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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Opinion No. 5077 (S.C. Ct. App. Filed January 23, 2013)

Kirby L. Bishop, Herman G. Boney, Richard H. Brown, Michael D. Catt, Basilides F. Cruz, Robert B. Dozier, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, William J. Meyer, Charles F. Morris, Sr., and Joseph A. Smith,

of whom,

Balisides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, are
.....Respondents,

v.

City of Columbia,.....Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kirby L. Bishop, Herman G. Boney, Richard H. Brown, Michael D. Catt, Basilides F. Cruz, Robert B. Dozier, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, William J. Meyer, Charles F. Morris, Sr., and Joseph A. Smith, Plaintiffs,

Of whom Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith are, Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2010-176227

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 5077
Heard March 28, 2012 – Filed January 23, 2013

AFFIRMED IN PART AND REVERSED IN PART

Nancy Bloodgood, of Foster Law Firm, LLC, of Charleston, for Appellants.

W. Allen Nickles, III, of Nickels Law Firm, LLC, and Matthew A. Nickles, of Walker & Reibold, LLC, both of Columbia, for Respondent.

WILLIAMS, J.: On appeal, Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gilliam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, and Joseph A. Smith (collectively, Retirees) claim the circuit court erred in granting the City of Columbia's (the City) motion for summary judgment on Retirees' claims for continuing free health insurance under claims for breach of contract, promissory estoppel, and equitable estoppel. We affirm in part and reverse in part.

FACTS/ PROCEDURAL HISTORY

Retirees are a group of retired firefighters and police officers who each worked at least twenty years for the City of Columbia. Retirees elected to have group health insurance provided by the City through BlueCross BlueShield of South Carolina. Prior to July 1, 2009, the City paid all costs required to fund the group health insurance for employees and retirees. Retirees received newsletters stating retiree health insurance was free and were told by the City's human resources department that retiree health insurance would be at no cost to the retiree.

Retirees received an employee handbook and an insurance benefits booklet each year they were employed by the City. Under the heading "Employee Benefits," the employee handbook provided, "All employees who retire at age 65 or later . . . will be kept under the City's group coverage with the City making a cash contribution." The employee handbook also outlined a policy for employees who retire with twenty years or more of continuous service, stating, "Currently the City will, at no cost to eligible employees, continue health coverage for eligible employees."

The employee handbook's cover page stated in large font that the employee handbook was "**(NOT A CONTRACT)**." The next page of the employee handbook was dedicated to an "**IMPORTANT NOTICE**," which stated, "**NOTHING IN THIS HANDBOOK . . . SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT**." The important notice further noted, "The City reserves the right to revise, supplement, or rescind any policies or portion of the employee handbook, from time to time, as it deems appropriate in its sole and absolute discretion."

The insurance benefits booklet provided to employees and Retirees each year stated health insurance was "not just fringe benefits, but because the City pays the vast majority of the cost for [Retirees], they represent a significant cost of compensation far beyond your paycheck."

Retirees stated they relied on assurances made by supervisors that retiree health insurance would continue to be free, and they stated they accepted lesser salaries while employed by the City because of the City's policy of providing free health insurance to retirees.

In planning for the 2009-2010 budget, the City considered a number of cost-saving measures, including shifting part of rising health care costs to participants in the City's group health insurance plan. Plan participants, including Retirees, received information, offered objections, and attended meetings concerning the proposed changes to the group health insurance policy. On May 6, 2009, the City Council unanimously voted to require financial contributions by employees and retirees for participation in the group health insurance plan beginning July 1, 2009. Each of the Retirees left employment with the City before July 1, 2009.

On August 10, 2009, thirteen retirees sued the City seeking: (1) reimbursement of all premiums paid since July 1, 2009; (2) individual health insurance on the same terms as provided on the date of retirement prior to July 1, 2009; (3) guarantee of no future reductions in benefits for life; and (4) guarantee of no charges for health benefits for life. The Retirees alleged four causes of action: (1) breach of contract; (2) promissory estoppel; (3) violation of the South Carolina Unfair Trade Practices Act; and (4) declaratory judgment. With the consent of the City, the Retirees amended their complaint to assert equitable estoppel as a cause of action. The City filed a motion to dismiss, and the circuit court dismissed Retirees' unfair trade practices claim but allowed the remaining actions to proceed. The City timely filed a motion for reconsideration, or in the alternative, a motion to stay pending appeal. The circuit court denied both of the City's motions. The City made a summary judgment motion on May 6, 2010. After a hearing, the circuit court granted the City summary judgment on Retirees' breach of contract, promissory estoppel, and equitable estoppel causes of action.[1] Seven of the thirteen retirees bring this appeal.

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[1] The circuit court found Retirees' claims were not actionable in contract because: (1) Retirees were at-will employees and the City promised Retirees unvested fringe benefits, rather than compensation; (2) the City could not be legally bound by promises and representations made by its employees; (3) the City's handbooks and benefits booklets used present tense language that did not make permanent guarantees to support a contractual right; (4) any contract for future benefits would violate public policy because it would bind future city councils in the performance of their governmental functions; and (5) the benefits are governed by the contract between the City and BlueCross BlueShield of South Carolina. The court found

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) provides a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). In *Hancock*, our supreme court clarified that the level of evidence required to defeat a motion for summary judgment is dependent upon the non-moving party's burden of proof at trial. 381 S.C. at 330-31, 673 S.E.2d at 803.

LAW/ANALYSIS

I. Breach of Contract

Retirees argue the circuit court erred in granting summary judgment on their cause of action for breach of contract because the record establishes the City breached the contract they had with Retirees. We disagree.

Specifically, Retirees argue the City offered to pay the cost of the retiree health insurance through the employee handbook, insurance benefits booklet, and

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Retirees' claims were not actionable in promissory or equitable estoppel because the actions and statements of the City's employees could not bind a municipality in the council–manager form of government; Retirees are deemed to know this limitation; and Retirees therefore could not reasonably rely on any of the alleged promises or representations in deciding to work for the City.

statements made by City representatives. Retirees contend they accepted the offer by complete performance, working for the City for over twenty years. Further, Retirees argue working for the City for more than twenty years constituted valid consideration for the contract because they could have earned higher salaries from other employers.

The City argues the employee handbook, insurance benefits booklet, and verbal representations do not create a unilateral contract for continuing free health insurance. We agree with the City and address each assertion in turn.

A. Employee Handbook

Retirees argue the employee handbook created a unilateral contract. We disagree.

A unilateral contract has three elements: (1) a specific offer; (2) communication of the offer to the employee; and (3) performance of job duties in reliance on the offer. *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 336, 516 S.E.2d 923, 926 (1999). "The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference." *Watkins v. Disabilities Bd. of Charleston Cnty.*, 444 F.Supp.2d 510, 514 (D.S.C. 2006). However, a court should resolve whether the employee handbook constitutes a contract as a matter of law when the employee handbook's policies and disclaimers, taken together, establish that an enforceable promise does or does not exist. *Id.* An employee handbook forms a contract when: (1) the handbook provisions and procedures in question apply to the employee; (2) the handbook sets out procedures binding on the employer; and (3) the handbook does not contain a conspicuous and appropriate disclaimer. *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 20 (Ct. App. 2006).

Here, we find the employee handbooks applied to the Retirees during their employment, and the employee handbooks set out a policy of continuing free health insurance. Specifically, the 1987 version stated, "The City of Columbia hereby declares as a matter of policy that the City government . . . can better serve the public by administering . . . a personnel program which provides for and incorporates the following: . . . 5. Providing a program of extended benefits including . . . retirement benefits. " Later versions of the handbook added the following: "Currently, the City will, at no cost to eligible employees, continue health coverage for eligible employees in accordance with the following" eligibility requirements. We hold a contract does not exist.

In *Marr v. City of Columbia*, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992), our supreme court held an employee handbook did not form a contract when the employee handbook had a large disclaimer on the front cover stating, "Not a Contract"; there was no evidence the employee handbook was treated as a contract notwithstanding the disclaimer; and there was no evidence the parties waived the disclaimer. Further in *Marr*, the next page of the employee handbook contained an "IMPORTANT NOTICE" that explicitly stated nothing in the handbook should be deemed to constitute a contract. *Id.* The court went on to state the following:

> If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document. . . . Where, as here, the employer conspicuously disclaims the handbook as a contract and the parties have not waived the disclaimer, summary judgment for the employer on the issue of whether the handbook forms an employment contract is appropriate.

Id.

Since at least 1987 the employee handbooks contained the same disclaimer as the employee handbook in *Marr*, stating in large font, "Not a Contract" on the front cover of the employee handbooks. Further, the page after the cover page of the employee handbooks was devoted to an "IMPORTANT NOTICE," which provided in bold, conspicuous language: "NOTHING IN THIS HANDBOOK OR IN ANY OF THE CITY'S PERSONNEL POLICIES SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT . . . ." Each Retiree signed numerous acknowledgment forms confirming the employee handbooks did not create a contract. We find the plain language of the employee handbook conspicuously disclaims the existence of a contract, and no evidence indicates the City treated the handbook as a contract despite the disclaimer.

Moreover, our current statutory framework supports the conclusion that the employee handbook contained a conspicuous disclaimer. On March 15, 2004, the South Carolina General Assembly passed section 41-1-110 of the South Carolina

Code (Supp. 2011), which states a handbook shall not create an employment contract if it is conspicuously disclaimed. Section 41-1-110 provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, *shall not create an express or implied contract of employment if it is conspicuously disclaimed.* For purposes of this section, a disclaimer in a handbook or personnel manual must be in *underlined capital letters on the first page of the document and signed by the employee.* For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

(emphasis added). Section 41-1-110 applies to all employee handbooks issued by the City after June 30, 2004.[2] The only employee handbook provided in the record after June 30, 2004, is the employee handbook for 2005. As said before, the second page of the 2005 employee handbook contained a disclaimer stating, "NOTHING IN THIS HANDBOOK OR IN ANY OF THE CITY'S PERSONNEL POLICIES SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT . . . ." This disclaimer was in all capital letters and was underlined. Additionally, beginning in 2004, Retirees signed a disclaimer contained in the employee handbook. Analogizing to the current statute, we find the disclaimer contained in the 2005 employee handbook was conspicuous as a matter of law, and the City did not waive the disclaimer. *See* § 41-1-110 ("[A] handbook . . . issued by an employer . . . shall not create an express or implied contract of employment if it is conspicuously disclaimed."); *Marr v. City of Columbia*, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992) ("Where, as here, the employer conspicuously disclaims the handbook as a contract and the parties have not waived the disclaimer, summary judgment for the employer on the issue of whether the handbook forms an employment contract is appropriate."). Accordingly, the circuit court did not err in granting summary judgment on Retirees' breach of contract claim.

B. Insurance Benefits Booklet

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[2] All other employee handbooks provided in the record are not subject to section 41-1-110 as they were issued prior to June 30, 2004.

performance of all duties and obligations imposed on the municipality by law."); City of Columbia Ordinance § 1-2(a) (providing that whenever the ordinances require or authorize the head of a department or other officer of the city to do some act or perform some duty, the department head or other officer is authorized to designate, delegate and authorize subordinates to do the required act or perform the required duty unless the terms of the provision specifically designate otherwise); *cf.* 56 Am. Jur. 2d Municipal Corporations, Etc. § 237 ("The general rule with regard to municipal officers is that they have only such powers as are expressly granted by . . . sovereign authority or those which are necessarily to be implied from those granted.").

Here, the City has adopted the council–manager form of municipal government. City of Columbia Ordinance § 2-1. Under that form, the City's legislative and policy powers are vested in the City Council, and the salaries of the City's employees and officials must be approved by the City Council. S.C. Code Ann. § 5-13-30 (2011); City of Columbia Ordinance § 2-111. The City Manager is the chief executive officer and administrative head of the City. Thus, he is responsible for the administration of the municipality's affairs, including the employment of assistants to exercise such supervisory responsibilities over departments as he may delegate. S.C. Code Ann. § 5-13-90 (2011); City of Columbia Ordinance § 2-114(a)-(b). Further, each officer and department head has supervisory control of his department subject to the City Manager's direction and is authorized to delegate power to subordinates to perform their duties. City of Columbia Ordinance § 2-151(a)-(b); City of Columbia Ordinance § 2-125.

Therefore, to survive summary judgment on this argument, Retirees must provide a scintilla of evidence that the supervisors and human resource personnel who made the alleged promises had authority to create contracts for continuing free life insurance. Retirees have failed to do so. They have failed to show any action by the City Council or City Manager authorizing such contracts or granting the authority to these employees to enter the contract. They also failed to provide any evidence the supervisors and human resource employees who made the promises either had authority to enter these contracts directly or through the proper delegation of authority. Consequently, these alleged promises cannot bind the City under a theory of unilateral contract.[4]

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[4] The City also argues, and Retirees dispute, that summary judgment on the contract claims was appropriate because: (1) Retirees were "at-will" employees; (2) contracts for continuing free health insurance would violate public policy; and (3) Retirees could not have a permanent right to free lifetime health insurance under

II. Promissory Estoppel and Equitable Estoppel

Retirees argue the circuit court erred in granting the City's motion for summary judgment on the promissory estoppel and equitable estoppel causes of action. Retirees maintain a genuine issue of material fact exists as to whether they reasonably relied on statements by City's representatives and written promises to provide continuing free health insurance after retirement. We agree in part.

As a general rule, to prove estoppel against a city, the relying party must prove: (1) lack of knowledge and of the means to obtain the knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. *S.C. Dep't of Transp. v. Horry Cnty.*, 391 S.C. 76, 83, 705 S.E. 2d 21, 25 (2011). Similarly, 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. *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993).

A. Written Promises

Retirees assert summary judgment was inappropriate because there is evidence they reasonably relied to their detriment on the City's written promises to provide free health insurance made in the employee handbook, insurance benefits booklet, and employee newsletters.[5] We agree in part.

Retirees argue they relied upon the employee handbook and benefits booklet in deciding to remain employed with the City each year until they reached twenty

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Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (1996). Because we affirm the grant of summary judgment against the contract claims on other grounds, we need not address these arguments. *See Futch v. McAllister Towing Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

[5] We do not address the employee newsletters in light of our finding that summary judgment was not appropriate as a result of the City's oral promises and representations.

years' service. However, the employee handbook conspicuously disclaimed any binding promises, and the benefits booklet made no promises of continuing free health insurance at all. Therefore, Retirees cannot claim reasonable reliance on those materials, and the estoppel claims cannot survive summary judgment to the extent the claims are based on them.

B. Statements by City Employees

Retirees argue summary judgment on estoppel was inappropriate because there is a genuine issue of fact as to whether they reasonable relied on promises and representations made by City employees. We agree.

The acts of a city official acting within the proper scope of his or her authority may give rise to estoppel against a municipality. *Charleston Cnty. v. Nat'l Advert. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987); *Landing Dev. Corp. v. City of Myrtle Beach*, 285 S.C. 216, 221, 329 S.E.2d 423, 426 (1985) ("Government agents, acting within the proper scope of their authority, can by their acts give rise to estoppel against a municipality."); *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 493-94, 257 S.E.2d 716, 718 (1979) (holding the city was not immune from an estoppel claim because a permit applicant bought property in reliance upon: (1) a zoning ordinance passed by the city council and a zoning map issued by the city pursuant to the ordinance that indicated the applicant's property was zoned for the applicant's intended purpose and (2) a statement by the city zoning administrator confirming what the ordinance and zoning map said). "The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment." *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987).

The City cites to a number of cases, arguing that they indicate Retirees could not rely upon the representation of City employees as to whether they were entitled to free health insurance for life. However, two of the cases do not involve governmental entities. *See McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008); *West v. Gladney*, 341 S.C. 127, 134-35, 533 S.E.2d 334, 337-38 (Ct. App. 2000). Other cases involve civil rights claims alleging violations of the plaintiffs' constitutional rights as a result of official policy by the City. *See Stanley v. Kirkpatrick*, 357 S.C. 169, 176, 592 S.E.2d 296, 299 (2004); *Todd v. Smith*, 305 S.C. 227, 230-31, 407 S.E.2d 644, 646-47 (1991). Another case addresses whether a public officer could sustain a contract claim. *See Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 131, 459 S.E.2d 876, 880

(Ct. App. 1995), *aff'd by* 324 S.C. 239, 478 S.E.2d 836 (1996). Further cases hold that estoppel will not lie against a governmental entity when the government's employee gives erroneous information in contradiction of a statute. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210-11, 417 S.E.2d 579, 582-83 (1992); *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319-20, 659 S.E.2d 263, 267 (Ct. App. 2008). One also holds that a party cannot reasonably rely on government conduct to create a contract where the governmental actor purports to act pursuant to legislation that itself does not give authority to make the contract. *See Ahrens v. State*, 392 S.C. 340, 353-57, 709 S.E.2d 54, 61-63 (2011). Lastly, a case holds that the plaintiffs could not rely upon representations by a governmental employee where the employee explicitly said his assertions were subject to the school board's approval. *See Davis v. Greenwood School Dist.*, 365 S.C. 629, 634-35, 620 S.E.2d 65, 67-68 (2005).

None of the above cases answer whether a private party may rely on the representations of municipal employees for estoppel claims when the authority to make those representations *can* be traced back to the legislation that granted the municipal authority. *See Oswald v. Aiken Cnty.*, 281 S.C. 298, 303, 315 S.E.2d 146, 150 (Ct. App. 1984) ("The County cannot escape liability to Oswald under a policy it had the general power to implement on the ground that the administrator was not technically authorized to approve payment for compensatory time."). Here, the evidence does not conclusively indicate the City's employees gave information that contradicted a statute or ordinance. Nor does the evidence conclusively indicate the employees acted outside their authority when they explained Retirees' benefits.

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. Retirees presented evidence the City's human resource employees repeatedly told them that retiree health insurance would continue to be free throughout retirement, specifically during discussions on how to explain the City's obligations to new recruits. The City provided employees with newsletters stating free insurance would continue upon retirement. The City Manager indicated that human resource employees were authorized to inform Retirees about their insurance benefits, and the City's ordinances support this testimony.[6]

[6] *See* City of Columbia Ordinance § 2-114 ("(a) Duties. The city manager shall be the chief executive officer of the city and head of the administrative branch of city

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.

Therefore, instead of holding Retirees were charged with knowledge of the extent to which the City's employees were incorrect, it is a question of fact as to whether these explanations were authorized and reasonably relied upon. As a result, the trial court erred in granting summary judgment on Retirees' estoppel claims.

CONCLUSION

Based on the foregoing, we find the trial court properly granted summary judgment against Retirees on their contract claims. We also find the trial court properly granted summary judgment against Retirees on all of their estoppel claims to the extent those claims are based upon the employee handbook and benefits booklet. However, we find the 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.

Accordingly, the circuit court's rulings are

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government. The city manager shall perform and exercise the duties and responsibilities prescribed by law for this office and such other duties and responsibilities as prescribed by the City Council. (b) Assistants. The city manager may employ assistants to exercise such supervisory responsibilities over departments as the city manager may delegate."); City of Columbia Ordinance § 2-151 ("(a) The following departments of the city are created: . . . Human resources; . . . Fire; . . . (b) The head of each department shall be a director, who shall be an officer of the city and shall have supervision and control of his department, subject to the city manager. The city manager may serve as director of one or more departments or divisions within any department."); City of Columbia Ordinance § 2-125 ("The director of human resources, subject to the city manager, shall have administrative supervision over the department of human resources and shall be responsible for those activities relating to employment, employee relations, and training and shall perform such additional duties as may be assigned by the city manager.").

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
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of whom,

Balisides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, are ..... Appellants,

v.

City of Columbia, ... Respondent.

RESPONDENT'S PETITION FOR REHEARING

The City of Columbia, Respondent, hereby petitions this Court for rehearing of its opinion filed January 23, 2013. This Petition is submitted pursuant to Rule 221(a), SCACR. For the reasons set forth in the memorandum in support filed herewith, it is respectfully submitted that the opinion issued by this Court overlooks and misapprehends controlling authority and misapplies the law of this State.

SIGNATURE PAGE FOLLOWS

Respectfully submitted,

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February 6, 2013

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RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

PROCEDURAL POSTURE

In an opinion filed January 23, 2013, this Court affirmed in part and reversed in part the decision of the Honorable James R. Barber, III, Circuit Court Judge, granting summary judgment to Respondent City of Columbia ("City") on all claims raised in Appellants' Complaint. This Court affirmed the grant of summary judgment as to Appellants' contract claim but reversed the grant of summary judgment on the equitable

and promissory estoppel theories. For the following reasons, that portion of the opinion reversing the grant of summary judgment reflects a misapprehension of the law and a misapplication of controlling legal principles and precedent.

FACTUAL BACKGROUND

Appellants retired from employment with the City on various dates prior to July 1, 2009. During their employment, Appellants elected to participate in the City's self-funded group health plan administered by Blue Cross/Blue Shield. Until July 1, 2009, the City paid the entire cost of the health care plan for all participants, including Appellants.

Effective July 1, 2009, the City's duly elected Council voted to impose a premium charge for all group health participants, including active employees and retirees. Appellants and others objected to this charge. On August 10, 2009, thirteen retirees, including the seven Appellants, filed suit asserting an entitlement to continue their participation in the group health plan without cost. As stated above, following a motion for summary judgment, Judge Barber found that Appellants had no enforceable contractual or equitable claims.

Notable for purposes of this petition, the record establishes that health plan documents distributed to participants during the period at issue contained the following language:

> By practicing cost containment with your medical expenses you, the beneficiary [insured], play a greatest role in helping to slow down the ever-increasing costs of health [insurance] coverage. You keep your coverage affordable by always using your benefits wisely, and this decreases the possibility of contribution increases.

(R. pp. 396, 399, 403, 406, 410)

In addition to this written notice, Appellants acknowledged that their insurance policies changed over the course of their employment and during retirement. (Appellant Cruz, R. pp. 444, 451-452, 454, 467; Appellant Dozier, R. pp. 469-470; Appellant Floyd, R. p. 486; Appellant Gillam, R. pp. 562, 565, 570, 573; Appellant Hill, R. pp. 581, 588, 595; Appellant Martin, R. pp. 603, 605, 614, 618; Appellant Morris, R. pp. 627, 628; Appellant Smith, R. pp. 649, 653) Upon retirement, the City offered employees the opportunity to continue coverage under its group health plan. This required the retiree to complete an application, agreeing to be bound by the terms of the plan. (R. pp. 208-214) Prior to July 1, 2009, retiring employees also received a letter stating in part: "Under the **current policy**, the City pays the retirees' portion of the health premium. Therefore, no monthly payments are necessary." (R. pp. 215-218)

Additionally, Appellants were on notice that only the City Manager is authorized to enter into contracts and that such contracts must be in writing and signed by the City Manager. This same conspicuous disclaimer further states:

> NO ORAL OR WRITTEN PROMISES OR REPRESENTATION BY A DEPARTMENT DIRECTOR, DIVISION HEAD, SUPERVISOR WILL CHANGE THE AT-WILL STATUS OF AN EMPLOYEE . . .
>
> THE CITY RESERVES THE RIGHT TO REVISE, SUPPLEMENT OR RESCIND ANY POLICIES OR A PORTION OF THE EMPLOYEE HANDBOOK FROM TIME TO TIME AS IT DEEMS APPROPRIATE, IN ITS SOLE AND ABSOLUTE DISCRETION

(R. pp. 669-670, 677-679, 707, 719-720, 738, 739)

Finally, Appellants were on notice that City Council alone has the authority to adopt a budget. S.C. Code Ann. § 5-13-30. In this instance, Appellants were aware that Council was considering imposing a health insurance premium for all participants in the

City's group health plan. Council engaged a consulting firm, solicited proposals, met in open session to discuss the proposed budgetary change, entertained public comment, and voted in public to make the change. (R. pp.500-532, 542-551, 558-560, 197-200) The legislative nature of the budgeting process does not differ because it occurred at the municipal, rather than state level. (City Manager Gantt, R. pp. 488-490; Appellant Morris, R. pp. 631-632; Appellant Smith, R. p. 660)

LEGAL ARGUMENT

1. The opinion under review overlooks and misapplies controlling precedent in holding that Appellants can maintain estoppel claims.

The opinion issued by this Court fails to apply the binding precedent of Ahrens v. State, 392 S.C 340, 709 S.E.2d 54 (2011)[1] The facts presented in Ahrens are strikingly similar to this case. In Ahrens, a group of retirees brought suit against the State seeking to bar withholding of contributions to the South Carolina Retirement Systems ("SCRS") When the Ahrens plaintiffs retired, state law did not require post-retirement contributions by working retirees. The retirees further asserted that SCRS representatives had informed them verbally and in writing that post-retirement employment by a covered employer would not require such contributions.

Following an amendment to the Retirement Act requiring contributions to the System by working retirees, the Ahrens plaintiffs brought suit to prohibit the State from withholding contributions, asserting that the previous statute and SCRS forms created enforceable contract rights and that the State was estopped from withholding contributions under the new statute. The trial court found no contract, but ruled in favor of the plaintiffs on equitable grounds.

[1] The Ahrens opinion was issued after final briefs were submitted in this appeal.

On appeal, the Supreme Court affirmed that neither the statute nor the language used in retirement forms created a contract between the State and the working retiree plaintiffs. Id. at 348-352, 58-60. The Court stated that even if the forms were binding contracts, "we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature." Id. at 351, 59. The Court cautioned that "[a]ny other holding would permit an executive agency to usurp the essentially legislative function of amending laws by binding the legislature through contract where it had no intention of being bound." Id. at 351, 60.

The Court reversed the trial court's award of relief on estoppel grounds, holding that the State could not be estopped by written or verbal representations of SCRS staff. Specifically, the Court held that "because this Court has ruled that the Working Retiree statute did not create a binding contractual right, estoppel cannot lie against the state . . ." Id. at 353, 61. This ruling makes it clear that statements made by government employees, even if within the scope of their employment, cannot bind the government without a supporting statutory or contractual foundation.

Although absence of authority alone was sufficient to reverse, the Court proceeded "for the purpose of clarifying the necessary elements to prove estoppel against the government..." to find that the Ahrens plaintiffs failed to establish other elements of their estoppel claims. Citing Grant v. City of Folly Beach, 346 S.C. 74, 80-81, 551 S.E.2d at 232, the Court stated: "To prove estoppel against the government, the relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." The Court found "it is difficult for [plaintiffs] to claim

they did not know, or had no means of knowing that these terms would ever change." Ahrens at 354, 61. The Court went on to find that plaintiffs could not establish either the second or third elements of estoppel because of disclaimers included in the Retirement Systems' materials and plaintiffs' knowledge that laws are subject to change. Id.

The holdings in Ahrens are binding and controlling here. As in Ahrens, this Court correctly found that representations of the City employees did not create contracts for continuing free health insurance because municipal employees do not have authority to enter such contracts. See, Bishop v. City of Columbia, 2013 WL 238870 at *3-5 (S.C. App.) As in Ahrens, however, the Court should have found the absence of authority to enter contracts or interfere with legislative functions fatal to Appellants' estoppel claims.

The opinion under review notes the legislation addressed in Ahrens did not provide authority to enter contracts, and indicates the representations here may be "traceable" to legislation that delegates authority to municipalities. See, Bishop v. City of Columbia, 2013 WL 238870 at *8 (S.C. App.) In support of this distinction, the opinion states that the record does not "conclusively indicate the employees acted outside their authority when they explained Retirees' benefits." Id. This begs the question. The issue is not whether certain City employees had the authority to "explain" current health benefits, but whether any employee had the authority to bind City Council to provide free health insurance for life. The law is clear that no municipal employee has this authority, as this Court found in rejecting Appellants' contract claims. Indeed, the Supreme Court has consistently held that that the appropriation of public funds is exclusively a legislative function. Edwards v. State, 383 S.C. 82, 90, 678 S.E.2d 412, 416-417 citing, State ex rel Condon v. Hodges, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); Gilstrap

v. S.C. Budget and Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992); Clarke v. S.C. Pub. Serv. Auth., 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) In this context, representations by City employees regarding the duration of free health insurance cannot bar City Council from exercising its delegated legislative authority to adopt a budget that includes a modest charge for health care to offset the public's contribution and reduce the City's unfunded liabilities. (R. pp. 394, 533-539)

Finally, the Supreme Court's decision in Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (1996) cannot be reconciled with reinstatement of Appellants' estoppel claims. The Alston opinion holds 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. Id. at 48, 179. Alston futher holds that a city must have the ability to alter its benefits to meet changing circumstances. Id. at 48-49, 170-180 This is the very action taken by City Council in balancing competing budgetary concerns by enacting a slight premium contribution for all participants in the City's self-funded health plan. (R. pp. 200, 534-539) Here, as in Ahrens and Alston, legislative action cannot be confounded by representations of government employees, regardless of position or form of communication.

2. The opinion under review misapplies the law in failing to address the absence of evidence necessary to establish each element of Appellants' estoppel claims.

To survive summary judgment, Appellants must offer evidence on each essential element of the claims presented. For equitable estoppel against the City, Appellants were required to show: (1) lack of knowledge and of the means to obtain the knowledge of the

truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. S.C. Dep't of Transp. V. Horry Cnty., 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011) For promissory estoppel, the essential elements 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; (4) and the party to whom the promise is made must sustain injury in reliance on the promise. Woods v. State, 314 S.C. 502, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) The opinion under review addresses only reasonable reliance. The Court erred in reversing the grant of summary judgment on this ground because: (1) it failed to apply the proper standard of review in holding that Appellants provided sufficient evidence of reasonable reliance and (2) it failed to address all of the essential elements of Appellants' estoppel theories, which cannot be maintained without evidence to support each element.

As the Supreme Court observed in Ahrens, the burden of proving estoppel rests with the proponent to show absence of knowledge, or means to gain knowledge. Ahrens at 361, 65, fn 8. Here, Appellants offered no evidence to satisfy these criteria. Rather, as the trial judge found, Appellants had multiple notices that health plans are subject to change and the cost of such benefits must be budgeted by Council. (See, Annual Financial Reports showing costs and "current" sources of funding at R. pp. 379-394)

Promissory and equitable estoppel claims are tried to a judge. Ahrens at 348, 58. In this instance, the trial judge had all the information necessary to make factual findings. (Trial Court Oder, R. p. 34) Accordingly, nothing was taken from a jury and the "scintilla" standard of review was not appropriate. Instead, appellate review should have

been de novo, with due respect afforded the trial judge. Twitty v. Harrison, 230 S.C. 174, 177-78, 94 S.E.2d 879, 880 (1956) (Appellant has the burden of showing error in findings of fact on appeal of equity ruling) If properly applied, this review would have revealed insufficient evidence on essential elements in addition to reliance.

Appellants had means of determining the scope of Council's authority by reviewing the law, reading the plain language of benefits booklets and the application required to be signed for continued insurance upon retirement. (Trial Court Findings 2, 4, 6, 7, 9, 16, 17 at R. pp. 17-19) Accordingly, as the trial judge noted, any reliance by Appellants on representations to the contrary was neither reasonable nor justified. (Trial Court Order, R. pp. 30-34) These findings and conclusions were within the purview of the trial judge, are supported by the record and should be sustained.

3. The opinion under review misapplies the law in a manner that is internally inconsistent and in violation of public policy.

The opinion correctly finds that Appellants' promissory and equitable estoppel claims cannot be based on any written documents, such as the employee handbook or benefits booklet provided by the City because "the employee handbook conspicuously disclaimed any binding promises, and the benefits booklet made no promises of continuing free health insurance at all." Bishop v. City of Columbia, 2013 WL 238870 at *6 (S.C. App.) Nevertheless, the opinion would allow Appellants to pursue those claims based upon statements by City employees without authority to bind Council's legislative authority. As addressed above Ahrens and Alston do not support this result. Moreover, the two findings are inconsistent.

It is not reasonable for an employee to rely upon oral representations that contradict written materials warning that health insurance is subject to change. As the trial judge accurately found, Appellants accepted changes to their insurance coverage while employed and after retirement. Appellants, like all participants in the group health plan, were on notice that insurance benefits could change in the future. No "reliance" on statements by fellow employees, however well intentioned or sincerely held, alters the controlling holdings in Ahrens and Alston that legislative power is not subject to estoppel. Here, City Council had statutory authority to enact public policy through its budget process. S.C. Code Ann. § 5-13-30. The recourse in such cases is political rather than judicial. See, Segars-Andrews v. Judicial Merit Selection Com'n., 387 S.C. 109, 121-122, 691 S.E.2d 453, 460 (2010); South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n., 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) (judicial review unavailable on questions that surround policy choices and value determinations constitutionally committed to the legislative process)

CONCLUSION

For the reasons stated above, Respondent, City of Columbia, requests that this Court reconsider its opinion filed January 23, 2013.

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Columbia, South Carolina
February 6 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

C.A. No.: 2009-CP-40-5680

Kirby L. Bishop, Herman G. Boney, Richard H. Brown, Michael D. Catt, Basilides F. Cruz, Robert B. Dozier, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, William J. Meyer, Charles F. Morris, Sr., and Joseph A. Smith,

of whom,

Balisides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, are
..... Appellants,

v.

City of Columbia, ... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Respondent's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Nancy Bloodgood, Esquire
Foster Law Firm, LLC
895 Island Park Drive, Suite 202
Daniel Island, South Carolina 29492

This 6th day of February, 2013.

NICKLES LAW FIRM, LLC

By: _____

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The South Carolina Court of Appeals

Kirby L. Bishop, Herman G. Boney, Richard H. Brown, Michael D. Catt, Basilides F. Cruz, Robert B. Dozier, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, William J. Meyer, Charles F. Morris, Sr., and Joseph A. Smith, Plaintiffs,

Of whom Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith are Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2010-176227

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
W. Allen Nickles, III
Matthew Anderson Nickles
Nancy Bloodgood

FILED
February 22, 2013