THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 17 2014
S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2009-CP-40-0189

George M. Lee, III, and Elizabeth Sims, ... Plaintiffs,

Of Whom, George M. Lee, III is the, ... Appellant,

v.

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 of the Court's recent decision in *Lee v. University of South Carolina*, Op. No. 27372 (S.C. S.Ct. filed April 2, 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 *Lee v. University of South Carolina*, Op. No. 27372 (S.C. S.Ct. filed April 2, 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: _____

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

April 17, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 17 2014
S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2009-CP-40-0189

George M. Lee, III, and Elizabeth Sims, ... Plaintiffs,

Of Whom, George M. Lee, III is the, ... Appellant,

v.

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

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 of its recent decision in *Lee v. University of South Carolina*, Op. No. 27372 (S.C. S.Ct. filed April 2, 2014). The University

respectfully submits that the following points were overlooked or misapprehended by the majority of this Court:

I.

The Appellant George M. Lee, III entered into a Memorandum of Agreement with the Gamecock Club on March 9, 1990, which provided that as a Lifetime Full Scholarship member of the Gamecock Club, Lee would "have the opportunity to purchase tickets entitled to the Gamecock Level or membership presently held." (R. 101). This case turns on the meaning of the language "opportunity to purchase tickets."

After a full bench trial, the Circuit Court determined that the language was unambiguous. Judge DeAndrea Benjamin ruled that the "opportunity to purchase tickets" language was intended by the parties to require Lee, like other Gamecock Club members, to pay the required fees and costs associated with the purchase of season tickets to certain sporting events. Lee was only entitled to "the opportunity to purchase tickets," and with the initiation of the YES program, that opportunity has not been denied to Lee.

The majority of the Court agreed with Judge Benjamin that the language is unambiguous. Slip Op. at 5. However, the majority found "legal error" in Judge Benjamin's interpretation. *Id.* In effect, the majority disagrees with Judge Benjamin's interpretation. The majority concluded that the "opportunity to

purchase tickets" requires the payment of the ticket price only and not any additional fees, such as payment of the seat license fee.

In his dissent, Justice Pleicones agreed with Judge Benjamin. He "found that the trial court was correct in its construction of this contract." Slip Op. at 7. He agreed that Lee had still been provided the "opportunity to purchase tickets" when the University required payment of the seat license fee. *Id.* Thus, Justice Pleicones' interpretation of the contract is at odds with that of the majority.

While all six judges who have construed the "opportunity to purchase tickets" language have concluded that it is unambiguous, all six judges do not agree on the meaning of that language. Four justices of this Court have interpreted the language one way (in favor of the Appellant Lee), and two judges (Pleicones and Benjamin) have interpreted the same language a different way (in favor of the University).

At the very least, this logically compels the conclusion that *the operative language is indeed ambiguous*. This Court has held that "[a]n ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner." *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742, 745 (1997). The present scenario meets that very definition. The six judges who have studied and considered the "opportunity to purchase tickets" language cannot agree on its meaning. That includes the members of the State's highest court. This Court could not

unanimously agree on the meaning of this language. With all due respect, that renders the language ambiguous. Applying the language from *Penton*, the Court has shown that the "opportunity to purchase tickets" language is "capable of being understood in more ways than just one."[1]

By way of analogy, the United States Supreme Court has held in the context of a qualified immunity analysis that a difference in opinion among judges on a constitutional question is indicative that the operative law is not clearly established. *See*, *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"). *See also*, *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("[s]ince qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, it surely must be appropriate when reasonable jurists can do so"). The same is true in the context of contract interpretation. Where judges disagree on the construction to be given to the operative contract language, then it is fair to conclude that the language is ambiguous.

---

[1] Stated differently, the Court of Appeals has explained that "[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement; and (2) is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." *Laser Supply & Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139, 144 (Ct. App. 2009). Obviously, the six judges who have opined on the meaning of the "opportunity to purchase tickets" language are reasonably intelligent persons and no doubt the judges have viewed the language objectively. And those judges have reached two differing interpretations of the language. That leads to the obvious conclusion that the language is legally ambiguous.

Therefore, while all of the judges in this litigation have concluded that the "opportunity to purchase tickets" language is unambiguous and that their construction of the language is correct, what has been overlooked is that the reasonable disagreement between the judges makes it evident that the language is indeed ambiguous. Therefore, on rehearing, the University respectfully requests that the Court, at a minimum, conclude that the "opportunity to purchase tickets" language is ambiguous and subject to clarification by reference to parol evidence.

II.

If the Court concludes – as it logically should – that the "opportunity to purchase tickets" language is ambiguous, then the Court should vacate its remand for entry of judgment for Lee. Then, the Court has two options: (1) remand for a new trial or (2) give effect to Judge Benjamin's alternative ruling. The University suggests that the second option is most appropriate in light of the controlling standard of review.

Judge Benjamin concludes in her order that, even if she were to find the Agreement to be ambiguous and were to consider the extrinsic evidence offered by Lee, her ultimate decision would not change. (R. 4). She would still conclude that the intent of the parties required Lee to pay all fees and costs required of other Gamecock Club members, including the seat license fee, in order to purchase season tickets for sporting events. In *Middleton v. Eubank*, 388 S.C. 8, 694 S.E.2d 31 (Ct. App. 2010), the Court of Appeals addressed the applicable standard of

review where a contract is deemed ambiguous. The Court explained that "if a contract is deemed ambiguous, the fact finder must ascertain the parties' intentions from the evidence presented." 694 S.E.2d at 34. Furthermore, "[i]n an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless there is no evidence that reasonably supports the court's findings." *Id.* Under the applicable standard of review, Judge Benjamin's alternative ruling is unassailable absent an error of law, which has not been shown. Therefore, the Court is requested on rehearing to affirm Judge Benjamin's alternative ruling below, or at a minimum, remand for a new trial.

III.

The majority of this Court determined that "the clear and unambiguous language of the Agreement prohibits the University from imposing additional fees that Lee must pay before being allowed the opportunity to purchase tickets." Slip Op. at 5. With all due respect, there is no such prohibition in the Agreement. The majority fails to cite to the specific language that it relies on in making that statement. In his dissent, Justice Pleicones made this very point, and yet the majority still did not cite the language. Slip Op. at 7. As the majority writes, "[c]ourts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." Slip Op. at 5. Yet, this is precisely what the majority has done – added a provision to the Agreement that denies the University the ability to charge an additional fee for the tickets.

IV.

The majority has also overlooked or misapprehended Lee's benefit of the bargain. The majority writes: "Were we to accept the University's view of the Agreement, it would mean Lee received little or nothing in the bargain." Slip Op. at 5. With all due respect, that is incorrect and disregards clear evidence in the record and the trial judge's factual findings. As Judge Benjamin explained, Lee received the benefit of his bargain. In addition to receiving the opportunity to purchase tickets, Lee "was able to receive the benefits of a higher level of membership in the Gamecock Club and not have to pay Gamecock Club dues yearly." (R. 3). Certainly, being exempt from the payment of yearly dues alone is much more substantial than "little or nothing," as the majority unfairly describes it. In fact, the evidence reflects that Lee continues to save $1,000 per year on the dues that he would otherwise have to pay as a Full Scholarship member. (R. 53-54). In addition, Lee has the benefit of the highest priority in seat selection. (R. 88, 130). Further, Lee has the ability to name an heir who will remain a member at the Lifetime Scholarship level upon his death. (R. 102).

With all due respect, the majority disregarded the standard of review and substituted its own view of the evidence on this factual finding. Judge Benjamin's finding that Lee received the benefit of his bargain is supported by sufficient evidence in the record and should not have been overturned. In short, as Justice Pleicones points out and as Lee conceded, Lee is a Lifetime Scholarship member

who receives all of the benefits of that membership level, and he has been provided the opportunity to purchase tickets in the same manner and at the same cost as other Gamecock Club members at his level. Lee has received the benefit of his bargain – a critical point which the majority respectfully has overlooked.

CONCLUSION

Based on the foregoing discussion, the Respondents University of South Carolina and the University of South Carolina Gamecock Club respectfully request that the Court rehear its decision in order and affirm the entry of judgment in their favor on Lee's declaratory judgment/breach of contract claim. In the alternative, the Court is requested to remand for a new trial.

Respectfully requested,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

April 17, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2009-CP-40-0189

George M. Lee, III, and Elizabeth Sims, ... Plaintiffs,

Of Whom, George M. Lee, III is the, ... Appellant,

v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys 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 copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 17th day of April 2014:

Mark W. Hardee, Esquire
The Hardee Law Firm
2301 Devine Street
Columbia, South Carolina 29205