THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2015-002103
Unpublished Opinion No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015)

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 Petitioners/Respondents,

v.

The University of South Carolina and the University of South Carolina Gamecock Club Respondents/Petitioners.

RESPONDENTS/PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Respondents/Petitioners ("Respondents" or "University") certify that they filed a Petition for Rehearing on July 30, 2015 (J.A. at 572-83), and the South Carolina Court of Appeals denied the petition on September 17, 2015 (J.A. at 601-02).

QUESTIONS PRESENTED

1. **Did the Court of Appeals err when it concluded equitable estoppel could be used to support a claim for affirmative relief?**

2. **Did the Court of Appeals err in reversing the trial court on the issue of equitable estoppel when the record is devoid of any evidence of equitable estoppel?**

INTRODUCTION

This case is about parking assignments for University of South Carolina home football games for certain Lifetime Members of the Gamecock Club ("Lifetime Members"). This Court has ruled on similar matters involving the Gamecock Club and its Lifetime Membership program. It declared that the contract governing the Lifetime Members ("Lifetime Membership Contract") is unambiguous in *Lee v. The University of South Carolina*, 407 S.C. 512, 518, 757 S.E.2d 394, 397-98 (2014). Additionally, this Court addressed the rights of certain Gamecock Club members in *Springob v. The University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014), which involved an alleged oral contract to purchase premium basketball seats. In *Springob*, this Court held there was an issue of fact as to whether the University could be estopped from asserting the statute of frauds as a defense to the oral contract. 407 S.C. at 497-98, 757 S.E.2d at 387-88.

In the present matter, the Court of Appeals relied on both *Lee* and *Springob* in reaching its decision. It properly applied *Lee* to conclude that the Lifetime Membership Contract was unambiguous, and therefore, no extrinsic evidence was admissible to alter its terms. The Court of Appeals misapplied *Springob,* however, in permitting Petitioners to assert a claim for relief based on equitable estoppel. By doing so, the Court of Appeals departed from established precedent and converted the doctrine from its limited role as a defensive shield into the basis for an affirmative cause of action. This Court should review and reverse the decision of the Court of Appeals.

STATEMENT OF THE CASE

The Petitioners/Respondents ("Petitioners"), Mena Gardiner, George M. Lee, III, and John Love, are Lifetime Members. (J.A. at 14.) Their Lifetime Memberships are governed by the Lifetime Membership Contract, which includes an attached Exhibit A that lists the rights and privileges of the Lifetime Member. (J.A. at 15, 93-103.) Among other things, the Lifetime

Membership Contract provides that the Lifetime Member is entitled to "assigned reserved parking." (J.A. at 96, 99 & 103.)

Prior to the 2012 football season, the "assigned reserved parking" available to Petitioners was on the apron of Williams Brice Stadium. (J.A. at 15.) Beginning with the 2012 football season, parking on the apron was no longer available to Gamecock Club members. (*Id.*) Petitioners were given the opportunity to participate in a parking selection process governed by Gamecock club priority points system, or receive "assigned reserved parking" in the new Farmers' Market parking area. (*Id.*) In June of 2012, each of the Petitioners chose to participate in the priority points parking selection process and selected spaces in the Farmers' Market parking area. (*Id.*) Moreover, each received two spaces in the Farmers' Market, rather than the one space they had on the apron. (*Id.*)

Petitioners thereafter filed this breach of contract action alleging that Respondents breached their Lifetime Membership Contracts by (1) not allowing them to park on the Stadium's apron and (2) not affording them the "appropriate priority" with respect to the selection of parking spaces. (J.A. at 14-15, 194-99.) In response, Respondents contend and the trial court agreed that the Lifetime Membership Contracts do not grant Petitioners the right to park on the Stadium's apron, or provide any priority with respect to the selection of parking spaces. (J.A. at 17, 213-219.)

The parties engaged in written discovery, and Respondents deposed the Petitioners and a witness, Marion Hope, who is the brother of Petitioner Mena Gardiner. The parties then filed cross motions for summary judgment. (J.A. at 115-23.) Petitioners contended they were entitled to summary judgment because they were "parties to separate clear and unambiguous contracts with the defendants guaranteeing them assigned and reserved parking privileges as lifetime members .

. . " and Respondents breached the contracts by "taking each plaintiffs' priority in parking . . . ." (J.A. at 116-17.) Additionally, Petitioners argued that they were entitled to summary judgment based on theories of equitable estoppel and collateral estoppel. (J.A. at 117.) In support of their Motion, Petitioners filed the affidavit of George Lee that stated that Lee was promised "guaranteed assigned and reserved parking" in his Lifetime Membership contract. (J.A. at 297-298.)

Respondents argued they were entitled to summary judgment because Petitioners were provided with "assigned reserved parking," as required by the unambiguous Lifetime Membership Contracts. (J.A. at 121-22.) Respondents also pointed out that the contracts do not grant the right to any specific parking space to Petitioners or any priority with respect to parking. (*Id.*) In support of their Motion for Summary Judgment, Respondents relied on the affidavit of Marcy Girton. (J.A. at 275-96.) Marcy Girton was the Deputy Director of Athletics for the University, and she testified in her affidavit that Petitioners were provided assigned reserved parking. (J.A. at 275-78.)

On August 9, 2013, the trial court heard the cross-motions for summary judgment. (J.A. at 14.) On August 27, 2013, the trial court granted Defendants' Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment. (J.A. at 13-27.) The trial court held that "Defendants did not breach the clear, unambiguous provision of the Lifetime Membership contract regarding parking" because Petitioners were provided with "assigned reserved parking." (J.A. at 17.) It further held that the contracts do not grant any selection priority or specific parking spaces to Petitioners. (*Id.*)

On September 9, 2013, Petitioners filed a motion for reconsideration. (J.A. at 9-12.) On September 17, 2013, the trial court denied the motion for reconsideration. (J.A. at 7-8.) Petitioners then filed and served their Notice of Appeal. (J.A. at 4-6.)

In an unpublished opinion, the Court of Appeals affirmed in part and reversed in part. The opinion holds that: (1) the Lifetime Membership Contract is unambiguous; (2) extrinsic evidence is inadmissible to vary its terms because the contract is unambiguous; (3) evidence of custom and usage is inadmissible because the contract is unambiguous; and (4) collateral estoppel does not bar Respondents from arguing that the contract is unambiguous because the issue of parking was not litigated in the unpublished opinion of *Rosen v. The University of South Carolina*, Op. No. 2011-UP-331 (S.C. Ct. App. June 27, 2015) (J.A. at 547-56.) The Court of Appeals, however, reversed the trial court on the issue of equitable estoppel and remanded the case on this issue. (J.A. at 554-56.) The Court of Appeals concluded there is a factual issue "as to whether USC was equitable estopped from denying Appellants the highest priority to available parking as Lifetime Scholarship Members." (J.A. at 555-56.) The Court of Appeals reached this decision, in part, based on *Springob v. The University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014). (J.A. at 555.) Both Petitioners and Respondents petitioned the Court of Appeals for rehearing, but both petitions were denied. (J.A. at 557-83.) This Petition for Writ of Certiorari followed.

ARGUMENT

Equitable estoppel is a doctrine that courts apply in limited situations to prohibit a party from asserting a right that he otherwise would have. It does not itself create any rights in the party asserting it. Its use is said to be defensive because it is raised as a defense to the assertion of a claim by another. It may not be used offensively because no action seeking affirmative relief may be predicated on equitable estoppel. Likewise, it may not be used to modify an unambiguous written agreement. In the present case, the Court of Appeals ignored these fundamental principles and incorrectly held that Petitioners are permitted to use equitable estoppel as the basis for a claim

against Respondents. The Court of Appeals further erred in finding that a question of fact exists when there is no evidence in the record to support any of the elements of equitable estoppel.

I. The Court of Appeals Erred When It Permitted Petitioners to Seek Affirmative Relief Based on Equitable Estoppel.

A. Equitable estoppel is a defensive shield, not an offensive weapon.

This Court has clearly held that equitable estoppel may not be used as an offensive weapon. For example, in *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992), this Court declared:

> 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 307 S.C. at 345, 415 S.E.2d at 388 (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 thought 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)).

The Court of Appeals ignored these established principles of law when it transformed equitable estoppel into the basis for an affirmative claim. The Court of Appeals' decision permits Petitioners to create contractual rights that do not appear in the unambiguous written contract between the parties. The unambiguous nature of that agreement had been established prior to the

Court of Appeals decision. *Lee*, 407 S.C. at 518, 757 S.E.2d at 397-98 (2014). By allowing equitable estoppel to add to or modify the unambiguous, contractual terms, the Court of Appeals converted equitable estoppel into an offensive weapon. The decision allows the Petitioners to add or modify the clear, unambiguous terms, while prohibiting the Respondents from enforcing them. *Janasik* and its progeny preclude this result. Equitable estoppel may not afford contractual rights to Petitioners that are not contained within the contract.

B. Equitable estoppel may not serve to modify the unambiguous terms.

When a contract is unambiguous, "'the contract's language determines the instrument's force and effect.'" *Id.* 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)). Nor does equitable estoppel permit the Petitioners to rely on it 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))). Thus, while equitable estoppel may lie

to prevent the assertion of a contractual right by one party, it is never available to create new contractual rights that are not in the agreement.

These well-established principles of law exist because parties to an unambiguous contract must be able to rely on their agreed upon terms. Equitable estoppel cannot be used as to circumvent these principles, allowing a court to "write in" new terms or modify the existing terms. Consequently, equitable estoppel does not allow a court to avoid its obligation to enforce the terms of the unambiguous contract.

The trial court and the Court of Appeals have already determined that the written Lifetime Membership Contract does ***not*** provide that Petitioners are entitled to the highest, or indeed any, priority with respect to parking. Resort to equitable estoppel, however, invites the result that Petitioners are entitled to priority expressly not provided in the agreement. This contortion of equitable estoppel improperly 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 absent of any written evidence of mutual agreement, supported by further consideration, that modifies the unambiguous terms.

C. The Court of Appeals erroneously relied on *Springob* because *Springob's* application of equitable estoppel is defensive, not offensive.

The Court of Appeals erred in relying on *Springob* to reverse the trial court's grant of summary judgment on the equitable estoppel issue. In *Springob*, this 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 a purported oral contract. *Springob*, 407 S.C. at 497, 757 S.E.2d at 387-88. In the present case, the Court of Appeals' ruling permits Petitioners to use equitable estoppel to create rights that do not exist and are not contemplated in the unambiguous contract. This is an offensive use of equitable estoppel, which is different than the defensive use in *Springob*. This distinction is

expressly addressed (and warned against) 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; using estoppel to create new contract rights is not.

II. The Court of Appeals Erred When It Reversed the Trial Court on Equitable Estoppel Because the Record Contains No Evidence of the Elements of Equitable Estoppel.

Assuming *arguendo* that equitable estoppel could be used in this matter, the record is devoid of any evidence to support a claim of equitable estoppel, much less a claim of equitable estoppel *against the government*. 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 Enters., Inc.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel, however, can be available against the government in certain situations.

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)).

A. Petitioners fail to prove any of the elements of equitable estoppel.

Petitioners fail to satisfy their burden because they 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 Petitioners 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 unambiguous written contracts.

1. Petitioners 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 explicitly contradicts any statement suggesting that Petitioners had the highest priority with respect to parking. The contract states that Petitioners have "assigned reserved parking" – nothing more, nothing less. (*See, e.g.*, J.A. at 93, 99, 103.) 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." (*See, e.g.*, J.A. at 96.) Even if Respondents caused Petitioners to believe they had the best priority for parking, a review of their contracts would inform them that they do not. Contracting parties are presumed to know the contents of their contracts, and they cannot look to equitable estoppel to protect their interests.

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, Petitioners 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.

Moreover, there is absolutely no evidence in the record that any of the Petitioners 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. Petitioners 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. Petitioners 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 Petitioners 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. Petitioners 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, Petitioners have not established any of the three elements, much less all of them. The record does not support a claim for equitable estoppel.

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

The Court of Appeals' only reference to statements made by Respondents after the executions of the contracts was the Chris Wyrick letter, dated March 5, 2008. (J.A. at 549.) In the record, none of the Petitioners states that he or she saw, knew of, or relied on the Wyrick letter. But even if they did, Wyrick's 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 Petitioners read Wyrick's statement, they could have reviewed their unambiguous contracts and seen that his statement does not comply with the contract's terms.

This case mirrors the legal principles discussed in *Service Management, Inc. v. State Health & Human Services Finance. Commission*, 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989). In *Service Management, Inc.*, this Court held that equitable estoppel does not trump the written contractual terms between a nursing home and the State. *Service Mgmt, Inc.*, 298 S.C. at 237-38, 379 S.E.2d at 444. 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 more than $7.79 per patient day by adding in an inflation figure. *Id.* After discovery the error, 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.

The Court of Appeals 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, the Lifetime Membership Contract governs the parties, and equitable estoppel should not be allowed to create or modify terms in the present unambiguous contract. The statement made by Chris Wyrick was erroneous, and he had no authority to modify the clear and unambiguous terms of the contract. Moreover, there is no consideration to support any alleged modification. Consequently, his statement does not alter the Lifetime Membership Contract or provide a platform for equitable estoppel.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court grant Respondents/Petitioners' Petition for Writ of Certiorari.

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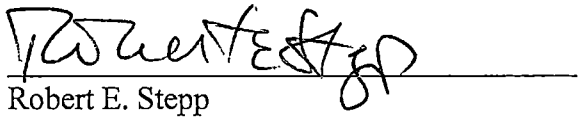
By: 

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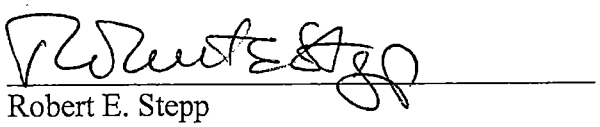
PROOF OF SERVICE

I certify that I have caused service of Respondents/Petitioners' Petition for Writ of Certiorari and Appendix by hand delivery, on October 30, 2015, to their attorney of record, Julius W. Babb, IV, Esquire, J. Lewis Cromer & Associates, LLC, 1418 Laurel Street, Suite A, Columbia, South Carolina.



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