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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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

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

Robert E. Stepp
Bess J. DuRant
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449 (29211)
Columbia, South Carolina 29201
(803) 929-1400
Attorneys for Respondents/Petitioners

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INTRODUCTION

The ultimate question in this case is: can equitable estoppel be used to add or modify terms of an unambiguous contract? The unavoidable answer is no. Petitioners/Respondents, George M. Lee, III, Mena H. Gardiner, and John Love ("Petitioners"), try to avoid this answer by contending that equitable estoppel is not being used to obstruct the clear and unambiguous terms of the contract. Rather, they argue that equitable estoppel is being used to prevent Respondents/Petitioners, the University of South Carolina and the University of South Carolina Gamecock Club ("Respondents" or "University"), from asserting various defenses to the contract. The defenses, although successful, are not at issue. What is at issue is whether the plain and ordinary meaning of term "assigned reserved parking" has been properly applied by Respondents. It has. Petitioners (and this Court) cannot rewrite the terms of a clear and unambiguous contract by relying on equitable estoppel.

The Court of Appeals, however, opened the door to this possibility by improperly injecting equitable estoppel into this matter when it relied on *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014). The reliance on *Springob* is misguided because the *Springob* Court applied equitable estoppel strictly in a defensive matter. *Springob*, 407 S.C. at 497-98, 757 S.E.2d at 387-88 (holding question of fact existed as to whether equitable estoppel precluded a statute of frauds defense to a purported oral contract). Here, equitable estoppel could only serve to be applied as an offensive tool. The plain and ordinary terms of the contract must be applied, and equitable estoppel cannot be used to change or inform its terms.

ARGUMENT

I. THE APPLICATION OF EQUITABLE ESTOPPEL IS OFFENSIVE, NOT DEFENSIVE.

This Court has determined that equitable estoppel can only be used in a defensive manner. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992) ("Estoppel and waiver are ***protective only***, and are to be involved as shields, and not as offensive weapons."(emphasis added)); *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) ("'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.'" (emphasis added) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994))). In direct contravention of this Court's holdings, the Court of Appeals opinion permits equitable estoppel to be used as an offensive weapon, which could result in new or modified terms in the unambiguous Lifetime Membership Contract.

Petitioners attempt to overcome this fundamental error by claiming that equitable estoppel would only serve to prevent the University from asserting various defenses, such as statute of frauds and lack of consideration. (Pet'rs/Resp'ts' Return to Resp'ts/Pet'rs' Petition for Writ of Certiorari (hereinafter, "Resp'ts' Return") at 4.) This argument, however, does not accurately depict how equitable estoppel would be applied in the present matter. As interpreted by the Court of Appeals, equitable estoppel would prevent the University from enforcing the clear, unambiguous terms of the contract and interfere with the application of well-established contract principles, such as the parol evidence rule and the construction of unambiguous contracts.

The trial court did not grant summary judgment to Respondents on the basis of any affirmative defenses. Rather, it granted summary judgment because it concluded that there was no breach of the contract because "assigned reserved parking" was provided to Petitioners. (J.A.

at 17-23.) In other words, Petitioners failed to state a claim because the unambiguous contract did not provide them with any specific parking space or priority with respect to parking. (*Id.*) Because it is an unambiguous contract, there can only be 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). "Assigned reserved parking" was provided to Petitioners. There is no need to resort to equitable estoppel[1] because the parties expressed their intent within the four corners of the contract. The parties must be able to rely on the written terms of their agreements.

Springob has no application to the present matter. It involved an alleged oral contract and centered on whether the University could apply the statute of frauds defense to the purported oral contract. *Springob*, 407 S.C. at 493-94, 757 S.E.2d at 385-86. Here, there is a written contract, and Petitioners have not pled any oral agreements outside of the written Lifetime Membership Contracts.[2] (J.A. at 195-99.) If equitable estoppel were to be applied here, it would estop Respondents from relying on basic contract law and allow the Petitioners to write in new terms to

[1] Petitioners assert that a contract and promissory estoppel are two distinct theories. (Resp'ts' Return at 5.) This is true. But it is also true that promissory estoppel and equitable estoppel are not synonymous. *See Rushing v. McKinney*, 370 S.C. 280, 293-95, 633 S.E.2d 917, 924-25 (Ct. App. 2006) (listing different elements for promissory estoppel and equitable estoppel). Promissory estoppel has never been mentioned before in this matter, and it is inapplicable and not preserved for review.

[2] In fact, Petitioners specifically allege that Respondents have breached "their ***written agreements*** with the plaintiffs in denying them the rights and privileges . . . ." (J.A. at 198, ¶ 14 (emphasis added).)

their clear and unambiguous agreements. Such an action flies in the face of the principal objective of contract law, which is to give effect to the intentions of the parties to the agreement.

II. NO EVIDENCE EXISTS IN THE RECORD TO SUPPORT ANY CLAIM OF EQUITABLE ESTOPPEL.

Petitioners fail to offer any evidence to support any of the elements of equitable estoppel, much less all of them. First, they rely on vague, alleged promises made before the Lifetime Membership Contracts were entered – all of which would be merged into the final contract. Second, they rely on a letter from Chris Wyrick, which none of the Petitioners acknowledged receiving or reviewing. Regardless, the letter could not form the basis of an equitable estoppel claim because it would not have induced them to enter into the Lifetime Membership Contract because it was written decades after the contracts were entered.

A. Petitioners Fail to Satisfy Any of the Elements of Equitable Estoppel.

Regarding the specific elements of equitable estoppel, Petitioners claim they lacked knowledge or the means of knowledge as to parking because the term "'assigned reserved parking' in Exhibit A does not contain any language on priority." (Resp'ts' Return at 7.) This language is precisely why Petitioners should have known that they had no priority with respect to parking. Priority was mentioned for location of seat tickets, but not parking. The plain language of the contract reveals there was no intent to create any priority for parking. Second, there could be no justifiable reliance on any representations because the language of the contract would inform them that they had no priority. Moreover, they cannot rely on any conduct or representations made after the contract was executed because these actions would not have caused or encouraged them to enter the contract. Third, they suffered no prejudicial change in position. There is no evidence in the record that there was any change, other than the removal of their "assigned reserved parking" from the Williams-Brice Stadium apron to the adjacent Farmers' Market parking area. Petitioners

claim that this change is prejudicial because this move "subjected [Petitioners] to a lower priority . . . ." (*Id.* at 8.) But this claim is based on a false supposition. Petitioners never had any priority with respect to parking, as evidenced by the clear, unambiguous language of the Lifetime Membership Contract.

B. Erroneous Statements of Government Officials Do Not Estop Respondents.

The Chris Wyrick letter, dated March 5, 2008, cannot serve as a basis to estop the Respondents. (*See* J.A. at 305.) First, it was written decades after the contracts were entered; therefore, it is impossible for Petitioners to have relied on it while entering into the contracts. Second, Chris Wyrick's erroneous interpretation of the Lifetime Membership Contract 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."); *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) (providing "[a]n erroneous misconstruction of the contract by a State employee does not change its explicit terms . . . ."). Even if Petitioners reviewed the Wyrick letter, they could have reviewed their own Lifetime Membership Contract and understood that it was inconsistent with Wyrick's statement. After all, "citizens are presumed to know the law and are charged with exercising 'reasonable care to protect [their] interest[s].'" *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (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)).

Petitioners attempt to distinguish *Service Management, Inc. v. State Health & Human Services*, 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989) by claiming (1) priority was not expressly

stated in the Lifetime Membership Contract like the calculation rates were in the *Service* contract; and, (2) representations by "top officials" were made in the present matter, unlike the "mere" calculation errors in *Service*. (Resp'ts' Return at 10.) These distinctions miss the point. Unauthorized or erroneous conduct or representations by government officials cannot estop the public. It is of no moment whether the calculation method was explicitly stated in *Service* or whether "mere" calculations or statements by "top officials" were made. The State cannot be estopped by this conduct.

This is best established by *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010). In *Quail Hill*, the Richland County Subdivision Coordinator told a real estate developer's broker that a certain parcel of land would be suitable for the development of manufactured housing. *Quail Hill*, 387 S.C. at 227, 692 S.E.2d at 501. Moreover, the tax bill from the assessor's office provided that the property could be developed for manufactured housing. *Id.* In reliance on those representations, the developer then purchased the property and had it surveyed, platted, and prepared for development. *Id.* Soon thereafter, the Richland County Development Services Department recommended approval of the developer's subdivision plan to the Planning Commission. *Id.* at 228, 692 S.E.2d at 501. Then, the Planning Commission unanimously approved the site plan. *Id.* at 228, 692 S.E.2d at 502. Consequently, the developer began to market and sell lots for the subdivision. *Id.* Five lots were sold, and manufactured homes were being installed on two of the lots. *Id.* Soon, neighbors began to question the zoning and voiced opposition to the development. *Id.* This caused Richland County's Zoning Administrator to review the County's Official Zoning Map, where he discovered that the property was not in fact zoned for manufactured housing. *Id.* As a result, the Administrator ordered the developer to cease development, and litigation followed.

Despite the erroneous representation from the Richland County Subdivision Coordinator, the tax bill, and the approval of the plan by both the Richland County Development Services Department and the Planning Commission, the County was not estopped to enforce its zoning ordinances. *Id.* at 235-39, 692 S.E.2d at 505-08. As stated by this Court, "'*[t]he 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.*'" *Id.* 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)). This Court held that neither the Richland County Subdivision Coordinator nor the Tax Assessor's office was "authorized to interpret or alter the zoning classification designated on the Official Zoning Map." *Id.* at 237, 692 S.E.2d at 506. Although the developer had representations from both the Coordinator and the Tax Assessor's office, the Court found that the developer had "means of knowledge" by reviewing the zoning map and it "could not justifiably rely solely on information provided by staff members." *Id.* at 239, 692 S.E.2d at 507.

In *Quail Hill*, the developer purchased the property and began to develop, sell lots, and begin installation of manufactured homes on some of those lots in reliance on erroneous advice from the County. The developer nonetheless could not estop the government from enforcing its zoning ordinances. Here, Petitioners had a clear and unambiguous contract that informed them of their rights and obligations. If estoppel did not apply despite the numerous misrepresentations made by the Richland County officials in *Quail Hill*, it surely does not apply here based on an erroneous representation made years after the contracts were executed as to which there was no reliance.

CONCLUSION

Equitable estoppel cannot become a blue pencil for courts to rewrite contracts. The Court of Appeals opinion permits such a result. Equitable estoppel is not being used to prevent Respondents from asserting any defenses. Rather, it is being used to create contractual rights for Petitioners. The Court of Appeals improperly applied *Springob* to allow equity to rewrite the Lifetime Membership Contracts. Moreover, it overlooked the well-established law regarding equitable estoppel against the government. This Court should grant Respondents' Petition for Writ of Certiorari to remedy these errors.

SOWELL GRAY STEPP & LAFFITTE LLC

By: _____

Robert E. Stepp
SC Bar # 5335
Bess J. DuRant
SC Bar # 77920
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents/Petitioners the University of South Carolina and the University of South Carolina Gamecock Club

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PROOF OF SERVICE

I certify that I have caused service of Reply to Petitioners/Respondents' Return to Respondents/Petitioners' Petition for Writ of Certiorari by hand delivery, on December 10, 2015, to their attorney of record, Julius W. Babb, IV, Esquire, J. Lewis Cromer & Associates, LLC, 1418 Laurel Street, Suite A, Columbia, South Carolina.

BDRT

Robert E. Stepp
Bess J. DuRant
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449 (29211)
Columbia, South Carolina 29201
(803) 929-1400

Attorneys for Respondents/Petitioners