976) *et seq.* The Circuit Court’s award of attorneys’ fees and costs does not comply with S.C. Code Ann. § 15-77-300 (1976) *et seq.* and, therefore, constitutes an abuse of discretion and error.

A. Award of Attorneys’ Fees and Costs Does Not Comply with S.C. Code Ann. § 15-77-300 et seq.

The award of fees and costs by the Circuit Court does not comply with S.C. Code Ann. § 15-77-300 (1976) *et seq.* First, the statute does not allow for the recovery of costs. Second, Respondents did not petition the Court for fees and costs in accordance with S.C.

Code Ann. § 15-77-310 (1976). Third, the Circuit Court did not make the requisite findings to award fees and costs. *See* S.C. Code Ann. § 15-77-300(B) (1976) (requiring court make specific written findings as required by S.C. Code Ann. § 15-77-300(B)(1-5)). Fourth, the Circuit Court is unclear and inconsistent as to the award of attorneys' fees to Respondents. Fifth, the City, a municipality, is not subject to Respondents' claim for attorneys' fees and costs because it is neither the "state" nor an "agency," pursuant to S.C. Code Ann. § 15-77-300 *et seq.* *See South Carolina Public Information Foundation v. Courson*, 420 S.C. 120, 124, 801 S.E.2d 185, 187 (Ct. App. 2017) (noting "agency" is undefined in S.C. Code Ann. § 15-77-300 *et seq.*).

Sixth, the Circuit Court relies upon an improper consideration as to whether an award of attorneys' fees is appropriate: "The cost to the City to keep its promise to these four (4) Plaintiffs [Respondents] was very minimal." There is no support for the Circuit Court concluding the cost to the City to comply with the alleged promise for a Medicare supplement is a factor the Circuit Court could consider in applying S.C. Code Ann. § 15-77-300 (1976) *et seq.*, in respect to awarding attorneys' fees.

1. The Recovery of Costs is Not Allowed

S.C. Code Ann. § 15-77-300 (1976) *et seq.* does not allow for, either expressly or by implication, the recovery of costs. Indeed, costs are not mentioned or otherwise addressed in S. C. Code Ann. § 15-77-300 (1976) *et seq.* Consequently, the Circuit Court abused his discretion and erred in awarding costs to Respondents.

2. The City, a Municipality, is Not Subject to Respondents' Claim for Attorneys' Fees Because it is Neither the "State" Nor an "Agency," and Respondents Do Not Contest "State" Action

The Circuit Court, in contradiction to *Courson*, concluded the City is an "agency," without citing any supporting legal authority because there is no support for the conclusion by the Circuit Court. (R. pp. 33 - 34.) Moreover, the Circuit Court cited no authority for concluding the City is "the state," as referenced, but not defined, in S.C. Code Ann. § 15-77-300 (1976). (R. pp. 33 - 34.)

Moreover, neither the State of South Carolina nor the City filed the lawsuit, and Respondents' lawsuit does not contest "state action." As expressly recognized in S.C. Code Ann. § 15-77-300 (1976) attorneys' fees are only recoverable in three circumstances: 1) "civil action brought by the State;" 2) civil action brought by "*any political subdivision of the state*;" and, 3) civil action brought by any party who is contesting state action.") (emphasis added). Pursuant to the express language of S.C. Code Ann. § 15-77-300 (1976), the only circumstance allowing for recovery attorneys' fees as to a "political subdivision of the state" is when the "political subdivision" brings (i.e. files) the action. The City did not bring or otherwise assert any claim(s) against Respondents.

3. Respondents Did Not Petition the Court for Attorneys' Fees

Respondents were required to "petition" the Circuit Court of attorneys' fees. S.C. Code Ann. § 15-77-310 (1976) ("The party shall petition for the attorney's fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request.") However, Respondents never submitted a petition for attorneys' fees, only an affidavit in support of their claim for attorneys' fees and costs.

4. The Circuit Court Did Not Make the Requisite Findings to Award Attorneys' Fees and Costs

Even if Respondents were allowed to petition for attorneys' fees and costs, the Circuit Court did not make the requisite findings to award attorneys' fees. S.C. Code Ann. § 15-77-300(B) (1976) expressly required the Circuit Court make the following specific written findings: 1) the "nature, extent and difficulty of the case;" 2) the "time devoted;" 3) the "professional standing of counsel;" 4) the "beneficial results obtained;" and, 5) the "customary legal fees for similar services." The Circuit Court failed to make any of the required written findings. (R. pp. 33 - 34.) Finally, the Circuit Court failed to find the City lacked substantial justification for its actions, including contesting Respondents' claims.

5. The Circuit Court is Unclear and Inconsistent as to the Award of Attorneys' Fees

The Circuit Court is unclear and inconsistent as to the award of attorneys' fees to Respondents. In particular, the Circuit Court makes contradictory findings as to the amounts of attorneys' fees it awarded Respondents.

Initially, the Circuit Court concludes and finds Respondents are entitled to \$51,100.00 in attorneys' fees and costs. (R. p. 34.) However, the Circuit Court then, in Exhibit A to the Second Order, states Respondents are entitled to \$58,048.15 (\$55,335.00 in attorneys' fees and \$2,713.15 in costs). (R. p. 35.) The Circuit Court's conflicting awards of attorneys' fees constitutes an abuse of discretion and error by the Circuit Court.

6. The Circuit Court Relied Upon Evidence Irrelevant to the Application of S.C. Code Ann. § 15-77-310

In awarding attorneys' fees to Respondents pursuant to S.C. Code Ann. § 15-77-310 (1976), the Circuit Court states the following as a reason for it awarding costs and fees: "[t]he cost to the City to keep its promise to these four (4) Plaintiffs was very minimal."

(R. p. 34.) However, S.C. Code Ann. § 15-77-310 (1976) does not allow the Circuit Court to consider such in regard to considering whether an award of attorneys' fees is either allowed or appropriate.

7. **The Circuit Court's Award of Attorneys' Fees Was Premature**

The Circuit Court awarded Respondents' attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 *et seq.* Pursuant to S.C. Code § 15-77-300, "[t]he party shall petition for the attorney's fees within thirty days following final disposition of the case." (emphasis added.) As recognized in McDowell v. S.C. Dep't of Soc. Servs., 300 S.C. 24, 26-27, 386 S.E.2d 280, 281 (Ct. App.1989) "final disposition" does not occur until the remittitur from the appellate court is filed by the clerk of the court from which a party appealed. The Circuit Court's award of attorneys' fees to Respondents was premature because no "final disposition" occurred.

V. **THE CIRCUIT COURT IS INCONSISTENT AND AMBIGUOUS AS TO THE AWARD/RELIEF GRANTED EACH RESPONDENT**

Initially, in the Circuit Court orders: "Plaintiffs [Respondents] Rissanen, Forner, Baxley, and Hood shall be reimbursed the cost for any and all Medicare Supplement Policies they have purchased and will continue to purchase." (R. p. 34.) (emphasis added.) However, the Circuit Court then ordered: "After considering the expert testimony, I conclude the Plaintiffs [Respondents] are entitled to \$214,236.15 as a judgment against the City. This includes actual damages, attorney's fees, and costs. The breakdown is shown on Exhibit A of this Order and attached and made part hereof." (emphasis in original.) (R. p. 34.)

The noted directives by the Circuit Court are inconsistent and undefined. First, the Circuit Court appears to order the City to "reimburse" Respondents for Medicare

supplement premiums each already paid and may pay in the future. However, the Circuit Court provides no specific amount of reimbursement, if any, the City is required to pay each Respondent, whether now or in the future. (R. p. 34.) Moreover, the Circuit Court's directive to "reimburse" is inconsistent with the following statement by the Circuit Court: "the Plaintiffs [Respondents] are entitled to \$214,236.15 as judgment against the City. This includes actual damages, attorney's fees, and costs."

Additionally, in the Second Order, the Circuit Court references Exhibit A to it for a "breakdown" (i.e. itemization) of the \$214,236.15 awarded to Respondents. (R. p. 34.) However, the itemized amounts shown in Exhibit A to the Circuit Court's Second Order do not equal \$214, 236.15. (R. p. 35.) To the contrary, the itemized amounts listed in Exhibit A to the Circuit Court's Second Order appear to equal only \$214,232.15. (R. p. 35.)

Further, in the Second Order, the Circuit Court states the following regarding Respondents' requests for costs and attorneys' fees: "After consideration of the factors used for evaluating reasonable attorney's fees, this Court finds Plaintiff's [Respondents'] attorney fees and costs in the amount of \$51,100.00 reasonable and must be paid by the City pursuant to S.C. Code 15-77-300." (R. p. 34.) However, in Exhibit A to the Second Order, the Circuit Court, awards Plaintiffs \$55,335.00 in attorneys' fees. (R. p 35.) Consequently, it is unclear whether the Circuit Court awarded Respondents \$51,100.00 or \$55,335.00 in attorneys' fees.

VI. CIRCUIT COURT ERRED IN FINDING THE ALLEGED PROMISE TO PROVIDE A MEDICARE SUPPLEMENT CONSTITUTED A PROMISE TO PAY WAGES

The Circuit Court erred in concluding the City's alleged promise to provide a Medicare supplement to Respondents constituted a promise to pay wages. (R. pp. 29 - 30.) The Circuit Court's reference to and express reliance upon the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 (1976) *et seq.*, is inexplicable and unsupportable considering Respondents asserted no claim pursuant to the South Carolina Payment of Wages Act.

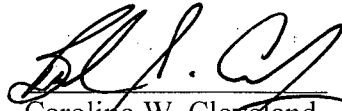
Moreover, by law, "wages" are confined to monetary payments. Anderson v. Baptist Medical Center, 343 S.C. 487, 489, 551 S.E.2d 526, 530 (2001) (fringe benefits such as "medical, disability and life insurance" are not part of an employee's wages). *See also* S.C. Code Ann. § 41-1-25(A)(1) (1976) ("employee benefit" means anything of value in addition to wages, including "any health benefits"). The Supreme Court stated in Anderson that including fringe benefits, such as insurance in the calculation of wages, "would dramatically alter the practice in this state." *Id.* 343 S.C. at 497, 551 S.E.2d at 531.

The Circuit Court concluded a post-retirement healthcare benefit, in this instance a Medicare supplement, is a form of deferred compensation "earned" during their employment and to which Respondents are entitled upon retirement. (R. pp. 29 - 30.) In this regard, the Circuit Court's finding is contrary to the Supreme Court's decisions in Alston and Anonymous Taxpayer, and the General Assembly's definition of "employee benefits" in S.C. Code Ann. § 41-1-25 (1976). Therefore, the Circuit Court's Second Order is in error in regard to this issue.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's Order and enter judgment in favor of the City.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C.W. Cleveland', written over the printed name.

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Charleston, South Carolina
September 26, 2019

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Circuit Court Judge J. C. Nicholson, Jr.

Case No. 2019-000332

RECEIVED

SEP 27 2019

SC Court of Appeals

Alvar R. Rissanen, Michael H. Baxley,
Clifford W. Forner, and Willie L. Hood,

Respondents,

v.

City of North Charleston,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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