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

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' RETURN TO APPELLANTS' PETITION FOR REHEARING

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Respondents the University of South Carolina and the University of South Carolina Gamecock Club hereby respond to Appellants' Petition for Rehearing ("Appellants' Petition"). For the reasons outlined below, the Appellants' Petition should be denied.

I. THE SOUTH CAROLINA SUPREME COURT HAS ESTABLISHED THAT THE CONTRACT IS UNAMBIGUOUS.

In *Lee v. University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014), the South Carolina Supreme Court held that the contracts at issue are unambiguous. This Court is bound is by the Supreme Court's decision. Appellants are attempting to conflate precedent with collateral estoppel to avoid *Lee*. Appellants argue that the *Lee* Court "only addressed the meaning of the term that gave Gamecock Club members the opportunity to purchase tickets . . . ." (Appellants' Pet. For Reh'g 6.) Appellants assert that *Lee* does not collaterally estop Appellants because the Supreme Court did not address the term "assigned reserved parking," and thus, the term was not necessary to the holding and was not actually litigated. (*Id.*)

Appellants misunderstand the relevance of *Lee*. The *Lee* opinion serves as precedent, not as a basis for collateral estoppel. Moreover, the *Lee* Court's decision is not as narrow as Appellants claim. The *Lee* Court did not limit its holding to the terms regarding Lee's opportunity to purchase tickets. In fact, the *Lee* Court broadly declared "the Agreement is unambiguous[]" and "[t]he language of the Agreement is clear." *Lee*, 407 S.C. at 518, 757 S.E.2d at 397-98.[1] This decision binds this Court. S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014) ("[T]his court lacks the authority to

[1] In fact, the dissent agrees with this conclusion, as it concluded "I agree with the circuit court, and the majority, that this contract is unambiguous on its face." *Id.* at 519, 757 S.E.2d at 398 (Pleicones J., dissenting).

rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."); *Freeman v. Freeman*, 323 S.C. 95, 105, 473 S.E.2d 467, 473 (Ct. App. 1996) ("We, of course, are bound by the decisions of the South Carolina Supreme Court."). The holding is not limited to one specific term in the contract, and this Court is constrained to follow the Supreme Court's ruling.

II. NO EXTRINSIC EVIDENCE OR PARTIES' CONDUCT MAY BE CONSIDERED BECAUSE THE CONTRACT IS UNAMBIGUOUS.

Because this Court is bound by *Lee*'s holding that the contract is unambiguous, Appellants cannot rely on any extrinsic evidence, including the parties' conduct, to construe the agreement. *See, e.g., McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."); *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 2002) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." (internal quotation marks and citation omitted)); *Moss v. Porter Bros., Inc.*, 292 S.C. 444, 448, 357 S.E.2d 25, 27 (Ct. App. 1987) (providing evidence of custom and usage may not be used to contradict, vary, or explain the terms of an unambiguous contract); *Autry v. Bell*, 114 S.C. 370, __, 103 S.E.2d 749, 750 (1920) ("The evidence of custom and usage had nothing to do with the express contract, the basis of plaintiff's claim, and could not vary or explain the same; it was unambiguous in its terms."). "The law is this state regarding the construction and interpretation of contracts is well settled." *Lee*, 407 S.C. at 517, 757 S.E.2d at 397 (internal quotation marks and citation omitted). Relying on these well settled principles, this Court correctly concluded that the circuit court properly excluded extrinsic evidence and parties' conduct.

III. THIS COURT'S UNPUBLISHED OPINION CANNOT SERVE AS THE BASIS FOR COLLATERAL ESTOPPEL.

Unlike *Lee, Rosen v. The University of South Carolina, et. al.*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011) has neither precedential value nor any preclusive effect in this matter. Collateral estoppel "prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *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 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." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)).

First, because this Court chose to not publish *Rosen*, it has no precedential value. *See* Rule 220(a), SCACR (stating "memorandum opinions shall not be published in the official reports and shall be of no precedential value"); Rule 268(d), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceeds in which they are directly involved."). Second, the meaning of "assigned reserved parking" was never litigated in *Rosen*, and therefore, it cannot serve to collaterally estop Respondents from maintaining that they provided Appellants with "assigned reserved parking." Finally, if *Rosen* were given any preclusive effect, it would be inconsistent with *Lee*, which clearly holds that the contract is unambiguous. An unpublished Court of Appeals opinion cannot overrule a published Supreme Court opinion. Appellants' argument to the contrary is fallacious and unsupported.

IV. THE TRIAL COURT'S INTERPRETATION OF "ASSIGNED RESERVED PARKING" WAS CORRECT.

Contrary to Appellants' argument, the plain, ordinary meaning of "assigned reserved parking" is not "best available parking space." Because this contract is unambiguous, its terms must be given their plain and ordinary meaning. *See 56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 472, 769 S.E.2d 242, 246 (Ct. App. 2014) ("When [a] contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." (internal quotation marks and citation omitted) (alteration in original)). Appellants want to stray from the plain and ordinary meaning of "assigned reserved parking" and impose additional terms on the contract. If the parties contemplated Appellants having priority with respect to parking, they could have included it in the contract, like they did with assignment of football and basketball tickets. (*See* R.p. 225, R.p. 269, R.p. 234.) Appellants receive the "best available" tickets for up to four football and basketball tickets. "Best available" or any similar language is conspicuously missing with respect to the assignment of parking. It only follows that the parties did not agree Appellants would have the "best available" parking.

The Lifetime Membership Contract makes no reference to a specific parking space or to priority with respect to parking. The contract simply states that "assigned reserved parking" is available for the Appellants. The Court cannot read "best available" or priority into "assigned reserved parking." Appellants' interpretation of "assigned reserved parking" deviates from the plain and ordinary meaning of the term, and the trial court properly rejected it.

CONCLUSION

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

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Columbia, South Carolina
August 10, 2015

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PROOF OF SERVICE

I certify that I have caused service of the Respondents' Return to Appellants' Petition for Rehearing on the Appellants by hand delivery, on August 10, 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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