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 whom
George M. Lee, III, Mena H. Gardiner and John Love .....Appellants, are the

v.

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

APPELLANTS' RETURN TO RESPONDENTS' PETITION FOR REHEARING

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Appellants hereby respond to Respondents' Petition for Rehearing ("Respondents' Petition"). For the reasons set forth below, the Respondents' Petition should be denied.

I. THE COURT OF APPEALS CORRECTLY HELD THAT SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE QUESTIONS OF FACT EXIST AS TO EQUITABLE ESTOPPEL.

The Respondents incorrectly argue that the Court's reliance on equitable estoppel principals is erroneous. In support of their contention, Respondents argue that equitable estoppel is not an offensive weapon, it cannot modify the terms of an unambiguous contract, and the *Springob* case is not instructive. For the reasons set forth herein, the Appellants assert that the Court of Appeals correctly held that summary judgment was inappropriate under equitable estoppel principals.

The Respondents seek to use the unambiguity issue to squirm out of their assurances and promises made to Appellants concerning priority for parking, whether by contending that the contract is unambiguous, the statute of frauds defense, exclusion of extrinsic evidence, parol evidence rule, or some other assertion. The Respondents argument that the Appellants are somehow using promissory estoppel as an offensive weapon is unfounded.

Even assuming for purposes of this argument that the "assigned reserved parking" is unambiguous, this would not preclude reliance upon promissory or equitable estoppel. Defendants have raised a defense of statute of frauds as to oral representations or documents other than the Memorandum of Agreement and Exhibit A to support the breach of contract claim, as well as a defense that there is lack of consideration as to these representations. (R. p. 215). They have argued that oral and documentary representations made prior to the contract do not apply because of defenses such as, for example, statute of frauds. They have also argued that oral and documentary representations made after the contract was established similarly are barred

from consideration as new contracts or modifications to the existing written Memorandum of Agreement because of defenses such as statute of frauds or lack of consideration. Reliance on equitable estoppel in this case is not for purposes of being an offensive weapon, but instead is being used as a shield against the Respondents use of various defenses to escape the promises they made to the Appellants. The Court properly found that there is sufficient evidence to equitably estop Respondents such that summary judgment was inappropriate.

The Respondents' reliance on an unambiguous contract to preclude equitable estoppel is misplaced. "A contract and promissory estoppel are two separate and distinct legal theories. They 'are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.'" *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (citing *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985)). Even if the Court determined that the contract term was unambiguous, this does not preclude the Court from finding that sufficient evidence has been presented about Respondents' representations to Appellants to raise a question of material fact as to whether the Respondents should be equitably estopped from denying the Appellants the highest priority.

Finally, the Respondents assert that the Court erred in relying on *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014). They take the position that *Springob* is inapplicable because equitable estoppel is being used as a shield rather than a sword. The Respondents' argument is misplaced and the Court properly relied on *Springob*. The courts have held that equitable estoppel or promissory estoppel may be used to preclude summary judgment, even where a valid contract is found to not exist. *See Bishop v. City of Columbia*, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013); and *Springob*, 407 S.C. 490. Similar to the present case, the plaintiff in *Springob* presented evidence of representations by the University of South Carolina

and the court found that there were genuine issues of material fact such that summary judgment should have been denied based on equitable estoppel. The Respondents are attempting to create a distinction without a difference. In the present action, equitable estoppel would act as a shield against the Respondents defenses and assertions that the oral and written representations—outside of the Memorandum of Agreement—prevent any rights the appellants have to top priority. The Court's finding in favor of estoppel prevents an unjust result and prevents the sanctioning of potential fraud or misrepresentation.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO CREATE A QUESTION OF FACT AS TO EQUITABLE ESTOPPEL.

The Respondents erroneously assert that the record is devoid of any evidence to support equitable estoppel. Contrary to their assertion, the Court of Appeals correctly found that the record contains sufficient evidence to create a question of fact as to equitable estoppel and that summary judgment was inappropriate.

A. Appellants have established sufficient evidence as to all the elements of equitable estoppel and summary judgment was inappropriate.

The Appellants presented sufficient evidence to support the elements of equitable estoppel, thus the Court of Appeals ruling as to equitable estoppel is correct. While the Appellants dispute the ruling on unambiguity, the determination does not preclude a finding in favor of equitable estoppel.

The record reflects that the Respondents made representations and promises to the Appellants both prior to and after the execution of the Memorandum of Agreement to which they reasonably relied to their detriment with a lack of knowledge as to the truth of the facts in question.

1. Appellants lacked knowledge or the means of knowledge of the truth as to the facts in question.

The Respondents incorrectly argue that Appellants had the means of knowledge because of the purportedly unambiguous contract. The Respondents themselves have argued that the term "assigned reserved parking" in Exhibit A does not contain any language on priority. Essentially, they have argued that silence as to such term does not create an ambiguity or create additional terms. Under this analysis, Exhibit A would not provide any means of knowledge of the truth as to the facts regarding priority of parking. Prior to the written contract, the University made representations about the top priority they held as lifetime members and about the best parking specifically on the apron of the stadium. At this time, parking was still allowed on the apron of the stadium. Even when the University later planned to remove parking around the stadium, they continued to make representations such as the letter to Chris Wyrick. Nothing in the contract, whether ambiguous or otherwise, would provide the means of knowledge of the truth that the University never meant to uphold their promises.

2. Appellants justifiably relied upon Respondents representations and conduct.

The Appellants have established sufficient evidence that they justifiably relied upon the Respondents representations and conduct. First, the Appellants argue that the parking term is ambiguous. However, even assuming the term is unambiguous and silent on the issue of priority for parking, then the mere terms are not instructive on priority; and the representations made by the Respondents both prior to and after execution as to priority would be justifiably relied upon. Moreover, there is not a merger clause or a non-reliance clause in the contract that might preclude them from relying upon the representations. *See Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984).

3. Appellants suffered a prejudicial change in position.

The Respondents incorrectly assert that the Appellants did not suffer a prejudicial change in position. A review of the record, in the light most favorable to Appellants, supports that they did suffer a prejudicial change in position and that questions of fact exist as to the same.

The testimony presented in the Record shows that Appellants justifiably relied upon the representations of the Respondents to enter the written contract and provide consideration with the belief that they would have parking on the apron of the stadium and have top priority in parking. They suffered a prejudicial change in position by entering the contract, losing their parking places on the apron of the stadium and then being subjected to a lower priority when they were changed to the new parking places. Moreover, the continued conduct of providing the parking on the apron of the stadium for years and the assertions of the Respondents after the execution of the contract led to the Appellants further justifiable reliance. Further, because they now are competing with non-lifetime members as to priority they will have to pay more money to reach higher priority points or risk losing further priority ranking and being designated worse parking places into the future.

B. The statements by Respondents regarding priority may be used to estop Respondents.

The Respondents incorrectly argue that statements made by Respondents regarding priority are erroneous and cannot be used to estop Respondents. As an initial matter, it seems as if the Respondents are making a new argument that Chris Wyrick lacked authority to make statements on priority and they were incorrect. This spin on the Wyrick statement is unfounded, without merit and not preserved at this stage. Chris Wyrick sent a letter dated March 5, 2008 to the Lifetime Members, which includes the Appellants. (R. p. 302). The letter explicitly provides

that "Life Members are at the top of all Gamecock Club priority." *Id.* Mr. Wyrick then goes on to sign the letter and provide his position as Executive Director of the Gamecock Club. It is inconceivable to believe that the Executive Director somehow lacked the authority to issue this statement. Moreover, this statement also acts as a modification or supplement to the written contract to the extent the Court finds the original term unambiguous and silent on priority. It is signed by the Respondent which is the party that Appellants seek to estop.

The Respondents reliance upon *Service Mgmt, Inc. v. State Health & Human Servs. Fin. Comm'n*, 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989) is misplaced. In that action, the written contract explicitly gave a reimbursement rate per patient day, but the nursing home received a higher payment due to an erroneous calculation based upon a contradictory rate. *Id.* When asked to be reimbursed, the nursing home opposed reimbursement for the error by claiming estoppel. *Id.* This is not remotely comparable to the present action. There was no exact rate for priority in the written agreement and the communications were not merely calculation errors but instead representations from Respondents top officials.

The Court of Appeals correctly held that there was sufficient evidence to raise questions of fact as to equitable estoppel and summary judgment was inappropriate.

CONCLUSION

For the reasons set forth above, the Appellants respectfully request that this Court deny Respondents' Petition for Rehearing.

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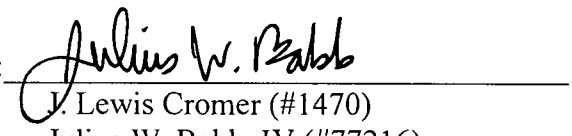
J. LEWIS CROMER & ASSOCIATES, LLC

BY: 

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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 having a copy of it hand-delivered, on August 10, 2015, addressed to Robert E. Stepp, Esquire & Bess J. DuRant, Esquire, Sowell Gray Stepp & Lafitte, LLC, 1310 Gadsden Street, Columbia, SC 29201.

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August 10, 2015

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August 10, 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 Return to Respondent's Petition for Rehearing in connection with the above referenced matter, along with the Proof of Service. Please file and return the clocked-in copies to our courier.

By copy of this letter to counsel of record, we are serving a copy of same to them. Thank you for your assistance in this matter. Should you have any questions, please feel free to contact our office.

With kind regards, I remain

Sincerely,

Iris W. Ray

Iris W. Ray
Litigation Paralegal

/iwr
Enclosures

cc: Robert E. Stepp, Esquire (via hand delivery)
Bess J. DuRant, Esquire (via hand delivery)
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