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Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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

v.

The University of South Carolina and the University of South Carolina Gamecock Club Petitioners.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The core of Respondents' argument is that alleged oral promises made prior to the execution of a written, unambiguous contract can serve to modify the agreement of the parties to create new rights and impose new duties not set out in the contract itself. Thus, according to Respondents, they are entitled to priority in the assignment of parking spaces even though the Contract does not grant them that right. This assertion, however, ignores two fundamental principles of South Carolina law. First, a court must enforce the unambiguous terms of a contract as written because it is the writing that express the parties' intent. Second, equitable estoppel may not be used offensively to create rights not provided in the written agreement. Respondents' case flies in the face of these tenets. Despite Respondents' arguments, there is no authority that affects the application of the principles to the facts of this case. The terms of the unambiguous contract control, and equitable estoppel has no application.

Respondents attempt to avoid this result by claiming the equitable estoppel should be used to preclude Petitioners from asserting defenses to the Contract. However, the defenses are not at issue in this appeal. The interpretation of the Contract is at issue – whether the plain and ordinary meaning of the term "assigned reserved parking" been applied to the Respondents. It has, and Respondents do not contend otherwise.

Additionally, Respondents argue that *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014) insulates them from the well-established pillars of South Carolina law. *Springob*, however, does not support Respondents' argument because the *Springob* Court applied equitable estoppel strictly in a defensive manner. *Id.* 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). In the present matter, equitable estoppel would serve only as a tool to

afford profit and gain to Respondents, which is specifically precluded under South Carolina law. Respondents cannot avoid the principles that the plain and ordinary terms of the Contract must be applied and that equitable estoppel cannot be used to trump or inform its terms. This Court should reverse the Court of Appeals.

ARGUMENT

I. Respondents' Use of Equitable Estoppel is Offensive and Impermissible.

Respondents' application of equitable estoppel would impose a new term of priority parking onto a written, unambiguous contract. Rather than receive "assigned reserved parking" as promised in the Contract, Respondents are asking this Court to "write in" a new term of "assigned reserved parking in the best available parking area." This affirmative application of equitable estoppel is strictly prohibited. *See, e.g., 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."); *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 failed to do.'" (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994))). Despite this Court's holding regarding equitable estoppel, 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 Contract.

Respondents concede that equitable estoppel can only be used defensively. In an effort to fall under the defensive use of equitable estoppel, Respondents contort the facts by claiming that a court would be applying equitable estoppel in a defensive manner because it would only serve to prevent the University from asserting various defenses, such as statute of frauds and lack of consideration. (Br. of Resp'ts at 9-10.) This argument, however, does not accurately depict how

equitable estoppel would be applied. 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. Equitable estoppel would also add new or modified terms to the Contract.

Nor was summary judgment granted to Petitioners on the basis of any affirmative defenses. Rather, summary judgment was granted because the trial court concluded that there was no breach of the Contract because "assigned reserved parking" was provided to Respondents. (App. at 17-23.) In other words, Respondents were not entitled to prevail 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 indisputably provided to Respondents. 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.

[1] Respondents assert that a contract and promissory estoppel are two distinct theories. (Br. of Resp'ts at 6-7.) 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 was mentioned for the first time in Respondents' return to Petitioners' petition for rehearing before the Court of Appeals (App. at 592), and it is inapplicable and not preserved for review.

Springob does not support Respondents' position. *Springob* 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. In other words, equitable estoppel would have served to prohibit the University from asserting a statute of frauds defense to an oral contract, which is an appropriate use of equitable estoppel in South Carolina. *See, e.g., Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 40-41, 320 S.E.2d 720, 723 (Ct. App. 1984) ("While the authorities are in conflict as to whether equitable estoppel may be invoked to bar the defense of the statute of frauds . . . , the rule appears to be in South Carolina that estoppel may be so used." (citation omitted)); *Springob*, 407 S.C. at 497, 757 S.E.2d at 387-88 ("[T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." (alteration in original) (quotation marks and citation omitted)).

Here, there is a written contract, and Respondents have not pled any oral agreements outside of the written contracts.[2] (App. at 195-99.) If equitable estoppel were to be applied here, it would estop Petitioners from relying on basic contract law and allow the Respondents to write in new terms to their clear and unambiguous agreements. More specifically, it would allow Respondents to write in their version of alleged oral promises made decades ago. 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. Equitable Estoppel Cannot Lie against Petitioners.

Respondents contend there is a genuine issue of material fact as to whether Petitioners should be equitably estopped. This statement is inaccurate as a matter of law. As discussed

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

previously, equitable estoppel cannot revive or substantiate any alleged promises and impose them onto an unambiguous, written contract. This is a legal conclusion, and no fact can change the result. Respondents rely on two sources to support their equitable estoppel claim. First, they rely on vague, alleged promises made before the 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 Respondents 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 Contract because it was written decades after the Contracts were entered.

A. Respondents Cannot Satisfy Any of the Elements of Equitable Estoppel.

Respondents contend that because the Contract is silent on the issue of priority and parking they had no means of knowledge as to the issue, and therefore, could justifiably rely on the purported representations. (Br. of Resp'ts at 10-11.) This logic is faulty. The absence of language granting them priority with respect to "assigned reserved parking" is precisely why Respondents should have known that they had no priority with respect to parking. For example, the Contract provides that Respondents receive the "best available" tickets for up to four football and basketball tickets. (*See, e.g.*, App. at 228, 237, 282.) Yet, this language is conspicuously missing as to parking assignments. Thus, the plain language of the Contract reveals there was no intent to create any priority for parking. Respondents had every means of knowledge as to the lack of priority and parking.

Moreover, there can be no justifiable reliance on any representations because the language of the Contract informs them that they have no priority. Additionally, 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. Finally, they suffered no prejudicial change

in position. Curiously, Respondents do not address this issue in their brief. Presumably, they do not address prejudicial change in position because 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. This change could not be prejudicial, as a matter of law, because Respondents never had any priority with respect to parking, as evidenced by the clear, unambiguous language of the Contract.

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

Just as the alleged oral promises cannot serve as the basis to estop Petitioners, neither can the Chris Wyrick letter, dated March 5, 2008. (App. at 305.) First, it was written decades after the Contracts were entered; therefore, it is impossible for Respondents to have relied on it while entering into the Contracts. Second, Chris Wyrick's erroneous interpretation of the Contract cannot be used to estop the Petitioners.[3] *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 Respondents reviewed the Wyrick letter, they could have reviewed their own 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].'"

[3] Respondents contend that Petitioners are making this argument for the first time in the Brief of Petitioners. This is incorrect. Petitioners have continuously made this argument. (*See, e.g.*, App. at 527, 580-82.)

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)).

Respondents 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 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*. (Br. of Resp'ts at 12 n.6.) 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 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.

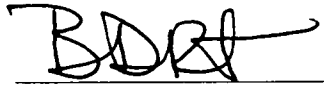
In *Quail Hill*, the developer purchased the property and began to develop, sell lots, and begin installation of manufactured homes on some of those lots in reliance on erroneous advice from the County. The developer nonetheless could not estop the government from enforcing its zoning ordinances. Here, Respondents 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 be used affirmatively to add contractual rights to an unambiguous contract. To allow otherwise would undermine a core principle of contract law – an unambiguous contract's language, alone, controls the contract's force and effect. Courts are constrained by the four corners of an unambiguous contract, and equitable estoppel cannot be introduced to allow courts to look beyond those four corners. Contracting parties must be able to rely on the written terms to which they agreed. The Court of Appeals, however, has called into question this principle and has turned equitable estoppel on its head by making it an instrument of gain and profit, which is specifically prohibited by this Court in *Janasik*. The Court should reverse the Court of Appeals.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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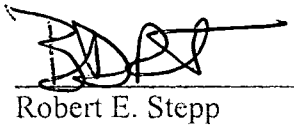
PROOF OF SERVICE

I certify that I have caused service of the Petitioners' Reply Brief on the Respondents by hand delivery, on December 21, 2016, to their attorney of record, Julius W. Babb, IV, Esquire, J. Lewis Cromer & Associates, LLC, 1418 Laurel Street, Suite A, Columbia, SC 29201.



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