THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable James R. Barber, III, Circuit Court Judge

Case 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,

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.

FINAL BRIEF OF APPELLANTS

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
Telephone: (843) 744-7828
Facsimile: (843) 577-0434
Email: nbloodgood@fosterfoster.com
Attorneys for the Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. **Did the Circuit Court err in determining Appellants cannot establish a cause of action for breach of contract when the record establishes that a completed contract existed between Appellants and Respondent at the date of each Appellant's retirement?**

II. **Did the Circuit Court err in finding that Respondent promised Appellants fringe benefits when Respondent's booklets state that the promise is not for fringe benefits but, rather, is for compensation?**

III. **Did the Circuit Court err in granting Respondent's Motion for Summary Judgment on the Promissory Estoppel and Equitable Estoppel Causes of Action when a genuine issue of material fact exists as to whether Appellants' reliance on Respondent's promise was reasonable in light of Respondent's repetitive verbal and written confirmations of the promises over a period of many years?**

IV. **Did the Circuit Court err in finding Respondent could not legally be bound by the promises made by its representatives when the promises were made within the scope of their employment?**

V. **Did the Circuit Court err in finding that Respondent's handbooks and benefit booklets only use present tense language and therefore do not establish a contractual right to continuing free health insurance when the facts before the court indicate that the handbooks and booklets use future tense language?**

VI. **Did the Circuit Court err in its holdings regarding bonded indebtedness, Appellants' at-will status, and Respondent's contract with BlueCross BlueShield of South Carolina because these holdings are irrelevant to the contractual promises made to Appellants and do not alter these promises?**

STATEMENT OF THE CASE

On August 10, 2009, thirteen Plaintiffs, seven of whom are the Appellants in this matter, instituted the underlying lawsuit by filing a Summons and Complaint in the Court of Common Pleas in the Fifth Judicial Circuit, County of Richland. (R. pp. 36-56.) The Complaint alleges causes of action for breach of contract, promissory estoppel, violation of the South Carolina Unfair Trade Practices Act, and declaratory judgment. (Id.) On August 26, 2009, Respondent filed an Answer to the Complaint alleging the following defenses: failure to state a claim; sovereign immunity; statute of limitations; accord and

satisfaction; immunity as a result of the South Carolina Tort Claims Act; lack of standing; and governmental authority. (R. pp. 57-72.) Simultaneously, Respondent also filed a Motion to Dismiss the Complaint for failure to state a claim, sovereign immunity, lack of standing, exercise of governmental authority, and unreasonable reliance upon unauthorized, ultra vires communications. (R. pp. 73-74.)

On October 14, 2009, Plaintiffs, with the written consent of Respondent, filed an Amended Complaint which added a cause of action for equitable estoppel. (R. pp. 75-96.) Respondent filed an Answer to the Amended Complaint on October 15, 2009. (R. pp. 97-112.) On December 7, 2009, Respondent's Motion to Dismiss the Complaint was heard by the Honorable Judge G. Thomas Cooper, Jr. Judge Cooper took the matter under advisement, and on January 11, 2010, granted Respondent's Motion to Dismiss as to the cause of action for violation of the South Carolina Unfair Trade Practices Act and denied Respondent's Motion to Dismiss as to all other causes of action. (R. pp. 1-12.) On January 21, 2010, Respondent timely filed a Motion for Reconsideration or, in the Alternative, a Motion to Stay Pending Appeal. (R. pp. 113-120.) Judge Cooper denied Respondent's Motion on March 23, 2010 and, additionally held that his Order should be amended to omit a finding that "[w]ages include future compensation." (R. pp. 13-14.)

On May 6, 2010, Respondent filed a Motion for Summary Judgment. (R. pp. 121-122.) Respondent's Motion was heard by the Honorable Judge James R. Barber, III on August 12, 2010. On September 10, 2010, Judge Barber signed an Order granting Respondent's Motion for Summary Judgment. (R. pp. 15-35.) Judge Barber's Order was filed with the Richland County Clerk of Court on September 13, 2010 and mailed to the parties on September 14, 2010. (Id.) Appellants received written notice of the entry of

this Order on September 16, 2010 and filed and served a Notice of Appeal from Judge Barber's Order Granting Respondent's Motion for Summary Judgment on October 15, 2010. (R. pp. 164-167.) Appellants' Notice of Appeal was only filed on behalf of seven of the thirteen original Plaintiffs. (Id.) The amount involved on appeal is estimated to be a total of $140,000, or approximately $20,000 per Appellant.

STATEMENT OF FACTS

Appellants, a group of retired firefighters and police officers, each worked at least twenty years for Respondent. (R. pp. 76-86.) Respondent promised Appellants that in exchange for their twenty years of service, Respondent would pay the cost of their single coverage retiree health insurance. (R. pp. 339-378; 395-415; 416-431; 446-448; 478-479; 557; 563-566; 591-593; 605; 608; 626-627; 649-652; 663-664.) Appellants accepted lesser salaries while employed by Respondent and made long term financial decisions based on Respondent's promise. (R. p. 91.) Respondent followed through on its agreement for a number of years after Appellants retired, then, in May of 2009, refused to continue to pay the cost of Appellants' single coverage retiree health insurance. (R. p. 169, lines 20-23; p. 170, lines 11-16.)

The City Manager is the head of the administrative branch of the City of Columbia and sets the terms of employment for employees of the City. S.C. Code Ann. § 5-13-90 (2004). The City Manager is responsible for everyone hired at the City. (R. p. 498, lines 22-25.) The City Manager has authority to authorize increases in pay for employees and the City Council has no authority to change the Manager's decision regarding wages once he sets them. (R. p. 492, lines 16-24; p. 499, lines 1-8.)

Appellants received an insurance benefits booklet and employee handbook each year they were employed. (R. pp. 76-89; 339-378; 395-415.) The booklet and handbook stated the terms of their retiree health coverage. (R. pp. 339-378; 395-415.) Some Appellants had already retired when the City of Columbia started putting a disclaimer on its employee handbook pursuant to S.C. Code § 41-1-110. (R. p. 88.) The handbooks distributed prior to 2000 contained no disclaimers and specifically stated, "We have prepared this Handbook to acquaint all employees with the City's policies and benefits . . . *The City of Columbia declares as a matter of policy* that the City government through its employees and officials can best serve the public by administering within the framework of the organization *a personnel program which provides* for and incorporates ... equitable and *adequate compensation* through a modern, balanced and well-structured salary schedule ... [and] providing a program of extended benefits including...retirement benefits ... *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.*" (R. pp. 339-378.) (emphasis added) After 2000, an at-will disclaimer was added to the handbooks but the handbooks continued to state every year that the City would pay the cost of retiree health insurance for employees retiring with twenty years of service. (Id.)

The City of Columbia's "Employee and Retiree Health Coverage" booklets never contained any disclaimers and stated regarding retiree health insurance, "*These are not just fringe benefits*, but because the City pays the vast majority of the cost for you, *they represent a significant cost of compensation far beyond your paycheck.*" (R. pp. 395-415.) (emphasis added). As late as 2008, the City of Columbia's "Employee and Retiree

Health Coverage" booklet stated, "*Retirees who are currently covered will remain covered as stated at the time of retirement.*" (Id.)

Respondent's financial statements, which were approved by majority vote of Council as part of the City's annual audit, stated that Respondent paid health insurance premiums for all qualifying retirees. (R. pp. 379-394.) Until recently, the financial statements specifically stated, "*The City provides post-employment health care benefits, in accordance with City policy*, to all employees who retire from the City...and have been employed by the City for twenty years or more ... [c]urrently, the City is financing the post-employment benefits on a *pay-as-you-go* basis ..." (Id.) (emphasis added) Respondent's newsletters also stated retiree health insurance was free. (R. pp. 422, 424, 427, 429, 431.) Additionally, Mona Holiday, Respondent's Human Resources employee, repeatedly stated to Appellants that retiree health insurance was free. (R. pp. 557, 605.) The current City Manager testified part of Human Resource employee Mona Holiday's job responsibility was to provide information to retirees. (R. p. 496, lines 19-23.)

Appellant Frank Cruz, who was hired in 1982, testified several supervisors told him he would not be eligible for many raises as a city employee, but would have insurance for life. (R. p. 447, lines 1-24.) He testified this promise was repeated during merit interviews and evaluation times. (R. p. 447, lines 1-5.) Specifically, Appellant Cruz recalled Captain Jeffcoat and Chiefs Douglas and Stewart making these statements. (R. p. 447, lines 13-14.) He received booklets through the years that explained the free retiree health insurance. (R. p. 464, line 2—p. 465, line 13.) Appellant Cruz also received a letter from Mona Holiday indicating he should not sign up for Part D Medicare as the City's retiree insurance was better. (R. p. 450, line 18—p. 454, line 8.) Appellant Cruz

testified he had seen other employees retire and receive the retiree insurance and his father had retired from the military and had insurance for life, so he understood the importance of it. (R. pp. 452, lines 10-14; p. 459, lines 15-22.)

Appellant Cruz testified everyone in the Department tried to make it to twenty years because they wanted the free retiree health insurance. (R. p. 460, line 14—p. 461, line 7.) Appellant Cruz testified he finished his obligation and retired based on the promise of free health insurance. (R. pp. 459-463.) Appellant Cruz also trained employees during orientation for nine years and he told new hires that if they remained with the City, they would not be rich but would be taken care of by the City with free health insurance when they retired. (R. p. 449, line 7—p. 450, line 6.)

Appellant Joseph Floyd was told about the free retiree health insurance when he first came to department. (R. pp. 477-478.) He testified past Chiefs talked about it and Chief Jansen complained when he did not qualify because he could not meet the years of work requirement. (R. p. 478, line 19—p. 479, line 11.) Appellant Floyd recalled Chief Evans and Ron Cunningham instructing him to advise the recruits about the free retiree health insurance because it was a selling point that could be used in recruiting. (R. p. 479, lines 10-20.)

Appellant Floyd testified he does not think retirees should be treated the same as active employees because retirees have done what they had to do, while those who are presently working have not yet fulfilled their obligation. (R. p. 481, line 8—p. 482, line 24.) Appellant Floyd testified the retirees have worked all these years and were told and led to believe that their health insurance would be taken care of and they would not have to pay for it. (R. p. 476, line 18—p. 477, line 3.)

Appellant Cam Gilliam testified he stayed with the City for twenty-six years to obtain the free retiree health insurance. (R. p. 566, lines 2-6.) He testified that he "fulfilled [his] obligation" and expected to receive what he was promised. (Id.) Appellant Gilliam testified he believed he would have a good and valid policy when he retired. (R. p. 563, line 24—p. 565, line 5; p. 569, lines 3-6.) He testified while employed with the City he knew he was not going to make a lot of money, but the free health insurance would be good when he retired. (R. p. 571, line 14—p. 572, line 8.) Appellant Gilliam asked about the health insurance at a Planning for the Future Seminar and talked with Mona Holiday about the retiree health insurance; he said he had no reason to think he wasn't going to receive it. (R. p. 557, lines 3-14.) Appellant Gilliam also testified the promised free retiree health care was common knowledge and that pretty much everybody talked about it. (R. p. 557, lines 12-14; pp. 564-565.) He also explained that one of his responsibilities as a Captain was to disseminate the City's policies. (R. p. 561, line 11—p. 562, line 5.)

Appellant Alma Hill received benefits booklets while he was employed and he reviewed the booklets for major changes to his health coverage. (R. p. 581, line 10—p. 582, line 13.) Appellant Hill testified he was led to believe that he would have free insurance when he retired by his supervisors; he testified it was common knowledge. (R. p. 587, lines 3-25; pp. 592-593.) When he retired in January of 2009, he received a letter from the City's HR Department stating that he should not take Medicare D when he became eligible as the City's insurance coverage was superior. (R. p. 578, lines 6-13; pp. 587-588, 595.)

Appellant Barry Martin retired in April of 2008. (R. p. 598, lines 3-7.) His father had also retired from the City's fire department and Appellant Martin knew his father received free health insurance for life. (R. p. 601, line 2—p. 602, line 9.) He recalled Mona Holiday explaining the retiree health insurance to him. (R. p. 605, lines 8-19.) His supervisors, Chiefs Anderson, Boykin, Stewart and Williams also assured him the City was a great place to work due to the retiree health insurance. (R. p. 608, lines 6-18.) Appellant Martin testified he worked for the City for thirty-five years in large part to get the free retiree health insurance so he never believed he had to look elsewhere for insurance. (R. pp. 598-602.) He has fulfilled his part of the agreement by working thirty-five years and he just wants the City to do the same. (Id. and p. 609, line 19—p. 610, line 2.) He testified he is entitled to the promised free retiree health insurance and needs it because he has a steel plate and screws in his leg from injuries suffered while employed which still require care. (R. p. 612, lines 14-23.)

Appellant Charles Morris testified the City Manager told him he would have free insurance. (R. p. 626, line 24—p. 627, line 21.) He also testified that when the eligibility was changed from ten to twenty years, he recalled a lot of discussion about the promise of free retiree health insurance. (R. p. 634, line 21—p. 636, line 23.) Appellant Morris testified he wants the City to be responsible and do what it said it would do, which is to provide retirees free health insurance; he made a commitment and he wants the City to live up to their commitment. (R. p. 633, lines 1-7.)

Appellant Joseph Smith testified he was told the City would cover the cost of his health insurance when he retired at no cost to him. (R. p. 662, line 3—p. 663, line 8.) He testified he met the criteria for the free retiree health insurance because he worked the

required number of years. (R. p. 650, lines 1-7.) Appellant Smith testified the promise of free health insurance was made at County Council meetings and retirement seminars. (R. p. 654, lines 11-24; p. 658, lines 16-18.) He testified a council member (Cromartie) acknowledged the promise made to the retirees in a public meeting. (R. p. 655, lines 1-7.)

ARGUMENTS

Applicable Standard of Review

"Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Hoard v. Roper Hospital, 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010). In reviewing a grant of summary judgment this Court uses "the same standard which governs the trial court under Rule 56(c), SCRCP, and summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Id. at 546, 694 S.E.2d at 4 (citing Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Motions for summary judgment should be closely scrutinized, because of their potential to undermine the role of a jury of ordinary citizens, which lies at the heart of our justice system. As then Justice Rehnquist put it, "[j]urors bring to a case their common sense and community values; their 'very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect

the judicial eye.'" Parklane Hosiery Co. v. Shore, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (quoting H. Kalven & H. Zeisel, The American Jury 8 (1966)).

I. The Circuit Court erred in determining Appellants cannot establish a cause of action for breach of contract, because the record establishes that a completed contract existed between Appellants and Respondent at the date of each Appellant's retirement.

This case involves retired City of Columbia firefighters and police officers who were promised that Respondent (the City of Columbia) would pay the cost of their single coverage retiree health insurance if they remained employed by Respondent for twenty years. Each Appellant accepted Respondent's offer by complete performance. Respondent's subsequent failure to pay the cost of Appellants' single coverage retiree health insurance constitutes a breach of contract by nonperformance and Appellants are entitled to damages as a result of this breach. In regards to the precise issue currently before this Court, the evidence before the Circuit Court, when viewed in the light most favorable to Appellants, was at least susceptible of the inference that a valid contract existed and, as such, Appellants' cause of action for breach of contract should not have been dismissed on summary judgment.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). A contract has three required elements: an offer, an acceptance, and valuable consideration. Armstrong v. Collins, 366 S.C. 204, 222, 621 S.E.2d 368, 378 (Ct. App. 2005). Valuable consideration may take many forms, but is essentially "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Id. (citing Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503

S.E.2d 184, 186 (Ct. App. 1998)). The contract at issue here is a unilateral contract because Appellants were required to accept by performance instead of by return promise. See Sauner v. Public Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 165-66 (2003). The three elements of a unilateral contract are: "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 Telephone Cooperative, Inc., 335 S.C. 330, 335, 516 S.E.2d 923, 926 (1999). Under the unilateral contract analysis, "the employer is the offeror and the employee handbook and other publications and promises constitute the offer."[1] Reese v. Commercial Credit Corp., 955 F. Supp. 567, 569 (D.S.C. 1997) (citing Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452, 454 (1987)). "The employee accepts the offer by continuing to work and the employee's action or forbearance is consideration." Id.

When viewed in the light most favorable to Appellants, the evidence establishes that Respondent offered to pay the cost of Appellants' single coverage retiree health insurance in exchange for Appellants working for Respondent for twenty years. Respondent's offer to pay the cost of retiree single coverage health insurance was made in writing in the Respondent's handbooks, annual audits, benefit pamphlets and newsletters. (R. pp. 339-431.) Respondent's offer was also communicated through verbal promises by city managers, human resource employees, supervisors, and council members. (R. pp. 446-448; 478-479; 557; 563-566; 591-593; 605; 608; 626-627; 649-652; 663-664.) Respondent's offer was clear, specific, limited, and intended to induce performance. (R. pp. 339-431; 479.) Compare Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2006) (confirming that documents and oral statements made by an employer can

[1] The unilateral contract framework applies to *terms* of employment regardless of the at will nature of an employment agreement.

create a binding contract and remanding the issue to the trial court for a factual determination regarding the documents and statements) with Prescott, 335 S.C. 330, 335, 516 S.E.2d 923, 926 (discussions and statements did not create contractual rights because they were not specific, limited, or intended to induce performance, but instead constituted mere puffery). As a result of this offer, Appellants had the power of acceptance and were required to accept by performance instead of return promise. In response to the offer, each of the Appellants did in fact accept the offer by complete performance, specifically by working for Respondent for twenty years.

The contract also included valid consideration. Appellants' consideration was their act of working for Respondent for twenty continuous years, despite their knowledge that they could have earned a higher salary from other employers. (R. pp. 446-448; 478-479; 571-572; 608.) Respondent's consideration was its agreement to pay the cost of Appellants' single coverage retiree health insurance. Appellants fully performed their duties under the contract. Each contract was complete at the time of each Appellant's retirement. Respondent's failure to perform its part of the contract constitutes a breach by nonperformance and Appellants are entitled to damages as a result of Respondent's breach.[2]

It is well settled that if more than one reasonable inference is present as to the existence of a contract or if the evidence is conflicting in regards to the existence of a contract, then the issue should be submitted to the jury. Armstrong, 366 S.C. at 223, 621 S.E.2d at 378 (citing Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711,

[2] Respondent's part performance also serves as evidence of the existence of a contract. It is undisputed that Respondent paid the cost of Appellants' single coverage retiree health insurance premiums for some length of time after they retired. This part performance is evidence which creates an inference that a contract existed.

716 (2003)). The evidence here is conflicting and is susceptible of more than one reasonable inference. Therefore, the issue of whether a contract existed should have been submitted to the jury and should not have been disposed of through a summary judgment motion. See Prestwick, 331 S.C. at 389, 503 S.E.2d at 186 (if the evidence in the light most favorable to the nonmoving party "supports the existence of a contract, the issue should be submitted to a jury"). The Circuit Court erred in granting Respondent's Motion for Summary Judgment as to the breach of contract cause of action.

II. The Circuit Court erred in finding that Respondent promised Appellant fringe benefits, because Respondent's booklets state that the promise is not for fringe benefits but, rather, is for compensation and, therefore, a genuine issue of material fact exists as to whether Respondent promised benefits or compensation.

The Circuit Court's decision to grant Respondent's Motion for Summary Judgment on the Breach of Contract cause of action was based in part on its holding that fringe benefits are not vested or enforceable by contract (R. pp. 20-22) and are not wages (R. pp. 22-23). However, these conclusions of law were dependent upon the Court's determination that Respondent promised future fringe benefits to Appellants. This determination is erroneous, and, as such, the resulting conclusions of law are also erroneous.

When viewed in the light most favorable to Appellants, the evidence before the Court creates a genuine issue of material fact as to whether Respondent promised fringe benefits to Appellants or promised future compensation. In support of their argument that compensation was promised, Appellants presented Respondent's "Employee and Retiree Health Coverage" booklets, which were routinely provided to Appellants, never contained any disclaimers and, in regards to retiree health insurance, stated "these are *not*

just fringe benefits, but because the City pays the vast majority of the cost for you, they represent a significant cost of *compensation* far beyond your paycheck." (R. pp. 395-415.) (emphasis added) These booklets clearly create a genuine issue of material fact as to whether Respondent promised to provide Appellants fringe benefits or compensation. However, despite the existence of credible evidence in the record to support Appellants' argument, the Court found that no question of material fact existed and that fringe benefits were promised to Appellants.

Appellants assert that in light of the conflicting evidence before the Court, the Court erred in finding Respondent promised fringe benefits to Appellants and, as a result, should not have reached the analysis of whether a contract for fringe benefits is enforceable. However, even if this Court finds that the evidence before the Circuit Court was only susceptible of the inference that fringe benefits were promised to Appellants, the Circuit Court also erred in its application of the law regarding fringe benefits and its Order should be reversed on this ground, as well.

The case at hand is factually similar to Layman v. State and the Circuit Court erred in its cursory application of Layman. 368 S.C. 631, 630 S.E.2d 265 (2006) The Circuit Court's Order cited Layman as an example of "[t]he Supreme Court confirm[ing] the changeable nature of fringe benefits for municipal employees," (R. p. 21) but ignored Layman's discussion of the distinction between individuals who were already in the retirement system and individuals who had not yet joined the retirement system. This discussion is particularly relevant to the case at hand. (Id.) In Layman, the State entered into an agreement whereby individuals within the retirement system would not be required to contribute to the system if they met other requirements. 368 S.C. 631, 630

S.E.2d 265. The State later attempted to require these individuals contribute to the system and the Court held that this attempt was a breach of the earlier agreement because once the bargain had been formed, the agreement could not be unilaterally altered, but could only be altered by mutual agreement and further consideration. Id. at 640, 630 S.E.2d at 270. As a suggestion for future State policymakers, the Supreme Court commented that the State should have exempted the old participants from the new plan instead of trying to bind old participants to new rules. Id. at 640 n.7, 630 S.E.2d at 270 n.7.

Additionally, the Court in Layman found that it was improper for the State to utilize contractual language and then "disregard its plain meaning and practical effect." Id. at 641, 630 S.E.2d at 270. Here, Respondent has attempted to do the same thing. Respondent used contractual language in its booklets, handbooks, newsletters, and oral communications with Appellants and has now disregarded not only the plain meaning, but also the practical effect of these promises. Specifically, the practical effect of the promises was that multiple employees chose to work for Respondent for *twenty years* in order to fulfill their part of the agreement and receive the compensation promised to them. Respondent has now disregarded their promises, ignored Appellants' performance, and breached the agreement.

The Circuit Court also erred in its reliance on the Alston v. City of Camden case. 322 S.C. 38, 471 S.E.2d 174 (1996). The Court cited Alston in support of its finding that "[a]s a matter of law, municipal employees have no contractual right or vested interest in prospective benefits." (R. p. 20.) However, Alston is distinguishable from the case at hand for two reasons. First, Alston involved employees' challenges to "*fringe benefits* [provided by the City] pursuant to the terms of city ordinances and of an employee

handbook." Id. at 42, 471 S.E.2d at 176. These benefits included annual leave accrual, sick leave accrual, and health insurance benefits for dependents. Id. at 42-43, 471 S.E.2d at 176. Here, as previously discussed, the employee booklets did not specifically promise fringe benefits, but instead expressly explained that the promise was *not* a promise for fringe benefits. (R. pp. 287, 291, 295, 299, 302, 306, 311, 314, 319.) (emphasis added) Additionally, the promise at issue here did not include standard "benefits" such as annual leave, sick leave, and health insurance for dependents.

Alston is also distinguishable because all of its facts were stipulated to by the parties. Id. at 43, 471 S.E.2d at 176. Here, the facts have not been stipulated to by the parties. To the contrary, several key questions of fact exist, especially the question of whether Respondent promised fringe benefits or compensation. As such, the Circuit Court's reliance on Alston is misplaced and constitutes reversible error.

In regards to the Circuit Court's application of Layman and Alston, it is also relevant that the Court in Layman (which allowed recovery for retirees) specifically distinguished its facts from the Alston case (which denied recovery for all employees). Layman, 368 S.C. at 640, 630 S.E.2d at 270. Layman held that Alston was distinguishable because the agreement in Alston was the type of unilateral contract which is subject to modification at any time and involved fringe benefits for which employees had a reasonable expectation of change. Id. These distinctions provide additional support for Appellants' assertion that the case at hand is more on point with Layman than Alston. Here, unlike Alston, a genuine issue of material fact exists as to whether the promise involved fringe benefits or compensation. Further and also unlike Alston, the unilateral contract at issue here was not subject to modification because Appellants had already

completely performed their part of the bargain. Further, the reasoning of Alston and Fleming (on which Alston relies) is dependent on a current employer-employee relationship.[3] Alston, 322 S.C. at 48-49, 471 S.E.2d at 179; Fleming v. Borden, Inc., 316 S.C. 452, 462, 450 S.E.2d 589, 595 (1994). Appellants do not dispute that our Courts have clearly held that employers can unilaterally modify employee handbooks so long as the employees receive actual notice of the modification.[4] However, this rule cannot reasonably be extended to apply to retirees such as Appellants who have completed their performance under the unilateral contract.[5] As explained in Fleming, a unilateral contract cannot be modified by the promisor subsequent to the promisee's completion of performance. 316 S.C. at 461, 450 S.E.2d at 594. This is precisely what Respondent has done. Appellants completed their performance of the unilateral contract as of the date of their retirement. Respondent complied with their contractual promise for a number of

[3] The issues before the Court in Alston were whether a City ordinance created a contract or merely set policy and whether employee handbooks could be revised to alter the benefits of current employees. 322 S.C. 38, 471 S.E.2d 174. Here, an ordinance is not at issue. Further, the rule of Alston in relation to handbooks is simply that a government employer may unilaterally reduce benefits of current employees. Here, Appellants are not current employees, so that issue is not before the Court. Any unilateral change to the free health insurance Respondent contracted to provide for Appellants many years ago is a breach of a contract by Respondent.

[4] Additionally, just as in Layman, a finding by this Court that Respondent should be bound by its agreement with Appellants does not hamper Respondent's ability to govern, because Respondent can still pass ordinances, adopt budgets, and continue to function in its normal capacity in regards to current employees. See Layman, 368 S.C. at 641, 630 S.E.2d at 270. However, Respondent should not be able to pass ordinances or budgets that materially alter its agreement with Appellants.

[5] The Circuit Court cited Alston in support of its finding that employee contractual rights created by a handbook are subject to unilateral modification . . . because "the employer-employee relationship is not static." (R. p. 21, citing Alston, 322 S.C. at 48-49, 471 S.E.2d at 179.) This principle is inapplicable to the case at hand for two distinct reasons. First, Appellants are not employees. Secondly, as explained in Fleming, contracts cannot be unilaterally modified after one party has fully completed its performance under the contract. 316 S.C. at 461, 450 S.E.2d at 594. As such, the Circuit Court erred in its application of Alston to the facts at hand.

years, but then attempted to unilaterally modify the contract. Respondent's attempt to modify the unilateral contract is improper and the Circuit Court erred in holding that Appellants cannot establish a cause of action for breach of contract and in applying Alston to support this holding.

The Circuit Court also mischaracterized the holding in Alston by stating that the Supreme Court in Alston observed that "Any contractual rights created by a handbook or other writing *cannot* 'give rise to any legitimate expectation that fringe benefits provided for them will continue for any specific amount of time.'" (R. p. 21, citing Alston, 322 S.C. at 48, 471 S.E.2d at 179.) To state that the Supreme Court in Alston observed that contractual rights created by a handbook "*cannot*" give rise to an expectation of continued benefits is erroneous. Instead, the Court in Alston simply held that the employee handbooks at issue in Alston "*did not* give rise to any legitimate expectation that the fringe benefits provided for *therein* would continue for any specific amount of time." Alston, 322 S.C. at 48, 471 S.E.2d at 179. Central to this holding was the determination by the Court that "employees would have to have had a reasonable expectation that the level of fringe benefits set by the first employee handbook would continue for some specific amount of time (or possibly in perpetuity)." Id. Here, the facts are distinguishable. While the handbooks in Alston did not give rise to an expectation that benefits would continue for a specific time, the handbooks here created a reasonable expectation that the cost of single coverage retiree health insurance would continue for a specific amount of time. The handbooks even defined the specific time by clarifying that the cost would be paid until the retiree reached the age of 65. (R. pp. 339-378.) This language created a reasonable expectation by Appellants that the cost would be paid for a

specific amount of time. The Circuit Court erred in relying on Alston for the proposition that handbooks "cannot" give rise to a legitimate expectation that benefits will be provided for a specific amount of time (R. p. 21) and erred in applying Alston to the facts at hand. Handbooks and other promises clearly can give rise to legitimate expectations of continuing compensation in certain circumstances and, here the handbooks, booklets, and other promises did give rise to a legitimate expectation that the cost of single coverage retiree health insurance would be paid by Respondent.[6]

Appellants again point out that their primary argument is that the Circuit Court's entire analysis of whether fringe benefits are enforceable by contract is erroneous and premature as the Circuit Court should not have reached this analysis due the existence of a question of material fact as to whether Respondent promised "fringe benefits" or "compensation" to Appellants.[7] Appellants reiterate this argument in regards to the Circuit Court's holding that fringe benefits are not wages. The entire section of the

---

[6] In addition to the Court's misapplication of the Layman and Alston cases, which is discussed in pages 14-19 of this brief, Appellants note that the Circuit Court also erred in relying on Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008) to support its finding that the City Council acted within its legitimate legislative authority. The Anonymous Taxpayer case was brought pursuant to the Contract Clause of the Constitution. Here, Appellants did not challenge Respondent's actions on this basis and, as such, the Anonymous Taxpayer case is irrelevant and the Circuit Court's reliance on it was misplaced and erroneous.

[7] Appellants assert that a promise of wages in the future can be part of an employee's salary if the wages are compensation for labor which has already been performed for the employer's benefit. Executives at large financial institutions are routinely promised stock options and bonuses as part of their salary package. The S.C. 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. Code § 41-10-10. Here, the future wages promised to Appellants are compensation for work which had already been performed by Appellants. Appellants completely performed their part of the agreement by working for Respondent for 20 years.

Circuit Court's Order regarding the finding that fringe benefits are not wages is erroneous because it is dependent on a finding that fringe benefits were promised to Appellants and, as discussed above, a factual question exists as to whether fringe benefits or compensation was promised to Appellants.

However, even if this Court finds that no question of fact exists as to whether Appellants were promised fringe benefits, the Circuit Court also erred in finding that fringe benefits are not wages. The Circuit Court's reliance on the Anderson v. Baptist Medical Center case in support of its holding that fringe benefits are not wages is misplaced. 343 S.C. 487, 541 S.E.2d 526 (2001). Anderson examined whether medical, disability, and life insurance payments by an employer should be included in the calculation of an injured employee's average weekly wages for purposes of workers' compensation. Id. Anderson clearly states that the issue is "a question of statutory construction," specifically, the statutory construction of the Workers' Compensation Act and its definition of "average weekly wage." Id. at 495-96, 541 S.E.2d at 529-30. The Act sets forth specific criteria that must be met in order for earnings or allowances to be considered wages. Id. For example, the allowances must be made in lieu of wages and must be part of a wage contract. Id. at 495, 541 S.E.2d at 530. The Court ultimately held that fringe benefits should not be considered in calculating the average weekly wage for purposes of the Workers' Compensation Act. Id. at 497-98, 541 S.E.2d at 531. The determination of whether fringe benefits fall within the specific statutory definition of "average weekly wages" in the Workers' Compensation Act is not applicable to the case

at hand.[8] As such, the Circuit Court erred in relying on Anderson in support of its holding that fringe benefits are not wages. Anderson simply stands for the proposition that fringe benefits, when not given in lieu of wages and not part of a wage contract, are not within the workers' compensation definition of "average weekly wages." Id. at 497-98, 541 S.E.2d at 530-31. Further, while it is accurate that "[t]he Supreme Court ruled in Anderson that including fringe benefits such as insurance in the calculation of wages 'would dramatically alter the practice in this state" (R. p. 22), the Court was clearly only referring to the "calculation of wages" and "practice in this state" in regards to workers' compensation law. Id.

III. The Circuit Court erred in granting Respondent's Motion for Summary Judgment on the Promissory Estoppel Cause of Action because a genuine issue of material fact exists as to whether Appellants' reliance on Respondent's promise was reasonable in light of Respondent's repetitive verbal and written confirmations of these promises over a period of many years.

A cause of action for estoppel is not properly disposed of by a summary judgment motion if the facts regarding the estoppel are in dispute and capable of more than one reasonable inference. Our state courts, as well as our federal district courts, have held that "the general rule is that questions concerning reliance and is 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

[8] However, if this Court should find that the determination in Anderson is relevant to the case at hand, Appellants assert that the factors examined in Anderson weigh in Appellants' favor. Under the workers' compensation analysis, allowances are considered wages if they are given in lieu of wages and are part of a contract. Here, there is enough evidence to create a genuine issue of material fact as to whether the allowances promised to Appellants were given in lieu of wages (R. pp. 446-448; 478-479; 571-572; 608) and whether there was a contract between Appellants and Respondent.

supported the jury's verdict"); McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008); Greene v. Life Care Centers of America, Inc., 2008 U.S. Dist. LEXIS 103735 (D.S.C. December 23, 2008). This Court explained in Starkey v. Bell that "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)).

The Circuit Court's Order held that "estoppel is an issue to be decided by the court" and "a claim of equitable estoppel is an issue for the judge to determine, not the jury." (R. pp. 30, 34.) In support of its finding, the Circuit Court's Order cites the case of Gaymon v. Richland Memorial Hospital, 327 S.C. 66, 488 S.E.2d 332 (1997). However, the Gaymon case is not a case in which an estoppel claim was decided on a summary judgment motion. Gaymon's narrow holding only supports the proposition that an equitable estoppel defense should be *tried* by the court in equity, not by a jury. The case also explains that estoppel "*may involve a question of fact for the fact-finder.*" Thus, Gaymon's holding that estoppel should be tried by the court instead of a jury is irrelevant at the summary judgment stage of the proceedings if there exists a genuine issue of material fact. Whether the issue is ultimately tried by a court in equity or a by a jury, the issue must survive summary judgment if it involves questions of fact. Estoppel *can* be an issue for the court and *can* be properly dismissed through a summary judgment motion, but should not be dismissed on summary judgment when disputed facts exist as they do in this case.

Additionally, the Circuit Court's Order cites Davis v. Greenwood School District 50, 365 S.C. 629, 620 S.E.2d 65 (2005) to support its finding that the issue of reliance may be determined at the summary judgment stage of litigation. (R. p. 31.) The issue of reliance is not treated any differently than any other factual issue. Despite the fact that it *may* be determined on a summary judgment motion, it should not be determined at the summary judgment stage if the evidence and its reasonable inferences create a genuine issue of material fact when viewed in the light most favorable to the nonmoving party. Davis, 365 S.C. 629, 620 S.E.2d 65; Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Here, a question of fact exists as to the causes of action for equitable estoppel and promissory estoppel and, therefore, the Circuit Court erred in adjudicating these claims at the summary judgment state of the proceedings. Specifically, the Circuit Court erred in finding that the facts "lead to only one conclusion: that reliance by the Plaintiffs was unreasonable." (R. p. 31) In Davis, the Supreme Court held that the Circuit Court properly granted defendant's summary judgment motion as to the promissory estoppel cause of action because "all written documentation from the teachers' meetings reflect[ed] that Dr. Kinlaw told the teachers that they would receive a ten percent increase subject to the Board's approval each year," and, therefore, "it was unreasonable for Appellants to rely upon Dr. Kinlaw's statement that they would receive a ten-percent salary increase" because he "informed Appellants on several occasions that the incentive was subject to the Board's approval." 365 S.C. at 633-35, 620 S.E.2d at 67-68. Thus, summary judgment was proper because *all* of the documentation and evidence reflected that the promise was "subject to the Board's approval" and therefore it was unreasonable

for the teachers to rely on Dr. Kinlaw's promise and ignore constant explanations and warnings that the promise was conditional on the Board's approval.

The Circuit Court's Order also cited West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000) as an example of a case where the Court of Appeals confirmed that the issue of reliance may be determined on a summary judgment motion. In West, this Court found that the plaintiff's summary judgment motion was properly granted as to the defendant's counterclaim for negligent misrepresentation, because the defendant failed to prove that a genuine issue of material fact existed in regards to whether his reliance on the plaintiff's alleged misrepresentations was justified. As in Davis, summary judgment in West was proper because defendant "produced *no* evidence" to refute plaintiff's evidence that defendant's reliance was unreasonable. In West, the defendant also "had more access to the financial records" than plaintiff and "was in a better position than [plaintiff] to know the financial status of [the company]." Id. at 134-35, 533 S.E.2d at 337-38.

Contrary to West and Davis, there is ample evidence in the case at hand from which a jury could find Appellants' reliance was reasonable and, therefore, the Circuit Court erred in holding that Appellants' reliance was unreasonable. "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, 'including the positions and relations of the parties.'"[9] West, 341 S.C. at 134, 533 S.E.2d at 337-38

[9] The Circuit Court failed to evaluate the totality of the circumstances in determining whether Appellants' reliance on Respondent's promises was reasonable. The Court noted that Respondent did not challenge any verbal representations, but held that when written representations were before the Court, "the element of reasonable reliance may be properly adjudicated by way of summary judgment." (R. p. 30.) By holding that verbal representations are irrelevant when written representations are before the court, the Circuit Court erred because this Court has clearly held that "[a] determination of

(quoting Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985)). Whereas, all of the documentation in Davis reflected that the promise was subject to the board's approval, here, some of the documentation reflected that the policies were subject to change, but other documentation reflected that the policy was a promise that could be relied on by Appellants. Specifically, several documents reflected that the promise was unconditional and was not subject to any type of approval or changes. The July/August 2004 Newsletter stated:

> To continue your Health Insurance upon retirement you must meet two criteria: 1) Retire with the South Carolina Retirement System and 2) Be employed by the City of Columbia for 20 (not necessarily consecutive) years. You will be eligible to continue your health insurance at the same rates you are currently paying. Free for single coverage, and the same rates you currently pay for your dependents. (R. pp. 429, 431.)

Based on this written representation, there is an issue of material fact as to whether it was reasonable for Appellants to rely on the promise of paid health insurance during their retirement. It is conceivable that an employee reading this representation could reasonably believe that if he met these two criteria, he would be eligible to receive health

---

justifiable reliance involves the evaluation of the totality of the circumstances." West, 341 S.C. at 134, 533 S.E.2d at 337-38. The totality of the circumstances at least includes all verbal and written representations and the parties' positions and relations. Here, the verbal representations are particularly relevant because the written materials instructed the employees to seek clarity regarding the policies from their supervisors the Human Resources Department, and the verbal representations resulted from Appellants' adherence to this instruction. If a set of written documents makes a promise and also instructs and encourages the promisee to seek clarity in regards to the promise from agents or representatives of the promisor, then the statements of the agents and representatives are clearly relevant as to whether the promisee's reliance was reasonable. By not considering the verbal representations, the Court erred. Controlling case law does not support the act of ignoring a whole set of unchallenged representations that lend credibility to a party's assertion that his reliance on a promise was reasonable. Due to this error alone, the Circuit Court's grant of summary judgment as to the promissory estoppel and equitable estoppel causes of action should be reversed because the facts are disputed and more than one inference can be drawn from the facts.

insurance during retirement at the same rate he was currently paying, which was "[f]ree for single coverage." The reliance is even more reasonable in light of the vast number of documents which referred to the promise as a lifetime, continuing promise and because of the constant assurances by supervisors and Human Resource representatives that confirmed the promise. (R. pp. 446-448; 478-479; 557; 563-566; 591-593; 605; 608; 626-627; 649-652; 663-664.) Further, the current City Manager testified that he never told employees before July 1, 2009 that they might have to pay the cost of their health insurance and that he thought it was reasonable for employees to rely on the BlueCross BlueShield benefit booklets distributed to them (R. p. 495, lines 15-23; p. 497, lines 2-11). The mere existence of credible documents and numerous oral promises and assurances creates a question of fact as to whether Appellants' reliance on the promises in these documents was reasonable.

These facts are distinguishable from the facts in West, because the facts here illustrate that the positions and relations of the parties create an issue of material fact as to whether Appellants' reliance was reasonable. In West, the party who made the alleged misrepresentation presented evidence that the relying party had more access to documents and was in a better position to know information about the subject matter of the alleged misrepresentation. The difference here is twofold. First, here, the relying party (Appellants) had significantly less access to documents and information regarding the subject matter (retiree health insurance) for which Respondent made misrepresentations and was in a significantly worse position to acquire information about this issue. Second, in West, the non-moving party "produced no evidence" to refute the moving party's assertion that their reliance was unreasonable. Here, Appellants'

presented voluminous amounts of credible evidence to refute Respondent's assertion that reliance was unreasonable. (R. pp. 339-378; 395-415; 416-431; 446-448; 478-479; 557; 563-566; 591-593; 605; 608; 626-627; 649-652; 663-664.) Despite this evidence, the Circuit Court erroneously held that the evidence only supported one inference—that reliance was unreasonable. (R. p. 31.)

The Circuit Court also relied on McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008) in support of its holding that Appellants cannot prove reasonable reliance because they signed acknowledgments that the policies were subject to change. (R. p. 30.) The facts in McLaughlin are dissimilar to the facts at hand. In McLaughlin, this Court held that despite the general rule that issues of reasonable reliance are questions of fact, "there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter." 379 S.C. at 457-58, 665 S.E.2d at 671 (citing Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)). The Court further explained that there is no issue of material fact only "if the *undisputed* evidence clearly shows the party asserting reliance has knowledge of the truth of the matter." Id. As such, the Court in McLaughlin found that the plaintiff had knowledge of the truth of the matter and had no right to rely on an erroneous disclosure statement because he was in possession of two other documents that contradicted the disclosure statement *and* because he testified that these other documents placed him on notice. Id. McLaughlin's facts are inapposite to the facts at hand, because the Appellants here testified that they were given numerous confirmations of the promise to pay for health insurance and did not know that the promise could be broken. (R. pp. 446-448; 478-479; 557; 563-566; 591-593; 605; 608; 626-627; 649-652; 663-664.) Further, unlike

the plaintiff in McLaughlin, Appellants here did not testify that conflicting documents put them on notice that the promises were false. Further, any facts presented by Respondent asserting that Appellants *did* know the truth of the matter conflict with Appellants' testimony and create a disputed an issue of fact. Therefore, the Court's grant of summary judgment on Appellants' promissory estoppel and equitable estoppel claims is erroneous because a genuine issue of material fact exists as to whether Appellants had knowledge of the truth of the matter. Appellants' testimony that they did not "know the truth of the matter," as well as the totality of the circumstances surrounding the promises, clearly create a question of fact.

When the totality of the circumstances is evaluated and all of the evidence is viewed in the light most favorable to Appellants, it is clear that, unlike West, Davis, and McLaughlin, the evidence creates an issue of material fact as to whether Appellants' reliance on Respondent's statements was reasonable. As such, the Circuit Court erred in holding that a genuine issue of material fact did not exist.

IV. The promises made to Appellants were made by Respondent's employees and were made within the scope of their employment and, therefore, the Circuit Court erred in finding Respondent could not legally be bound by these promises.

In addition to the holding discussed in the above section, the Circuit Court also held that Appellants' claims for estoppel failed because (1) estoppel cannot be based on an illegal act, (2) "any reliance on promises of free lifetime health insurance was *per se* unreasonable because such promises would be illegal," and (3) promises by the City Manager, supervisors, and council members are not binding.[10] (R. pp. 28-29, 32-33.) The

[10] In granting Respondent's Motion for Summary Judgment on the equitable estoppel cause of action, the Circuit Court also noted that the fixing of city employees'

Court based this holding on its determination that the undisputed statements of employees, supervisors, and City representatives regarding the promise to provide the cost of insurance during retirement were illegal, unenforceable and non-binding because these statements cannot restrict the city council from exercising its legislative authority. (R. pp. 28, 32-33.)

Respondent asserts that it can breach the agreements with Appellants without consequences because it is lawfully exercising its governmental authority. This is erroneous. In Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948), the South Carolina Supreme Court held that "with respect to the power of a local governing body to enter . . . into a contract which will extend beyond the term for which the members of the council were elected, a distinction is drawn based upon the subject matter of the contract – whether legislative, or governmental, or whether business or proprietary." Id. at 23, 46 S.E.2d at 255. Accordingly, Newman requires as a first step a determination of the type of contract at issue – whether the contract's purpose is legislative (discretional and governmental) or for business reasons. Depending on the type of contract, it may or may

---

compensation is a legislative act pursuant to the McQuillin Municipal Corporations treatise. This treatise is not binding on the Court and is contradicted by state law. See S.C. Code Ann. § 5-13-90 (2004). Further, the Circuit Court also based its holding on its finding that "the City's manager may not expend more than $10,000 for any contract or service, including a group health plan, without prior approval of Council." (R. p. 32.) The Court does not cite authority in support of this finding, but Appellants presume that it is based on authority provided to the Court by Respondent in its Memorandum in Support of Summary Judgment. In Exhibit B to its Memorandum, Respondent attached a procurement ordinance stating that a city manager can only reject or approve bids for contracts involving less than $10,000. (R. pp. 191-193.) The ordinance does not indicate that it applies to group health plans (as stated by the Court on page 17 of its Order (R. p. 32)) and, as argued by Appellants in their Memorandum in Opposition to Respondent's Motion for Summary Judgment, the ordinance is merely a procurement ordinance and should not apply to employees and their terms of employment. As such, the Court's reliance on this finding was misplaced.

not be void merely because it extends beyond the terms of the elected city council members.

Here, it is clear that Respondent's City Manager is the head of the administrative branch of its government and may set the terms of employment for employees of the City. S.C. Code Ann. § 5-13-90 (2004). The City Manager's position is administrative, not legislative, and his duties are administrative, as well. Hiring personnel and establishing the terms of employment, including compensation, is an administrative or business function performed by the City Manager, and, therefore, this case is not about binding Council or any legislative body. Rather, the issue before the Court is whether the City Manager is bound by the terms of employment he offered the employees he hired.

Newman addressed the issue of whether a contract entered into by one set of commissioners regarding one of their employees was binding on a subsequent set of commissioners.[11] Here, the facts are distinguishable as the complaint alleges Respondent

[11] This case is also distinguishable from the unpublished opinion in Crow v. City of Gaffney, C.A. No. 07-CP-11-172 (Aug. 15, 2008). (R. pp. 171-183.) In Crow, retirees sued the City of Gaffney for changes to its retiree medical insurance program. (R. p. 171.) It is important to note that the City of Gaffney operates under a Council Form of Government pursuant to S.C. Code. Ann. § 5-11-10 *et seq* (2005). Under this form of government, the Gaffney City Council makes all legislative *and* administrative decisions. S.C. Code Ann. § 5-11-30 (2005). Therefore, in Crow, the court correctly concluded that under the rule of Newman, the Gaffney City Council could not enter into long term contracts because it was responsible for both the administrative and legislative decisions for the town, and it would be an illegal act for such long term contracts to bind successor city councils. In stark contrast, the City of Columbia operates under a Council-Manager form of government. This distinction is crucial in that the Columbia City Council does not handle administrative business, such as the entering into of employment contracts, on behalf of the City of Columbia. Therefore, unlike Crow, the city managers, as administrators, were responsible for the promise of free health care to Appellants. Again, under the Council-Manager form of government, the City of Columbia has only legislative authority, not administrative authority. Administrative authority to enter into labor contracts in Columbia rests with the city managers. Therefore, Respondent may choose to breach the contracts its city managers have made with the Appellants, but it

failed to pay Appellants the compensation promised to them by the City Manager at their time of hire. Per state law, the City Manager had full authority to set the terms of employment at the time of hire and if Respondent's City Council did not like the Manager's actions, it could have fired him. However, the Council could not have substituted its judgment for the City Manager's judgment regarding the hiring and firing of employees (R. p. 499, lines 1-8), and, pursuant to the Council-Manager form of government, still cannot do so because the functions of hiring and firing employees and setting the terms of their employment and compensation are business functions, not governmental functions. This case falls squarely within the "distinction" that the Newman court found compelling – a business or propriety function. Since the agreements at issue were part of a business function of the municipality and were created many years ago, they are enforceable beyond the terms of the elected city council members. Accordingly, since the agreements are valid against future city councils, Respondent cannot disavow the agreements by exercising its governmental authority and the Circuit Court erred in holding that Respondent's actions were proper.[12]

When a Manager acts within his authority to offer future consideration as wages, the promise is not illegal.[13] The issue before the Court is what consideration was

---

may not do so without consequences. The promise of free retiree health care was not made by a past city council, and therefore, unlike Crow, future city councils are bound by the promises of their past city managers. Further, Crow did not include a cause of action for equitable estoppel.

[12] In addition to applying to the Circuit Court's holding that estoppel cannot be based on an illegal act, the reasoning in this section also applies to the Circuit Court's holding that a contract for the payment of future health insurance is unenforceable because it violates public policy. Both holdings are erroneous for the same reasons.

[13] The compensation promised to Appellants included the value of free health insurance coverage for a certain period of time. The fact that the exact value of this compensation was unclear at the time it was offered, is irrelevant; this scenario is no different than

promised to Appellants by City Managers employed by Respondent in the past and whether Appellants' reliance on these promises was reasonable. As these determinations are wholly factual, the Court erred in granting Respondent's Motion for Summary Judgment as to the promissory estoppel and equitable estoppel claims. Respondent cannot avoid responsibility for business contracts on the basis that newly elected members of City Council do not like the terms of the business contracts which were legally entered into by the Respondent's former managers.

Further, "[a] governmental body is not immune from the application of the doctrine of estoppel where its officers or agents acted within the proper scope of their authority." Oswald v. County of Aiken, 281 S.C. 298, 315 S.E.2d 146, 149 (Ct. App. 1984); see also Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 221, 329 S.E.2d 423, 426 (1985) (citing Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979) (holding that the City is not immune from application of the doctrine of estoppel when there is no evidence that the Zoning Administrator was acting outside the scope of his authority in issuing a letter confirming the zoning of a particular property)). Here, the City Manager and Human Resources employees were acting within the scope of their employment when they made and confirmed promises of free retiree health coverage.[14] The City Manager is responsible for setting terms of employment and

---

executives in banks being offered lucrative stock options as part of their compensation package. Hiring employees and determining the compensation package for that employee is a typical business function of an administrator and, in this case, Respondent's City Manager.

[14] At the least, the questions of whether Respondent's City Manager and employees of Respondent's Human Resources Department were acting within the scope of their employment and whether at any time they exceeded the scope of their employment are factual questions for the jury and, as such, the Circuit Court's grant of summary judgment was improper on this basis.

the Human Resources Department is responsible for "those activities relating to employment, employee relation," among other activities. S.C. Code Ann. § 5-13-90 (2004); Columbia City Code, art. II, § 2-215. Employees of the Human Resources Department are not acting outside the scope of employment by making representations to City employees regarding the payment of health care because that is the exact type of activity for which they are responsible. Additionally, here, the current City Manager testified that part of Human Resource employee Mona Holiday's job responsibility was to provide information to retirees. (R. p. 496, lines 19-23.) The testimony of Appellants Gilliam and Martin confirms that Mona Holiday repeatedly represented that retiree health insurance was free. (R. p. 557, lines 9-14; p. 605, lines 7-19.) Further, the Human Resources Department also represented to Appellants that they should not sign up for Part D Medicare because Respondent's plan was superior. (R. pp. 450-454; 578; 587-588; 595.)

In holding that the actions of a city manager and other employees cannot bind a municipality, the Circuit Court relied on the case of Todd v. Smith. 305 S.C. 227, 407 S.E.2d 644 (1991). (R. p. 28.) The Court's reliance on Todd is misplaced and erroneous. In Todd, the Court examined whether the acts of city employees could be considered "official policy" such that the City could face § 1983 liability for the acts. Id. The majority[15] of the Court held that the acts of the municipal employees did not create liability for the City under § 1983 because the acts (1) "were individual discretionary acts, involving a decision on how to handle a situation which ha[d] arisen . . . only once in the entire history of [the City]," (2) "the municipal council never met, nor did they

[15] Chief Justice Toal dissented and Justice Chandler concurred with the result of the dissent.

vote, on the decisions made" by the employees, and (3) the council did not delegate the authority to make the policy decisions to the employees. Id. at 231, 407 S.E.2d at 647. The facts in Todd are clearly distinguishable from the facts in the case at hand and therefore, the Court's reliance on Todd was misplaced. First, unlike Todd, the statements here were repeated over twenty years as opposing to being "individual discretionary acts, involving a decision on how to handle a situation which ha[d] arisen . . . only once in the entire history of [the City]." Id. Further, the municipality clearly was aware of the promises (R. pp. 379-394) and benefitted from the promises. Perhaps most importantly, the issue in Todd was a completely different issue than the issue present in this case and, therefore, the Court's analysis in Todd is inapplicable here. The issue in Todd was whether the municipality had undertaken an "official policy" such that the municipality should be liable pursuant to § 1983. Id. at 232, 407 S.E.2d at 647. The first element of § 1983 liability for a municipality is that the action complained of was taken pursuant to "official policy." Id. Here, the issue is quite different. The issue is whether it was reasonable for city employees to rely on representations of other employees and whether those representations were made within the scope of the maker's employment. This is a completely distinguishable inquiry. The determination of whether reliance on employees' representations is reasonable should not be judged by the same standard as the determination of whether an action constituted "official policy" to subject a municipality to liability under § 1983.[16]

[16] The case of Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004) is also distinguishable. Stanley also examined whether an action constituted an "official policy" in regards to § 1983 liability and found that the facts and inferences "do not rise to the level of a policy" and employees of an animal shelter do not have the authority to set city

In the alternative, if this Court finds that the Circuit Court's reliance on Todd was proper, Appellants assert that Chief Justice Toal's dissent in Todd is relevant to the determination of whether Appellants' reliance on statements of municipal employees was reasonable and the Circuit Court erred in failing to consider her reasoning. Chief Justice Toal's dissent points out that one of the City employees testified that "[t]he council was aware of what we were going to do and we were not given any instruction the contrary as to not to do what we planned." Id. at 234, 407 S.E.2d at 648. On the basis of this testimony, Chief Justice Toal concludes that the City implemented a policy "through the use of lesser agents of the City . . . and through its acquiescence in their actions and decisions." Id. at 235, 407 S.E.2d at 649. In support of her conclusion, Chief Justice Toal noted that "[i]f a higher official has the power to overrule a decision but as a practical matter never does so, the decisionmaker may represent the effective final authority on that question." Id. at 235, 407 S.E.2d at 648-49 (quoting Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) and citing Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987)).

Chief Justice Toal's reasoning is particularly relevant to the case at hand. Here, the City Council was acutely aware of the promise to pay the cost of health insurance for retirees if they worked over twenty years and was aware of the representations being made by the City Manager and other employees. The Council was also aware that the City Manager, as part of his job responsibilities, was setting the terms of employment for Appellants and was including free retiree health insurance as one of the terms. The promise was made at County Council meetings and retirement seminars and was acknowledged by council members. (R. pp. 654-655; 658.) However, for over twenty

---

policy. Id. at 176, 592 S.E.2d at 299. The authority of a City Manager is much different than the authority of employees of an animal shelter.

five years, the City Council never overruled the City Manager's decisions or actions. Additionally, the City Council benefitted from the agreement. As Chief Justice Toal explained in Todd, the City Council should not be able to now avoid responsibility for a deal which they were aware of and benefitted from.

Further, the case of Townes Associates, Ltd. v. City of Greenville employs the same reasoning as Chief Justice Toal's opinion in Todd. 266 S.C. 81, 221 S.E.2d 773 (1976). While Todd and Stanley were not estoppel cases and instead both examined whether actions by employees constituted "official policy" pursuant to § 1983, Townes examined the exact issue present here: whether a municipality could be estopped by the acts of its officers. Id. However, the Circuit Court found that Todd and Stanley were relevant and binding on the case at hand, but Townes was inapplicable. This determination was erroneous.

In Townes, the Court found that the City Council had authorized its manager to enter into a contract and, in so finding, relied on the fact that Council knew about the contract and benefitted from it. Id. at 87, 221 S.E.2d at 776. The Court acknowledged that a municipality generally cannot be estopped by the unauthorized acts of its officers, but determined that estoppel was proper in the circumstances, because "when officers or agents of a governmental body act within the proper scope of their authority, a municipality cannot escape liability on a contract within its power to make, on the ground that the officer executing it in its behalf was not technically authorized to do so, where he was the proper person to enter into such a contract." Id. In so holding, the Court determined that the Town should not be able to escape liability for the reasonable value of the plaintiff's services. Id. at 88, 221 S.E.2d at 776.

In distinguishing the case at hand from Townes, the Circuit Court noted that Respondent's Council did not delegate authority to the Manager and did not show an intent to provide the cost of retiree health insurance. (R. p. 30.) These determinations are erroneous,[17] but, additionally, the decision to distinguish Townes is erroneous because this case is very similar to Townes and reasoning of Townes is instructive. In Townes, Council knew about the contract and benefitted from it. 266 S.C. at 87, 221 S.E.2d at 776. The same is true here. Further, in Townes, the Court refused to let the Town avoid liability for the reasonable value of the plaintiff's services. Id. at 88, 221 S.E.2d at 776. Here, the Town seeks to do the same thing—to avoid compensating its employees for the reasonable value of their services.[18] As such, the Circuit Court erred in finding that Townes did not apply to the facts at hand.

---

[17] Respondent was not required to specifically delegate authority to the Manager because, pursuant to statute, the Manager has the authority to hire and fire employees and set the terms of employment. S.C. Code Ann. § 5-13-90 (2004). Further, Respondent's Council was aware of the promise to pay the cost of health insurance for retirees if they worked over twenty years and was aware of the representations being made by the City Manager and other employees. (R. pp. 379-394.)

[18] Appellants assert that this case is factually similar to the situation in Middletown Twp. Policemen's Benev. Ass'n v. Town of Middletown, 744 A.2d 649 (N.J. 2000). (R. pp. 184-190.) The New Jersey Supreme Court framed the issue as "whether a municipality may be equitably estopped from terminating post-retirement health benefits of a former municipal employee where that employee has received (and relied on) those benefits for a period of years." Middletown, 744 A.2d at 649. The police officer was repeatedly promised that he would keep his same health benefits upon retirement and retired early because of those promises. Id. at 654-55. Ultimately, the court reasoned that it would "frustrate the demands of justice and good conscience" for the town to terminate the health insurance benefits and held that the town was equitably estopped from terminating the benefits. Id. at 655. Here, it would "frustrate the demands of justice and good conscience" for Respondent to breach the promises that were made to and relied upon by Appellants for many years. Many Appellants have limited incomes and find themselves suddenly having to pay large sums out of pocket for the health care they were promised would be free. Further, whether Respondent's representations regarding free single coverage retiree health insurance amounted to misrepresentation or concealment is a genuine issue of fact for a jury to decide. The Circuit Court held that the Middletown

"Estoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as the equities between the parties may preponderate." Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 221, 329 S.E.2d 423, 425 (1985) (quoting Pitts v. New York Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369 (1966)). Here, the Circuit Court held that, in light of Todd and Stanley, any reliance by Appellants on the promises of the City Manager and other employees was *per se* unreasonable because the promises were illegal. As discussed above, this holding is erroneous and the Circuit Court's reasoning is flawed. Further, in the light most favorable to Appellants and in light of Townes, Chief Justice Toal's dissent in Todd, the totality of the circumstances, and the equities of the parties, Appellants' reliance on the promises of the City Manager and other employees was reasonable. Respondent's promises were made to induce Appellants to continue working for Respondent, and the promises were made by authorized agents of Respondent over the course of many years. As such, the Circuit Court erred in granting Respondent's Motion for Summary Judgment.

V. The Circuit Court erred in finding that Respondent's handbooks and benefit booklets only use present tense language and therefore do not establish a contractual right to continuing free health insurance because the facts before the Court indicate that the handbooks and booklets used future tense language.

The Circuit Court's Order included several erroneous findings of fact. Specifically, the Court held that "[t]he handbooks and other publications relied upon by Plaintiffs do not contain language making permanent guarantees. Instead, these

---

case did not apply because it applied New Jersey law and involved a collective bargaining agreement. Appellants assert that the case is relevant to the case at hand because of the similarities in facts and because of the case's accurate commentary on the relevance and appropriateness of equitable estoppel as a remedy to address a municipality's sudden termination of promises which had been complied with for many years. As such, the Circuit Court erred in refusing to apply the case to the facts at hand.

publications are each in the *present tense* and apply only to the period of their effectiveness." (R. p. 23.) The Court also held that "[t]he benefits booklets relied upon by Plaintiffs do not contain language making permanent guarantees. Instead, these booklets are in the *present tense* and apply only to the period of their effectiveness." In fact, the handbooks included the following language: "[a]ll employees who retire at age 65 or later ... *will be kept* under the City's group coverage, with the City making a cash contribution." (R. pp. 339-378.) (*emphasis added*) Additionally, the benefits booklets contained the following language: Retirees who are currently covered *will remain covered* as stated at the time of retirement." (R. pp. 395-415) (*emphasis added*) As a result, these findings by the Court were clearly erroneous in light of the evidence before the Court. The language of "will be kept" and "will remain covered" is future tense language. As such, the existence of future tense language supports Appellants' position that reliance on these promises was reasonable.

Additionally, this language supports Appellants' position that the handbooks and booklets constitute enforceable contracts. "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 capable of more than one inference." Watkins v. Disabilities Bd. of Charleston, 444 F.Supp.2d 510, 514 (D.S.C. 2006) (citing Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 108-09, 616 S.E.2d 694, 697 (2005)). Further, "in most instances, summary judgment is inappropriate when a handbook contains both a disclaimer and promises." Id. at 515 (citing Fleming v. Borden, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994)). To be enforceable, promises in handbooks must be definitive and specific. Id. Here, the handbooks did not contain

disclaimers until 2000 and some Appellants had already retired prior to 2000. (R. pp. 339-378.) The "Employee and Retiree Health Coverage" booklets never contained disclaimers. (R. pp. 395-415.) The promises in the handbooks and booklets that Appellants "will remain covered" and "will be kept" under Respondent's coverage are specific and definite promises. The absence of disclaimers (except for those appearing on the handbooks after 2000) and the existence of promises at least create a question of fact as to whether the handbooks and booklets constitute enforceable contracts. As a result of the Circuit Court's erroneous finding that the booklets and handbooks do not make permanent guarantees and are only in the *present tense*, this Court should reverse the Circuit Court's Order granting summary judgment.

VI. The Circuit Court's holdings in regards to bonded indebtedness, Appellants' at-will status, and Respondent's contract with BlueCross/BlueShield of South Carolina are erroneous because these holdings are irrelevant to the contractual promises made to Appellants and do not alter these promises.

In addition to the issues and holdings discussed in sections I-V of Appellants' brief, the Circuit Court also based its holding on the following three ancillary issues: (1) a "contract for future health insurance benefits" is void because it violates the "Bonded Indebtedness" section of the South Carolina Constitution" (R. p. 26); (2) municipal employees are at-will and therefore have no right to "free lifetime health insurance benefits" (R. pp. 26-27); and (3) Appellants agreed to accept coverage under the group health plan as specified by the contract between Respondent and BlueCross/Blue Shield of South Carolina and "cannot now seek exemption from their premium obligation." (R. p. 27.) Each of these holdings is erroneous and, as such, these errors support Appellants' request that this Court reverse the Circuit Court's grant of summary judgment.

In regards to the holding about bonded indebtedness, Appellants assert that this holding is erroneous as the bonded indebtedness section of the South Carolina Constitution does not apply to Respondent's promise to pay the *cost* of Appellants' single coverage retiree health insurance. Respondent promised wages to Appellants, which is an expense, not a debt. For many years, Respondent treated this cost as an expense, not a debt. (R. pp. 379-394.) Respondent only recently changed its accounting practices. Prior to GASB 45, the cost of retiree health insurance was never a contingent liability; it was an expense paid year to year. Id. To allow Respondent to now assert that the compensation should be considered an unconstitutional open-ended debt is improper, especially in light of the relative positions of the parties. See Landing Dev. Corp., 285 S.C. at 221, 329 S.E.2d at 425 (quoting Pitts, 247 S.C. 545, 148 S.E.2d 369) ("Estoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as the equities between the parties may preponderate."); West, 341 S.C. at 134, 533 S.E.2d at 337-38 (quoting Elders, 286 S.C. at 233, 332 S.E.2d at 567) ("A determination of justifiable reliance involves the evaluation of the totality of the circumstances, 'including the positions and relations of the parties.'").

In regards to the holding about Appellants' at-will status, Appellants acknowledge that they were at-will employees. However, at-will employment has nothing to do with the contract for wages which is at issue here. The length of employment and the amount of wages paid to employees are two different subjects. The fact that Appellants were at-will employees when they were employed by Respondent is irrelevant to the issue of whether Respondent has breached a contract by failing to pay Appellants *the consideration for a completed contract regarding wages.*

Finally, in regards to the holding that Appellants agreed to accept coverage under the group health plan as specified by the contract between Respondent and BlueCross/Blue Shield of South Carolina and "cannot now seek exemption from their premium obligation" (R. p. 26), Appellants assert that this holding is erroneous because Appellants are not seeking exemption from their premium obligation. Instead, Appellants are requesting that Respondent fulfill its contractual obligation to pay the cost of Appellants' single coverage retiree health insurance. To fulfill this promise in this past, Respondent paid Appellants' premium in its entirety and should continue to do the same until they have completed their contractual obligation to Appellants.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court's grant of Respondent's Motion for Summary Judgment.

Nancy Bloodgood

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
Foster Law Firm, LLC
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
(843) 744-3033
Attorneys for Appellants

Date: 5-11-11
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable James R. Barber, III, Circuit Court Judge

Case 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,

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.

CERTIFICATE OF COUNSEL

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
Telephone: (843) 744-7828
Facsimile: (843) 577-0434
Email: nbloodgood@fosterfoster.com
Attorneys for the Appellants

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

Nancy Bloodgood

Nancy Bloodgood, Esquire, SC Bar 6459
Lucy C. Sanders, Esquire, SC Bar 78169
FOSTER LAW FIRM, L.L.C.
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
Telephone: (843) 744-7828
Facsimile: (843) 577-0434
Email: nbloodgood@fosterfoster.com
Attorneys for the Appellants

Charleston, South Carolina

Date: 5-11-11

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.

FINAL BRIEF OF RESPONDENT

NICKLES & SOLOMON, LLC

W. Allen Nickles, III
Matthew A. Nickles
1519 Richland Street
Columbia, South Carolina 29201
(803)779-8080

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 COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b).

May 16, 2011.

NICKLES & SOLOMON, LLC

W. Allen Nickles, III
Matthew A. Nickles
1519 Richland Street
Columbia, South Carolina 29201
(803)779-8080
Attorneys for Respondent

Columbia, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

STATEMENT OF ISSUES ON APPEAL

I. **Whether the Circuit Court correctly held that retirees cannot establish a cause of action for breach of contract.**

II. **Whether the Circuit Court correctly held that retirees cannot establish a claim of promissory estoppel or equitable estoppel**

III. **Whether the Circuit Court correctly held that a contract for free lifetime health insurance would violate public policy.**

IV. **Whether the Circuit Court properly held that retirees had no contract right to compensation based on their at-will status.**

V. **Whether the Circuit Court correctly concluded that retirees agreed to be bound to the terms of the contract between the City and Blue Cross/Blue Shield of South Carolina.**

VI. **Whether the doctrine of *stare decisis* supports the decision by Council to apply group health costs consistently to active employees and retirees.**

STATEMENT OF THE CASE

This is an appeal from a summary judgment order issued in favor of the City of Columbia ("City").

On August 10, 2009, thirteen retired City of Columbia employees ("Retirees") sued the City of Columbia in the Richland County Court of Common Pleas. The Complaint 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. (R. pp. 49-56) In response, the City filed an Answer and Motion to Dismiss on August 26, 2009. (R. pp. 57-72; 73-74) With consent of the City, Retirees filed an Amended Complaint on October 14, 2009, which added equitable estoppel as a cause of action. (R. pp. 75-96) The City filed an Answer to the Amended Complaint on October 15, 2009. (R. pp. 97-112) The City's Motion to Dismiss was heard by Judge G. Thomas Cooper, Jr., on December 7, 2009. On January 12, 2010, Judge Cooper dismissed Retirees' Unfair Trade Practices Act claim but allowed the remaining causes of action to proceed. (Order Den. Mot. to Dismiss R. pp. 3-12) The City timely filed a Motion for Reconsideration or, in the Alternative, a Motion to Stay Pending Appeal. (R. pp. 113-120) Judge Cooper denied this Motion but also amended his Order to omit a finding that "wages include future compensation." (Order Den. Mot. for Recons. R. p. 14)

The City filed a Motion for Summary Judgment on May 6, 2010. (R. pp. 121-122) The City's motion was heard by the Honorable Judge James R. Barber, III, on August 12, 2010. After the hearing, Judge Barber signed an Order granting summary judgment to the City on September 10, 2010. (Order Granting Summ. J. R. pp. 16-35)

Following the grant of summary judgment, seven of the original thirteen Retirees timely filed and served a Notice of Appeal from Judge Barber's Order granting summary judgment. (R. pp. 164-167)

STATEMENT OF THE FACTS

The facts of this case are largely undisputed and are set forth in the order issued by Judge Barber. For purposes of appeal, the pertinent facts are summarized below.

The City has a council/manager form of government under which council retains all legislative power and policy making authority. (Gantt R. p. 491)[1] City policies and procedures are subject to change. (Floyd R. p. 486; Martin R. p. 603). Adoption of a budget is a legislative power confined to City Council. (Gantt R. pp. 489-490; Morris R. pp. 631-632).

Once a budget is adopted by Council, the City Manager must administer the City within the budget. (Gantt R. pp. 488-489; Morris R. pp. 631-632; Smith p. 660). The City Manager may enter agreements requiring expenditure only in amounts of $10,000 or less. All other commitment of City funds must be authorized by Council. (Ordinance Sec. 2-207 R. p. 193).

Council has approved a pay and classification plan for City employees. This plan sets ranges of compensation for employees. (Gilliam Affidavit ¶ 8, R. p. 195). The City Manager cannot provide compensation to employees beyond the range set for a position. The City

[1] All deposition references designate the last name of the deponent, for example "Floyd R. p. 486" or "Floyd App. R. p. 685."

Manager may approve an initial salary for an employee only up to five percent (5%) above the minimum set for the position. The City Manager may not approve compensation that exceeds a salary range. (Gantt R. pp. 492-493).

Group health insurance is available to City employees and eligible retirees under a self-funded plan administered by Blue Cross/Blue Shield of South Carolina. The City must reflect the cost of providing group health insurance as a contingent liability. (Gantt R. p. 494). The group health insurance plan is available to City employees and eligible retirees on the same basis. At all times, active employees and eligible retirees have been offered the same group health insurance options. (Cruz R. pp. 445-446; Floyd R. pp. 480, 482; see also Gilliam Aff. ¶ 4, R. p. 194). The City's cost of providing group health and dental benefits rose from $8,484,055.46 during fiscal year 2002/2003 to $17,256,661.34 in 2008/2009. (R. p. 220).

Prior to July 1, 2009, the City paid all costs required to fund group health insurance for individual employees and eligible retirees. (Gilliam Aff. ¶ 4, R. p. 194). In planning for the 2009-2010 budget, however, Council looked at a number of cost saving measures, including limits on overtime, furloughs and shifting a part of rising health care costs to participants in the City's self-funded group health plan. As part of this process Council retained a consulting firm, Towers Perrin, to examine health insurance options. Towers Perrin offered suggestions to Council beginning in December 2008. (R. pp. 500-532).

During the spring of 2009, there was active debate regarding anticipated cost saving measures under consideration by Council. Fact sheets were distributed addressing health care, overtime, and furlough issues. (Gantt R. pp. 533-541). A request for proposals for administration

of the City's group health plan was issued. (Gantt R. pp. 542-551). Plan participants, including Retirees, received information from and communicated with Council members, offered objections, and attended meetings to discuss the proposed changes. (Cruz R. pp. 455-458; Floyd R. pp. 475-477; Gillam R. pp. 558-560; Martin R. p. 611; Morris R. p. 630; Smith R. pp. 654-659).

On May 6, 2009, Council unanimously voted to require financial contributions by individual employees and eligible retirees for participation in the group health insurance plan beginning July 1, 2009. (R. pp. 199-200). All eligible group health insurance plan participants are charged on the same basis for individual coverage. This is $33.18 per month for Plan A and $63.17 per month for Plan B. (R. p. 207).

Each of the Retirees left employment with the City before July 1, 2009. Each Retiree elected to participate in the City's group health insurance plan upon retirement. The membership application providing for group health insurance coverage contains a certification statement which includes the following language:

> I understand that upon acceptance of this application by the insurance company, and so long as I meet the eligibility requirements of the contract with this employer, I will be provided with coverage as specified by the group health contract between my employer [City] and the Corporation [Blue Cross/Blue Shield]."

(Sample applications R. pp. 208-214; see also Cruz App. R. pp. 680-682; Floyd App. R. pp. 685, 692; Gillam App. R. pp. 697, 702; Hill App. R. pp. 703-705, 708-711; Morris App. R. pp. 728-29; Smith App. R. p. 734).

All employees who retire from employment with the City are provided a letter from the benefits administrator in the City's Human Resources Department that describes benefits available upon retirement. Prior to July 1, 2009, in reference to group health insurance, this letter stated, in part: "Under the **current policy**, the City pays retirees' portion of the health premium. Therefore, no monthly payments are necessary." (Sample retirement letters provided at R. pp. 215-218).

After the City began requiring participants to contribute to the cost of the group health plan, Retirees brought this action seeking the following relief:

a. Reimbursement of all premiums paid since July 1, 2009;

b. Individual health insurance at the same terms (or better) as provided on the date of retirement;

c. Guarantee of no future reductions in benefits for life; and

d. Guarantee of no charges for health benefits for life.

(Floyd R. pp. 482-485; Gillam R. p. 569; Hill R. pp. 589-590; Smith R. pp. 649-650).

Because the Retirees and others have retired on different dates, the relief requested would require the City to establish individual health plans, with different terms and benefits, on the date of every retirement prior to July 1, 2009. (Floyd R. pp. 482-484).

Originally, there were 540 individuals covered by the City's group health plan who retired before July 1, 2009. (Gilliam Aff. ¶ 6, R. p. 195) As stated above, the cost of providing

group health insurance has risen steadily over the past several years. This cost continues to climb. For example, during fiscal year 2009-2010, the total cost of providing group health insurance was $18,208,146.64, including retiree costs of $5,727,047.70. (weekly claim totals for 2009-2010 provided at R. pp. 219-220). Even the Retirees concede that the current plan offers a "good policy" and the City continues to make a "cash contribution" that covers the majority of their heath care costs. (Gillam R. pp. 564, 573; Martin R. p. 609; Smith R. p. 661)

STANDARD OF REVIEW

This Court applies the same standard as the trial court when reviewing a grant of summary judgment. Hoard v. Roper Hosp., 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010). Summary judgment is appropriate when 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 judgment as a matter of law. Rule 56(c), SCRCP; Green v. Cottrell, 346 S.C. 53, 550 S.E.2d 324 (Ct. App. 2001); Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000); see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d. 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issues of material fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to

the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). In responding to a motion for summary judgment, a plaintiff must offer evidence that a genuine issue of material fact exists as to each element necessary to establish the asserted claims. McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008).

ARGUMENT

I. The Circuit Court correctly held that Retirees cannot establish a cause of action for breach of contract.

A. Supreme Court's holding in *Alston* precludes Retirees' claim for free lifetime health insurance.

In Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (1996), a group of employees and retirees[2] sued the City of Camden challenging a reduction in the percentage of health insurance benefits borne by the city. There, as here, the plaintiffs sought to prevent a municipality from making a prospective change in health benefits applicable to current and former employees. In holding for the city, the Supreme Court observed as follows:

- South Carolina law is clear that "public employees have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment." Id. at 45, 471 S.E.2d at 177.

[2] Retirees assert that Alston applies only to current employees. However, two retired employees are listed in the Alston caption.

- Ordinances or other policies that establish a standard personnel system do not constitute contracts. Id. at 46-47, 471 S.E.2d at 178.

- Policies that apply to fringe benefits are not permanent in nature and may be changed prospectively. Id. at 48, 471 S.E.2d at 179.

- Even assuming the language of a handbook (or other documents) constituted a contract, employees have "no reasonable expectation that the terms of the 'contract' would remain unchanged." Id., 471 S.E.2d at 179.

- Any contractual rights created by a handbook or other writing cannot "give rise to any legitimate expectation that fringe benefits provided for them will continue for any specific amount of time." Id., 471 S.E.2d at 179.

- Employee contractual rights created by a handbook are subject to unilateral modification. This rule rests on the recognition that "the employer-employee relationship is not static. Employers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of business and the employees. This is especially true where . . . [e]mployees concede their at-will status." Id. at 48-49, 471 S.E.2d at 179 (internal citations omitted).

- Government "should have more flexibility than business with respect to the employer/employee relationship." Accordingly, a prospective change in benefits does not impair any contractual right. Id. at 49, 471 S.E.2d at 179.

Applying Alston to the present case, the Circuit Court correctly held that Retirees had no contractual right to health insurance benefits listed in prior City handbooks. (Order Granting Summ. J. R. pp. 20-22) As in Alston, Retirees had no reasonable expectation that the benefits would last in perpetuity because South Carolina law clearly establishes that the City could modify the handbooks at any time.

On appeal, Retirees assert that the Circuit Court erred in relying on Alston and argue that their case is more similar to Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2006). (Br. of Appellants pp. 15-22) This argument is unavailing. Layman addressed whether a state statute that required public employees to retire within five years in exchange for certain benefits was contractual in nature. Id. at 640. The present case does not involve any *quid pro quo*. Instead, the decision to offer health insurance for free or to impose a small cost is the same exclusive, unilateral prerogative of council enforced in Alston.

Retiree's reliance on Layman is further misplaced because, in Layman, the Supreme Court specifically confirmed the changeable nature of fringe benefits for municipal employees. Addressing concerns by the State that this opinion overruled Alston, the Court responded:

> We find that Alston is distinguishable in several respects. First, the Court held that the benefits affected in Alston were "fringe benefits," and that the employees had a reasonable expectation that those benefits might be subject to change. In addition, the agreement in Alston was the type of unilateral contract that is subject to modification at any time.

368 S.C. at 640, 630 S.E. 2d at 270 (internal citations omitted).

Two years after Layman, the Supreme Court rejected a claim by public retirees seeking to avoid a change in the State's approach to taxing retirement benefits. See Anonymous Taxpayer

v. S.C. Dep't of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008). In this opinion, the Supreme Court dismissed the retirees' claims under contract, due process, and the takings clause, finding that the challenged action served a legitimate governmental purpose. Applied to the present circumstances, there can be no question that City Council acted within its legitimate legislative authority in requiring retiree participants in the City's group health plan to share a small portion of the costs of their health care benefits.

B. The Circuit Court properly found that health insurance is a fringe benefit not wages protected by state law.

On appeal, Retirees assert that the Circuit Court erred in finding that health insurance benefits listed in handbooks distributed to the Retirees were fringe benefits. Specifically, they assert that the Circuit Court's reliance on Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E.2d 526 (2001), was misplaced because that case dealt with the Worker's Compensation Act. (Br. of Appellants p. 21-22) Retirees' argument is infirm for several reasons.

First, Retirees offer no authority for their assertion that health insurance supplied to City employees is not a fringe benefit. (Id. at p. 15-22) Notably, retiree health benefits are clearly identified as "Post-employment Benefits" rather than "Deferred Compensation" in the annual Combined Financial Statements issued by the City's outside auditors. (CAFR excerpts for 1993-2007, R. pp. 379-394). Second, Alston described similar benefits supplied to city employees – annual leave, sick leave, and health insurance benefits – as fringe benefits. Third, the plain ordinary definition of "fringe benefits" includes employer paid insurance. Black's Law Dictionary (9th ed. 2009); see Universal Mar. Serv. Corp. v. Wright, 155 F.3d 311, 320 (4th Cir.

1998) (collecting dictionary definitions of "fringe benefits"). Fourth, Retirees' comparison of employer paid life insurance to stock options and bonuses offered to financial executives is unpersuasive. (Br. of Appellants p. 20 n.7) Employer paid insurance is unlike these forms of compensation. Stock options and bonuses are typically received or exercised at a certain specified time. However, an employee's, or retiree's, receipt of the benefit of employer paid insurance is contingent upon an event that may or may not happen and is therefore inappropriately labeled a "wage." Wright, 155 F.3d at 321-25. Fifth, the assertion that health insurance is deferred compensation is contrary to the Supreme Court's decisions in Alston, Layman, and Anonymous Taxpayer. It is also inconsistent with the legislative authority on the part of City Council to adopt a budget. S.C. Code Ann. § 5-13-30(3).

In the present case, City Council voted on May 6, 2009 to alter the fringe benefit program available to all current and former employees. The City Manager is obligated to implement all resolutions adopted by Council. Retirees' requests would invalidate a duly adopted resolution and require the City Manager to operate in a manner inconsistent with the City's elected governing authority. For all these reasons, the Circuit Court correctly followed South Carolina precedent in holding that health insurance is a fringe benefit rather than a "wage" protected by law. (Order Granting Summ. J. R. pp. 22-23).

C. The handbook, benefits booklet, and verbal representations did not create a contract for free insurance.

The Circuit Court correctly ruled that the evidence before the court did not support an inference of a valid unilateral contract. (Order Granting Summ. J. R. pp. 23-25) "A unilateral

contract has the following 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." Towles v. United HealthCare Corp., 338 S.C. 29, 524 S.E.2d 839, 844 (Ct. App. 1999) (citing Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 336, 516 S.E.2d 923, 926 (1999)).

On appeal, Retirees assert that the City's handbooks, benefits booklets, and verbal representations by City employees created a unilateral contract in which Retirees agreed to work for 20 years in exchange for free health insurance for the duration of their lives. (Br. of Appellant p. 12). However, these communications are insufficient to create a reasonable inference of the unilateral contract alleged by the Retirees.

The City's handbook, benefits booklets, and verbal representations did not create a unilateral contract for free health insurance with the Retirees. Prior to any claim asserted in this case, our Supreme Court ruled that the City's handbook did not create a contractual relationship with its employees. Marr v. City of Columbia, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992). This holding is consistent with the doctrine that a general policy statement will be considered a promise only if it is definitive in nature and guarantees specific treatment in specific situations. Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (2005).

Since at least 1987, the City has made clear that its handbooks create no contractual rights. (R. pp. 242-243, 246-247, 250-251, 256-257, 261-263, 266-268, 272-274, 277-279, 282-283). While employed, no Retiree disputed his at-will status. To the contrary, each signed acknowledgments confirming that the handbooks issued by the City did not create contracts. (Cruz R. pp. 675, 677-679; Floyd R. p. 690; Gillam R. pp. 699-700; Hill R. pp. 577, 594; Martin

R. pp. 613-621; Morris R. pp. 639-642; Smith R. pp. 665-670). In this context, the Circuit Court was clearly justified in finding that no written representation to Retirees created a contractual right to free health insurance.

For example, the Circuit Court correctly observed:

- Handbooks do not contain language making permanent guarantees. Instead, all handbooks are temporary and apply only to the period of their effectiveness. (Handbook excerpts addressing retirees and health insurance R. pp. 222, 226, 229-230, 232, 237, 241, 245, 249, 254, 260, 264-265, 269-271, 275-276, 280-281, 284-285) (Order Granting Summ. J. R. p. 23)

- Handbooks were subject to change and were changed during each Retiree's employment. (Cruz R. p. 444; Floyd R. pp. 474, 486; Gillam R. p. 562; Hill R. pp. 577, 588; Martin R. p. 604; Morris R. pp. 628-629; see also Gilliam Affidavit ¶ 3, R. p. 194) (Order Granting Summ. J. R. p. 23)

- Benefits booklets do not contain language making permanent guarantees. Instead, all booklets are temporary and apply only to the period of their effectiveness. (Benefits booklets addressing retirees and health insurance provided at R. pp. 286-338) (Order Granting Summ. J. R. p. 23)

- Benefits booklets were subject to change and were changed during each Retiree's employment. (Cruz pp. R. pp. 451-453; Dozier R. pp. 469-470; Gillam R. p. 562;

Smith R. p. 653; see also Gilliam Affidavit ¶ 3, R. p. 194) (Order Granting Summ J. R. p. 23).

- Handbooks and benefit booklets presented accurate information during the time they were in effect. (Smith R. p. 653) (Order Granting Summ. J. R. p. 23).

- Handbooks and benefit booklets were amended before July 1, 2009 to reflect charges for individual health coverage to employees and retirees. (Gilliam Affidavit R. p. 194) (Order Granting Summ. J. R. p. 23).

- Retirees signed up for continuing group health coverage knowing that a charge for the individual benefit would be imposed. (Order Granting Summ. J. R. pp. 23-24).

- No Retiree was required to continue with coverage under the group health plan after July 1, 2009. (Gilliam Affidavit R. p. 194) (Order Granting Summ. J. R. p. 24).

- Documents provided at retirement before July 2009 described the "current" policy of not charging for health insurance. (Sample retirement letters provided at R. pp. 215-218). The term "current" does not guarantee that the policies will stay the same "forever." (Cruz R. pp. 451-452; Gillam R. p. 570; Hill R. p. 578) (Order Granting Summ. J. R. p. 24).

The above findings of fact, supported by the evidence of record, establish that the Circuit Court was correct in holding that the handbooks and benefits booklets relied upon by Retirees

could not form the basis of an enforcable contract for free health insurance in perpetuity. (Order Granting Summ. J. R. pp. 24-25.[3]

Similarly, the Circuit Court properly found that verbal representations allegedly made by City employees to the Retirees regarding health insurance benefits are not sufficient to create a contract. The representations identified by Retirees are not binding or enforceable because these statements cannot restrict a city council from exercising its legislative authority.

As a matter of law, the actions or statements of a city manager or any other municipal employee in the council/manager form of government cannot bind the municipality. This issue was addressed by the South Carolina Supreme Court in Todd v. Smith, 305 S.C. 227, 407 S.E.2d 644 (1991). Affirming summary judgment in favor of the City of Myrtle Beach, the Court stated as follows:

> In the council/manager form of city government all legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor to have one vote. Section 5-13-30, Code of Laws of South Carolina, 1976. Under the form of government adopted by the City of Myrtle Beach, the city manager and the director of the Myrtle Beach Convention Center do not have the authority to set city policy, nor can their acts be said to represent official policy in view of the legislative authority granted to the municipal council.

Todd, 305 S.C. at 231, 407 S.E.2d at 646-647.

Subsequently, in rejecting a § 1983 action against the City of Columbia, the Supreme Court confirmed that, **as a matter of law**, only City Council can serve as a policymaker. Stanley

[3] Retirees contend that a statement in benefit booklets that insurance benefits "are not just fringe benefits" because the City pays the vast majority of the cost establishes a contractual right. This isolated statement creates no vested interest and merely accurately describes the continuing decision by City Council to absorb the "vast majority" of health costs for employees and retirees. Additionally, there is no evidence that the Retirees actually relied upon or changed their positions based upon this representation.

v. Kirkpatrick, 357 S.C. 169, 176, 592 S.E.2d 296, 299, n.6 (2004). As Todd and Stanley make clear, only City Council may make policy and only those policy decisions enacted by Council can bind the City. Accordingly, Retirees' purported entitlement to a lifetime of free health benefits based upon promises by City employees or individual representatives cannot be pursued under contract. See Berkeley Electric Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992) (municipality is not bound by promises of its employees which contravene a statute). Any reliance on promises of free lifetime health insurance was *per se* unreasonable because such promises would be illegal.

D. The Circuit Court's holding conforms to established law applied in this State and to similar circumstances in Florida.

As detailed above, South Carolina courts have often addressed the issue of whether an employee handbook has created a contract. See McMillan v. Pee Dee Regional Airport Comm'n, 705 F. Supp. 2d 496, 500-04 (D.S.C. 2010) (reviewing South Carolina cases). Retirees object that the claims in these cases primarily address alleged wrongful termination of employment and do not apply to actions following retirement. See, e.g., Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002); Paul H. Tobias, 3 Lit. Wrong. Discharge Claims App'x A (2010). This argument ignores the controlling authority of Alston that a municipal handbook did not create a contract for health benefits. Additionally, the precise claim brought by Retirees has been addressed by the court of a sister state.

Carlucci v. Demings, 31 So.3d 245 (Fla. Dist. Ct. App. 2010), involved an Orange County Sheriff's Office ("OCSO") retiree, Susan Taylor, who claimed to be entitled to a fully

paid lifetime health insurance policy. Officer Taylor based her argument on a "general order" issued by the OCSO Sheriff in 1998.[4] The 1998 order provided that a full-time OCSO employee who retired on or after May 1, 1998 and had 20 years of service could retain their Sheriff's Office health insurance at no cost. Taylor was qualified and retired under this order's provisions. In 2005, Orange County realized its budget could not withstand the expense and the Sheriff discontinued health insurance payments. Taylor then filed a class-action lawsuit to enforce the 1998 order. The court, however, held Taylor was not entitled to free lifetime health insurance through the OCSO. As in South Carolina, Florida law establishes "that policy statements contained in employment manuals do not give rise to enforceable contract rights . . . unless they contain specific language which expresses the parties' explicit mutual agreement." Furthermore, the court held that because the Sheriff could unilaterally alter general orders, they could not form the basis of a contract.

Like the general order in Carlucci, the handbooks issued to the Retirees established no permanent rights. As observed in Alston, even "mandatory" language in a municipal ordinance did not create vested contractual rights. Alston, 322 S.C. at 47, 471 S.E.2d at 111. Also like the general order in Carlucci, the City had the right to amend its handbooks and benefit booklets. Indeed, it did so several times during the Retirees' tenure as City employees. Finally, like Carlucci, the requirement that "general policy statements [in a handbook] must be definitive in

[4] The OCSO used general orders to provide employees with information and establish internal guidelines and procedures. The Sheriff could amend or rescind general orders at any time. Thus, they closely resemble City handbooks and employment manuals in general.

nature, promising specific treatment in specific situations" is lacking in the present case. See Hessenthaler, 365 S.C. 101, 616 S.E.2d 694. For these reasons, the Circuit Court correctly rejected Retirees' claims to permanent "frozen" health benefits.

II. The Circuit Court correctly held that Retirees could not establish a claim of promissory estoppel or equitable estoppel.

The Circuit Court held that there is no genuine issue of material fact concerning whether the Retirees could reasonably rely on the statements of City employees regarding free lifetime health insurance. (Order Granting Summ. J. R. p. 31) To establish a claim of promissory estoppel, Retirees must show: (1) a promise unambiguous in its terms; (2) reasonable reliance on the promise; (3) reliance is expected and foreseeable by the party who made the promise; and (4) injury in reliance on the promise. Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984). When granting summary judgment, the Circuit Court presumed as true Retirees' allegations that City employees verbally promised them free lifetime health insurance. Nevertheless, the Circuit Court held that Retirees could not establish reasonable reliance because none of these statements could bind a city council in the exercise of "governmental functions," including the terms and conditions of employment. (Order Granting Summ. J. R. p. 28); see Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995); Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 25 (1948).

As discussed above, the Circuit Court properly held that actions and statements of a city manager or any other municipal employee in the council/manager form of government cannot bind the municipality. Only City Council can serve as policy maker. Thus, any promises made

by the City Manager or other municipal employees for free lifetime health insurance were illegal and could not form the basis of a claim sounding in contract or promissory estoppel.

Furthermore, the Circuit Court properly concluded that Retirees could not establish reasonable reliance because they had notice that the terms of the group health plan could change. (Order Granting Summ. J. R. p. 30) Regardless of what they were told, Retirees agreed to be bound by the terms of the group health plan. (Membership Applications provided at R. pp. 208-214) Retirees were aware that the terms of the group health plan changed during their employment and could not reasonably assume that changes would cease to take place after they retired. In fact, the letter provided to retirees from the City's benefits administrator prior to July 1, 2009, made clear that payment of the retirees' portion of the health premium was "under the current policy." (R. pp. 215-218) Retirees signed acknowledgements during their employment that policies were subject to change. (See, e.g., Cruz R. pp. 671-679; Floyd R. pp. 683-691; Gillam R. pp. 693-696, 698-701; Hill R. pp. 706-707; Martin R. pp. 712-720; Morris R. pp. 721-727; Smith R. pp. 730-733, 735-739) This record establishes that Retireess cannot prove reasonable reliance, an essential element of promissory estoppel. Accordingly, the City is entitled to dismissal of this claim.

The Circuit Court also properly denied the Retirees' claim for equitable estoppel. (Order Granting Summ. J. R. pp. 31-34) The essential elements of equitable estoppel against a government agency are (1) lack of knowledge and means of knowledge of the truth as to the facts in question; (2) justifiable reliance on the government's conduct; and (3) a prejudicial change of position. See Am. Legion Post 15 v. Horry County, 381 S.C. 576, 584, 674 S.E.2d

181, 185 (Ct. App. 2009). Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests. Id. (citing Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (finding estoppel unavailable where a representative of the state's retirement system erroneously provided retirement benefit advice beyond the scope of his authority and in contradiction of law)). As the Supreme Court observed in Berkeley Electric Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992), parties are charged with knowledge of limiting legislation and cannot have "reasonably justified" reliance on actions inconsistent with such legislation. In reaching this conclusion, the Court stated:

> Restrictions on municipal power are created to protect citizens. Although it may seem harsh to deny Berkeley a remedy . . . it is better that Berkeley suffer from the mistake of Mount Pleasant than for this Court to adopt a rule which, through improper combination or collusion, could be detrimental or injurious to the public.

Id. at 210, 417 S.E.2d at 583.

Opposing the Circuit Court's order, Retirees argument consists of essentially two parts: 1) setting wages is an administrative act of the City Manager, and 2) the Manager could properly exercise his administrative ability and bind the City to contracts lasting longer than a council's term under the "business function" exception. (Br. of Appellant p. 29-40). Both of these arguments were properly rejected by the Circuit Court.

Retirees assert that a promise of compensation to employees is an "administrative" rather than "legislative" act. (Am. Compl. ¶'s 125-32, R. p. 95). On this basis, Retirees assert that "a city manager's promise of free single coverage health insurance for life is lawful." (Am. Compl. ¶ 130, R. p. 95) This argument fails for a number of reasons. First, the fixing of city employees'

compensation is a legislative act. 4 McQuillin Mun. Corp. § 13.03.15 (3d ed. 2010). Second, our Supreme Court acknowledged in Alston that municipal employee benefits are not vested and that any "promise" of such benefits, even by way of ordinance, is unenforceable. Third, no municipality, whether through council or manager, is authorized by the South Carolina Constitution to enter open-ended indebtedness as would be required to afford lifetime free health insurance. Fourth, under the council-manager form of government, it is the duty of the council to adopt the budget of the municipality. S.C. Code Ann. § 5-13-30(3). Finally, the City's manager may not expend more than $10,000 for any contract or service without prior approval of council. (See Ordinance Sec. 2-207, provided at R. p. 193).

As stated above, the Supreme Court has held in the Todd and Stanley decisions that only council is authorized by law to make policy. Specifically, the Court stated in Stanley that under the City of Columbia's council/manager form of government "all legislative powers of the municipality and the determination of all matters of policy [are] vested in the municipal council." 357 S.C. at 176, 592 S.E.2d at 299. It has been established for more than 100 years that an "administrative" act is enforceable only if supported by legislative authority. See Glenn v. County Comm'rs of York, 6 S.C. 412, 1873 WL 11018, at *21 (1873) ("administrative" act cannot create new rights or obligations but may be exercised only under legislative authority). In this context, any promises by a city manager, supervisor, or individual council member of lifetime free health insurance are not binding against the City. Accordingly, Retireess cannot establish the essential elements of equitable estoppel which, among other things, require lack of means of knowing the truth and justifiable reliance upon acts or representations.

Should the Court find even a scintilla of evidence to support justifiable reliance, Retirees still cannot establish a prejudicial change of position. Some Retirees testified that they may have pursued or accepted other employment if informed that they may be charged for health insurance in the future. Others testified that they may have postponed their retirement dates had they known that after July 1, 2009 they would be required to pay $33.18 or $67.13 per month, depending upon the group health plan selected. (Br. of Appellant pp. 3, 6-9; Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. R. pp. 157-159). This testimony hardly rises above mere speculation and falls far short of establishing a prejudicial change of position. See 7 S.C. Jur. Estoppel & Waiver § 14. In fact, each Retiree acknowledged receiving substantial increases in pay during their employment, significant promotions, personal gratification, and valuable pension benefits upon retirement. (Cruz R. pp. 433-442; Floyd R. pp. 474-474; Gillam R. pp. 553-556, 567-568; Hill R. pp. 575-576, 579-580, 583-586; Martin R. pp. 597-601; Morris R. pp. 623-625, 637-638; Smith R. pp. 644-648, 652, 656). Finally, each Retiree chose to continue to participate in the group plan like more than 500 of their fellow retirees. (Gilliam Affidavit ¶ 6, R. p. 195). The record establishes that Retirees cannot satisfy the prejudicial change of position element necessary to provide equitable estoppel.

III. The Circuit Court correctly held that a contract for free lifetime health insurance would violate public policy.

As a matter of law, South Carolina courts will not enforce a contract that violates public policy, statutory law, or constitutional provisions. See McConnel v. Kitchens, 20 S.C. 430 (1884); Batchelor v. Am. Health Ins. Co., 234 S.C. 103, 107 S.E.2d 36 (1959). It has been

established for more than fifty years that a council "has no authority to make . . . a contract extending beyond the terms of its office; that the acts of former councils relating to governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils." Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948); see also Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), aff'd., 478 S.E.2d 836 (1996) (re-affirming Newman's holding that a municipal council lacks the power to bind a successor council to a contract involving the terms and conditions of municipal employment). A lifetime health insurance program necessarily spans multiple four-year council terms and restricts subsequent elected officials in representing the interests of their constituents. Accordingly, no council in the 1980s, 1990s, or 2000s had or has the authority to provide such a benefit.

Had the City intended to create a lifetime contractual entitlement to free health insurance benefits and the authority to bind future councils, the contract would be void as a matter of constitutional law. The South Carolina Constitution, Article X, § 14, entitled "Bonded Indebtedness of Political Subdivisions" governs the extent to which municipalities and other political subdivisions may incur indebtedness. Subsection (2) of this article provides:

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

Any general obligation debt by a municipality must be incurred "upon such terms and conditions as the General Assembly shall prescribe by law" and must involve the delivery of "a schedule showing the date and the principal and interest payments to become due." See Art. X, § 14 (2) and (5); see also S.C. Code Ann. § § 11-15-10, et seq. ("Bonds of Political Subdivisions," noting the limitation of general obligation debt is eight percent of the total assessed value of the taxable property of a political subdivision). None of these procedural safeguards have been alleged and "no other" form of activity is an allowed method of incurring debt under the South Carolina Constitution. Accordingly, the City is constitutionally prohibited from undertaking an open-ended pledge of future payments on behalf of former employees.

IV. The Circuit Court correctly held that retirees had no contract right to compensation based on their at-will status.

The Circuit Court properly held that all employees of the City of Columbia are at-will and non-contractual. Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981); Bane v. City of Columbia, 480 F. Supp. 34 (D.S.C. 1979); (Order Granting Summ. J. p. 11-12). No Retiree has provided a "written agreement" signed by an authorized representative that establishes an unalterable, vested interest in free lifetime health insurance. An employer enjoys the right to make prospective changes in the conditions of employment at any time. Alston, 322 S.C. at 49, 471 S.E.2d at 179 (citing Cotter v. Desert Palace, Inc., 880 F.2d 1142, 1145 (9th Cir. 1989)). Moreover, any "contract" or promise of such coverage would be unenforceable under controlling statutory and constitutional provisions.

V. The Circuit Court correctly concluded that Retirees agreed to be bound to the terms of the contract between the City and BlueCross/Blue Shield of South Carolina.

The Circuit Court correctly held that Retirees agreed to join the group health plan entered into between the City and BCBS and could not now attempt to exclude themselves from its terms. (Order Granting Summ. J. R. p. 27)

Retirees signed standard applications for group health insurance coverage during employment and upon retirement. The standard application contains a certification which includes the following language:

> I understand that upon acceptance of this application by the insurance company, and so long as I meet the eligibility requirements of the contract with this employer, I will be provided with coverage as specified by the group health contract between my employer [City] and the Corporation [Blue Cross/Blue Shield]."

(Sample applications provided at R. pp. 208-214; see also Cruz R. pp. 680-682; Floyd R. pp. 685, 692; Gillam R. p. 697, 702; Hill R. pp. 703-705, 708-711; Morris R. pp. 728-729; Smith R. p. 734).

The group health plan in effect beginning July 1, 2009 provides all participants, including retirees, the option of selecting between a Plan A and Plan B. Under Plan A, all participants are charged a premium of $33.18 per month. Under Plan B, the premium is $63.17 per month. (Benefits summary provided at R. p. 207). Having agreed to accept coverage under the group health plan, Retirees cannot now seek exemption from their premium obligation.

VI. The doctrine of *stare decisis* supports the decision by Council to apply group health costs consistently to active employees and retirees.

In exercising its legislative authority to modify the City's group health insurance plan, Council was on notice of the Supreme Court's holding in Altson that health insurance is a "fringe benefit" subject to prospective modification. The doctrine of *stare decisis* exists to "insure a quality of justice which results from certainty and stability." State v. One Coin-Operated Video Game Mach., 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (quoting McCall v. Batson, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985)).

The Supreme Court's holding in Alston clearly established that city employees have no legitimate expectation that health benefits would continue in perpetuity. Furthermore, the Alston Court held that a city must have the ability to alter its benefits to meet changing circumstances. Alston, 322 S.C. at 48-49, 471 S.E.2d at 179. Where the Court has spoken plainly on an issue, the public should have confidence that the law is settled. Wehle v. S.C. Ret. Sys., 363 S.C. 394, 611 S.E.2d 240 (2005). For these reasons, the *stare decisis* doctrine provides an additional sustaining ground upon which to affirm the decision of the Circuit Court.

CONCLUSION

The evidence of record supports the Circuit Court's decision that the City of Columbia is entitled to summary judgment. Based on controlling precedent from the South Carolina Supreme Court, statutory law, and the state constitution, the Circuit Court correctly found that the employee handbooks, benefits booklets, and alleged verbal representations of City employees

and officials are legally insufficient to create a reasonable inference that a contract or promise existed between the Retirees and the City entitling them to free health care for life. Therefore, the order of the Circuit Court granting summary judgment in favor of the City should be AFFIRMED.

NICKLES & SOLOMON, LLC

BY: _____

W. Allen Nickles, III
Matthew A. Nickles
1519 Richland Street
Columbia, South Carolina 29201
(803)779-8080

Attorneys for Respondent

May 16, 2011
Columbia, South Carolina