THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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

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

PETITIONERS/RESPONDENTS' RETURN TO RESPONDENTS/PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case is about promises that were not upheld concerning parking spaces for the University of South Carolina home football games for certain Lifetime Members of the Gamecock Club ("Lifetime Members"). The Petitioners/Respondents ("Petitioners" or "Petitioners/Respondents"), Mena Gardiner, George M. Lee, III, and John Love, are Lifetime Members. The promises integral to this case are based upon the Lifetime Membership Contract (the "Contract")[1] reached between the Respondents/Petitioners the University of South Carolina and the University of South Carolina Gamecock Club ("Respondents" or "Respondents/Petitioners") and the Petitioners as part of the Lifetime Membership program; as well as oral promises made to Petitioners before, during and after the Contracts were executed. The Petitioners/Respondents' set forth a statement of the case in their own Petition for Writ of Certiorari that is also before this Honorable Court, however the pertinent portions are set forth as follows.

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. (J.A. at 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 to the Contract, including "assigned reserved parking" for football games. *Id.*

[1] The Petitioners entered into written contracts with Respondents/Petitioners, which include an "Exhibit A" to the Contract with the term "Assigned Reserved Parking". (J.A. at 93-107).

John Love graduated from the University in 1982 and became a Gamecock Club member. (J.A. at 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. (J.A. at 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 of parking went from the Athletic Director's parking space followed by the parking spaces for Harry Gregory, Sr., John Love, and Harry Gregory, Jr. (J.A. at 246-247).

In May of 1990, George M. Lee executed his Lifetime Contract, wherein he was given 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. (J.A. at 229-237, 297-298).

Petitioners' Contracts were honored collectively for decades, until the summer of 2012. (J.A. at 297, ¶ 5). Pursuant to their Contracts, Petitioners were given priority in parking assignments ahead of non-lifetime donors. (*Id.* at ¶¶ 5-6). However, through the recent actions taken by the Respondents/Petitioners, the Petitioners' priority in parking was rescinded and numerous non-lifetime donors have been given priority ahead of each Petitioner. (J.A. at 297-298, ¶¶ 6-7).

As referenced in the Final Brief on Appeal (J.A. at 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. (J.A. at 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." (J.A. at 305).

ARGUMENT

The Respondents/Petitioners have petitioned this Court for a Writ of Certiorari concerning the Court of Appeals decision to reverse the trial court's order concerning equitable estoppel and remand the case on this issue. The arguments presented as part of their petition are not persuasive, as the Court of Appeals correctly decided on the equitable estoppel issue. For the reasons set forth by the Court of Appeals and arguments made herein, the Respondents/Petitioners' Petition for Writ of Certiorari 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/Petitioners incorrectly argue that the Court of Appeals' reliance on equitable estoppel principals is erroneous. In support of their contention, Respondents/Petitioners 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 Petitioners assert that the Court of

Appeals correctly held that summary judgment was inappropriate under equitable estoppel principals.

The Respondents/Petitioners seek to use the unambiguity issue to circumvent their assurances and promises made to Petitioners 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/Petitioners argument that the Petitioners are somehow using promissory estoppel as an offensive weapon is unfounded. As discussed below, the Court of Appeals correctly relied upon the *Springob* case and principals of equity when reaching its decision on equitable estoppel. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Jones v. Leagan*, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct.App.2009) (citing *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct.App.1983)).

Even assuming for purposes of this argument that the "assigned reserved parking" term in the Contract is unambiguous, this would not preclude reliance upon promissory or equitable estoppel. In their Answer, the Respondents/Petitioners 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. (J.A. at 218). Respondents/Petitioners have argued that oral and documentary representations made prior to the contract do not apply; and 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. Reliance on equitable estoppel in this case is not merely for purposes of being an offensive weapon, but instead is being used as a shield against the Respondents/Petitioners use of various defenses to escape the promises they made to the Petitioners. The Court of Appeals properly found that there is sufficient evidence to equitably estop Respondents such that summary judgment is inappropriate.

The Respondents/Petitioners' 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/Petitioners' representations to Petitioners to raise a question of material fact as to whether the Respondents/Petitioners should be equitably estopped from denying the Petitioners the highest priority.

Finally, the Respondents/Petitioners assert that the Court of Appeals 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 of Appeals 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/Petitioners are attempting to create a distinction without a difference. In the present action, equitable estoppel would act as a shield against the Respondents/Petitioners defenses and assertions that the oral and written representations—outside of the Memorandum of Agreement—prevent any rights the Petitioners have to the highest priority. The Court of Appeals' decision concerning 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/Petitioners 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. Petitioners established sufficient evidence as to all the elements of equitable estoppel and summary judgment was inappropriate.

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

The record reflects that the Respondents/Petitioners made representations and promises to the Petitioners both prior to and after the execution of the Contract to which the Petitioners reasonably relied to their detriment with a lack of knowledge as to the truth of the facts in question.[2]

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

The Respondents/Petitioners incorrectly argue that Petitioners had the means of knowledge because of the purportedly unambiguous contract. The Respondents/Petitioners 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 Contracts, the Respondents/Petitioners made representations about the top priority Petitioners would hold as lifetime members and about the best parking spaces, 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 from 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.

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[2] In addition to representations similar to those made to other Petitioners, the Respondents/Petitioners promised John Love "the best parking spot available" among other items in exchange for a $10,000.00 donation and annual donation of $1,000.00. (J.A. at 238-272). The adverse change in parking is a breach of this agreement. Moreover, the Respondents/Petitioners should be equitably estopped from asserting defenses to bar this agreement. Mr. Love reasonably relied on their promises to his detriment with a lack of knowledge as to the truth of the facts in question.

2. Petitioners justifiably relied upon Respondents/Petitioners representations and conduct.

The Petitioners have established sufficient evidence that they justifiably relied upon the Respondents/Petitioners representations and conduct. First, the Petitioners 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/Petitioners 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. Petitioners suffered a prejudicial change in position.

The Respondents/Petitioners incorrectly assert that the Petitioners did not suffer a prejudicial change in position. A review of the record, in the light most favorable to Petitioners, 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 Petitioners justifiably relied upon the representations of the Respondents/Petitioners to enter the written Contracts 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 Contracts, 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

Contracts led to the Petitioners further justifiable reliance. The Petitioners continued to donate to the Respondents/Petitioners on an annual basis to maintain their Lifetime Member status. Because Petitioners now are competing with non-lifetime members as to priority in parking, they will have to pay more money to reach higher priority points or risk losing further priority ranking and being designated worse parking places in the future.

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

The Respondents/Petitioners incorrectly argue that statements made by their agents and officials regarding priority are erroneous and cannot be used to estop Respondents/Petitioners. 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 included the Petitioners. (J.A. at 305). 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 Contracts to the extent the Court finds the original term unambiguous and silent on priority. It is signed by the Respondents/Petitioners which are the parties that Petitioners seek to estop.

The Respondents/Petitioners 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/Petitioners 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 Petitioners/Respondents respectfully request that this Honorable Court deny Respondents/Petitioners' Petition for Writ of Certiorari.

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November 30, 2015

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PROOF OF SERVICE

I certify that I have caused service of the Petitioners/Respondents' Return to Respondents/Petitioners' Petition for Writ of Certiorari by hand delivery, on November 30, 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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