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.

APPELLANTS' PETITION FOR REHEARING

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STATEMENT OF THE CASE

On June 7, 2012, Linda Rodarte, J. Perry Kimball, George M. Lee, Mena H. Gardiner, and Mitchell Bailey filed an action against the Respondents concerning a breach of their lifetime contract regarding their football parking spaces near Williams Brice Stadium. On July 6, 2012, the plaintiffs amended their Complaint and John Love was substituted for Mitchell Bailey. (R., p. 191).[1] Both the plaintiffs and respondents filed motions for summary judgment with the Court and both provided legal memoranda in support and opposition. (R., pp. 81 - 185).

On August 27, 2013, Judge Cooper filed an Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (R. p. 10). Plaintiff filed a Motion for Reconsideration (R. p. 6), which was denied by Judge Cooper by Order dated September 17, 2013. (R. p. 4). Plaintiff filed a timely notice of appeal.

The Appellate Court affirmed the circuit court's findings as to the ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution of the contract, and collateral estoppel. However, the Appellate Court reversed and remanded the circuit court's decision as to equitable estoppel. Appellants file this Petition for Rehearing as to the Appellate Court's affirmation of the circuit court's findings as to the ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution of the contract, and collateral estoppel.

[1] Linda Rodarte voluntarily dismissed her claims on June 7, 2013 and she is no longer a party. Perry Kimball has resolved his issues with the Respondents and is not an Appellant to this appeal.

STATEMENT OF FACTS

The University of South Carolina ("USC") is a state university with an athletics program including football. "The Gamecock Club is an organization which boosts and promotes USC athletics and with whom USC has partnered in the promotion of its programs and in the awarding of privileges in attendance at athletic events on USC property based upon financial contributions made by supporters of athletics." (R. p. 191). In the mid-1980s, the Lifetime Membership program was established by the Gamecock Club. Certain rights and privileges regarding USC athletics were offered to participating donors ("Lifetime Members")[2] in exchange for certain consideration. The terms of the Lifetime Membership agreement was memorialized in a written contract ("Lifetime Membership contract" or the "contract"). The Appellants, George M. Lee, Mena H. Gardiner and John Love, are Lifetime Members of the Gamecock Club. (R., pp. 91 - 104).

Each contract included an attached "Exhibit A," which stated that, among other benefits, each Lifetime Full Scholarship member and Lifetime Scholarship (Silver Spur) member would receive "assigned reserved parking." (R., pp. 91 - 104). Stuart Hope originally entered his Lifetime Contract in 1986 and the rights and privileges to the contract passed to his named beneficiary, Mena Gardiner, at the time of his death. Marion "Bubba" Hope, son of Stuart Hope, was present during the negotiations his father had with the Gamecock Club concerning the Lifetime Membership Contract. (R. pp. 218-225). The Hopes were assured by representatives of the Respondents that they would have top priority to the items set forth in Exhibit A, including "assigned reserved parking" for

[2] There are two levels within the Lifetime Membership—Lifetime Silver Spur Memberships and Lifetime Scholarship Memberships. Lifetime Silver Spur Memberships paid $40,000.00 or more while Lifetime Scholarship Memberships paid $25,000.00-$40,000.00 in consideration. Within the class of Lifetime Members, the Lifetime Silver Spur Members hold a higher priority on

football games. *Id.* John Love executed his contract in 1990, and he was made assurances of his specific parking location as part of his Lifetime contract. (R. pp. 235-269). Mr. Love had previously donated $10,000.00 to have a premium parking space for football games, and this parking space then improved when he became a Lifetime member. *Id.* In May of 1990, George M. Lee executed his Lifetime contract, wherein he was given a specific parking place in exchange for a life insurance policy and was given assurances that he would be given excellent parking on the apron of the stadium. (R. pp. 294-295, 226-230).

Appellants' contracts were honored, collectively for decades, until the Summer of 2012. (R. pp. 294-295, ¶ 5). Pursuant to their contracts, Appellants were given priority in parking assignments ahead of non-lifetime donors. (*Id.* at ¶¶ 5-6). However, through the recent actions taken by the Respondents, the Appellants' priority in parking was rescinded by the Respondents and numerous non-lifetime donors have been given priority ahead of each Appellant. (*Id.* at ¶¶ 6-7).

As referenced in the Statement of the Case on Appeal, Harry Gregory provided numerous documents, including an email dated March 26, 2012, a flyer for the Lifetime Membership, a letter from Chris Wyrick (then Executive Director of the Gamecock Club) dated March 5, 2008, and Gamecock Club Board of Directors Meeting Minutes from May 18, 2007. (R. pp. 299 -302). These documents show that Lifetime Members were considered to have the highest priority in all matters including priority.

The aforementioned actions of the Respondents amounted to a breach of the Appellants' respective contracts and this action followed.

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certain rights and privileges than the Lifetime Scholarship Members.

ARGUMENT[3]

I. THE APPELLATE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION THAT THE CONTRACT IS UNAMBIGUOUS.

Because the Appellate Court misapprehended the applicability of the holding in *Lee v. the Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) and overlooked the arguments raised in Appellants' briefs, the Appellant Court erred when it affirmed the trial court's holding that the contract between the parties is unambiguous.

Under the doctrine of issue preclusion, a valid and final judgment is conclusive in a subsequent action if the issue of fact or law was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carman v. S.C. Alcoholic Beverage Control Com'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994) (citing *S.C. Prop. And Casualty Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991)). The Appellate Court based its decision to affirm the trial court's decision on *Lee v. the Univ. of S.C.*, in which the Court held that a lifetime contract similar to Appellants' contracts was unambiguous. *Lee v. the Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014).

However, in contrast to the term at issue in the Appellants' case, the issue in *Lee* surrounded the term in the Lifetime contract that allowed Gamecock Club members to "have the opportunity to purchase tickets entitled to the Gamecock Level or membership presently held." *Id.* at 514, 757 S.E.2d at 396. Because the issue in *Lee* surrounded the opportunity to purchase tickets terms of the contract, the determination of the ambiguity of the other terms in the contract, including the term at issue in the Appellants' case, "assigned reserved parking," was not necessary to support the holding

[3] The Appellants are in agreement with the Appellate Court's reversal on the issue of Equitable

in *Lee*. The outcome in *Lee* would have been the same regardless of the determination of the ambiguity of the term, "assigned reserved parking." Furthermore, because the determination of the ambiguity of the term, "assigned reserved parking," was not necessary to the holding, the issue did not receive the attention it deserved from either party or the Court, thus the issue was not actually litigated. Therefore, the Appellate Court should not have affirmed the trial court's finding that the term is unambiguous based on the holding in *Lee*.

In addition, the Appellate Court erred when it affirmed the trial court's holding, because, although the Court in *Lee* ruled that the contract is unambiguous as to the terms concerning the opportunity to purchase tickets, the Court in *Lee* never addressed whether the term, "assigned reserved parking," is unambiguous in favor of the Appellants' or the Respondents' meaning of the term. Once a court finds that a contract is unambiguous, the court's function is to interpret the agreement's lawful meaning and the intent of the parties as found within the agreement. *Miles v. Miles*, 393 S.C. 111, 116, 711 S.E.2d 880, 883 (2011) (citing *Smith-Cooper v. Cooper,* 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001)). The court in *Lee* only addressed the meaning of the term that gave Gamecock Club members the opportunity to purchase tickets, not the term that gave Gamecock Club members "assigned reserved parking." *Lee* at 518, 757 S.E.2d at 398. Even assuming, *in arguendo*, that the court in *Lee* may have interpreted the "assigned reserved parking" term to be unambiguous, the court may have interpreted the plain language of the contract in the same sense that the Appellants interpreted it instead of the Respondent's interpretation. The Appellants' final briefs set forth the arguments as to their interpretation, which the Appellate Court should have considered. Therefore, the judgment in *Lee* does not support the trial court's decision to

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Estoppel and are not seeking rehearing on this issue.

grant the motion for summary judgment, and the Appellate Court should have reversed and remanded the trial court's decision to determine the meaning of the term.

II. BECAUSE THE APPELLATE COURT ERRED WHEN IT AFFIRMED THAT THE CONTRACT IS UNAMBIGUOUS, THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EXTRINSIC EVIDENCE.

Because the Appellate Court erred when it affirmed the trial court's decision that the contract is unambiguous, the Appellate Court also erred when it affirmed the trial court's decision to exclude extrinsic evidence. "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. 617, 623, 550 S.E.2d 299, 303 (2001) (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)). Because the contract is ambiguous, extrinsic evidence should have been admitted to show the intent of the parties. Therefore, the Appellate Court erred when it affirmed the trial court's decision to exclude extrinsic evidence and overlooked the Appellants' arguments.

III. BECAUSE THE APPELLATE COURT ERRED WHEN IT FOUND AFFIRMED THAT THE CONTRACT IS UNAMBIGUOUS, THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE THE PARTIES' CONDUCT.

Because the Appellate Court erred when it affirmed the trial court's decision that the contract is unambiguous, the Appellate Court also erred in affirming the trial court's decision to exclude evidence of the parties' conduct. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *Id.* Because the contract is ambiguous, evidence concerning the parties' conduct after the execution of the contract should have been considered to determine the parties' intent. Therefore, the Appellate Court erred when it affirmed the trial court's

decision to exclude evidence concerning the parties' conduct and overlooked the Appellants' arguments.

IV. THE APPELLATE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S REJECTION OF COLLATERAL ESTOPPEL.

Because the Appellate Court misapprehended the holding in *Rosen v. the Univ. of S.C.*, the Appellate Court erred when it affirmed the trial court's rejection of collateral estoppel. See *Rosen v. the Univ. of S.C.*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011)(unpublished). For collateral estoppel, "the party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The Appellate Court found that the issue litigated in *Rosen* was different than the issue in this case, and that collateral estoppel does not apply.

However, the court in *Rosen* held that the exact same three words that are at issue in this case, "assigned reserved parking," were ambiguous. *Rosen v. the Univ. of S.C.*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011) (unpublished). Further, the ambiguity of the term was actually litigated, directly determined, and necessary to support the prior judgment in *Rosen*. The fact that the ambiguity of the term created a different problem in the *Rosen* case should not preclude the Appellants from asserting collateral estoppel. The Appellants' argument that the term is ambiguous is actually strengthened by the fact that more than one problem arose from the ambiguity of the same term, because it supports Appellants' argument that there are numerous ways to interpret the term. It is also worth noting that the Appellate Court's reliance on the *Lee*

decision is inconsistent with their holding on the rejection of collateral estoppel as it pertains to the *Rosen* case. The *Lee* case did not specifically address the term "assigned reserved parking" but was used by the Appellate Court as a basis to hold that this term must also be unambiguous; however the Appellate Court rejected collateral estoppel under the *Rosen* holding which specifically found that the exact same term with the exact same three words of "assigned reserved parking" in the substantially identical contract was ambiguous. Therefore, the Appellate Court erred when it affirmed the trial court's rejection of collateral estoppel.

V. THE APPELLATE COURT ERRED IN NOT FINDING THE CONTRACT TO BE UNAMBIGUOUS IN FAVOR OF THE APPELLANTS.

The Appellate Court erred in affirming the trial court's finding that the contract is unambiguous in favor of the defendant's interpretation. "A contract is ambiguous when 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) (emphasis added). Assuming, *in arguendo*, that the Respondent's interpretation is reasonable, the Appellants have argued that the parking terms of the contract are ambiguous because their interpretation is reasonable under the law surrounding contractual interpretation. However, the Appellants have also asserted that they do not believe the Respondent's interpretation is reasonable and that to the extent the contract is determined to be unambiguous then it should be interpreted as unambiguous in their favor. Even assuming the *Lee* holding applies to the parking term, the Appellate Court should have then found that the term was unambiguous in Appellants' favor.

The trial court's interpretation of the "assigned reserved parking" term would mean that

the University could designate parking for the lifetime members to even the farthest reaches of Gamecock Club parking and still be in compliance. Similar to the *Lee* case, "it would mean [the Appellants'] received little or nothing in the bargain," for the University could designate parking wherever they want and change it at any time. *Lee* at pp. 5-6. The Appellants' were given assigned reserved parking on the apron of the stadium, which is considered to be the closest and best parking places. Nothing in the contract allows the Respondents to change the assigned parking place at will, much less to allow them the ability to change it to an inferior parking place. To the extent the University had to shut down parking on the apron of the stadium (which is questionable), they should have provided the best equivalent parking places to comply with the contractual terms.

To the extent the Appellate Court finds the contract unambiguous, it should be determined to be unambiguous in favor of the Appellants.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants respectfully request that the Court grant Appellants' Petition for Rehearing.

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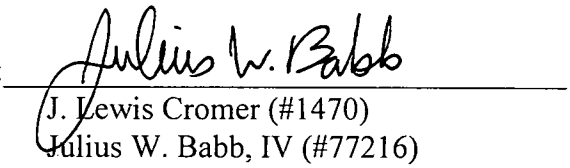
July 30, 2015

J. LEWIS CROMER & ASSOCIATES, LLC

BY: 

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of which
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PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., caused to have served the Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on July 30, 2015, addressed to Robert E. Stepp, Esquire & Bess J. DuRant, Esquire, Sowell Gray Stepp & Lafitte, LLC, P. O. Box 11449, Columbia, SC 29211.

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July 30, 2015

VIA HAND DELIVERY
Hon. Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Linda Rodarte, et al. vs. USC***
Appellate Case No. 2013-002295

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant's Petition for Rehearing in connection with the above referenced matter, along with the Proof of Service. Also enclosed please find our firm's check in the amount of $25.00 for the motion fee. Please file and return the clocked-in copies to our law clerk.

By copy of this letter to counsel of record, we are serving a copy of same to them.

With kind regards, I remain

Sincerely,

Iris W. Ray

Iris W. Ray
Litigation Paralegal

/iwr
Enclosures

cc: Robert E. Stepp, Esquire
Bess J. DuRant, Esquire
Clients