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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-40-03924
Appellate Case No.: 2013-002295

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JUL 30 2015

SC Court of Appeals

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

Of Whom George M. Lee, III, Mena H. Gardiner and
John Love are the

Appellants,

v.

The University of South Carolina and the University of
South Carolina Gamecock Club

Respondents.

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Respondents the University of South Carolina and the University of South Carolina Gamecock Club (collectively, “Respondents” or “USC”) submit this Petition for Rehearing of this Court’s unpublished opinion filed July 15, 2015, which affirmed in part and reversed in part the circuit court’s order and remanded this matter “as to whether USC was equitably estopped from denying Appellants the highest priority to available parking as Lifetime Scholarship Members.” *Rodarte v. University of South Carolina*, Op. No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015).

The grounds for this petition are two-fold. First, the doctrine of equitable estoppel is a defensive doctrine that does not create or impose contractual rights with respect to an unambiguous contract. Second, even if the legal principle of equitable estoppel were applicable, the record contains no evidence to support an equitable estoppel claim. As affirmed by this Court, the Lifetime Membership contract is unambiguous, and consequently, neither extrinsic evidence nor the parties’ conduct is instructive in determining the parties’ rights, which are entirely controlled by the terms of the unambiguous contract. *See N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015) (“If a contract’s language is unambiguous, the plain language will determine the contract’s force and effect.”). Equitable estoppel cannot be imposed on the unambiguous contract to afford rights to Appellants.

I. EQUITABLE ESTOPPEL DOES NOT SERVE TO CREATE RIGHTS WITH RESPECT TO AN UNAMBIGUOUS CONTRACT.

Equitable estoppel may not be used by a party offensively to establish contractual rights that are not part of the written agreement between the parties. Similarly, a party cannot use equitable estoppel to modify a contract. The modification of a contract requires proof of the same elements necessary to create a valid contract, including consideration. This record does not contain

any such evidence. Finally, *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014) is not instructive in this matter because equitable estoppel was being used as a shield, rather than a sword, in *Springob*. In sum, the Court's reliance on equitable estoppel principles to reverse the circuit court was erroneous.

A. **Equitable estoppel is not an offensive weapon that confers rights upon contractual parties.**

Appellants may not resort to equitable estoppel to avoid the unambiguous terms of the Lifetime Membership contract or to create new contractual rights. Equitable estoppel is a defensive measure. As elucidated by the South Carolina Supreme Court,

Estoppel and waiver are *protective only*, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons.

Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992) (citations omitted) (emphasis added). “Equitable estoppel is *the inhibition to assert such right* by reason of mischief following one's own fault and may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right.” *Id.* at 344, 415 S.E.2d at 387 (emphasis added). ““Equitable estoppel occurs *where a party is denied the right to plead or prove* an otherwise important fact because of something which he has done or failed to do.”” *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (emphasis added) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)).

Here, equitable estoppel is not being used as a shield or defense to a claim, but it is being used improperly as a sword to “write in” new contractual terms or modify the existing ones. As determined by this Court, the contract and its term “assigned reserved parking” are unambiguous.

If equitable estoppel were to be applied in this case, it would serve to prevent Respondents from enforcing the terms of the unambiguous contract, while bestowing new rights to Appellants. Such a result flies in the face of the defensive nature of equitable estoppel.

B. Equitable estoppel cannot modify the terms of an unambiguous contract.

Both the Supreme Court and this Court have found this contract is unambiguous. *See Lee v. University of South Carolina*, 407 S.C. 512, 518-19, 757 S.E.2d 394, 397-98 (2014); *Rodarte v. University of South Carolina*, Op. No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015). When a contract is unambiguous, “the contract’s language determines the instrument’s force and effect.” *Lee*, 407 S.C. at 518, 757 S.E.2d at 397 (quoting *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013)). “A court **must enforce** an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Id.* (emphasis added) (quoting *S.C. Dep’t of Transp. v. M&T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

Courts cannot alter, modify, or write new contracts when the parties have an unambiguous contract. *Lee*, 407 S.C. at 518, 757 S.E.2d at 398. Consequently, estoppel “cannot be applied in the presence of an unambiguous contract” 28 Am. Jur. 2d *Estoppel and Waiver* § 31 (2011); *see also Zarrella v. Minnesota Mut. Life Ins. Co.*, 824 A.2d 1249, 1260 (R.I. 2003) (“[Q]uasi-contractual remedies such as equitable estoppel are inapplicable when the parties are bound by an express contract.” (citing numerous cases)). The parties to an unambiguous contract must be able to rely on their agreed upon terms. Equitable estoppel cannot be used to avoid this Court’s obligation to enforce the terms of the unambiguous contract. Nor can the Appellants use equitable estoppel in an attempt to modify unilaterally the unambiguous terms of the contract. *Lee*, 407 S.C. at 518, 757 S.E.2d at 398 (“Indeed, ‘[o]nce [a] bargain is formed, and the obligations set, a contract

may only be altered by mutual agreement and for further consideration.” (quoting *Layman v. State*, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2005))). The Court has held that the written Lifetime Membership agreement does *not* provide that Appellants are entitled to the highest, or indeed any, priority with respect to parking. Resort to equitable estoppel, however, invites the result that Appellants are entitled to priority expressly not provided in the agreement. This impermissibly alters the agreement in the absence of any legal basis for the modification. The parties are bound by the unambiguous contract, and the record is devoid of any written evidence of mutual agreement, supported by further consideration, that modifies the unambiguous terms.¹

C. **Springob is not instructive because its application of equitable estoppel is defensive, not offensive.**

This Court errs in relying on *Springob* to reverse the circuit court regarding equitable estoppel. In *Springob*, the Supreme Court held that a question of fact existed as to whether Respondents were equitably estopped from asserting the defense of the statute of frauds to the purported oral contract. *Springob*, 407 S.C. at 497, 757 S.E.2d at 387-88. In the present case, equitable estoppel is being applied to create rights that otherwise would not exist. This is quite different from the defensive application of equitable estoppel in *Springob*. This dichotomy illustrates the distinction drawn in *Janasik*. Equitable estoppel is protective only and cannot be used by parties to gain or profit. *Janasik*, 307 S.C. at 345, 415 S.E.2d at 388. Being estopped from relying on the statute of frauds is permissible; being estopped from relying on the terms of an unambiguous contract is not.

¹ Any evidence of modification would have to be in writing because the Lifetime Membership contract is subject to the Statute of Frauds. As held by the Supreme Court, “a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

II. THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT EQUITABLE ESTOPPEL.

Even if equitable estoppel could apply to the present matter, Appellants have offered no evidence that Respondents should be estopped from relying on the terms of the unambiguous contract. Generally, “estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel, however, can be available against the government in certain situations.

A. The law of equitable estoppel against the government.

In these situations, the party claiming estoppel against the government “must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government’s conduct, and (3) a prejudicial change in position.” *Id.* at 236-37, 692 S.E.2d at 506. “The party asserting estoppel bears the burden of establishing all its elements.” *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting *Estes v. Roper Temp. Servs.*, 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991)). “Absent even one element, estoppel will not lie against a government entity.” *Id.* at 320, 659 S.E.2d at 267.

“The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.” *Quail Hill, LLC*, 387 S.C. at 236, 692 S.E.2d at 506 (emphasis in original) (quoting *DeStefano v. City of Charleston*, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). Similarly, “[a]n erroneous misconstruction of the contract by a State employee does not change its explicit terms” *Service Mgmt., Inc. v. State Health & Human Servs. Fin. Comm’n*, 298 S.C. 234, 237, 379 S.E.2d

442, 444 (Ct. App. 1989). “[P]arties entering into agreements with the state assume the risk of ascertaining that he who purports to act for the state stays within the bounds of his authority.” *Id.* at 238, 379 S.E.2d at 444. Additionally, “citizens are presumed to know the law and are charged with exercising ‘reasonable care to protect [their] interest[s].’” *Morgan*, 377 S.C. at 320, 659 S.E.2d at 267 (alterations in original) (quoting *Smothers v. U.S. Fidelity & Guar. Co.*, 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996)).

B. Appellants fail to prove any of the elements of equitable estoppel.

A review of the record shows that Appellants have offered no evidence to support their claim for equitable estoppel. First, this Court has already held that the contract is unambiguous, and therefore, neither extrinsic evidence nor the parties’ conduct may be considered. Consequently, the only pertinent representations would occur after the parties had entered into the contracts. There is no lack of means of knowledge or justifiable reliance because the parties had the unambiguous contract to inform them of their rights and obligations. Additionally, there is no evidence of any prejudicial change. Finally, even if the Appellants could offer the requisite proof to substantiate an equitable estoppel claim, any representations by Respondents concerning priority were simply incorrect, and Respondents cannot be estopped from enforcing the terms of the contracts.

1. Appellants had the means of knowledge of the truth as to the facts in question because they were parties to an unambiguous contract.

The first element of equitable estoppel against the government is lack of knowledge and of the means of knowledge of the truth as to the facts in question. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. Here, the unambiguous contract would contradict any statement suggesting that Appellants had the highest priority with respect to parking. The contract states that Appellants

have “assigned reserved parking” – nothing more, nothing less. (*See, e.g.*, R. pp. 90-93.) It does not mention priority, unlike the some of the other benefits, which are “Four Season Football Tickets (Best Available),” “Second Priority on Away and Bowl Game Tickets,” “Second Priority on Away and Tournament Game Tickets,” and “Second Priority on Any Tickets Involving Any Other South Carolina Athletic Events.” (R. p. 93). Even if Respondents caused Appellants to believe they had the best priority for parking, a review of their contracts would inform them that they do not.

2. There is no justifiable reliance upon the Respondents’ representations or conduct.

The second element of equitable estoppel against the government is justifiable reliance upon the government’s conduct. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. “The right to rely must be determined in light of the plaintiff’s duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him.” *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). Like the first element, Appellants cannot establish that they justifiably relied upon the Respondents’ representations or conduct because there is nothing before this Court that shows any change in position in reliance on the alleged statements. Contracting parties are presumed to know the contents of their contracts, and they cannot look to equitable estoppel to protect their interests.

Moreover, there is absolutely no evidence in the record that any of the Appellants relied (justifiably or not) on any conduct or statements of Respondents after they signed their contracts. They may claim that they were told that, prior to the execution of the contracts, they would have the highest priority, but those representations are merged into final, unambiguous contract. These representations cannot support an equitable estoppel claim.

3. Appellants have not suffered any prejudicial change in position.

The third element of equitable estoppel against the government is a prejudicial change in position. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. Appellants have not offered a shred of evidence that they have changed their position in reliance on Respondents' representations made after the parties entered into the contracts. Even if Appellants could use representations purportedly made before they entered into the contracts, they have offered no evidence of any detrimental change in reliance on statements by Respondents' agents. Appellants carry the burden of establishing each element of equitable estoppel. *See Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (providing the party asserting estoppel bears the burden of proving the elements of equitable estoppel and "[a]bsent even one element, estoppel will not lie against a government entity."). Here, Appellants have not established any of the three elements, much less all of them.

C. Any statements by Respondents regarding priority for parking were erroneous and cannot be used to estop Respondents.

This Court's only reference to statements made by Respondents after the executions of the contracts was the Chris Wyrick letter, dated March 5, 2008. (*Rodarte Op.* at *3.) In the record, none of the Appellants state that they saw, knew of, or relied on the Wyrick letter. But even if they did, his statement in the letter is simply erroneous and cannot be used to estop the Respondents. *See S. C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987) ("The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment."). Even if the Appellants read Wyrick's statement, they could have reviewed their unambiguous contracts and seen that his statement does not comply with the contract's terms.

For example, in *Service Management, Inc. v. State Health and Human Services Finance Commission*, this Court held that equitable estoppel does not trump the written contractual terms between a nursing home and the State. *Service Mgmt, Inc. v. State Health & Human Servs. Fin. Comm'n*, 298 S.C. 234, 237-38, 379 S.E.2d 442, 444 (Ct. App. 1989). In *Service Management, Inc.*, this Court affirmed a trial court's decision that a nursing home had to reimburse the State for overpayment of Medicaid funds erroneously calculated by State employees. *Id.* at 237-38, 379 S.E.2d at 444. The nursing home and the State entered into a written contract which provided that the nursing home would be reimbursed \$7.79 per patient day. *Id.* at 236, 379 S.E.2d at 442. State employees, however, calculated that the nursing home should be reimbursed \$9.36 per patient day for a period of time and then \$8.78 per patient day. *Id.* The State employees arrived at these figures by adding an inflation factor. *Id.* The State sought to recover the overpayments. *Id.* The nursing home replied by stating "the rate computation was made by State employees and [the nursing home] had a right to rely on it; therefore, the State is bound by the computation." *Id.* at 237, 379 S.E.2d at 443.

This Court disagreed with the nursing home and concluded that the contract "clearly states" that the nursing home was entitled to \$7.79 per patient day and that an "erroneous misconstruction of the contract by a State employee does not change its explicit terms and the State is not bound by the act of its officer in making an unauthorized payment." *Id.* at 237, 379 S.E.2d at 444. "Accordingly, estoppel will not bar recoupment of overpayments obtained as a result of the error of a state's officer." *Id.* at 238, 379 S.E.2d at 444.

The contract bound the nursing home and the State in *Service Management, Inc.*, and equitable estoppel was not allowed to create new contractual terms or alter the existing terms. Likewise, equitable estoppel should not be allowed to create or modify terms in the present

unambiguous contract. The statement made by Chris Wyrick was incorrect, and he had no authority to modify the clear and unambiguous terms of the contract. Consequently, his statement should not be used to bar the Respondents from enforcing the contracts.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court grant a rehearing in this matter or reconsider this matter and affirm the circuit court's decision.

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G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

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

Of Whom George M. Lee, III, Mena H. Gardiner and
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PROOF OF SERVICE

I certify that I have caused service of the Respondents' Petition for Rehearing of Time to File a Petition of Rehearing on the Appellants by hand delivery, on July 30, 2015, to their attorney of record, Julius W. Babb, IV, Esquire, J. Lewis Cromer & Associates, LLC, 1418 Laurel Street, Suite A, Columbia, SC.



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July 30, 2015

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SC Court of Appeals

BY HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
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Columbia, South Carolina 29201

Re: Linda Rodarte, et al. vs. The University of South Carolina, et al.
Civil Action No.: 2012-CP-40-3924
SGS&L File No.: 6468/1501

Dear Ms. Kitchings:

Enclosed are an original and seven (7) copies of Respondents' Petition for Rehearing in the above-referenced matter. Please file the original and return a filed-stamped copy to my office by our courier. Also enclosed is a check in the amount of \$25.00 for the filing fee.

Thank you for your assistance in this matter and please contact me if you have any questions.

Sincerely,

Bess J. DuRant

cc: Julius W. Babb, IV, Esquire (via hand delivery)
Edwin E. Evans, Esquire (via email)