THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Circuit Court Judge J.C. Nicholson, Jr.

Appellate Case No. 2019-000332

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

v.

City of North Charleston, Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE FACTS

The four (4) Respondents are retired City of North Charleston fire fighters who were employed by Appellant. In May of 1998, Appellant's Mayor, Keith Summey, sent a letter to Appellant's Finance Committee indicating his plan for providing Plaintiffs with the following:

> 1) free single coverage health insurance when they retired (if they had worked for the City for 30 years);
> 2) free Medicare supplemental health insurance policy when they became eligible for Medicare at age 65; and
> 3) continuation of health care coverage for their spouse and/or dependents on a City health insurance policy until their spouse and/or dependents became Medicare eligible.

(R. pp. 160, 163, 378-379, 457.)

The Mayor's written promises in this letter and his subsequent verbal promises were similar to an ordinance the City had passed in 1984 that was never nullified; the promises in 1998 were just more generous. (R. pp. 318, 495-496.) In 2004, the Mayor issued an Executive Order that contained the same language as the 1984 Ordinance regarding retiree health insurance. (R. pp. 318, 336, 495-496, 520.) Appellant's Mayor advised the City Council of this promise and the City implemented and honored the Mayor's promises for many years. (R. pp. 316, 327-328, 337-339.) Appellant's Mayor, the Mayor's Special Assistant Ray Anderson, City Council Members, Personnel Director Bob Connella, the Finance Director, and Respondent Rissanen in his capacity as Fire Chief and Respondent Baxley as Assistant Chief in charge of Personnel, all distributed and verbally repeated the Mayor's promises in the letter to the employees' on many occasions. (R. pp. 160-161, 164-167, 178-180, 208, 237-240, 247, 263-265, 309, 337-341.)

When accounting practices changed for political entities and cities and counties were required to begin accounting for their contingent liabilities in the same manner as private businesses, Appellant reneged on two (2) parts of its promise to its retirees. (R. pp. 309-310, 312,

380-381, 322-325.) Specifically, Mayor Summey sent Respondents a letter in 2009 indicating the City would continue to pay all of, or a percentage of, the cost of retiree health insurance until age 65 based on years of service, but for employees retiring after June 30, 2009, all healthcare benefits would cease once that employee became eligible for Medicare. (R. pp. 174, 458.) Appellant still continues to honor part of its promise as it still pays the cost of retiree health insurance premiums and allows dependents to remain on Appellant's policy until a retiree reached age 65. (R. pp. 115-118, 131-132.)

Respondents believed because they had retired prior to 2009, they would continue to be treated in conformance with the 1998 promises ("grandfathered") based on conversations they had with Appellant officials. (R. pp. 182, 185-186, 314-316, 351-352, 459.) At the end of 2011, the Mayor met with Respondents Rissanen and Baxley and assured them they would be treated differently as they had already they retired and he instructed the Personnel Director at the time, Chris Ruth, to look into the problem. (R. pp. 190-191, 352-353, 370.) Based on these representations, Respondents believed the Mayor was going to help them. (R. p. 191.) It was not until after the last meeting with an insurance agent on May 11, 2012, which Chris Ruth had arranged, that it became clear Appellant would not honor its promises; Respondents realized then that their dependents would not continue to be covered at all on the City's health insurance when Respondents turned 65 and they would have to pay the cost of a Medicare Supplement Plan when they reached age 65. (R. p. 192.)

Respondent Rissanen

Respondent Risannen worked for Appellant for 35½ years from 1970-2005. (R. p. 155.) He was Fire Chief for 13 years and when he retired he was 54 years old (R. pp. 155-156.) Respondent Rissanen was the Fire Chief in 1998 when Summey was elected Mayor and first

proposed the promise of free retiree health insurance in a letter to the Finance Committee. (R. pp. 159-160, 163-164, 457.) Bob Connella, the Personnel Director, and the Mayor explained at breakfast meetings and luncheons at the fire stations that retirees would receive free health insurance for themselves, could keep their dependents on the City's policy after they turned 65, and that the City would pay for a free Medicare supplement when Respondents turned 65 for the rest of their lives. (R. pp. 160-162.) City Councilmembers discussed the Mayor's promise at Council meetings, as did the Mayor's Special Assistant, Ray Anderson. (R. pp. 164, 166-167.) In his capacity as Fire Chief, Rissanen was expected to talk to employees about the promise of free health insurance, which he did, and he required his staff to relay this information to employees also. (R. pp. 178-179.) The Mayor called his promise a "honey of a deal" and told Risannen he did it to ensure a good quality of life for Appellant's employees and to give them peace of mind. (R. pp. 164-165, 227-228.) Bob Connella later assured Respondent Risannen that he would be "grandfathered" if changes were made after he retired. (R. p. 166.)

Rissanen testified he had no reason to believe the promise would not be kept as the Mayor was a personal friend and he trusted Ray Anderson. (R. p. 180.) Eventually, Bob Connella advised Respondent Rissanen to retire sooner rather than later to ensure Rissanen would be grandfathered so Risannen retired after 35 years of service, instead of 40 years as he had planned. (R. pp. 181-182.) Risannen testified he would not have been able to retire when he did if it were not for the promise of free health insurance. (R. pp. 227-228.)

When Appellant notified employees it was changing the promise and would no longer allow dependents to remain on the City' health insurance policy when the retiree turned 65 and it would also not pay the cost of a Medicare Supplement policy, Respondent Risannen had already been retired for four (4) years. (R. p. 174.) Risannen was upset and spoke to Councilwoman

Jerome who assured him he was grandfathered so the changes would not affect him; Bob Connella told Rissanen the same thing, as did Councilman King. (R. pp. 175-177, 182.)

Nevertheless, when Risannen turned 65, he had to pay the cost of a Medicare supplement himself and he testified that as of the date of the trial, he had incurred $3,075 out of pocket for payment of premiums and he paid $146.45 per month for his Medicare Supplement Plan. (R. p. 196.) Risannen testified that although the Mayor's promise did not mention what the future cost of a Medicare Supplement Plan might be, he understood Appellant would pay the cost for the rest of his life. (R. pp. 214-215.)

Respondent Baxley

Respondent Baxley worked for Appellant for 34 years, from November 1971 until June 30, 2005. (R. p. 236.) He was 54 when he retired and had been Personnel Chief of eight (8) years. (R. pp. 236-237.) Part of Baxley's job was to hire employees and conduct orientations, and when he did so he told them if they worked for Appellant for 30 years they would get free retiree health insurance. (R. pp. 237-238.) Baxley worked with Bob Connella in the Personnel Department every day and he heard the Mayor's promise repeated and bragged about 20-30 times by Bob Connella and the Mayor at staff lunches. (R. pp. 239-240, 247, 263-265.)

In 2009 when the Mayor indicated the promise was changing, Councilwoman Jerome told Baxley he had nothing to worry about because he had already retired. (R. p. 241.) Baxley has known the Mayor since high school and he trusted him; the Mayor told him if he worked until age 65 he would have his health insurance paid for the rest of his life. (R. pp. 241-242.) Similar to Risannen, Baxley retired early as he believed he would receive free health insurance. (R. p. 245.) At the time of the trial, Respondent Baxley paid $137.40 per month for a Medicare

Supplement Plan and had paid $2,630.22 out of pocket for health insurance premiums. (R. p. 251.)

Respondent Forner

Respondent Forner retired in 2009 after 27½ years of service at age 51. (R. p. 274.) At the time, he was a Battalion Chief and had been one for 12 years. (R. pp. 274, 284-285.) Forner heard the Mayor make the promise of free health insurance for the rest of their lives to him and other fire fighters at fire stations luncheons and he believed the Mayor, whose integrity he testified was impeccable. (R. p. 276.) Forner was still working in 2009 and when he learned the Mayor was changing the promises, he took money out of his wife's 401k to purchase two (2) years of service so he could retire early and be grandfathered. (R. pp. 277-278.) Respondent Forner is not yet eligible for Medicare yet but continues to pay a discounted rate to obtain health insurance from Appellant. (R. pp. 282, 286.) Respondent Forner will be 65 in 2023. (R. p. 274.)

Respondent Hood

Respondent Hood was employed by Appellant for 33 years from 1972 until 2005. (R. p. 290.) Hood was an Assistant Chief at the time of his retirement. (R. p. 278.) Hood heard the Mayor's promises at fire station luncheons and understood he would receive a free Supplement Medicare Policy from Appellant when he turned 65. (R. pp. 292-293, 300-301.) Hood believed what the Mayor told him and retired early as he thought he would have extra money due to not having to pay health insurance premiums. (R. pp. 297-298.)

In 2009, Respondent Hood met with Ms. Ruth in the Personnel Department and was told that she was working on providing the retirees a supplemental policy; Hood expected she would get that done for them. (R. p. 304.) In December of 2010, he testified he received a letter from Humana regarding a policy they offered but he was turning 65 the next month and had already

signed up for a Medicare Supplement Policy that was what he could afford. (R. pp. 295-296, 307.) Respondent Hood paid $131.00 per month for a Medicare Supplement Policy at the time of the trial and testified the amount had increased over the years. (R. p. 296.) He had paid $10,891 out of pocket as he had to pay deductibles under his Medicare Supplement Plan. (Id.)

ARGUMENT

I. The Circuit Court Did Not Err in Applying the Doctrine of Equitable Estoppel to Toll the Statute of Limitations.

"[A] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." RWE NuKEM Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730 (2007) (quoting Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997)). "The inducement may consist of ... conduct that suggests a lawsuit is not necessary." Black, supra (emphasis added). Appellant's conduct suggested a lawsuit would not be necessary. Specifically, Respondents were told by the Director of Personnel and Councilmembers that they would be grandfathered and the Mayor testified he wanted the Respondents to be grandfathered and directed the Director of Personnel to find a supplemental plan for Respondents. (R. pp. 166, 175-177, 182, 241, 351-352, 459.)

Whether a party can be estopped from claiming the statute of limitations is a factual matter to be determined by the judge. Id. In 2009 when Respondent Rissanen found out that Appellant's promise was being changed, he sought and received assurances for almost two (2) years from the Personnel Department and senior administrative staff that he would be grandfathered. (R. pp. 166, 175-177, 182, 241, 351-352, 459.) In fact as late as June 21, 2011, he received an email from Councilman Astell stating he was grandfathered. (R. pp. 175-177,

182, 459.) At the end of 2011, Respondents Risannen and Baxley went to talk to the Mayor and the Mayor said he understood their problem and would see what he could do for them. (R. pp. 186-187.) During the meeting, the Mayor directed Chris Ruth in the Personnel Department to look into the problem and she subsequently scheduled a meeting with an insurance agent in May of 2012; Rissanen testified he believed until May 11, 2012 that something would be done to help them. (R. pp. 190-191.) Baxley testified that after he met with the Personnel Department and Mayor he believed the Mayor was going to try to get the problem worked out. (R. pp. 246-247, 271.) It was not until after the May 11, 2012 meeting with the insurance agent that Risannen and Baxley knew Appellant would not honor its promises. (R. pp. 192, 246-247.) Baxley relayed this information to Respondents Forner and Hood, among others. (R. pp. 670-671.)

There was sufficient evidence from which the Circuit Court could find that the Mayor and Appellant's HR and administrative personnel assured Respondents verbally and in writing over the course of two (2) years that they would be grandfathered; the City even arranged for Respondents to meet with an insurance company to determine if there was a cheaper policy available for Respondents' wives; the Mayor told Baxley he would "help" him. (R. pp. 637-643, 663, 670.) The Circuit Court found that Respondents were not on notice that Appellant had decided not to grandfather them until after 2011 and that as late as 2011, Mayor Summey told Respondents he wanted to keep the promise and was directing City employees to find a way to help Respondents. (Id.)

There are sufficient facts in the record from which the Circuit Court determined that Appellant's conduct induced Respondents to hold off filing a law suit as they believed that they would be grandfathered and the promises made to them would be kept. Based on the testimony at trial and at the Hearing in March of 2018 addressing Appellant's Motion to Alter or Amend the

Order, the Circuit Court correctly found that it was not until 2011 that the statute of limitations began to run. (R. pp. 770-772, 101, 102.)

II. The Circuit Court Correctly Found Respondents Proved All Elements of Their Promissory Estoppel Claim.

The elements of promissory estoppel are: (1) a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relies on it; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. Bishop v. City of Columbia, 401 S.C. 651, 664, 738 S.E.2d 255, 261 (Ct. App. 2013) (citing Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993)).

A. Respondents Proved by a Preponderance of Evidence that Appellant Promised to Pay the Cost of Their Retirees' Heath Insurance Premiums, Including a Medicare Supplement Plan Premium.

Although the 1998 Memorandum uses words like "hope" and "aspiration", the Mayor testified he considered that this Memorandum was "notice" to the City Council that retiree health insurance would be funded. (R. p. 361.) Following this Memorandum, multiple verbal representations were made to employees that were the same promises as in this 1998 Memorandum. Appellants do not deny that Appellant's Mayor, the Mayor's Special Assistant Ray Anderson, City Council Members, Personnel Director Bob Connella, Finance Director, the former Director of Human Resources for the City, made verbal promises to Respondents that they would pay for the cost of a Medicare Supplement Policy for retirees beginning at age 65.[1] (App.'s Brief, pp. 22-23.)

[1] Respondents Rissanen and Baxley have not appealed the Circuit Court's decision regarding their spouses.

Verbal assurances are sufficient to bind a governmental entity. See, Bishop, 401 S.C. at 666, 738 S.E.2d at 263. ("Retirees provided a scintilla of evidence that they reasonably relied upon the representations and promises of the City's human resource employees' explanations of the health insurance benefits to their detriment."); see also Charleston County v. Nat'l Advert. Co., 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987). The Record reflects an abundance of verbal assurances made to Respondents over the course of many years by various City officials who were authorized to make assurances.

B. Appellant's Promise was "Unambiguous."

Appellant contends its promise was ambiguous because it did not specify which Medicare Supplement Plan it would provide. In the same manner that deductibles or prescription amounts may change over the years, the fact that the type of Supplement Plan Plaintiffs choose might change or be different over time, is not enough to make the admitted promise so ambiguous that it cannot be kept. Here, the terms of the promise at issue was payment by Appellant of the cost of a Medicare Supplement Plan at age 65 for each Respondent in exchange for working for Appellant for a certain number of years. It would be absurd to assume the cost would remain the same from year to year or that one Respondent might choose a different Plan from another. These are details associated with the promise that could not be easily known in advance but that does not alter the underlying terms of the promise. In fact, Mayor Summey acknowledged that he would have loved to continue doing what he had been promised, which suggests that the promise was clear enough that all parties understood its terms and clear enough that it could easily be fulfilled if Appellant chose to continue to honor it. (R. pp. 351-352.) The Court did not err in finding that the promise was clear as it was fulfilled by the City for many years. (R. pp. 209, 97.)

C. Respondents' Reliance Was Reasonable.

In promissory estoppel cases, "the general rule is that questions concerning reliance and its reasonableness are factual questions for the jury." Unlimited Servs. v. Macklen Enters., 303 S.C. 384, 387-88, 401 S.E.2d 153, 155 (1991) (holding that "reliance was a jury issue since *some* evidence was presented and the Court of Appeals erred in finding that no evidence supported the jury's verdict"). "Issues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts." Unlimited Servs., 303 S.C. at 387, 401 S.E.2d at 155 (quoting Starkey v. Bell, 281 S.C. 308, 315 S.E.2d 153 (Ct. App. 1984)). "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, 'including the positions and relations of the parties.'" West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337-38 (Ct. App. 2000) (quoting Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985)).

Here, there is ample evidence that the Respondents' reliance was reasonable because of the circumstances surrounding the promise, the context in which the promise was made and repeated, and the position of the parties making the promise. Respondents trusted Mayor Summey when he made these promises because he made them repeatedly and he always did what he said he would do. (R. p. 180.) See Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984) (A party's reliance on a representation is not unreasonable, unexpected, or unforeseeable as a matter of law when testimony indicates that the representation is the type of representation that is not uncommon in a certain line of business or in regular dealings with certain types of individuals).

Appellant's Finance and Human Resources employees were authorized to provide information to employees regarding health care and insurance and also confirmed and explained the promise when asked about it. (R. pp. 160-161, 164-167, 178-180, 208, 309, 337-341, 738-740.) Appellant's Mayor confirmed the promise in public and private meetings, as well. (R. pp. 711-714.)

D. Appellant's Promise was a Promise Involving Deferred Wages and Was Not a Violation of Public Policy.

The South Carolina Payment of Wages Act defines wages as "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract." S.C. Ann. Code § 41-10-10 (emphasis added). The payment of the future costs of health care premiums was compensation for work which had already been performed by Respondents. (R. pp. 238, 272-273, 621, 652-654.) Respondents worked for the City for the requisite number of years to obtain insurance that would cost them nothing (or almost nothing in Respondent Forner's case) and, thus, the promise has significant value which is an easily ascertainable monetary amount.

In Bishop, supra, this Court referred to the promise of retiree health insurance as a promise for "free" insurance, indicating its agreement that the promise involved the monetary value of the insurance, not merely a future benefit.

> Retirees also testified that several supervisors informed them they would receive free health insurance for life during their individual merit interviews and evaluations, which were incidental to the supervision of their employment. Therefore, the employment review

> context during which the representations were made provides a scintilla of evidence to suggest the representations and promises were within the supervisors' authority and reasonably relied upon.

Bishop v. City of Columbia, 401 S.C. at 667, 738 S.E.2d at 263. (emphasis added).

This Court has already held that a claim for free retiree health insurance is not precluded based on the same argument that Defendant is making now and the Circuit Court did not err in holding the promise was capable of being fulfilled. Deferring wages for work already accomplished is a recognized form of compensation under S.C. Ann. Code § 41-10-10 and does not violate public policy.

Regarding Appellant's violation of public policy argument, Appellant in essence argues that a promise made by the Mayor can never be binding, and violates public policy, because Appellant's legislative body (City Council) could decide in the future not to fund the Mayor's promise. However, the Circuit Court correctly rejected Appellant's argument that the Mayor's promise was not binding because it was unfunded in 2009.

Respondents do not dispute that a City Council can refuse to fund certain matters in a budget, but that does not change the fact that the Mayor was authorized to and made a promise, that Respondents relied upon and then suffered injury when the Mayor's promise was broken. (R. pp. 318, 331-333, 337-341, 378-379, 520.) Appellant could have kept the promise by finding the funds in its budget to do so. For instance the Finance Director testified that Appellant was self-insured so it had the ability and flexibility to change the rules regarding its insurance premiums and could have grandfathered the current retirees, required current employees to pay part of the cost of their health insurance premiums, cut its budget in other places. (R. pp. 308-309, 312-316.) As Appellant chose

to break a binding promise, just as if it had chosen to breach a contract, the Circuit Court correctly held it must pay the damages resulting from the Mayor breaking his promise.

Further, the Circuit Court's Order is not contrary to S.C. Const. art. I, § 8 as the Circuit Court is not interfering with a legislative function. The Court has not ordered Appellant to fund retiree benefits or to provide health insurance to dependents of retirees; the Court has merely ordered Appellant to pay the damages directly occasioned by Appellant's failure to keep its Mayor's promises. In this case, the damages are the costs to each Respondent of paying for a Medicare Supplement Plan.

Appellant enacted Ordinance 84-23 and has never amended or repealed it. Ordinance 84-23 states firefighters with 30 years' service can retain health, life and dental insurance under the City's group plan by paying same rate as active employees, and the Ordinance was ordained by both Mayor and City Council. (R. pp. 495-496.)

Further, in 2004, personnel policies were removed for the Appellant's Code and thereafter established through Executive Order by the Mayor. (R. pp. 520, 331-32.) In 2004, the Mayor restated his promises regarding retiree health care in an Executive Order which reflected the same verbal promises he had made since 1998 regarding retiree health insurance. (R. pp. 520, 332-336.) The Circuit Court did not tell Appellant it must keep the Mayor's promises or follow its Executive Orders or fund Ordinance 84-23; rather, it merely held that if Appellant chooses not to fulfill the Mayor's promises it is liable for the damages resulting from that decision.

E. Respondents Presented Evidence of Injuries They Suffered as a Result of Their Reliance on Appellant's Promise.

"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, 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). Appellant seeks to impose an incorrect, more onerous standard upon Respondents than the "but-for" standard discussed in Barnes.

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). Contrary to Appellant's contention, there is no "detrimental reliance" element in promissory estoppel. Respondents needed only to demonstrate an injury in reliance on the promise—that is, an injury that would not have occurred but for Appellant's reneging on its promise. Here, that is the payment out of their pocket for the cost of health insurance premiums.

Second, there is no support for the theory that "a plaintiff must demonstrate that he would have been better off if he had not relied upon a promise." This "requirement" is inconsistent with the law on promissory estoppel in South Carolina and the principles that underpin promissory estoppel. An analysis of the case law establishes that "injury in reliance" requires only that Respondents 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). 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 would 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. This is underscored by the two leading cases on promissory estoppel: Craft, supra and Barnes, supra. A faithful application of the legal analyses and holdings of these cases does not support a "would have been better off" standard for demonstrating an injury in reliance.

In short, the fourth element of promissory estoppel does not require Respondents to demonstrate that they "would have been better off." Respondents proved at trial that the loss of no-charge health insurance coverage until death—would not have occurred but for Appellant breaking its promise; thus, Respondents met the "injury in reliance" element. Respondents presented unrebutted testimony that they had incurred out-of-pocket expenses when Appellant broke its promise and also provided a reasonable estimate of future out of pocket costs. Specifically, each party named an expert, took the experts' depositions, and then the expert reports were made part of the record for the Circuit Court to consider at a hearing held on November 8, 2018. ((R. pp. 915-922.)

F. The Circuit Court Did Not Rely Upon Inadmissible Evidence.

Respondent Rissanen's testimony regarding wages paid to other fire fighters was properly held admissible by the Circuit Court as Rissanen was the Fire Chief for 13 years and testified he obtained a document from the State with all of the salaries of fire fighters in various departments throughout the State listed (and his department had also been asked to provide this same information), he showed this document to the City's Finance Director, and he spoke to other fire fighters so he knew that the salaries paid in his department were less than in other municipalities and counties. The document was not entered as an exhibit; it was only used to refresh Rissanen's memory. (R. pp. 169-170.) Further, as Respondent Rissanen testified, he did no need the document to know that his department was being paid less, "Most firefighters know what the other departments are making." (R. p. 171.)

G. The Circuit Court Did Not Rely Upon Irrelevant Evidence

Appellant argues the Circuit Court erred in considering the cost to Appellant of keeping its promise when it decided the issue of attorney fees. However, the cost of Appellant keeping its promise was only part of the Court's reasoning. The Order awarding attorney fees incorporated the filed Amended Affidavit in Support of Attorney Fees, which sets out the five (5) factors to be considered under the statute and Respondent's Supplemental Memorandum filed March 28, 2018. (R. p. 35, 452-456.)

The statement on page 16 of the Nov. 2018 Order regarding the minimal cost to Appellant specifically addresses S.C. Code § 15-77-300 which states in pertinent part, "the court may allow the prevailing party to recover reasonable attorney fees .... If (1) The court finds the agency acted without substantial justification..." (R. p. 33.) Here, there was

evidence of Appellant not acting with substantial justification when it broke its promise as the Finance Director testified Appellant's annual budget is 120 million dollars, Appellant puts aside 1.5 to 2 million per year to over the health expenses of all of its employees, and the cost of providing health insurance coverage for these four (4) Respondents for life was only about $72,000, which is a very small percentage of Appellant's annual budget. (R. p. 312-316, 322-325, 380-381.) The Circuit Court did not abuse its discretion by finding that the minimal cost to Appellant of keeping its promise to these four (4) Respondents is evidence that Appellant acted without substantial justification in breaking its promise and was relevant to the issue of an award of attorney fees.

H. The Circuit Court Did Not Rely On Evidence Not in the Record or Evidence Contrary to the Record.

Appellant asserts Mayor Summey's 1998 Memorandum is not relevant because it was only a recommendation and not a promise. This assertion is rebutted by Mayor Summey who testified that this Memorandum was prepared at his direction, was his idea, he had authority to make this recommendation to City Council, City Council did not object to his recommendation, but agreed to it, and that he then verbally repeated what was in the 1998 Memorandum to the fire fighters at the fire stations. (R. pp. 337-341.) The Mayor testified he was sorry he could not keep the "promises" he made in 1998 and he wanted the Respondents to be grandfathered. (R. pp. 341, 351-352.) In fact, Mayor Summey described the 1998 Memorandum as notice to City Council to let Council know that retiree health insurance would be funded in the budget. (R. p. 361.) Similarly, Appellant's Finance Director testified the Mayor is in charge of personnel policies and can spend money. (R. pp. 316-318) Whether the Memorandum was merely a recommendation is not the point; its significance is that the 1998 Memorandum is documentation of the Mayor's promise.

Appellant next asserts that statements made by City Council members are not consistent with the findings of the Circuit Court. However, Respondent Rissanen's and Baxley's depositions were made Court exhibits and were part of the record. Respondent Rissanen testified in his deposition about statements by Council members, as did Respondent Baxley. (R. pp. 720-722, 634.) Contrary to Appellant's argument, the Record also reflects conversations between Rissanen and HR Personnel about Respondents being grandfathered. Rissanen testified he had several conversations with Connella and Ruth.(R. pp. 706-711, 713-718, 739-740.)

Appellants contend there is no support in the record for the fact that Respondents Rissanen and Baxley relayed information to Hood and Forner. However, Respondent Baxley testified in his deposition that when he left the meeting in 2011 with the Mayor he thought that the Mayor was going to do something to address his situation and he would be grandfathered; that he kept the other fire fighters appraised and told them that the Mayor was going to fulfill his promise; and that he relayed this information to Respondents Forner and Hood, among others. (R. pp. 670-671.)

Finally, the Circuit Court's finding in its Nov. 2018 Order that Respondents accepted lower wages does not refer to the fact that Respondents turned down job offers, as detrimental reliance is not an element of promissory estoppel. (See Argument 2 E., infra.) Rather, Respondents accepted lower wages from Appellant because they knew they would receive free insurance when they retired which was valuable and not what other firefighters were going to receive. (R. pp. 227-228, 245, 277-278, 297-298, 658-659, 669, 725-726.) Further, Respondents did not have to turn down other jobs or pursue jobs with higher earning potential to prove an injury because detrimental reliance is not an element of a promissory estoppel claim.

III. The Circuit Court Did Not Err in Awarding Costs and Attorney Fees.

A. An Award of Attorney Fees Complies with S.C. Code Ann. § 15-77-300 *et seq.* and the Appellant is Subject to Respondents' Claim for Attorney Fees Because it is a Political Subdivision of the State.

1. The Recovery of Costs is Allowed in an Equity Action.

Promissory estoppel is an equitable remedy. Barnes v. Johnson, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013) (noting that "promissory estoppel is a flexible doctrine that aims to achieve equitable results"). In an equity suit, the matter of costs is within the discretion of the Circuit Court Judge. Bredenberg v. Landrum, 32 S.C. 215, 225, 10 S.E. 956, 960 (1890). See also, South Orange Trust Co. v. Conner, 226 S.C. 216, 224-25, 89 S.E.2d 372, 375 (1955) ("Liability for costs of the Circuit Court in equity cases is generally controlled by the decision of the Circuit Judge and the exercise of his discretion in such matters will not be interfered with except for a clear abuse of discretion or for violation of some principal of law.") In accord, Dunn v. Dunn, 298 S.C. 365, 380 S.E.2d 836 (1989) (no mandate that costs be taxed against the losing party as liability for costs is in the court's discretion). As this is a suit in equity, the Circuit court did not err in awarding costs.

2. Respondents Petitioned the Court for Attorney Fees in Accordance in S.C. Code Ann. § 15-77-310 and the Circuit Court Made the Requisite Findings to Award Attorney Fees and Costs.

S.C. Code § 15-77-300 provides in relevant part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.
> Id. (emphasis added)

On February 20, 2018, Respondent's counsel filed an Affidavit in Support of Attorney Fees factors addressed in S.C. Code Ann. § 15-77-300 (B) were addressed and timesheets attached. (R. pp. 419-429.) At a subsequent hearing, the Circuit Court requested copies of Respondents' legal fee agreements which were then provided to the Court in an Amended Affidavit on November 8, 2018, along with an updated amount of attorney fees. (R. pp. 843-854.) The Order dated November 13, 2018 awarding attorney fees states that it is based on the pleadings and post-trial memoranda submitted by counsel. (R. p. 19.) It is undisputed that the issue of attorney fees pursuant to S.C. Code Ann. § 15-77-300 was thoroughly briefed for the Circuit Court. It is true that the Order does not repeat the language in the two (2) Affidavits but it is clear from those pleadings and the attachments that they were the factual basis for the Court's conclusion. (R. p. 33.) The Order states, "The Amended Affidavit in Support of Attorney Fees is filed with the Charleston County Clerk of Court. The Affidavit is part of this Order by reference." (R. p. 35.)

3. The Circuit Court's Award of Attorney Fees Was Proper and Not Premature.

The Circuit Court properly held that S.C. Code § 15-77-300 applies to municipalities as municipalities are political subdivisions of the State in the same manner as are counties. Municipalities, like counties, are authorized under the State Constitution and State law. Municipal corporations only exist when they are created by the State. Municipalities are agents of the State as an agent is one who acts in place of another by authority from him or one who acts in some matter pertaining to the administration of government; this is exactly what municipalities when they are created per the State Constitution and State law.

S.C. Const. art. VIII § 8 states the General Assembly shall provide by general law the criteria and the procedures for the incorporation of new municipalities. Further, S.C. Code Ann. § 5-1-10 states, "A municipality having a certificate of incorporation issued by the Secretary of State and a township established by act of the General Assembly are declared to be perpetual bodies, politic and corporate, entitled to exercise all the powers and privileges provided for municipal corporations in this State, and subject to all the limitations and liabilities provided for municipal corporations in this State. "Municipality" means a city or town issued a certificate of incorporation, or township created by act of the General Assembly." S.C. Code Ann. § 5-1-20 (emphasis added). S.C. Code Ann. § 5-1-26 requires that upon receipt of a filing for a proposed municipal incorporation, the Secretary of State shall transfer a copy of the filing to the Joint Legislative Committee on Municipal Incorporation for review who makes a recommendation to the Secretary of State whether the area meets the minimum State statutory service standard incorporation requirements. Counties and cities are both creations of State constitutional and statutory law and there is no basis to distinguish between them for purposes of this Statute.

The Tort Claims Act has been repeatedly and consistently applied against municipalities which the Legislature and the courts have acknowledged are political subdivisions under this Act. See, e.g., Rolandi v. Spartanburg, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987) ("Where a resident filed suit against the city for damage to her property resulting from the backup of sewage from a sanitary sewer line and where the city provided evidence of a lack of liability insurance at the time of the incident, the claims against the city were barred by the doctrine of sovereign immunity pursuant to S.C. Code Ann. § 15-78-20 (c), and the trial court properly granted the city's motion for summary judgment.") The Tort Claims Act states in pertinent part:

> Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for

> torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion.
>
> The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.

S.C. Code Ann. § 15-78-20 (emphasis added)

Recently, the Court of Appeals addressed this issue in Reeves v. South Carolina Municipal Ins. and Risk Financing Fund, 2019 S.C. App. LEXIS 39 (filed May 1, 2019), noting that in S.C. Code Ann. § 15-78-30 (d) the Tort Claims Act defines "governmental entity" as "the State and its political subdivisions" and "political subdivision" is defined to include municipalities, the Court of Appeals held that a voluntary self-insurance pool created by municipalities of the State was a political subdivision under the Tort Claims Act.

In short, a municipality is a creation of the State, a political subdivision, and a body corporate of the State of South Carolina. Therefore, any person contesting action by a municipality who is the prevailing party can be awarded attorney fees under S.C. Code Ann. § 15-77-300 at the discretion of the Circuit Court judge.

Finally, the award of attorney fees is not premature. At a March 2018 hearing, Appellant cited two (2) cases in support of its position that an award of attorney fees was premature: McDowell v. South Carolina Dept. of Social Servs., 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) and Willis Constr. Co. v. Sumter Airport Comm'n, 308 S.C. 505, 419 S.E.2d 240 (Ct. App. 1992). The Court indicated it would consider the cases and revisit the issue of whether it was premature to award attorney fees. (R. pp. 793-795.) Neither of these two (2) cases supports

Appellant's position. In McDowell, the attorney filed an untimely petition for attorney fees after the Court of Appeals had already ruled and in Willis, after both sides had appealed, the lower court held that the Airport Commission was not a political subdivision of the State. Nothing in these two cases indicates the Circuit Court's decision as to when to award attorney fees was in error and he did not abuse his discretion in awarding them after the trial and before an appeal. The Circuit Court's decision that an Order issued after a trial is a final order and the trial judge has authority to award attorney fees at that point is sound.

IV. The Circuit Court's Order is Not Inconsistent and Ambiguous as to the Award/Relief Granted Each Respondent.

The Circuit Court's Order is not ambiguous as it was based on the exact numbers contained in the report of Respondent's expert witness 4) and the Amended Affidavit of Attorney Fees which was expressly made part of the Order by reference. (R. pp. 915-919, 843-85, 35.) Respondents agree there is a typographical error on page 16 of the Order as the amounts on Exhibit A add up to $214, 232.16, whereas the amount stated in the Order is four dollars more, or $214,236.15, but rather than waste judicial resources on this issue, undersigned counsel agrees to return $4.00 to Appellants in the event the Circuit Court's Order is upheld.

The first Affidavit for Attorney fees documented $51,100 of attorney fees whereas after several more hearing and briefings, the filed Amended Affidavit, which the Court made part of the Order by reference, documented $55,335.00 of Attorney fees, which is the number stated on Ex. A of the Order and on the Form 4. (R. pp. 35, 105.) The former attorney fees number stated on page 16, Paragraph 5 (R. p. 104) is clearly a scrivener's error. The correct amount of Attorney fees awarded is $55,335.00.

V. The Circuit Court Did Not Err in Finding Payment of the Cost of Medicare Supplement Premiums is Payment of Wages.

In addition to Respondents' argument in Section II D. infra, Respondents respectfully ask the Court to note that the Mayor's promise involved Appellant paying the cost of health insurance premiums. No promises were ever made regarding deductibles or what type of health insurance Appellant would offer. This case is not about Appellant's decision to make necessary changes in Appellant's health insurance program applicable to employees and retirees; it is about Appellant's decision to start charging retirees for health insurance coverage after the age of 65.

In recognition of this fact, the Circuit Court opened the record and asked the parties to address in post-trial briefs the issue of Respondents' monetary damages and thereafter issued an Order in November 2018 holding that make whole relief was available in an equity case. (R. pp. 761, 774, 777, 779-780, 781, 785, 26-30.) In this case, the make whole relief consisted of Appellant reimbursing Respondents for their out of pocket costs as of the date of trial and in the future, based on expert testimony.

Alston v. City of Camden, 322 S.C. 39, 471 S.E.2d 174 (1996) is not on point as it is a case involving the ability of one legislative body to bind a future legislative body by contract. There is no contract entered into by a legislative body at issue here. This case involves only a promissory estoppel claim based on promises made by a Mayor who had authority to set wages. As Chief Administrator, the Mayor has the responsibility of appointing all employees and directing and supervising the administration of all departments. S.C. Code § 5-9-30. Appellant's Mayor would not be acting outside the scope of his employment by making representations to City employees regarding the City's future payment of health insurance premiums as part of a compensation package because that is the type of representation for which he is responsible as Chief Administrator. The promise made by Appellant's Mayor was not merely a promise for

benefits that could change in the future, but a promise of future compensation in exchange for a set number of years of service to Appellant.

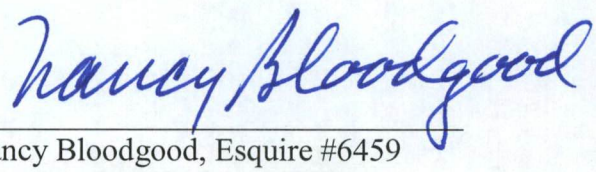
Appellant's Mayor is the head of the administrative branch of the City and appoints all employees and directs and supervises the administration of all departments. S.C. Code Ann. § 5-9-30. The Mayor's position and duties are administrative, not legislative. Appointing personnel and establishing the terms of employment (including compensation used as a recruiting and retention tool) is an administrative or business function performed by the Mayor, and, therefore, this case is not about binding a legislative body.

The Anderson case cited by Appellant is not relevant. For instance, Anderson v. Baptist Medical Center, 343 S.C. 487, 551 S.E.2d 526 (2001) is a workers' compensation case. In Anderson, the Court was determining how to determine the "average weekly wage" of a claimant and held, "the average weekly wage should be calculated based only on "the actual sum paid to the employee as his wages, not the totality of payments including reimbursements." 343 S.C. at 496, 541 S.E.2d at 530 (internal citations omitted.) This holding has nothing to do with promissory estoppel.

CONCLUSION

Based on the foregoing discussion and analysis, the Circuit Court did not err in finding all of the elements of a promissory estoppel claim were met and awarding damages and attorney fees. Respondent respectfully requests Appellant's appeal be dismissed and the Circuit Court's decision upheld.

Respectfully submitted,



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September 27, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Circuit Court Judge J.C. Nicholson, Jr.

Appellate Case No. 2019-000332

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

v.

City of North Charleston, Appellant.

CERTIFICATION OF COUNSEL AND CERTIFICATION OF COMPLIANCE WITH SCACR, Rule 211 (b)

I, Nancy Bloodgood, Esquire, hereby certify, pursuant to Rule 211 (b) of the South Carolina Appellate Court Rules, that Appellants' final briefs are identical to the briefs previously served under SCACR, Rule 208 except for revised references to the Record and the correction of typographical errors. No other changes have been made.

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