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,

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

v.

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

RETURN TO RESPONDENTS' PETITION FOR RE-HEARING AND MEMORANDUM IN SUPPORT

Appellants file this Return to Respondents' Petition for Rehearing and request that this Court deny the Petition.

While Respondents argue that this Court's decision "changes the controlling law in South Carolina on the statute of frauds," it is *Respondents* who seek to change the law on estoppel in South Carolina. Essentially, Respondents are asking this Court to declare the well-founded fairness exception of "estoppel" a nullity.

As this Court correctly observed:

> [T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds. *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984)(citing *Florence Printing Co. v. Parnell*, 178 S.C. 119, 127, 182 S.E. 313, 316 (1935)). The party asserting estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. *Id.* It is not sufficient to show merely that he has lost an expected benefit under the contract. *Id.* Before the estoppel doctrine can be invoked, however, there must be competent proof of the existence of the oral contract. *Alt. Wholesale Co. v. Solondz*, 283 S.C. 36, 40, 320 S.E.2d 720, 723 (Ct. App. 1984)(quotations and citations omitted).

Slip Op. at 5.

As this Court correctly found:

> Taking the evidence in the light most favorable to the Appellants, we find there is proof of an oral contract between the parties. Certainly, it is undisputed that there is an agreement for performance over the initial five-year period, and the University so concedes. Appellants' affidavits create a fact question as to the existence of an oral contract beyond year five. Indeed, Appellants' affidavits state they were induced to purchase the special seating under an oral promise that they would not have to pay a fee separate from the Gamecock Club membership and the face value of season tickets beyond year five. This is sufficient to create an issue of material fact as to whether Appellants suffered a definite, substantial, and detrimental change in reliance on these purported oral representations. Thus, we find that the trial court erred in granting summary judgment in favor of the University.

Slip Op. at 6.

Importantly, **Appellants' sworn affidavits remain undisputed and therefore unchallenged** and provide competent proof of the existence of the oral contract. Chris Massaro – Respondents' only witness to the agreements - admitted at his deposition that he cannot recall what he told Appellants. Given

the unique nature of the seats, there is no remedy except enforcement of the bargain adequate to restore Appellants to their former positions. The undisputed affidavits present more than a scintilla of evidence to overcome summary judgment. "The non-moving party is only required to submit a mere scintilla in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), cited Slip. Op. at 3.

As an additional sustaining ground, the doctrine of part performance requires that this matter be remanded for trial. "The theory of the equitable doctrine of part performance . . . is that **a 'court of equity will not permit a statute designed to prevent frauds to be used as an instrument to effect a fraud.**" Aust v. Beard, 230 S.C. 515, 522-523, 96 S.E.2d 558, 562 (1957)(emphasis added); *see also* Wright v. Trask, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997). A court may compel specific performance of an oral contract where: (1) there is clear evidence of an oral contract; (2) the contract had been partially executed; and (3) the party who requested performance had completed or was willing to complete his part of the oral contract. Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803, 811 (S.C.App. 2009).

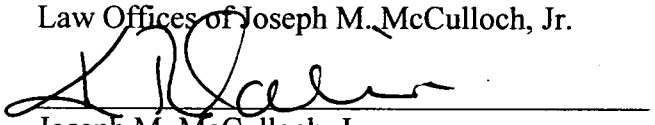
Respondents instigated the offer, chose to make it partially in writing and chose to finalize the deal without a sufficient written memorialization [although Appellants asserted otherwise but respect the Supreme Court's holding in this regard]. Respondents have not disputed the fact that Appellants made all payments for the five years including seat payments, Gamecock Club membership payments and season ticket payments which is the sum total of performance by

Appellants under the agreements shown to exist by Appellants. Appellants submitted sworn Affidavits establishing the agreement between the parties which Affidavits remain unchallenged by Respondents' only witness to these transactions, Chris Massaro, Respondents' authorized offeror.

Based on the above, Respondents' Petition for Rehearing must be DENIED.

Respectfully Submitted,

Law Offices of Joseph M. McCulloch, Jr.



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April 7, 2014

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served the **Return to Respondents' Petition for Rehearing and Memorandum in Support** on Andrew F. Lindemann, Esq. and Will Davidson by prepaid first-class United States Mail with an envelope addressed to: Andrew F. Lindemann, Esq., Will Davidson, Esq., Davidson & Lindemann, 1611 Devonshire Drive, Post Office Box 8568, Columbia, SC 29202 this **7th day of April, 2014.**

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