THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
Appellate Case No. 2013-002295

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

of which
George M. Lee, III, Mena H. Gardiner and John Love.. .....Appellants,

v.

The University of South Carolina & The University of
South Carolina Gamecock Club,..... .....Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. BECAUSE THE CONTRACT BETWEEN RESPONDENTS AND APPELLANTS CONTAINS LANGUAGE THAT IS AMBIGUOUS, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erred by holding that the "assigned reserved parking" term in the lifetime contract is unambiguous and granting the Respondents' motion for summary judgment as to the breach of contract claim. Respondents' argument on brief is similarly erroneous and summary judgment should be denied. The contract is ambiguous because "the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

A. The Term "Assigned Reserved Parking" is Capable of More than One Reasonable Interpretation Thus is Ambiguous.

The Appellants received "assigned reserved parking" on the apron of the stadium, which was the best available parking at the time these contracts were entered. This parking was to remain as their "assigned reserved parking" for their lifetime pursuant to the lifetime agreement. Even under the Respondents' view that they could provide parking anywhere and it would satisfy the term simply because they call it assigned and reserved, which Appellants refute, their actions are still a breach of the agreement because they are trying to alter the parking that was already provided. In other words, the parking places on the apron of the stadium were "assigned" and "reserved" for Appellants and nothing in the contract provides Respondents the ability to issue different parking or subject the Appellants to an annual priority system. There is an ocean of

difference between giving "assigned reserved parking" for a year on an annual basis and giving "assigned reserved parking" for a lifetime.[1] Respondents are committing the very sin they so protest—allowing silence to create an ambiguity. The Respondents own arguments tend to establish that there is an ambiguity in the contract even under their own reasoning.

The Respondents argue that the contract does not mention priority thus it should not be considered, yet they admit both in their brief and in the affidavit of Marcy Girton that they subjected Plaintiffs to the priority system. This in and of itself is consideration of alleged facts outside of the four corners of the contract, thus Plaintiff should similarly be allowed to use extrinsic evidence; which would show that an ambiguity exists and there are factual issues inappropriate for summary judgment. The lack of a term for priority simply bolsters the fact that the contract is ambiguous.[2] The University, as drafter and master of the contract, could have put language in indicating the priority or a clause allowing the University to change the parking, but they did not.

Respondents' try to draw a parallel between the football and basketball parking which only highlights the ambiguity. The first several items in the Exhibit A are relating to football games and the last few are relating to basketball. Adding "at Coliseum" simply indicates that

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1 Non-lifetime members renew annually thus it makes sense that they may be under the priority system before each season and points may vary each year based on their donations. This is the exact type of situation that the lifetime members were contracting to avoid. It is clear from the contract that the purpose of the lifetime membership was to avoid having to spend more and more money each year to compete with other donors for priority. Instead, they paid a large sum to ensure their specific parking places and priorities; which is clear from the contract itself.

2 The ticket terms all have language indicating some type of priority, because priority is what the lifetime members were purchasing as to tickets. However, a specific parking place was to be "assigned" and "reserved" for the lifetime of the contract thus no need for a priority term. However, the University contends that the parking on the apron of the stadium was removed for safety concerns, thus the lifetime members should receive parking places that are equivalent.

particular term relates to basketball. There is little doubt that the contract is poorly constructed and unclear, which creates ambiguity. Further, the basketball parking term includes an exception of "(if available)" while the football parking term does not. If the parties intended for the football parking to be changed after the contract was entered and parking initially assigned and reserved, then they could have added "(if available)." On the face of the contract itself when looking at the entirety of the contract, it is clear that Respondents' do not have this right and they cannot now use silence to read such a right into the contract. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 805 (Ct. App. 2011). Based on the foregoing reasons, the trial court erred by granting summary judgment.

B. The "Red Herring" Argument.

The Respondents take issue that Appellants made alternative arguments, although it is unclear as to what effect, if any, they are asserting this has to support summary judgment. Quite honestly, this argument is nothing more than a red herring to try and divert the Court's attention from the ambiguous contract. While it is true that Appellants took the position in their motion for summary judgment that the contract was unambiguous in that it clearly gives them a permanent parking place and/or top priority as lifetime members, this is the polar opposite of what Respondents assert. It is mind boggling to understand their position that the parties taking two completely opposite positions that their interpretation are unambiguous somehow equates to the parties agreeing.[3] If anything, this exemplifies that the terms are susceptible to more than one interpretation. The Appellants did not view the contract as being "reasonably susceptible of

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The only equivalent is the best parking outside the apron for the duration of the contract.

3 As the Respondents themselves noted in their brief, ambiguity is a question of law for the court and they look at the contract itself to make this determination. *See ESA Service, LLC v. S.C.*

more than one interpretation" because they do not view the Respondents' interpretation as one that could be reasonably drawn from the contractual language. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302-03. However, Appellants noted in their previous arguments and for purposes of this appeal, but without agreeing, that assuming the Respondents' interpretation could be reasonably drawn, the contract is ambiguous since the Appellants' interpretation could equally be reasonably drawn. This argument serves no purpose herein or on summary judgment.

C. <u>The Timmons Case.</u>

The Appellants disagree with Respondents' assertion, set forth in footnote five of their brief, that the *Timmons v. The University of South Carolina, et. al.*, Civil Action 2012-CP-40-3931, is not constructive.

The Respondent University is the same party that is also in the *Timmons* case and the plaintiff in that matter is also a lifetime member with a lifetime contract containing an Exhibit A to said contract with the identical "assigned reserved parking" term set forth therein. (*See* Timmons Docs-Memorandum in Support of Summary Judgment, pp. 1-6).4 The University of South Carolina, in that action, filed a motion for summary judgment as to the various claims made by the Timmons, which included the movement of their "assigned reserved parking" place from the apron of the stadium just like in the present appeal. *Id.* In fact, in Section I(D)(1) of the supporting memorandum, the University argues that the term "assigned reserved parking" is "unambiguous" and does not entitle the Timmons to a "specific parking space or parking on the

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Dept. of Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (Ct. App. 2011).

4 Appellants have not included the exhibits to the memorandum on the record as it is rather voluminous (approximately an additional 117 pages). The exhibits to the opposition

apron of the Stadium...[n]or do the contracts make any statement about Timmons' priority for purposes of the assignment of parking spaces." (Timmons Docs-Memorandum in Support of Summary Judgment, pp. 11-12). The Timmons responded in turn by opposing the language as ambiguous. (Timmons Docs-Memorandum in Opposition to Summary Judgment). On July 19, 2013, the Honorable G. Thomas Cooper, Jr. denied the motion for summary judgment on the basis that there are issues of fact. (Timmons Docs-Order Denying Summary Judgment, filed July 19, 2013). On August 9, 2013, less than one month after the Timmons Order was filed, the parties in the present appeal argued cross motions for summary judgment before the Honorable G. Thomas Cooper, Jr.; wherein Respondents' attorney acknowledged that he was recently before Judge Cooper for the Timmons case but that it involved different issues. (Transcript of Hearing on August 9, 2013, pp. 4-6). The Respondents attempt to distinguish the cases is inaccurate and summary judgment should have been denied as to the Respondents motion in the present action just as it was in the Timmons case.

Undersigned counsel has all due respect for the Honorable Judge Cooper, who has always been and continues to be an excellent and fair judge to practice before. The Appellants simply believe that the fact the same reasonable judge draws two different rulings on the same term evidences its ambiguous nature and supports a denial of summary judgment. Moreover, the Respondents should be bound by the Timmons ruling as they cite to and distinguish the case within oral arguments for summary judgment in this matter, yet the cases both include the same exact issue as to breach of the "assigned reserved parking" term by moving both sets of plaintiffs off the apron of the stadium in 2012. Accordingly, summary judgment should have been denied.

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memorandum are likewise left off the record.

II. BECAUSE EXTRINSIC EVIDENCE WAS IMPROPERLY EXCLUDED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The exclusion of extrinsic evidence is clear error and should be reversed. As argued in Appellants Brief in this appeal, extrinsic or parol evidence was improperly excluded by the trial court. The contractual language is ambiguous thus evidence should be admitted to show intent. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 (citing *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878). Because the contract is ambiguous, the Appellants were improperly excluded from providing extrinsic evidence.

The Respondents additionally assert that all discussions prior to the contract are merged into the contract. There is no merger clause in the contract, and the promises made to the Appellants are valid evidence of the intent of the parties and not to alter the terms of the agreement.

III. BECAUSE THE PARTIES' CONDUCT WAS IMPROPERLY EXCLUDED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erroneously held that the parties' conduct or course of dealing after the execution of the contract could not be considered to determine their intent as the contract is unambiguous The conduct can be used to determine intent and is not being used to contradict or vary a clear and unambiguous term of the contract. *See S.C. Dep't of Natural Res.*, 345 S.C. at 623, 550 S.E.2d at 303.

The contract is also missing key terms needed for the Respondents position to make any sense, such as if the assigned reserved parking can be altered, when can it be altered, can priority

be imposed on the Appellants, or the process for reassignment. Custom usage and practice can be used to interpret contracts. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 285, 672 S.E.2d 816, 820-21 (Ct. App. 2009).

Contrary to Respondents position that the fact Appellants were supplied the same parking spot on the apron for years is irrelevant, "[t]he practical interpretation of the contract by the parties to it for any considerable period of time before it becomes the subject of controversy is entitled to great, if not controlling, influence." *Farr v. Duke Power Co.*, 265 S.C. 356, 363, 218 S.E.2d 431, 434 (1975). The potential reasons, other than contractual duty, for not changing the parking places for over two decades that Respondents assert in their brief are improbably and unreasonable. It is difficult to imagine the University maintaining the same premiere parking spaces for so long that are on the apron of the stadium itself for mere administrative convenience when such parking would attract big donations from lifetime members. Again, interpretation is by a "reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am.Jur.2d *Contracts* § 338, at 345 (1991)). Based on the foregoing reasons, summary judgment should have been denied.

IV. BECAUSE EQUITABLE ESTOPPEL AND COLLATERAL ESTOPPEL WERE INCORRECTLY REJECTED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erroneously rejected the equitable estoppel and collateral estoppel arguments made by Appellants.

John Love made a contribution in 1986 of $10,000.00 plus $1,000.00 a year to get premium parking near the end zone along with Full Scholarship status, which was promised to him by Chip Clary. (Love Dep., pp. 11-30 & Exhibits). In 1990, he went from good parking to excellent parking by becoming a lifetime member through the life insurance policy program. (Love Dep., p. 24). In fact, locking in priority and location for the parking for a lifetime was a major reason for this decision as himself, Harry Gregory, Jr. and Harry Gregory, Sr. all got parking place next to each other so close to the stadium that the only other parking place was assigned to the athletic director at the time. (Love Dep., pp. 15-20). Mr. Love had a conversation with the Gamecock Club, who assured them of this parking at the time. (Love Dep., pp. 27-28). He maintained this parking place until the 2012 move. (Love Dep., p. 19). Clearly Mr. Love reasonably relied on the assurances by Chip Clary in 1986 and the Gamecock club in 1990 and was justified in doing so, and as a result suffered when they moved the parking. The University had knowledge of the assurances being made and relied upon, as they were made to secure large donations.

Similarly, Stewart Hope was made specific assurances that he would have top priority on parking. (Hope Dep., pp. 17-20). George Lee also relied upon assurance by the Gamecock Club and/or University that he had specific parking places for the lifetime of the contract on the apron of the stadium and held the highest priority on parking and tickets as lifetime members. (Affidavit of George Lee; and Lee Dep., pp. 41-43).

The University not only expected the Appellants to rely upon these assurances, they knew they did because the assurances were made to secure the donations made pursuant to the lifetime contracts. *See Springob v. University of South Carolina et. al.*, App. Case No. 2012-206887, Op.

No. 27363 (S.C. March 12, 2014). The trial court erred in granting summary judgment, as there are material issues of fact relating to equitable estoppel.

The Respondents should also be collaterally estopped from asserting that the term "assigned reserved parking" is not ambiguous. Respondents assert that the question of whether "assigned reserved parking" was ambiguous was never litigated in *Rosen*. This is incorrect, as the term "assigned reserved parking" in exhibit a to a lifetime contract just like those of Appellants was the very term being litigated. *See Harvey J. Rosen, Joseph B. Rosen and Rebecca Nurick v. The University of South Carolina and The University of South Carolina Gamecock Club*, Op. No. 2011-UP-331 (S.C.CT.APP. filed June 27, 2011)(unpublished). The Court found that this exact three-word term in the same Exhibit A to a Lifetime Membership Contract was ambiguous. *Id.* Therefore, to the extent the Respondents assert a position contrary to the Court of Appeals holding in that case they are collaterally estopped from doing so.[5] *See Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (S.C. 2009) ("Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.").

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants respectfully request that the Court reverse the judgment of the trial court and remand for a new trial.

(Signature Block on Following Page.)

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5 Respondents again raise the red herring argument, which fails for the reasons set forth in Section I(B), *supra*.

March 27, 2014

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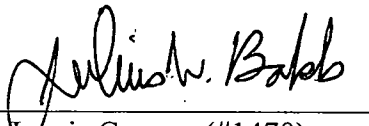
BY: 

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