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S.C. Supreme Court

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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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' RETURN TO PETITION FOR WRIT OF CERTIORARI

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OVERVIEW OF ISSUES

Petitioners George M. Lee, III, Mena H. Gardiner, and John Love ("Petitioners") seek a review of the Court of Appeals' decision on the construction and interpretation of a contract, the exclusion of extrinsic evidence, and the rejection of collateral estoppel. None of these issues merits review by this Court. *See* Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). There is no novel question of law; the decision was unanimous; there is no conflict with any of this Court's decisions with respect to the issues raised by Petitioners; and there are no constitutional issues or federal questions. *See id.* This Court should deny Petitioners' Petition.

The Court of Appeals unanimously affirmed the trial court's decision that the contract governing Lifetime Members of the Gamecock Club ("Lifetime Membership Contract") is unambiguous, as declared in *Lee v. University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014). (J.A. at 552-53.) Because the Lifetime Membership Contract is unambiguous, the Court of Appeals affirmed the trial court's ruling that extrinsic evidence (including evidence of parties' conduct) is inadmissible. (J.A. at 553-54.) Additionally, the Court of Appeals affirmed the trial court's rejection of collateral estoppel because the prior action (*Rosen v. University of South Carolina*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011)) did not address parking spots and priority, and therefore, this issue was never litigated. (J.A. at 556.)

All of these issues were decided on basic, well-established principles of law. The Court of Appeals unanimously resolved these issues, and it did not ignore or deviate from any decisions from this Court when determining these issues. Petitioners are simply trying to reargue their case. The case law with respect to contract interpretation and construction, extrinsic evidence, and collateral estoppel is fully developed in this State. These issues are not deserving of this Court's

review. *See* Rule 242(b), SCACR. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **Did the Court of Appeals err when it relied on precedent established in *Lee v. University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014) to affirm the trial court's decision that the Lifetime Membership Contract is unambiguous?**

II. **Did the Court of Appeals err when it affirmed the trial court's exclusion of extrinsic evidence, including evidence of parties' conduct, based on the unambiguous Lifetime Membership Contract?**

III. **Did the Court of Appeals err when it affirmed the trial court's rejection of collateral estoppel when the issue of "assigned reserved parking" was not litigated in the initial matter?**

IV. **Did the Court of Appeals err when it affirmed the trial court's interpretation of "assigned reserved parking"?**

COUNTER-STATEMENT OF THE CASE

Respondents adopt by reference and incorporate their Statement of the Case in Respondents/Petitioners' Petition for Writ of Certiorari.

ARGUMENT

I. The Court of Appeals Correctly Relied on *Lee* to Affirm the Trial Court's Conclusion that the Lifetime Membership Contract Is Unambiguous.

This Court has already concluded that the contract at issue is unambiguous in *Lee v. University of South Carolina*, 407 S.C. 512, 518, 757 S.E.2d 394, 397-98 (2014). After applying "settled principles of contract interpretation," this Court held the Lifetime Membership Contract is unambiguous and "[t]he language of the Agreement is clear." *Id.* As noted by this Court, "[t]he Agreement reflects the agreed upon bargain between [the Lifetime Member] and the University." *Id.* at 518, 757 S.E.2d at 398. Because the contract is unambiguous, "no construction is required and the contract's language determines the instrument's force and effect." *Id.* at 517-18, 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, 183 (2013) (internal quotation marks omitted)). The Court of Appeals correctly followed the precedent established in *Lee* and concluded that the substantially similar Lifetime Membership Contract in the present case is likewise unambiguous. (J.A. at 552-53.)

Petitioners try to circumvent the ruling in *Lee* by relying on issue preclusion. Specifically, Petitioners argue that because the issue of "assigned reserved parking" was not actually litigated in *Lee*, the Court of Appeals was not bound by *Lee*. Petitioners, however, misconstrue the import of *Lee*. *Lee* serves as precedent, not as a basis for issue preclusion. Moreover, this Court's decision in *Lee* is not as narrow as Petitioners claim. This Court did not limit its holding to the terms regarding Lee's opportunity to purchase tickets. In fact, this 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 the Court of Appeals. 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 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 the Court of Appeals was constrained to follow this Court's ruling. The Court of Appeals did not

[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).

misconstrue *Lee*. Rather, it properly applied *Lee*'s holding to the present matter. Stare decisis, not issue preclusion, governs this issue.

II. The Court of Appeals Correctly Affirmed the Trial Court's Exclusion of Extrinsic Evidence Because the Lifetime Membership Contract is Unambiguous.

Because the Lifetime Membership Contract is unambiguous, extrinsic evidence (including evidence of parties' conduct) is inadmissible. "[E]xtrinsic evidence may only be considered if the contract is ambiguous." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013) (citing *Duncan v. Little*, 384 S.C. 420, 425, 682 S.E.2d 788, 790 (2009)). *See also 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, the Court of Appeals correctly concluded that the trial

court properly excluded extrinsic evidence and parties' conduct. Only the content within the four corners of the contract is determinative of the parties' intent. Extrinsic evidence – prior to or after the execution of the contract – may not be considered.

III. The Court of Appeals Properly Rejected Collateral Estoppel Because the Issue Was Never Litigated Prior to This Matter.

Petitioners assert that *Rosen v. University of South Carolina*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011) collaterally estops Respondents from arguing that the Lifetime Membership Contract is unambiguous. An unpublished opinion of the Court of Appeals that does not address the location of parking, however, cannot serve as a basis for collateral estoppel. 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)). Petitioners' collateral estoppel argument is fallacious for numerous reasons.

First, *Rosen*, unlike *Lee*, has no precedential value because the Court of Appeals chose to not publish the *Rosen* opinion. *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, *Rosen* was about whether parking was free, not the location of or priority with respect to parking. Consequently, the meaning of "assigned reserved parking" was never litigated, directly determined, or necessary

to support the judgment in *Rosen*, and therefore, it cannot serve to collaterally estop Respondents from maintaining that they provided Petitioners 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 trump a published Supreme Court opinion. Petitioners' argument to the contrary is erroneous and unsupported.

IV. The Court of Appeals Properly Deferred to the Trial Court's Interpretation of the Unambiguous Lifetime Membership Contract.

The Petitioners' definition of "assigned reserved parking" alternates between "Space 'X' for the duration of the Lifetime Membership Contract" or "best available parking." This definition, however, is not the plain, ordinary meaning of "assigned reserved parking." 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)). Petitioners want to deviate from the plain and ordinary meaning of "assigned reserved parking" and impose additional terms on the contract. If the parties contemplated Petitioners 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, e.g.* J.A. at 228, 237, 272.) Petitioners 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. Similarly, there is no reference to a specific parking space in the contract. It only follows that the parties did not agree Petitioners would have the "best available" parking or a certain designated parking space.

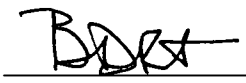
Petitioners are trying to circumvent this Court's, the Court of Appeals', and the trial court's decisions that the Lifetime Membership Contracts are unambiguous, by contending that their interpretation is the true and proper interpretation. However, the very nature of the contract being unambiguous means that it can only have one reasonable interpretation. *See Stevens Aviation, Inc. v. DynCorp. Int'l, LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011) ("A contract or provisions within it are unambiguous if they are not susceptible to more than one reasonable interpretation . . . ." (internal quotation marks and citation omitted)), *aff'd in part, rev'd in part*, 407 S.C. 407, 756 S.E.2d 148 (2014). Because the contract is unambiguous, its terms must be given their plain and ordinary meanings. *See 56 Leinbach Investors, LLC*, 411 S.C. at 472, 769 S.E.2d at 246. The 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 Petitioners. No reasonable interpretation of the term allows Petitioners to contend that they are entitled to a specific parking space or parking on the apron of Williams Brice Stadium. Similarly, "assigned reserved parking" cannot be reasonably interpreted to grant any priority regarding the selection of parking spaces to Petitioners. Petitioners' strained interpretation of "assigned reserved parking" strays from the plain and ordinary meaning of the term, and the Court of Appeals correctly affirmed the trial court's rejection of it.

CONCLUSION

Petitioners are simply rehashing their arguments that were rejected by both the trial court and the Court of Appeals. They are contorting *Lee* to avoid its holding that the Lifetime Membership Contract is clear and unambiguous, which precludes the introduction of extrinsic evidence. The Court of Appeals opinion in the present matter does not conflict with this Court's decision in *Lee*. The Court of Appeals properly (1) followed precedent with respect to the contract,

(2) excluded extrinsic evidence, (3) rejected collateral estoppel, and (4) refused to overrule the trial court's interpretation of "assigned reserved parking." Petitioners have offered no special or important reasons as to why this Court should grant their Petition. All of the issues raised by Petitioners were resolved on well-established principles of law. This Court should deny Petitioners' Petition for Writ of Certiorari.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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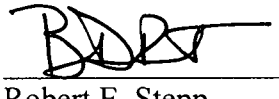
PROOF OF SERVICE

I certify that I have caused service of the Respondents/Petitioners' Return to Petition for Writ of Certiorari by hand delivery, on November 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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