THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2008-CP-40-5518

Les Springob, Paul Trussell, Barton Dumas,
Stanley Harpe and John Yenco, ... Plaintiffs,

Of Whom, Paul Trussell, Barton Dumas,
and John Yenco are, ... Appellants,

v.

The University of South Carolina and the
University of South Carolina Gamecock Club, ... Respondents.

PETITION FOR REHEARING

The Respondents University of South Carolina and the University of South Carolina Gamecock Club petition the South Carolina Supreme Court for a rehearing in part of the Court's recent decision in *Springob v. University of South Carolina*, Op. No. 27363 (S.C. S.Ct. filed March 12, 2014).

The grounds for the Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondents' petition for rehearing is based on the Court's decision in *Springob v. University of South Carolina*, Op. No. 27363 (S.C. S.Ct. filed March 12, 2014); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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March 27, 2014

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MEMORANDUM IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

The Respondents University of South Carolina and the University of South Carolina Gamecock Club (collectively referred to as "University") have petitioned this Court for a rehearing in part of its recent decision in *Springob v. University of*

South Carolina, Op. No. 27363 (S.C. S.Ct. filed March 12, 2014). The University maintains that the Court ruled correctly that the purported agreement between the parties is subject to the statute of frauds and was not capable of being performed within one year. The Court further ruled correctly that there is no signed writing sufficient to satisfy the statute of frauds. The University, however, seeks rehearing on the Court's ruling that "there is a genuine issue of material fact as to whether the University is estopped from asserting the statute of frauds as a defense." Slip Op. at 3. On that issue alone, the University respectfully submits that the following points were overlooked or misapprehended by this Court:

In addressing the application of an equitable estoppel exception to the statute of frauds, the Court correctly stated that "[b]efore the estoppel doctrine can be invoked, however, there must be competent proof of the existence of the oral contract." Slip Op. at 5, *citing Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 320 S.E.2d 720, 723 (Ct. App. 1984). This is a critical component to the estoppel exception because the statute of frauds is "designed to prevent frauds." *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558, 562 (1957). The estoppel exception recognizes that, where the existence of the oral contract and its essential terms are undisputed or uncontradicted, the statute of frauds defense should not be asserted as a mere legal technicality when the party asserting estoppel can show "a definite, substantial, detrimental change of position in reliance on the contract." Slip Op. at

5. However, the estoppel defense should not be utilized to circumvent the purpose of the statute of frauds where the existence of an oral contract and its essential terms are reasonably in dispute.[1] The allowance of parol evidence to establish the existence of an oral contract within the context of an estoppel exception circumvents the entire purpose of the statute of frauds. Hence, a prerequisite for the assertion of an estoppel exception is the existence of the oral contract and its essential terms.

In the case at bar, however, as this Court has already recognized, the existence of an oral contract and its essential terms beyond the initial five-year period remain in dispute. This Court found that "the brochure and subsequent correspondence do not establish the essential terms of the contract without resort to parol evidence." Slip. Op. at 5. This Court further recognized that, while the parties do not dispute the essential terms of the oral agreement for the initial five-year period, there is a dispute as to the existence of an agreement and its essential terms beyond five years. Slip Op. at 6. This Court, in fact, found that the Appellants are relying solely on parol evidence for its proof of an agreement beyond year five. *See*, Slip Op. at 6 ("Appellant's affidavits create a fact question as to the existence of an oral contract beyond year five").

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[1] It is well settled that the "[m]utual assent to all essential terms of the agreement is necessary to the formation of a contract." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399, 400, n.1 (Ct. App. 1994).

It is not, however, permissible for a party to rely on parol evidence to establish the essential terms of an oral contract that falls within the statute of frauds. If that were the law, there is no reason to have the statute of frauds. A party attempting to enforce an oral contract simply would have to offer parol evidence of the essential terms of the contract (regardless of whether those terms are disputed by the parties) and then prove detrimental reliance or a change in position. In effect, the statute of frauds would be rendered a nullity. With all due respect, it seems illogical on one hand to require a signed writing that establishes "the essential terms of the contract *without resort to parol evidence*"[2] to satisfy the statute of frauds, and yet on the other hand, to allow the plaintiff to present parol evidence to prove the existence of an oral contract and its essential terms within the guise of an estoppel exception to the statute of frauds. However, that is the net result of this Court's ruling.

In sum, this Court's decision changes the controlling law in South Carolina on the statute of frauds – a change that perhaps was not intended and warrants a rehearing. This Court has effectively ruled that a party may avoid the statute of frauds even where disputed parol evidence exists of an oral contract. According to this Court's reasoning, if the parol evidence taken in a light most favorable to the

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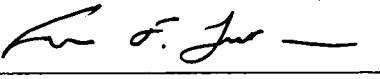
[2] *See*, Slip Op. at 4, *citing Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121, 122 (1975). (Emphasis added).

plaintiff supports the existence of an oral contract, that parol evidence is competent and may be admitted at trial to establish the oral contract and its essential terms as part of the estoppel exception to the statute of frauds. With due respect, the Court's error will allow any party claiming the existence of an oral contract to avoid the bar of the statute of frauds (1) by claiming that parol evidence supports the existence of the oral contract and (2) by then showing detrimental reliance or a change in position. If that is the law in South Carolina on the statute of frauds, there may as well be no statute of frauds. Any party claiming an oral contract to be performed beyond one year can simply offer parol evidence of that contract (without any evidence of a writing), and that becomes a question for the factfinder. In most instances, as in this case, that will make the existence of an oral contract a "swearing contest" for the factfinder to determine who is telling the truth, and that result will certainly not fulfill the purpose of the statute of frauds to prevent fraud. In effect, if the factfinder finds that the oral contract existed, the plaintiff asserting estoppel prevails, and if the factfinder finds that the oral contract did not exist, the defendant prevails. The statute of frauds is never an issue. It is rendered a nullity. Instead, the law should continue to hold that estoppel is not allowed as an exception to the statute of frauds except in cases where there is no reasonable or valid dispute as to the existence of an oral contract and its essential terms, as was the case in *Atlantic Wholesale Co., Inc. v. Solondz, supra.*

In the present case, as this Court recognized, there is a fact question in dispute as to the existence of an oral agreement and its essential terms beyond the initial five-year period. For that reason, the Appellant has not demonstrated the necessary prerequisite for claiming an equitable estoppel exception to the statute of frauds. The Court is respectfully requested to grant a rehearing on this basis and to affirm the entry of summary judgment for the University on the basis of the statute of frauds.

Respectfully requested,

DAVIDSON & LINDEMANN, P.A.

BY: 

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Respondents' Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 27th day of March 2014:

Joseph M. McCulloch, Jr., Esquire
Kathy Schillaci, Esquire
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