RECEIVED

DEC 10 2015

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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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

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

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

Julius W. Babb, IV (#77216)
J. Lewis Cromer (#1470)
J. LEWIS CROMER & ASSOCIATES, L.L.C.
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
(803) 799-9530
Attorneys for Petitioners/Respondents

Other Counsel of Record:
Robert E. Stepp, Esquire
Bess DuRant, Esquire
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Columbia, SC 29201
Attorneys for Respondents/Petitioners

INDEX

ARGUMENT ON REPLY[1]

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. In *Lee*, the plaintiff "filed a declaratory judgment action to determine whether they were entitled to purchase season tickets without paying the seat license fees." *Id.* This issue arose after the University implemented a seat license fee under a newly implemented YES (Yearly Equitable Seating) program. *Id.* This Court found that the language in the contract that provided the plaintiff with the "opportunity to purchase" season tickets is unambiguous. *Id.* The Court of Appeals in the present action incorrectly applied the *Lee* holding by expanding it to say that all terms in the contract are unambiguous.

The Respondents incorrectly argue that the Petitioners are trying to circumvent the holding in *Lee*, which is not the case. A specific issue was raised in that case regarding seat license fees and this Court presented an analysis of the particular terms in the contract in issue to come to their decision. This Court did not discuss whether the term "assigned reserved parking" was ambiguous nor does the Court appear to partake in a legal analysis to

[1] 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.

reach such a conclusion as they did for the seat license issue; thus the Court of Appeals reliance on *Lee* to preclude the parking issue at hand is overly broad and in error. Whether based upon issue preclusion or Stare Decisis is applied, the Court of Appeals should have made a determination on ambiguity using the same settled principals of contract interpretation as this Court addressed in *Lee*, but not simply held that it is unambiguous because the *Lee* case said another term in the contract is unambiguous. Moreover, even if there was a finding that the term is unambiguous, the Court of Appeals should have found that the unambiguity was in favor of the Petitioners. (*See* Section IV, *infra*).

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 AND EVIDENCE OF THE PARTIES' CONDUCT.[2]

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 and 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. 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)). "[W]here a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract and to establish the true intent

---

2 The Respondents presented a counter-statement of questions presented and seemed to combine the Appellants' second and third questions. The Appellants defer to their

and meaning of the parties." *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App.1988).

The Petitioners presented evidence that occurred prior to and contemporaneous with the execution of the contract, as well as evidence of representations by the Respondents after execution and the conduct of the parties during the contract. There is no merger clause in the contract that would otherwise express the intent of the parties for the contract to be treated as a complete integration. *See Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) (noting that a merger clause expresses the parties' intention that the writing be treated as a complete integration of their agreement).

Because the contract is ambiguous, extrinsic evidence and evidence of the parties' conduct 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. 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

---

questions presented but combine them for purposes of this reply.

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.

The Respondents articulate three reasons that collateral estoppel does not apply in this case. The first argument is that the *Rosen* case is an unpublished opinion without precedential value under Rule 220(a) and 268(d), SCACR. The Petitioners have argued that *Rosen* should collaterally estop the Respondents from arguing ambiguity, thus the issue is whether collateral estoppel applies because this same term was ruled ambiguous in a prior matter and not whether the decision constitutes legal precedent.

Secondly, the Respondents argue that the *Rosen* case involved a different matter than the present action. This is a distinction without a difference. The term at issue in both cases is "Assigned Reserved Parking." The court in *Rosen* determined the term is ambiguous. Because this matter has been actually litigated, directly determined to be ambiguous and necessary to support the decision; then collateral estoppel applies. The Respondents make some of the same arguments in this case as they did in that action, yet they would have the same three-word term be ambiguous in the context of whether the Lifetime Members paid for parking but unambiguous when discussing whether Lifetime Members can have their parking moved during the lifetime of the contract or what priority they have if it is moved. Lastly, the Respondents argue that giving *Rosen* preclusive effect would contradict the *Lee* decision. Based on the discussion above, this is simply not the case as the Court of Appeals applied an overbroad interpretation to the *Lee* holding.

IV. 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). The Petitioners have argued the reasons as to why the contract should be found unambiguous in their favor or at least found ambiguous if both interpretations are found to be reasonable. Even if the *Lee* holding applies to the parking term, the Court of Appeals should have then found that the term was unambiguous in Petitioners' favor similar to how this Court found the contract unambiguous in favor of that appellant.

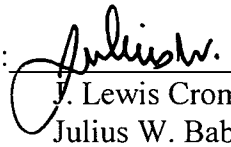
The Respondents' interpretation of the "assigned reserved parking" term would mean that the Respondents could designate parking for the lifetime members to even the farthest reaches of Gamecock Club parking and still be in compliance. Thus, "it would mean [the Petitioners'] received little or nothing in the bargain," for the Respondents could designate parking wherever they want and change it at any time. *Lee* at pp. 5-6. 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. The University 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: 

J. Lewis Cromer (#1470)
Julius W. Babb, IV (#77216)
1418 Laurel Street, Ste A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Petitioners/Respondents

December 10, 2015

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.

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

PROOF OF SERVICE

I certify that I have caused service of the Petitioners/Respondents' Reply to Respondents/Petitioners' Return to Petition for Writ of Certiorari by hand delivery, on December 10, 2015, to their attorneys of record, Robert E. Stepp and Bess J. DuRant, Esquire, of Sowell Gray at 1310 Gadsden Street, Columbia, SC.

J. LEWIS CROMER & ASSOCIATES, L.L.C.

By: Julius W. Babb

Julius W. Babb, IV (#77216)
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
(803) 799-9530
Attorneys for Petitioners/Respondents