THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners/Respondents certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 17, 2015.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION THAT THE CONTRACT IS UNAMBIGUOUS?

II. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EXTRINSIC EVIDENCE?

III. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EVIDENCE OF THE PARTIES' CONDUCT?

IV. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S REJECTION OF COLLATERAL ESTOPPEL?

V. DID THE COURT OF APPEALS ERR BY DETERMINING THAT THE CONTRACT IS UNAMBIGUOUS IN FAVOR OF THE TRIAL COURT'S INTERPRETATION?

STATEMENT OF THE CASE

A. Procedural History

On June 7, 2012, Linda Rodarte, J. Perry Kimball, George M. Lee, Mena H. Gardiner, and Mitchell Bailey filed an action against the University of South Carolina and the Gamecock Club concerning a breach of their lifetime contract regarding their football parking spaces near Williams Brice Stadium.[1] On July 6, 2012, an Amended Complaint was

[1]For purposes of this Petition, the Petitioners/Respondents George Lee, Mena Gardiner and John Love are referenced herein as "Petitioners"; and the Respondents/Petitioners University of South Carolina and Gamecock Club are referenced herein as "Respondents".

filed wherein John Love was substituted for Mitchell Bailey. (App. p. 195).[2] The parties filed cross-motions for summary judgment with the circuit court and both provided legal memoranda in support and opposition. (App. pp. 84 - 188).

On August 27, 2013, Judge Cooper filed an Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (App. pp. 13-27). Petitioners filed a Motion for Reconsideration (App. pp. 9-12), which Judge Cooper denied by Order dated September 17, 2013. (App. pp. 7-8). Petitioners filed a timely notice of appeal.

In an opinion filed July 15, 2015, the Court of Appeals affirmed in part and reversed in part the earlier decision. The Court of Appeals affirmed the trial court's findings on ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution, and collateral estoppel; however the Court of Appeals reversed and remanded as to equitable estoppel. Both parties filed separate Petitions for Rehearing on July 30, 2015. On September 17, 2015, both Petitions for Rehearing were denied by the Court of Appeals. (App. p. 601). The parties were granted extensions of time to file Petitions for Writ of Certiorari. The Petitioners now seek a Writ of Certiorari from the South Carolina Supreme Court to review the Court of Appeals' decision to affirm in part; however the Petitioners are not seeking review of the Court of Appeals decision reversal as to equitable estoppel.

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[2] 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.

B. Factual Summary

The University of South Carolina ("USC" or "University") is a state university with an athletics program that includes 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." (App. p. 196). 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")[3] 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 Petitioners, George M. Lee, Mena H. Gardiner and John Love, are Lifetime Members of the Gamecock Club. (App. pp. 93-103).

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." (App. pp. 93-103). The advertising circular presenting the Lifetime Scholarship program listed "Priority on season Football Tickers and Parking" as one of the Lifetime Benefits. (App. p. 304). For approximately 25 years, lifetime members such as Petitioners parked on the apron of the football stadium in

[3] 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 certain rights and privileges than

reserved parking spaces.

Stuart Hope originally entered his Lifetime Contract in May 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, testified that he was active in handling the negotiations that his father had with the Gamecock Club concerning the Lifetime Membership Contract. (App. pp. 220-228). 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 football games. *Id.*

John Love graduated from the University in 1982 and became a Gamecock Club member. (App. p. 239). Love testified that he negotiated with Chip Clary and the Gamecock Club to get "the best parking spot available" among other items in exchange for a donation of $10,000.00 and annual payment of $1,000.00. (App. pp. 238-272). From approximately 1987 to 1990, Love held a parking space where the current End Zone was later built. *Id.* After discussions with his friend Harry Gregory, Jr., Love sought the Lifetime Scholarship Membership so they could park together next to the stadium. *Id.* Love executed his contract in 1990, and he was made assurances of his specific parking location as part of his Lifetime contract. *Id.* Love was given an improved parking space "right outside the gate where the players enter the stadium" where the order went" the athletic director, Harry Gregory, Sr., John Love, and Harry Gregory, Jr. (App. pp. 246-247).

In May of 1990, George M. Lee executed his Lifetime contract, wherein he was given

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the Lifetime Scholarship Members.

a specific parking space in exchange for a life insurance policy and was given assurances that he would be given excellent parking on the apron of the stadium. Lee was given priority in parking from the time he entered the contract until the summer of 2012. (App. pp. 229-233, 297-298).

Appellants' contracts were honored, collectively for decades, until the Summer of 2012. (App. p. 297, ¶ 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 Petitioners' priority in parking was rescinded by the Respondents and numerous non-lifetime donors have been given priority ahead of each Petitioner. (App. P. 297-298, ¶¶ 6-7).

As referenced in the Final Brief on Appeal (App. P. 490), 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. (App. pp. 302-305). These documents show that Lifetime Members were considered to have the highest priority in all matters including parking. In the March 5, 2008 letter, Chris Wyrick states that "Life Members are at the top of all Gamecock Club priority." (App. p. 305).

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

ARGUMENT[4]

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

Because the Court of Appeals 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 Petitioners' briefs, the Court of Appeals 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 Court of Appeals based its decision to affirm the trial court's decision on *Lee v. the Univ. of S.C.*, in which the Supreme Court held that a lifetime contract substantially identical to the present Petitioners' 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 parking term at issue in this action, 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

[4] The Petitioners are in agreement with the Court of Appeals' reversal on the issue of Equitable Estoppel and are not seeking review on this issue.

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 Petitioners' case, "assigned reserved parking," was not necessary to support the holding 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 Court of Appeals should not have affirmed the trial court's finding that the term is unambiguous based on the holding in *Lee*.

In addition, the Court of Appeals 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 Petitioners' or the Respondents' interpretation 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 Supreme 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* 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 Petitioners interpreted it instead of the Respondents' interpretation. The Petitioners' final briefs set forth the arguments as to their interpretation, which the Court of Appeals should have considered. Therefore, the judgment in *Lee* does not support the trial court's decision to grant the motion for summary judgment, and the Court of Appeals should have reversed and remanded the trial court's decision to determine the meaning of the term.

II. BECAUSE THE COURT OF APPEALS 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 Court of Appeals erred when it affirmed the trial court's decision that the contract is unambiguous, the 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 Court of Appeals erred when it affirmed the trial court's decision to exclude extrinsic evidence and overlooked the Petitioners' arguments.

III. BECAUSE THE COURT OF APPEALS 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 Court of Appeals erred when it affirmed the trial court's decision that the

contract is unambiguous, the 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." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. at 623. 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 Court of Appeals erred when it affirmed the trial court's decision to exclude evidence concerning the parties' conduct and overlooked the Petitioners' arguments.

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

Because the Court of Appeals misapprehended the holding in *Rosen v. the Univ. of S.C.*, the Court of Appeals 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 Court of Appeals 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 Petitioners from asserting collateral estoppel. The Petitioners' 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 Petitioners' argument that there are numerous ways to interpret the term. It is also worth noting that the Court of Appeals' 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 Court of Appeals as a basis to hold that this term must also be unambiguous; however the Court of Appeals 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 Court of Appeals erred when it affirmed the trial court's rejection of collateral estoppel.

V. THE COURT OF APPEALS ERRED IN NOT FINDING THE CONTRACT TO BE UNAMBIGUOUS IN FAVOR OF THE PETITIONERS.

The Court of Appeals erred in affirming the trial court's finding that the contract is unambiguous in favor of the Respondents' 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 Respondents' interpretation is reasonable, the Petitioners have argued that the parking term of the contract is ambiguous because their interpretation is reasonable under the law surrounding contractual interpretation. However, the Petitioners 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 Court of Appeals should have then found that the term was unambiguous in Petitioners' favor.

The Respondents' interpretation of the "assigned reserved parking" term would mean that the Respondents 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 Petitioners'] received little or nothing in the bargain," for the Respondents could designate parking wherever they want and change it at any time. *Lee* at pp. 5-6. The Petitioners' were given assigned reserved parking spaces on the apron of the stadium, which are considered to be the closest and best parking spaces available. Nothing in the contract allows the Respondents to change the assigned parking space at will, much less to allow them the ability to change it to an inferior parking space. 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 spaces to comply with the contractual terms.

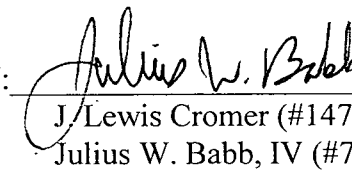
To the extent the Court of Appeals finds the contract unambiguous, it should be

determined to be unambiguous in favor of the Petitioners.

CONCLUSION

The decision by the Court of Appeals to partially affirm the trial court's grant of summary judgment was in error. Particularly, the Court of Appeals misapplied the prior decision of the Supreme Court in the *Lee* case, thus rejecting the Petitioners' other arguments. Based on the foregoing discussion and analysis, the Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari.

J. LEWIS CROMER & ASSOCIATES, LLC

BY: 

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PROOF OF SERVICE

I certify that I have caused service of the Petitioners/Respondents' Petition for Writ of Certiorari by hand delivery, on October 29, 2015, to their attorneys of record, Robert E. Stepp and Bess J. DuRant, Esquire, of Sowell Gray at 1310 Gadsden Street, Columbia, SC.

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October 29, 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, J. Perry Kimball, George M. Lee, III, Mena H. Gardner and John Love v. University of SC & University of SC Gamecock Club***
Appellate Case No. 2015-002103

Dear Ms. Kitchings:

Enclosed please find three (3) copies of Petitioners/Respondents' Petition for Writ of Certiorari in connection with the above referenced matter. Please file and return a clocked-copy to our courier. By copy of this letter to counsel of record, we are serving a copy of these documents.

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

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