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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-002295
Unpublished Opinion No. 2015-UP-357 (S.C. Ct.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.

JOINT APPENDIX

VOL 2.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-03924
Appellate Case No. 2013-00229s

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

Appellants.

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

Respondents.

FINAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT CORRECTLY FIND THAT THE CONTRACT IS UNAMBIGUOUS WHEN IT CONTAINS CLEAR LANGUAGE REGARDING THE ASSIGNMENT OF PARKING AND WHEN APPELLANTS AGREED THAT THE CONTRACT IS UNAMBIGUOUS?**
- II. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT TO RESPONDENTS BASED ON THE UNAMBIGUOUS LANGUAGE OF THE CONTRACT REGARDING THE ASSIGNMENT OF PARKING?**
- III. DID THE TRIAL COURT CORRECTLY EXCLUDE EXTRINSIC EVIDENCE AND EVIDENCE OF COURSE OF DEALING WHEN THE CONTRACT IS UNAMBIGUOUS?**
- IV. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO EQUITABLE ESTOPPEL WHEN THERE IS NO EVIDENCE TO SUPPORT THE ELEMENTS OF EQUITABLE ESTOPPEL?**
- V. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO COLLATERAL ESTOPPEL WHEN THE MEANING OF "ASSIGNED RESERVED PARKING" HAS NEVER BEEN PREVIOUSLY LITIGATED?**

STATEMENT OF THE CASE

This case is about the assignment of football parking spaces at Williams Brice Stadium for three lifetime members ("Lifetime Members") of the Gamecock Club. On June 7, 2012, Plaintiffs George M. Lee, III, Mena H. Gardiner, and Mitchell Bailey filed a Complaint against Defendants the University of South Carolina ("University") and the University of South Carolina Gamecock Club ("Gamecock Club").¹ (R.p. 202-208.) Plaintiffs are Lifetime Members of the Gamecock Club, who allege that Defendants breached the contracts governing the rights of Lifetime Members by not providing them with the requisite priority with respect to the assignment of parking spaces. (*Id.*) Plaintiffs sought an order from the court restraining Defendants from interfering with their contractual rights. (*Id.*) Additionally, Plaintiffs asked the court to determine the priority of the Plaintiffs within the entire group of Lifetime Members. (*Id.*) On July 6, 2012, Plaintiffs amended their Complaint to substitute John Love for Mitchell Bailey as a plaintiff. (R.p. 192-196.)

Defendants moved to dismiss the complaint on July 24, 2012. (R.p. 185 - 190.) In their motion to dismiss, Defendants argued that there were no breaches of the contracts as a matter of law because the contracts did not promise Plaintiffs any priority with respect to parking and because Plaintiffs had been provided with assigned reserved

¹ Linda Rodarte and J. Perry Kimball were also plaintiffs in this matter. However, they have dismissed their claims. On June 10, 2013, Plaintiff Rodarte dismissed her claims against Defendants. (R.p. 25 -26.) J. Perry Kimball abandoned his claims after the trial court granted summary judgment to Respondents.

parking as promised in the contracts.² (*Id.*) The Honorable George C. James Jr. denied Defendants' motion to dismiss. (R.p. 29.)

On October 3, 2012, Defendants filed their Answer, denying Plaintiffs' claims and asserting the following affirmative defenses: (1) failure to state a claim, (2) statute of limitations, (3) statute of frauds, (4) lack of consideration, (5) estoppel and/or waiver, and (6) sovereign immunity. (R.p. 210-216.) The parties engaged in written discovery, and Defendants deposed certain Plaintiffs and a witness, Marion Hope.

On June 14, 2013, Plaintiffs and Defendants filed cross-motions for summary judgment. (R.p. 112-116; R.p. 117-120.) Plaintiffs contended they were entitled to summary judgment because they were "parties to separate clear and unambiguous contracts with the defendants guaranteeing them assigned and reserved parking privileges as lifetime members" and Defendants breached the contracts by "taking each plaintiffs' priority in parking" (R.p. 113-114, ¶¶ 2-3.) Additionally, Plaintiffs argued that they were entitled to summary judgment based on theories of equitable estoppel and collateral estoppel. (R.p. 114-¶¶ 4-5.) In support of their Motion, Plaintiffs filed the affidavit of George Lee that stated that Lee was promised "guaranteed assigned and reserved parking" in his Lifetime Membership contract. (R.p. 294, ¶ 3.)

Defendants argued they were entitled to summary judgment because Plaintiffs were provided with "assigned reserved parking," as required by the unambiguous Lifetime Membership contracts. (R.p. 118-119.) Defendants also pointed out that the

² In response to Defendants' Motion to Dismiss, Plaintiffs filed Plaintiffs' Motion for Summary Judgment, in which they argued that they were "parties to separate clear and unambiguous contracts with the defendants guaranteeing them assigned and reserved parking privileges as lifetime donors" (R.p. 151-153 ¶ 2.) Plaintiffs, however, subsequently withdrew their Motion for Summary Judgment on the ground that they needed to engage in discovery. (R.p. 121-122.); (R.p. 27-28.)

contracts do not grant the right to any specific parking space to Plaintiffs or any priority with respect to parking. (*Id.*) In support of their Motion for Summary Judgment, Defendants relied on the affidavit of Marcy Girton. (R.p. 272-293.) Marcy Girton was the Deputy Director of Athletics for the University, and she testified in her affidavit that Plaintiffs were provided assigned reserved parking. (R.p. 272 - 275 ¶¶ 1,7 & 14 - 20.)

On August 9, 2013, the Honorable G. Thomas Cooper Jr. heard the cross-motions for summary judgment. On August 27, 2013, Judge Cooper granted Defendants' Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment. (R.p. 11-24.) Judge Cooper held that "Defendants did not breach the clear, unambiguous provision of the Lifetime Membership contract regarding parking" because Plaintiffs were provided with "assigned reserved parking." (R.p. 14.) He further held that the contracts do not grant any selection priority or specific parking spaces to Plaintiffs. (*Id.*)

On September 9, 2013, Plaintiffs filed a motion for reconsideration. (R.p. 6-9.) On September 17, 2013, Judge Cooper denied Plaintiffs' Motion for Reconsideration. (R.p. 5.) Plaintiffs Gardiner, Lee, and Love (collectively, "Appellants") filed and served their Notice of Appeal. (R.p. 1-3.)

STATEMENT OF THE FACTS

The Appellants are Lifetime Members of the Gamecock Club.³ (R.p. 272-273, ¶ 3.) The Lifetime Membership program affords Lifetime Members certain rights and privileges in exchange for certain financial commitments. (*Id.*) The rights and privileges of each Lifetime Member are memorialized in a written contract ("Lifetime Membership Contract") that governs the parties. (*Id.*). The rights and privileges of Lifetime Members are listed in Exhibit A to the contracts, which provides as follows:

- Four season football tickets (best available)
- Additional four season football tickets (total of 8)
- Assigned reserved parking
- Second priority on away and bowl games
- Tickets may be assigned to one designated heir
- Four season basketball tickets (best available)
- Assigned reserved parking at Coliseum (if available)
- Second priority on away and tournament game tickets
- Second priority on any tickets involving any other South Carolina athletic event.

(R.p. 223 - 225; R.p. 266 - 269; R.p. 231 - 234.)

³ There are two donor levels of Lifetime Members. The first level is the Lifetime Silver Spur membership, which required a \$40,000 or more payment. The second level is the Lifetime Scholarship membership, which required a \$25,000 - \$40,000 payment. (*See, e.g.,* R.p. 272 ¶ 3, 277 - 292.) With respect to this lawsuit, the main difference between the two levels is that a Lifetime Silver Spur member has first priority for away and bowl games, while a Lifetime Scholarship member has second priority. Appellants are Lifetime Scholarship members. (R.p. 284-292.)

Before the 2012 football season, Appellants' "assigned reserved parking" was located on the apron of Williams Brice Stadium ("Stadium"). (R.p. 12.) Parking for Gamecock Club members, including but not limited to Lifetime Members, however, was moved off the apron, beginning with the 2012 football season. (R.p. 273 ¶ 7.) In May of 2012, letters were sent to Appellants and other Gamecock Club members who parked on the apron, notifying them of the change. (R.p. 274 ¶ 10.) Appellants were informed that they could participate in a parking selection process governed by priority points or be assigned reserved parking in the new Farmers' Market parking facility ("Farmers' Market"). (R.p. 274 – 275 ¶¶ 10-11.)

The Farmers' Market is a premium, state-of-the-art parking area that has shaded tent zones and permanent restrooms. (R.p. 278 ¶ 8) Fans, who park in certain areas of the Farmers' Market, can use cable TV hookups and electrical outlets. (*Id.*) The Farmers' Market creates a vibrant "gameday" experience due, in part, to The Garnet Way, which is "a grassy promenade lined with scarlet oaks and provides a route for the marching band, cheerleaders, and football team to parade through the venue on the way to the Stadium." (R.p. 274, ¶ 8.) In June of 2012, Appellants chose to participate in the priority points parking selection process. (R.p. 275, ¶¶ 12, 16-18.) They each selected parking spaces in the Farmers' Market parking facility. (*Id.*) Specifically, Appellant Gardiner chose Spaces 6 and 7 in Row 1 in Garnet Way 4. (R.p. 275, ¶ 17; *see* R.p. 293.) Appellant Lee chose Spaces 1 and 2 of Row 4 in Quad 1 (R.p. 275, ¶ 16; *see* R.p. 293.), and Appellant Love chose Spaces 18 and 19 in Row 6 in Premium South (R.p. 275, ¶ 18; *see* R.p. 293.). Appellants selected two parking spaces, when previously they were only afforded one space on the apron of the Stadium. (R.p. 275, ¶¶ 16-18.)

Appellants thereafter filed this breach of contract action alleging that Respondents breached the Lifetime Membership Contracts by (1) not allowing them to park on the Stadium's apron and (2) not affording them the "appropriate priority" with respect to the selection of parking spaces. (R.p. 195, ¶¶ 14-15.) In response, Respondents contend and the trial court agreed that the Lifetime Membership Contracts do not grant Appellants the right to park on the Stadium's apron, or provide any priority with respect to the selection of parking spaces.

STANDARD OF REVIEW

The purpose of summary judgment is "to expedite disposition of cases which do not require the services of a factfinder." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004), *reh'ing denied* (May 20, 2004) (citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001)). On appeal from a grant of a summary judgment motion, an appellate court "applies the same standard as that required for the circuit court under Rule 56(c), SCRPC." *Bass v. Gopal, Inc.*, 384 S.C. 238, 243, 680 S.E.2d 917, 919-20 (2009) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

"In considering cross motions, the court should draw all inferences against each movant in turn." *RWE Nukem Corp. v. ENSR Corp.*, 373 S.C. 190, 195, 644 S.E.2d 730,

733 (2007) (quoting 73 Am. Jur. 2d *Summary Judgment* § 43 (2001)). “On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” *ENSR Corp.*, 373 S.C. at 195-96, 644 S.E.2d at 733 (citing *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)).

When this standard is applied to the present case, it is apparent that the Order granting summary judgment to Respondents and denying summary judgment to Appellants must be affirmed.

ARGUMENT

I. The Trial Court Correctly Found the Contract to Be Unambiguous Because It Contains Clear Language Regarding the Assignment of Parking and Because Appellants Agreed that the Contract is Unambiguous.

The clear and unambiguous Lifetime Membership Contract provides that Appellants are entitled to “assigned reserved parking.” “Assigned reserved parking” is susceptible of only one reasonable interpretation, and therefore, the term is unambiguous. No reasonable interpretation of the term allows Appellants to contend that they are entitled to a specific parking space or parking “at or near Williams Brice Stadium.” (*See* R.p. 195, ¶ 14.) Similarly, “assigned reserved parking” cannot be reasonably interpreted to grant any priority regarding the selection of parking spaces to Appellants. Moreover, Appellants agreed with the trial court and Respondents that the term was unambiguous. The trial court therefore correctly found that the contractual term “assigned reserved parking” is unambiguous.

A. The Plain and Ordinary Meaning of the Contractual Term “Assigned Reserved Parking” is Capable of Only One Reasonable Interpretation.

“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.” *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 464-65, 688 S.E.2d 597, 600 (Ct. App. 2010) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). To determine the parties' intention, courts first look to the contractual language. *Warner v. Warner*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). Contracts are “unambiguous if they are not ‘susceptible to more than one reasonable interpretation’” *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011) (quoting *TEG-Paradigm Envtl., Inc. v. U.S.*, 465 F.3d 1329, 1338 (Fed. Cir. 2006)). The determination of whether the language of a contract is unambiguous is a question of law for the court. *ESA Services, LLC v. S.C. Dept of Revenue*, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (Ct. App. 2011). Similarly, “the construction of a clear and unambiguous contract is a question of law for the court.” *Id.*

“If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). A court must look only to the four corners of the contract to determine the parties' intent and “‘when such contract is clear and unequivocal, its meaning must be determined by its contents alone.’” *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). A court must give the contractual terms contained in the four corners of the

document their plain, ordinary, and popular meaning when a contract is clear and unambiguous. *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 457-58 (Ct. App. 2011), *aff'd in part, rev'd in part*, No. 2011-203088, 2014 WL 766311 (S.C. Feb. 26, 2014). Consequently, courts cannot read words into a contract that “import an intent wholly unexpressed when the contract was executed.” *McPherson*, 206 S.C. at 204, 33 S.E.2d at 509.

In the present case, the trial court correctly held that Lifetime Membership Contracts were unambiguous with respect to parking rights because “assigned reserved parking” is not susceptible to more than one reasonable interpretation. Appellants do not challenge the fact that they were assigned parking spaces that were reserved for them. Rather, they argue that the Lifetime Membership Contract provides them a right to park on the apron of the Stadium and/or a place at the top of the parking priority list. The Lifetime Membership 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 Appellants. Nothing more and nothing less is promised to Appellants with respect to the assignment of parking.

B. Silence Does Not Create an Ambiguity.

The absence of any reference to the location of the assigned reserved parking or to any priority in the selection of parking spaces does not create an ambiguity and therefore does not permit the Court to go outside of the written agreement to determine the parties’ intentions. Silence in an agreement with respect to an issue does not create an ambiguity and does not allow a court to go outside of the contract to ascertain the parties’ intent. *See Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *see also*

Davis v. Orangeburg-Calhoun Law Enforcement Comm'n, 344 S.C. 240, 248-49, 542 S.E.2d 755, 759 (Ct. App. 2001) (holding that silence as to alleged adopted policies does not create an ambiguity with respect to a meeting's minutes because the silence "merely reflects that no official action [as to the policies] was discussed or taken.").

Neither a party nor the court may create an ambiguity when it does not exist within the contract. *Silver v. Aabstract Pools & Spa, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (stating "Homeowner cannot create ambiguity when it does not exist within the four corners [of the contract] . . ."). Similarly, a court may not consider the parties' unexpressed or secret intentions when construing a contract. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 805 (Ct. App. 2011) (stating "[t]he court is without authority to consider parties' secret intentions and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." (quotation marks omitted)).

In the present case, had the parties intended to include a promise regarding priority, they easily could have done so, as they did with respect to the assignment of football and basketball tickets. (*See* R.p. 225, R.p. 269, R.p. 234.) Appellants 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. It only follows that the parties did not agree Appellants would have the "best available" parking.

Similarly, had the parties agreed that Appellants were permanently assigned a specific parking space on the Stadium's apron, they could have said so in the agreement. For parking at basketball games, the contract grants Appellants "assigned reserved

parking *at Coliseum* (if available).” (See R.p. 269 (emphasis added).) For parking at football games, the contract does not state “assigned reserved parking *at Williams Brice Stadium*.” Rather, it simply states “assigned reserved parking.” The overt omission of “at Williams Brice Stadium” reveals that the parties reached no agreement regarding the permanent assignment of parking on the Stadium’s apron. Silence does not create an ambiguity, but rather reveals that the parties did not make any agreement as to those issues. The contractual term is clear. “Assigned reserved parking” has been provided to Appellants, and the trial court correctly granted summary judgment to Respondents.

C. Appellants Agreed that the Lifetime Membership Contract is Unambiguous.

Appellants argued twice to the trial court that the Lifetime Membership Contract is unambiguous. First, they contended as such in their Motion for Summary Judgment, in which they argued that they were “parties to separate clear and unambiguous contracts with the defendants guaranteeing them assigned and reserved parking privileges as lifetime donors” (R.p. 151 – 152, ¶ 2.)⁴ Second, they made the same argument in their second Motion for Summary Judgment, stating that the Lifetime Membership contract is unambiguous. (R.p. 113, ¶ 2.) Appellants also argued at the hearing on the Motion for Summary Judgment, however, that if the Lifetime Membership Contract was not unambiguously construed in their favor, then the contract should be deemed to be ambiguous.

Appellants cannot have it both ways. A contractual term is either ambiguous or not, and that determination is a question of law for the court. *ESA Services, LLC v. S.C.*

⁴ This motion was subsequently withdrawn by Plaintiffs on the ground that they needed to engage in discovery. (R.p. 121-122; R.p. 27-28.)

Dept of Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (Ct. App. 2011). Ambiguity is a threshold question for the court, not a retrospective analysis. A court looks to the language used in the contract to determine whether it is ambiguous. *Id.* It does not look to what the outcome would be if it were to decide that the contract is unambiguous.⁵ The trial court correctly determined that the Lifetime Membership Contract is unambiguous.

II. The Trial Court Correctly Granted Summary Judgment to Respondents Based on the Unambiguous Language in the Contract Regarding the Assignment of Parking.

Because the Lifetime Membership Contract contains clear and unambiguous language regarding the assignment of parking, the trial court correctly held Respondents did not breach the contract as a matter of law. The Lifetime Membership Contract provides that Appellants may enjoy “assigned reserved parking.” The Lifetime Membership Contract does not provide that Appellants are entitled to a specific parking space or parking on the Stadium’s apron. Nor does it make any statement about Appellants’ priority for purposes of the assignment of parking spaces. “Assigned reserved parking” was provided to Appellants. Therefore, there can be no dispute that Respondents complied with the terms of the Lifetime Membership Contract, and Appellants’ claim for breach of contract fails as a matter of law. The trial court correctly granted summary judgment to Respondents and denied summary judgment to Appellants.

⁵ Appellants rely on *Timmons v. The University of South Carolina, et. al.* (Civil Action Number 2012-CP-40-3931) to support their inconsistent claim regarding ambiguity. Their reliance, however, is misguided because the *Timmons* lower court did not find that “assigned reserved parking” was ambiguous. Moreover, the *Timmons* case involves several other issues that are not involved in this matter. A comparison of the two matters is therefore not instructive.

III. The Trial Court Correctly Excluded Extrinsic Evidence and Evidence of Course of Dealing Because The Contract Is Unambiguous.

Because the contract is unambiguous, the trial court properly excluded any extrinsic evidence, including any evidence of the course of dealing or the parties' conduct. First, the parol evidence rule excludes any extrinsic evidence or prior or contemporaneous agreements or understandings. Second, evidence of the parties' course of dealing or conduct cannot be introduced to vary or explain the terms of the unambiguous contract. The contract's language controls, and the court cannot look outside the four corners of the contract to glean the parties' intent.

A. The Parol Evidence Rule Bars the Introduction of Any Extrinsic Evidence.

“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.” *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 2002) (emphasis added) (quoting *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990)); 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 33:1 (4th ed. 1999) (noting that “‘parol’ or ‘extrinsic’ evidence includes any evidence that seeks to improve an agreement or understanding arising out of the parties’ words or conduct spoken or engaged in prior to or contemporaneous with the execution of the final, fully integrated written agreement . . .”). “The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing.” *Davis*, 394 S.C. at 128, 713 S.E.2d at 805 (quoting *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130,

134 (Ct. App. 1984)); 32A CJS *Evidence* § 1552 (“[I]n order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; if the evidence tends to vary or contradict the terms of the written instrument, or defeat its operation, it cannot be received.”).

The parol evidence rule incorporates the basic common law principle of merger. Indeed, “[i]t is elementary law that all parol agreements leading to the written contract are merged in the writing. The omission of any . . . antecedent agreement does not create an ambiguity.” *Welch v. Edisto Realty Co.*, 170 S.C. 31, ___, 169 S.E. 667, 671 (1933) (concluding that “[i]f plaintiffs desired the parol agreement, for which they now contend, be incorporated in the written instrument, they should have taken legal steps to reform that paper”). In other words, if the parties wanted a specific term to be included in the contract, they should have ensured its inclusion. *See* 17A Am. Jur. 2d *Contracts* § 388 (“In the absence of mistake or fraud, a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing.”).

Here, the term “assigned reserved parking” is clear and unambiguous. Consequently, Appellants cannot introduce extrinsic evidence to vary the terms of the agreement. They cannot introduce any evidence that they understood the term to be something other than what was written, i.e. that they would have parking on the Stadium’s apron for the duration of their Lifetime Membership Contract or that they would have priority with respect to parking. All discussions prior to the agreement were

merged into the Lifetime Membership Contracts.⁶ Appellants claim that they were assured top priority or a specific parking space prior to entering into the Lifetime Membership Contracts. (Initial Br. of Appellants 4.) If Appellants believed that they were entitled to a specific parking space or certain parking priority, they should have made sure these terms were included in the Lifetime Membership Contracts before they signed the contracts. However, they did not. They cannot now resort to the courts to rewrite their contracts.

B. Evidence of The Parties' Conduct and Course of Dealing May Not Be Considered.

The contractual language, not the parties' conduct or course of dealing, is the only expression of the parties' intent. Evidence of custom and usage may not be used to contradict, vary, or explain the terms of an unambiguous contract. *Moss v. Porter Bros., Inc.*, 292 S.C. 444, 448, 357 S.E.2d 25, 27 (Ct. App. 1987); *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."). Additionally, custom may be used to help in interpreting contracts only when a necessary term is omitted. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 285, 672 S.E.2d 816, 820-21 (Ct. App. 2009) (stating

⁶ Appellant Lee relies on purported correspondence between him and the Gamecock Club in which he claims he is afforded a certain parking space. (R.p. 229, ll. 7-15.) Similarly, Appellant Love argues that correspondence, which predates his Lifetime Membership Contract by approximately four years, and telephone conversations reveal that he is entitled to a specific parking space. (R.p. 245, l. 20 – R.p. 246, l. 2, R.p. 249, l. 3 – R.p. 253, l. 25.) Finally, Marion Hope, brother of Appellant Gardiner, states that prior to the execution of the Lifetime Membership Contract by his father, he understood Lifetime Members would have top priority in the Gamecock Club. (R.p. 218, l. 18 – R.p. 221, l. 4.) However, all of these communications predate the execution of their Lifetime Membership Contracts, and therefore, cannot be used to contradict, vary, or explain the unambiguous terms of the contract, itself.

proof of custom and usage may be used to supply an implied, necessary term). Moreover, custom may not be used to create any obligations. *Love v. Gamble*, 316 S.C. 203, 210, 448 S.E.2d 876, 880 (Ct. App. 1994) (providing “we know of no authority for the proposition that custom and usage alone can create a contract and give rise to a meeting of the minds on all essential terms of the contract.”).

Appellants’ attempt to explain the unambiguous term of “assigned reserved parking” is expressly precluded. Appellants cannot rely on custom in an effort to create obligations that were not contemplated by the parties when they entered into the Lifetime Membership Contract.⁷ The fact that Appellants were assigned the same parking space for years is not evidence of an obligation or agreement to do so. For example, there may not have been any need to reassign parking. This may be evidence of administrative convenience, but not the performance of a contractual duty. This purported evidence of custom was properly excluded because it did not show the parties’ contractual intent.

Additionally, there is no omission of a necessary term that would warrant the consideration of custom. The contracts explicitly state that Appellants are entitled to “assigned reserved parking.” There is a complete agreement, and it is not necessary to agree to a specific location or priority of assignment. Evidence of custom cannot create an obligation on Respondents to provide Appellants with either a specific parking space

⁷ Additionally, Appellants rely on documents from the 2000s to reveal the parties’ intent when they entered into contracts. Specifically, they look to a letter from Chris Wyrick with the Gamecock Club, dated March 5, 2008, and Gamecock Club Board Meeting Minutes from May 18, 2007 to claim that the contracting parties intended for Lifetime Members to have the highest priority with respect to parking. (See Initial Br. of Appellants 4-5, 11-12) Even if the court could consider such evidence, these documents were written decades after the parties entered into the contracts. Consequently, they shed no light on the intentions of the parties when they entered into the contracts.

for the duration of their contracts or a place at the top of parking priority. The trial court did not err in excluding this evidence.

IV. The Trial Court Correctly Granted Summary Judgment as to Equitable Estoppel When There Was No Evidence of the Elements of Equitable Estoppel.

The record is devoid of any evidence to support an equitable estoppel claim, and therefore, the trial court did not err in granting Respondents summary judgment with respect to the claim. For Appellants to establish equitable estoppel, they must show the following elements as to the party estopped:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts.

Langdale v. Carpets, 395 S.C. 194, 204-05, 717 S.E.2d 80, 85 (Ct. App. 2011). Additionally, the Appellants must have proved to the trial court the following elements as to themselves: ““(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government’s conduct, and (3) prejudicial change in position.”” *Ahrens v. State*, 392 S.C. 340, 353, 709 S.E.2d 54, 61 (2011) (quoting *Grant v. City of Folly Beach*, 346 S.C. 74, 80-81, 551 S.E.2d 229, 232 (2001)). The State cannot be estopped due to an error or mistake of a State employee or agent. See *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (“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.” (citation, internal quotation marks, and emphasis omitted)).

The Appellants established none of the elements of equitable estoppel. The Appellants offered no evidence as to conduct that could amount to a false representation or concealment of material facts by the Respondents.⁸ They offered no evidence that even if the Respondents made these false representations or concealments, that Respondents intended or expected Appellants to act upon them. Additionally, they offered no evidence that Respondents had knowledge of the "real facts." As to themselves, Appellants have offered no evidence that they justifiably relied on the conduct of Respondents or that they prejudicially changed their position based on the conduct of Respondents. Quite simply, the record is devoid of any evidence that could support a claim of equitable estoppel. The trial court properly granted summary judgment to Respondents and denied summary judgment to Appellants.

V. The Trial Court Correctly Granted Summary Judgment as to Collateral Estoppel Because the Meaning of "Assigned Reserved Parking" Has Never Been Previously Litigated.

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

⁸ In their brief, Appellants contend that "the Respondents made numerous assurances to the Appellants that they would have the highest priority as Lifetime Members and would have the parking on the apron of the stadium which is the best available parking." (Initial Br. of Appellants 12.) However, they do not cite to any evidence in the record for this statement. They do not state which person associated with Respondents made these representations, when these representations were made, and in what context the representations were made. There is no evidence to support these allegations. To the extent these representations were discussed in the deposition transcripts of Appellants, Appellants have failed to offer any evidence to establish any of the other elements required to prove a claim of equitable estoppel.

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)).

Because no court has ever ruled on the meaning of “assigned reserved parking,” the trial court did not err in granting Respondents summary judgment with respect to Appellants’ collateral estoppel claim. Contrary to Appellants’ assertion, this issue was not litigated in *Rosen v. The University of South Carolina, et. al.*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011).⁹ The question of whether “assigned reserved parking” is ambiguous was never raised and never litigated in *Rosen*. The issues raised in *Rosen* and in this case are separate, and therefore, *Rosen* has no preclusive effect in this matter.

Appellants’ counsel, who was also counsel for *Rosen*, asserted in the present matter that the contract was clear and unambiguous. (See R.p. 151-152, ¶ 2; R.p. 113, ¶ 2.) Appellants cannot maintain that collateral estoppel bars Respondents from arguing that the contract is clear and unambiguous when they maintained the same position in this matter. The trial court correctly granted summary judgment to Respondents and denied summary judgment to Appellants with respect to collateral estoppel.

⁹ *Rosen* is an unpublished opinion and has no precedential value and should not be cited or relied on as precedent in any proceeding except in those in which the unpublished opinion is directly involved. Rule 268(d)(2), SCACR.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's order granting Respondents' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment.

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May 19, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

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

Appellants,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-403924
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Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

of which
George M. Lee, III, Mena H. Gardiner and John Love Appellants,

v.

The University of South Carolina & The University of
South Carolina Gamecock Club Respondents.

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ARGUMENT

I. BECAUSE THE CONTRACT BETWEEN RESPONDENTS AND APPELLANTS CONTAINS LANGUAGE THAT IS AMBIGUOUS, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erred by holding that the "assigned reserved parking" term in the lifetime contract is unambiguous and granting the Respondents' motion for summary judgment as to the breach of contract claim. Respondents' argument on brief is similarly erroneous and summary judgment should be denied. The contract is ambiguous because "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) (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

A. The Term "Assigned Reserved Parking" is Capable of More than One Reasonable Interpretation Thus is Ambiguous.

The Appellants received "assigned reserved parking" on the apron of the stadium, which was the best available parking at the time these contracts were entered. This parking was to remain as their "assigned reserved parking" for their lifetime pursuant to the lifetime agreement. Even under the Respondents' view that they could provide parking anywhere and it would satisfy the term simply because they call it assigned and reserved, which Appellants refute, their actions are still a breach of the agreement because they are trying to alter the parking that was already provided. In other words, the parking places on the apron of the stadium were "assigned" and "reserved" for Appellants and nothing in the contract provides Respondents the ability to issue different parking or subject the Appellants to an annual priority system. There is an ocean of

difference between giving "assigned reserved parking" for a year on an annual basis and giving "assigned reserved parking" for a lifetime.¹ Respondents are committing the very sin they so protest—allowing silence to create an ambiguity. The Respondents own arguments tend to establish that there is an ambiguity in the contract even under their own reasoning.

The Respondents argue that the contract does not mention priority thus it should not be considered, yet they admit both in their brief and in the affidavit of Marcy Girton that they subjected Plaintiffs to the priority system. This in and of itself is consideration of alleged facts outside of the four corners of the contract, thus Plaintiff should similarly be allowed to use extrinsic evidence; which would show that an ambiguity exists and there are factual issues inappropriate for summary judgment. The lack of a term for priority simply bolsters the fact that the contract is ambiguous.² The University, as drafter and master of the contract, could have put language in indicating the priority or a clause allowing the University to change the parking, but they did not.

Respondents' try to draw a parallel between the football and basketball parking which only highlights the ambiguity. The first several items in the Exhibit A are relating to football games and the last few are relating to basketball. Adding "at Coliseum" simply indicates that

1 Non-lifetime members renew annually thus it makes sense that they may be under the priority system before each season and points may vary each year based on their donations. This is the exact type of situation that the lifetime members were contracting to avoid. It is clear from the contract that the purpose of the lifetime membership was to avoid having to spend more and more money each year to compete with other donors for priority. Instead, they paid a large sum to ensure their specific parking places and priorities; which is clear from the contract itself.

2 The ticket terms all have language indicating some type of priority, because priority is what the lifetime members were purchasing as to tickets. However, a specific parking place was to be "assigned" and "reserved" for the lifetime of the contract thus no need for a priority term. However, the University contends that the parking on the apron of the stadium was removed for safety concerns, thus the lifetime members should receive parking places that are equivalent.

particular term relates to basketball. There is little doubt that the contract is poorly constructed and unclear, which creates ambiguity. Further, the basketball parking term includes an exception of “(if available)” while the football parking term does not. If the parties intended for the football parking to be changed after the contract was entered and parking initially assigned and reserved, then they could have added “(if available).” On the face of the contract itself when looking at the entirety of the contract, it is clear that Respondents’ do not have this right and they cannot now use silence to read such a right into the contract. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 805 (Ct. App. 2011). Based on the foregoing reasons, the trial court erred by granting summary judgment.

B. The “Red Herring” Argument.

The Respondents take issue that Appellants made alternative arguments, although it is unclear as to what effect, if any, they are asserting this has to support summary judgment. Quite honestly, this argument is nothing more than a red herring to try and divert the Court’s attention from the ambiguous contract. While it is true that Appellants took the position in their motion for summary judgment that the contract was unambiguous in that it clearly gives them a permanent parking place and/or top priority as lifetime members, this is the polar opposite of what Respondents assert. It is mind boggling to understand their position that the parties taking two completely opposite positions that their interpretation are unambiguous somehow equates to the parties agreeing.³ If anything, this exemplifies that the terms are susceptible to more than one interpretation. The Appellants did not view the contract as being “reasonably susceptible of

The only equivalent is the best parking outside the apron for the duration of the contract.

³ As the Respondents themselves noted in their brief, ambiguity is a question of law for the court and they look at the contract itself to make this determination. *See ESA Service, LLC v. S.C.*

more than one interpretation” because they do not view the Respondents’ interpretation as one that could be reasonably drawn from the contractual language. *S.C. Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302-03. However, Appellants noted in their previous arguments and for purposes of this appeal, but without agreeing, that assuming the Respondents’ interpretation could be reasonably drawn, the contract is ambiguous since the Appellants’ interpretation could equally be reasonably drawn. This argument serves no purpose herein or on summary judgment.

C. The Timmons Case.

The Appellants disagree with Respondents’ assertion, set forth in footnote five of their brief, that the *Timmons v. The University of South Carolina, et. al.*, Civil Action 2012-CP-40-3931, is not constructive.

The Respondent University is the same party that is also in the *Timmons* case and the plaintiff in that matter is also a lifetime member with a lifetime contract containing an Exhibit A to said contract with the identical “assigned reserved parking” term set forth therein. (R. pp. 307-481).⁴ The University of South Carolina, in that action, filed a motion for summary judgment as to the various claims made by the Timmons, which included the movement of their “assigned reserved parking” place from the apron of the stadium just like in the present appeal. *Id.* In fact, in Section I(D)(1) of the supporting memorandum, the University argues that the term “assigned reserved parking” is “unambiguous” and does not entitle the Timmons to a “specific parking space or parking on the apron of the Stadium...[n]or do the contracts make any statement about

Dept. of Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (Ct. App. 2011).

⁴ Appellants have not included the exhibits to the memorandum on the record as it is rather voluminous (approximately an additional 117 pages). The exhibits to the opposition

Timmons' priority for purposes of the assignment of parking spaces." (R. pp. 354-355). The Timmons responded in turn by opposing the language as ambiguous. (R. pp. 344 -481). On July 19, 2013, the Honorable G. Thomas Cooper, Jr. denied the motion for summary judgment on the basis that there are issues of fact. (R. p. 340). On August 9, 2013, less than one month after the Timmons Order was filed, the parties in the present appeal argued cross motions for summary judgment before the Honorable G. Thomas Cooper, Jr.; wherein Respondents' attorney acknowledged that he was recently before Judge Cooper for the Timmons case but that it involved different issues. (R. pp. 33-35). The Respondents attempt to distinguish the cases is inaccurate and summary judgment should have been denied as to the Respondents motion in the present action just as it was in the Timmons case.

Undersigned counsel has all due respect for the Honorable Judge Cooper, who has always been and continues to be an excellent and fair judge to practice before. The Appellants simply believe that the fact the same reasonable judge draws two different rulings on the same term evidences its ambiguous nature and supports a denial of summary judgment. Moreover, the Respondents should be bound by the Timmons ruling as they cite to and distinguish the case within oral arguments for summary judgment in this matter, yet the cases both include the same exact issue as to breach of the "assigned reserved parking" term by moving both sets of plaintiffs off the apron of the stadium in 2012. Accordingly, summary judgment should have been denied.

II. BECAUSE EXTRINSIC EVIDENCE WAS IMPROPERLY EXCLUDED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The exclusion of extrinsic evidence is clear error and should be reversed. As argued in

memorandum are likewise left off the record.

Appellants Brief in this appeal, extrinsic or parol evidence was improperly excluded by the trial court. The contractual language is ambiguous thus evidence should be admitted to show intent. "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. at 623, 550 S.E.2d at 303 (citing *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878). Because the contract is ambiguous, the Appellants were improperly excluded from providing extrinsic evidence.

The Respondents additionally assert that all discussions prior to the contract are merged into the contract. There is no merger clause in the contract, and the promises made to the Appellants are valid evidence of the intent of the parties and not to alter the terms of the agreement.

III. BECAUSE THE PARTIES' CONDUCT WAS IMPROPERLY EXCLUDED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erroneously held that the parties' conduct or course of dealing after the execution of the contract could not be considered to determine their intent as the contract is unambiguous. The conduct can be used to determine intent and is not being used to contradict or vary a clear and unambiguous term of the contract. *See S.C. Dep't of Natural Res.*, 345 S.C. at 623, 550 S.E.2d at 303.

The contract is also missing key terms needed for the Respondents position to make any sense, such as if the assigned reserved parking can be altered, when can it be altered, can priority be imposed on the Appellants, or the process for reassignment. Custom usage and practice can be used to interpret contracts. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 285, 672 S.E.2d 816, 820-21 (Ct. App. 2009).

Contrary to Respondents position that the fact Appellants were supplied the same parking spot on the apron for years is irrelevant, "[t]he practical interpretation of the contract by the parties to it for any considerable period of time before it becomes the subject of controversy is entitled to great, if not controlling, influence." *Farr v. Duke Power Co.*, 265 S.C. 356, 363, 218 S.E.2d 431, 434 (1975). The potential reasons, other than contractual duty, for not changing the parking places for over two decades that Respondents assert in their brief are improbably and unreasonable. It is difficult to imagine the University maintaining the same premiere parking spaces for so long that are on the apron of the stadium itself for mere administrative convenience when such parking would attract big donations from lifetime members. Again, interpretation is by a "reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am.Jur.2d *Contracts* § 338, at 345 (1991)). Based on the foregoing reasons, summary judgment should have been denied.

IV. BECAUSE EQUITABLE ESTOPPEL AND COLLATERAL ESTOPPEL WERE INCORRECTLY REJECTED, THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE BREACH OF CONTRACT CLAIM.

The trial court erroneously rejected the equitable estoppel and collateral estoppel arguments made by Appellants.

John Love made a contribution in 1986 of \$10,000.00 plus \$1,000.00 a year to get premium parking near the end zone along with Full Scholarship status, which was promised to him by Chip Clary. (R. pp. 235-269). In 1990, he went from good parking to excellent parking

by becoming a lifetime member through the life insurance policy program. (R. p. 249). In fact, locking in priority and location for the parking for a lifetime was a major reason for this decision as himself, Harry Gregory, Jr. and Harry Gregory, Sr. all got parking place next to each other so close to the stadium that the only other parking place was assigned to the athletic director at the time. (R., pp. 240-245). Mr. Love had a conversation with the Gamecock Club, who assured them of this parking at the time. (R. pp. 252-253). He maintained this parking place until the 2012 move. (R., p. 244). Clearly Mr. Love reasonably relied on the assurances by Chip Clary in 1986 and the Gamecock club in 1990 and was justified in doing so, and as a result suffered when they moved the parking. The University had knowledge of the assurances being made and relied upon, as they were made to secure large donations.

Similarly, Stewart Hope was made specific assurances that he would have top priority on parking. (R. pp. 217-221). George Lee also relied upon assurance by the Gamecock Club and/or University that he had specific parking places for the lifetime of the contract on the apron of the stadium and held the highest priority on parking and tickets as lifetime members. (R. pp. 294 – 295 & 226-229).

The University not only expected the Appellants to rely upon these assurances, they knew they did because the assurances were made to secure the donations made pursuant to the lifetime contracts. *See Springob v. University of South Carolina et. al.*, App. Case No. 2012-206887, Op. No. 27363 (S.C. March 12, 2014). The trial court erred in granting summary judgment, as there are material issues of fact relating to equitable estoppel.

The Respondents should also be collaterally estopped from asserting that the term “assigned reserved parking” is not ambiguous. Respondents assert that the question of whether “assigned

reserved parking” was ambiguous was never litigated in *Rosen*. This is incorrect, as the term “assigned reserved parking” in exhibit a to a lifetime contract just like those of Appellants was the very term being litigated. See *Harvey J. Rosen, Joseph B. Rosen and Rebecca Nurick v. The University of South Carolina and The University of South Carolina Gamecock Club*, Op. No. 2011-UP-331 (S.C.CT.APP. filed June 27, 2011)(unpublished). The Court found that this exact three-word term in the same Exhibit A to a Lifetime Membership Contract was ambiguous. *Id.* Therefore, to the extent the Respondents assert a position contrary to the Court of Appeals holding in that case they are collaterally estopped from doing so.⁵ See *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (S.C. 2009) (“Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.”).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants respectfully request that the Court reverse the judgment of the trial court and remand for a new trial.

(Signature Block on Following Page.)

⁵ Respondents again raise the red herring argument, which fails for the reasons set forth in Section I(B), *supra*.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
Appellate Case No. 2013-002295

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

of which
George M. Lee, III, Mena H. Gardiner and John Love.....Appellants,

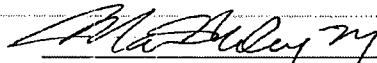
v

The University of South Carolina & The University of
South Carolina Gamecock Club,.....Respondents.

PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., caused to have served the Appellant's Final Brief and Final Reply Brief on counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 19, 2014, addressed to Robert E. Stepp, Esquire & Bess J. DuRant, Esquire, Sowell Gray Stepp & Lafitte, LLC, 1310 Gadsden Street, Columbia, South Carolina 29201

May 19, 2014


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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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 Appellants,

v.

University of South Carolina and University of South
Carolina Gamecock Club, Respondents.

Appellate Case No. 2013-002295

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-357
Heard April 21, 2015 – Filed July 15, 2015

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Julius W. Babb, IV, and J. Lewis Cromer, both of J.
Lewis Cromer & Associates, LLC, of Columbia, for
Appellants.

Robert E. Stepp and Bess J. DuRant, both of Sowell Gray
Stepp & Laffitte, LLC, of Columbia, for Respondents.

PER CURIAM: Linda Rodarte, J. Perry Kimball, George M. Lee, III, Mena H. Gardiner, and John Love filed this action against The University of South Carolina and The University of South Carolina Gamecock Club (collectively, USC), alleging breach of contract. Lee, Gardiner, and Love (Appellants) appeal the circuit court's order granting summary judgment to USC. Appellants argue the circuit court erred by (1) finding the contract was unambiguous; (2) excluding extrinsic evidence; (3) excluding evidence of the parties' conduct; and (4) rejecting Appellants' estoppel arguments. We affirm in part, reverse in part, and remand.

II. BACKGROUND FACTS

Appellants acquired Lifetime Scholarship Memberships¹ in the Gamecock Club, an organization supporting athletics at the University of South Carolina. The Lifetime Scholarship Membership program was established by the Gamecock Club in the mid-1980s. In exchange for donations to the Gamecock Club, the donors received lifetime rights and privileges that were memorialized in a Membership contract. Pursuant to Exhibit A of each contract, Appellants were entitled to the following:

- Four Season Football Tickets (Best Available)
- Additional Four Season Football Tickets (Total of 8)
- Assigned Reserved Parking
- Second Priority on Away and Bowl Game Tickets
- Tickets May Be Assigned to One Designated Heir
- Four Season Basketball Tickets (Best Available)
- Assigned Reserved Parking² at Coliseum (If Available)
- Second Priority on Away and Tournament Game Tickets
- Second Priority on Any Tickets Involving Any Other South Carolina Athletic Events

The advertising circular that introduced the Lifetime Scholarship Membership program listed "Priority on season Football Tickets and Parking" as one of the

¹ There are two donor levels of Lifetime Memberships—Lifetime Silver Spur Members, who donate more than \$40,000, and Lifetime Full Scholarship Members, who donate between \$25,000 and \$40,000.

² Lee and Love's contracts provided, "Assigned Parking at Coliseum (If Available)."

benefits of membership. A 1986 brochure described Lifetime Scholarship Membership football parking benefits as "Assigned Reserved Parking." For approximately twenty-five years, Appellants and other Gamecock Club members parked on the apron of the University's football stadium in reserved parking spaces.

Marcy Girton, the Deputy Director of Athletics for the University, averred by affidavit that on November 3, 2006, the Board of Directors of the Gamecock Club amended its Constitution and By-Laws to approve a priority point system for the allocation of benefits associated with membership in the Gamecock Club. The amendments provided that assignments for parking at home football games would be based on a member's priority point ranking.

Under the priority point system, points would be awarded as follows: (1) Gamecock Club members receive one point for every \$100 donation and two points for each consecutive year of giving; and (2) Gamecock Club members receive one point for every season ticket purchased for football, baseball, and men and women's basketball. Lifetime Scholarship Members were deemed to have made donations to the Gamecock Club in the amount of cash contributions they made when they became Lifetime Scholarship Members or the amount of the value of the life insurance policies they assigned to the Gamecock Club. By letter to Lifetime Scholarship members dated March 5, 2008, from Chris Wyack, Executive Director of the Gamecock Club, USC stated "Life[time] Members are at the top of all Gamecock Club priority."

Beginning with the 2012 football season, parking on the apron around the stadium was no longer available to Gamecock Club members. Prior to the football season, Appellants were informed they could no longer park on the apron of the stadium, and they could either participate in a parking space selection process based on the priority point system or the Gamecock Club would assign their parking. Lifetime Scholarship Members were not given priority over other Gamecock Club members in the priority point system. Appellants were each permitted to select two parking spaces. Members could select reserved parking from numerous outlying USC parking facilities, including the Armory, Carolina Park at the South Carolina State Fairgrounds, and the Farmers' Market. Appellants each selected parking spaces at the Farmers' Market.

Marion Hope (Hope) testified in deposition that he participated in the negotiations when his father, Stuart Hope (Mr. Hope),³ entered his Lifetime Scholarship Membership contract with USC on May 8, 1986. Mr. Hope had contributed \$5,000 and agreed to contribute an additional \$20,000 to become a Lifetime Scholarship Member. Hope testified a USC representative gave verbal assurances of privileges beyond those listed in Exhibit A of the contract, including eight basketball tickets (the contract said four) and top priority in the Gamecock Club. According to Hope, Mr. Hope was assured Lifetime Silver Spur Members had top priority and Mr. Hope's level, Lifetime Scholarship Membership, had second priority.

George Lee signed his contract in March 1990 and testified in deposition he was given Lifetime Scholarship Membership privileges in exchange for a life insurance policy on his life for \$100,000, payable to USC. Lee stated he received a specific parking space, space 214,⁴ per a letter signed by Art Baker on behalf of USC. By sworn affidavit, Lee averred he was given priority parking from the time he entered the contract until the summer of 2012. Lee stated, "[t]hrough the Gamecock Club's actions[,] persons have been given priority ahead of mine and in contravention of my contract rights." Lee claimed USC's actions violated his "rights under the contract and disregard[ed] the Gamecock Club's past course of dealing, over decades, regarding the assignment of reserved parking."

John Love testified in deposition that he sought out a Lifetime Scholarship Membership at the behest of his friends, Harry Gregory, Sr., and Harry Gregory, Jr., so they could park together next to the stadium. Love executed his contract for a Lifetime Scholarship Membership in March 1990 in exchange for purchasing a \$100,000 whole life policy and designating USC as the beneficiary. Love had been a Full Scholarship member since 1982, when he donated \$10,000 and pledged \$1,000 per year. Love testified that his communications with USC prior to executing the contract involved instructions to obtain the insurance policy and USC's assurances confirming that parking for the three spaces would be adjacent. Love testified he already had a good parking space; thus, the appeal of the Lifetime Scholarship Membership was that it would "define what my contributions for my lifetime would be to have the best priorities for tickets and parking. So those were the gist of my conversations."

³ Mr. Hope's rights and privileges under the contract passed to his named beneficiary, Mena Gardiner, at the time of his death.

⁴ Lee's deposition indicates parking spot 214; his affidavit names space 314.

Between 1990 and 2011, Love parked with Harry Gregory, Sr., and Harry Gregory, Jr., on either side of him. Love testified he met with two representatives from the Gamecock Club in the spring of 2012 to verify his membership entitled him to the best available parking. Love stated, "it was not a good conversation because when I said . . . our parking is the best available[.]" the representatives said, "I think you are going to be happy, but [we] can't tell you that that is what is going to happen with you" and referred Love to the contract language.

In June 2012, Appellants filed this action, alleging USC breached the Lifetime Scholarship Membership contracts by requiring Appellants to move to parking spaces at the Farmers' Market and by not giving Appellants first priority in the selection of new parking spaces.⁵ Appellants alleged their contracts entitled them to priority in parking ahead of non-lifetime donors; however, USC breached their contracts by giving numerous non-lifetime donors priority ahead of them. The parties filed cross-motions for summary judgment.⁶

On August 9, 2013, the circuit court heard the motions. Appellants argued the point system resulted in Appellants' priority being intertwined with the general populace of Gamecock Club members in priority rather than continuing as first priority within the Gamecock Club. Appellants argued the Lifetime Scholarship Membership contract unambiguously provided them with priority, or in the alternative, the contract was ambiguous.

By order filed August 27, 2013, the circuit court noted its order related only to the portion of Exhibit A to the contract addressing parking, making "no determination as to any other provision of the agreement." The court concluded the contract was unambiguous, the parole evidence rule precluded consideration of extrinsic evidence, and the parties' conduct could not be used to vary the terms of the contract. The court also found Appellants were not entitled to relief under either equitable or collateral estoppel. Thus, the court granted USC's motion for summary judgment and denied Appellants' motion for summary judgment. The court denied Appellants' motion for reconsideration. This appeal follows.

III. STANDARD OF REVIEW

⁵ In July 2012, Appellants filed an amended summons and complaint replacing plaintiff Mitchell Bailey with plaintiff John Love.

⁶ Appellants' previous motion for summary judgment was withdrawn, and USC's motion to dismiss was denied.

On appeal from the grant of a summary judgment motion, this court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper under Rule 56(c) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Singleton v. Sherer*, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct. App. 2008).

"It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "[A] reviewing court is free to decide questions of law with no particular deference to the trial court." *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

IV. LAW/ANALYSIS

A. Ambiguity

Appellants argue the circuit court erred in holding the "assigned reserved parking" clause in their contracts was unambiguous. We disagree.

We are bound by our supreme court's ruling in *Lee v. The University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014). In *Lee*, the court reversed the circuit court's entry of judgment for USC in a declaratory judgment action. *Id.* at 514, 757 S.E.2d at 396. George M. Lee, III, had been a member of the Gamecock Club for many years when, in 1990, he elevated his membership to the Lifetime Full Scholarship level by purchasing a life insurance policy and designating USC as the sole, irrevocable beneficiary. *Id.* at 515, 757 S.E.2d at 396. Lee entered an agreement with the Gamecock Club similar to the agreement in this case. *Id.* at 515 n.2, 757 S.E.2d at 396 n.2. Lee agreed to pay the policy premiums for eight years until the policy was paid up, at which time the Gamecock Club would own the policy. *Id.* at 515, 757 S.E.2d at 396. The agreement also stated Lee would "have the opportunity to purchase tickets entitled to the Gamecock Level or membership presently held." *Id.* at 516, 757 S.E.2d at 396. At the end of the eight year period, the Gamecock Club notified Lee that it had not realized the cash necessary to insure the face value of the policy and Lee was required to either revert back to Full Scholarship level, contribute \$500 or more per year to remain a Lifetime Full Scholarship member, or continue paying the premium. *Id.* Lee began paying \$500 per year. *Id.*

In 2008, USC instituted a Yearly Equitable Seating (YES) program, requiring all Gamecock Club members, regardless of membership level, to pay a seat license fee each year for the opportunity to purchase their seats. *Id.* at 516, 757 S.E.2d at 397. Lee was required to pay \$325 per year for each of his eight seats. *Id.* Lee filed a declaratory judgment action to determine whether he was entitled to purchase season tickets without paying the seat license fees. *Id.* The circuit court found the agreement was unambiguous and even though Lee was required to pay the seat license fee, he retained the opportunity to purchase season tickets; thus, USC complied with the contract. *Id.* at 517, 757 S.E.2d at 397.

Our supreme court reversed, finding the agreement was unambiguous, but the seat license fee requirement constituted the imposition of an additional term to the agreement that the parties did not agree upon. *Id.* at 518, 757 S.E.2d at 398. The court held USC was required by the terms of the agreement to permit Lee the opportunity to purchase tickets without being subjected to any other conditions, including the payment of seat license fees. *Id.* Thus, although the supreme court ultimately reversed the circuit court in *Lee*, we are bound by the supreme court's finding that the substantially identical contract was unambiguous.⁷ Accordingly, we affirm the circuit court's finding that the contract was unambiguous.

B. Extrinsic Evidence

Appellants argue the circuit court erred in refusing to consider extrinsic evidence. We disagree.

⁷ We find no merit in Appellants' reliance on this court's unpublished opinion in *Rosen v. The University of South Carolina*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011), finding the same contract was ambiguous. *See* Rule 220(a), SCACR (providing unpublished opinions have no precedential value); Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). Further, we find no merit in Appellants' reliance on the Richland County circuit court's order in *Timmons v. The University of South Carolina*, 2012-CP-40-03931. *See* 21 C.J.S. *Courts* § 212 (2006) ("Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court." (footnotes omitted)).

"[E]xtrinsic evidence may only be considered if the contract is ambiguous." *Preserv. 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)). "Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009). Because we affirm the circuit court's finding that the contract is unambiguous, we likewise affirm the circuit court's refusal to consider extrinsic evidence.

C. The Parties' Conduct

Appellants also argue the circuit court erred in holding the parties' conduct after the execution of the contract could not be considered to determine their intent. We disagree.

Evidence of custom and usage may not be used to contradict, vary, or explain the terms of an unambiguous contract. *Autrey v. Bell*, 114 S.C. 370, 374, 103 S.E. 749, 750 (1920); see *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 ("Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties."). Because we affirm the circuit court's finding regarding ambiguity, we likewise affirm the circuit court's refusal to consider the parties' conduct after the execution of the contract in determining the parties' intent.

D. Estoppel

Appellants lastly argue the circuit court erred in rejecting their estoppel arguments. We agree as to equitable estoppel and disagree as to collateral estoppel.

1. Equitable Estoppel

The elements of equitable estoppel for the party asserting the estoppel are the following: (1) a lack of knowledge and of a means of knowing the truth as to the facts in question; (2) a reliance upon the conduct of the estopped party; and (3) a prejudicial change in position. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The elements as to the party being estopped are the following: (1) conduct by the estopped party amounting to a false representation or a concealment of material facts; (2) an intention that such conduct be acted upon by the other party; and (3) actual or constructive knowledge

of the true facts. *Id.* The party asserting estoppel carries the burden of proof. *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965).

The circuit court rejected Appellants' equitable estoppel claim. In reversing the circuit court, we again rely on recent South Carolina Supreme Court precedent. In *Springob v. The University of South Carolina*, 407 S.C. 490, 493, 757 S.E.2d 384, 385-86 (2014), the court considered the plaintiffs' challenges to the Gamecock Club's imposition of premium seating fees on Gamecock Club members. The premium seating was originally offered to high-level Gamecock Club members via a brochure offering the seats and other amenities, including preferred parking, access to a private club in the arena, and the option to purchase the best tickets to all events held at the arena. *Id.* at 493-94, 757 S.E.2d at 386. The brochure offered the opportunity to purchase the tickets over five years at \$5,000 per seat in the first year and \$1,500 per seat in years two through five. *Id.* at 494, 757 S.E.2d at 386. USC employees allegedly promised the plaintiffs that after year five, they would only have to pay the face value of the season tickets and maintain their Gamecock Club memberships to retain the premium seats. *Id.* After the fifth year, USC requested a \$1,500 per seat fee and informed the plaintiffs they would be required to pay \$1,500 per seat each year to retain the premium seating. *Id.* The plaintiffs filed an action alleging breach of contract, and the circuit court granted USC's motion for summary judgment, finding that due to the absence of a written contract between the parties, the statute of frauds barred the plaintiffs' claims. *Id.*

Our supreme court affirmed in part, finding the circuit court correctly found the agreement was barred by the statute of frauds. *Id.* at 495, 757 S.E.2d at 386. However, the court reversed in part and remanded, finding there was a factual issue as to whether USC was equitably estopped from asserting the statute of frauds as a defense based on an alleged oral promise that the plaintiffs would not have to pay the fee beyond year five. *Id.*

Taking the evidence in the light most favorable to Appellants, we find there was proof supporting Appellants' estoppel claim, including Appellants' affidavits and depositions, which indicate Appellants relied on USC's assurances of first and second priority "always" in exchange for the increased donations made to USC. This is sufficient to create an issue of material fact as to whether Appellants suffered a detrimental change in reliance on the representations. *See id.*, 407 S.C. at 498, 757 S.E.2d at 388 (finding a fact question existed, which precluded summary judgment on the Gamecock Club members' estoppel claim based on oral representations by USC). Thus, we reverse and remand, finding a factual issue exists in this case as to whether USC was equitably estopped from denying

Appellants the highest priority to available parking as Lifetime Scholarship Members.

2. Collateral Estoppel

Appellants argue USC is collaterally estopped from asserting the term "assigned reserved parking" is unambiguous because the issue was litigated in *Rosen*. We disagree.

"Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." *S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). "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." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

We find the issue decided in *Rosen* involved the ambiguity of the contract as to whether USC could charge a fee for parking rather than whether USC could change parking spots and priorities, which is the issue this action. Thus, Appellants have not established the elements of collateral estoppel.

V. CONCLUSION

We affirm the circuit court's findings as to the ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution of the contract, and collateral estoppel. However, as to equitable estoppel, we reverse and remand to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT, LOCKEMY, and McDONALD, JJ., concur.

7.6287

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
Appellate Case No. 2013-002295

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

of which

George M. Lee, III, Mena H. Gardiner and John Love.....Appellants,

v.

The University of South Carolina & The University of
South Carolina Gamecock Club,.....Respondents.

APPELLANTS' PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

- I. DID THE APPELLATE COURT ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION THAT THE CONTRACT IS UNAMBIGUOUS?
- II. DID THE APPELLATE COURT ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EXTRINSIC EVIDENCE?
- III. DID THE APPELLATE COURT ERR WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EVIDENCE OF THE PARTIES' CONDUCT?
- IV. DID THE APPELLATE COURT ERR WHEN IT AFFIRMED THE TRIAL COURT'S REJECTION OF COLLATERAL ESTOPPEL?
- V. DID THE APPELLATE COURT ERR BY DETERMINING THAT THE CONTRACT IS UNAMBIGUOUS IN FAVOR OF THE TRIAL COURT'S INTERPRETATION?

STATEMENT OF THE CASE

On June 7, 2012, Linda Rodarte, J. Perry Kimball, George M. Lee, Mena H. Gardiner, and Mitchell Bailey filed an action against the Respondents concerning a breach of their lifetime contract regarding their football parking spaces near Williams Brice Stadium. On July 6, 2012, the plaintiffs amended their Complaint and John Love was substituted for Mitchell Bailey. (R., p. 191).¹ Both the plaintiffs and respondents filed motions for summary judgment with the Court and both provided legal memoranda in support and opposition. (R., pp. 81 - 185).

On August 27, 2013, Judge Cooper filed an Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (R. p. 10). Plaintiff filed a Motion for Reconsideration (R. p. 6), which was denied by Judge Cooper by Order dated September 17, 2013. (R. p. 4). Plaintiff filed a timely notice of appeal.

The Appellate Court affirmed the circuit court's findings as to the ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution of the contract, and collateral estoppel. However, the Appellate Court reversed and remanded the circuit court's decision as to equitable estoppel. Appellants file this Petition for Rehearing as to the Appellate Court's affirmation of the circuit court's findings as to the ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution of the contract, and collateral estoppel.

¹ Linda Rodarte voluntarily dismissed her claims on June 7, 2013 and she is no longer a party. Perry Kimball has resolved his issues with the Respondents and is not an Appellant to this appeal.

STATEMENT OF FACTS

The University of South Carolina ("USC") is a state university with an athletics program including football. "The Gamecock Club is an organization which boosts and promotes USC athletics and with whom USC has partnered in the promotion of its programs and in the awarding of privileges in attendance at athletic events on USC property based upon financial contributions made by supporters of athletics." (R. p. 191). In the mid-1980s, the Lifetime Membership program was established by the Gamecock Club. Certain rights and privileges regarding USC athletics were offered to participating donors ("Lifetime Members")² in exchange for certain consideration. The terms of the Lifetime Membership agreement was memorialized in a written contract ("Lifetime Membership contract" or the "contract"). The Appellants, George M. Lee, Mena H. Gardiner and John Love, are Lifetime Members of the Gamecock Club. (R., pp. 91 - 104).

Each contract included an attached "Exhibit A," which stated that, among other benefits, each Lifetime Full Scholarship member and Lifetime Scholarship (Silver Spur) member would receive "assigned reserved parking." (R., pp. 91 - 104). Stuart Hope originally entered his Lifetime Contract in 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, was present during the negotiations his father had with the Gamecock Club concerning the Lifetime Membership Contract. (R. pp. 218-225). The Hopes were assured by representatives of the Respondents that they would have top priority to the items set forth in Exhibit A, including "assigned reserved parking" for

² There are two levels within the Lifetime Membership—Lifetime Silver Spur Memberships and Lifetime Scholarship Memberships. Lifetime Silver Spur Memberships paid \$40,000.00 or more while Lifetime Scholarship Memberships paid \$25,000.00-\$40,000.00 in consideration. Within the class of Lifetime Members, the Lifetime Silver Spur Members hold a higher priority on

football games. *Id.* John Love executed his contract in 1990, and he was made assurances of his specific parking location as part of his Lifetime contract. (R. pp. 235-269). Mr. Love had previously donated \$10,000.00 to have a premium parking space for football games, and this parking space then improved when he became a Lifetime member. *Id.* In May of 1990, George M. Lee executed his Lifetime contract, wherein he was given a specific parking place in exchange for a life insurance policy and was given assurances that he would be given excellent parking on the apron of the stadium. (R. pp. 294-295, 226-230).

Appellants' contracts were honored, collectively for decades, until the Summer of 2012. (R. pp. 294-295, ¶ 5). Pursuant to their contracts, Appellants were given priority in parking assignments ahead of non-lifetime donors. (*Id.* at ¶¶ 5-6). However, through the recent actions taken by the Respondents, the Appellants' priority in parking was rescinded by the Respondents and numerous non-lifetime donors have been given priority ahead of each Appellant. (*Id.* at ¶¶ 6-7).

As referenced in the Statement of the Case on Appeal, 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. (R. pp. 299 -302). These documents show that Lifetime Members were considered to have the highest priority in all matters including priority.

The aforementioned actions of the Respondents amounted to a breach of the Appellants' respective contracts and this action followed.

certain rights and privileges than the Lifetime Scholarship Members.

ARGUMENT³

I. THE APPELLATE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION THAT THE CONTRACT IS UNAMBIGUOUS.

Because the Appellate Court 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 Appellants' briefs, the Appellate Court erred when it affirmed the trial court's holding that the contract between the parties is unambiguous.

Under the doctrine of issue preclusion, a valid and final judgment is conclusive in a subsequent action if the issue of fact or law was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carman v. S.C. Alcoholic Beverage Control Com'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994) (citing *S.C. Prop. And Casualty Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991)). The Appellate Court based its decision to affirm the trial court's decision on *Lee v. the Univ. of S.C.*, in which the Court held that a lifetime contract similar to Appellants' contracts was unambiguous. *Lee v. the Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014).

However, in contrast to the term at issue in the Appellants' case, the issue in *Lee* surrounded the term in the Lifetime contract that allowed Gamecock Club members to "have the opportunity to purchase tickets entitled to the Gamecock Level or membership presently held." *Id.* at 514, 757 S.E.2d at 396. Because the issue in *Lee* surrounded the opportunity to purchase tickets terms of the contract, the determination of the ambiguity of the other terms in the contract, including the term at issue in the Appellants' case, "assigned reserved parking," was not necessary to support the holding

³ The Appellants are in agreement with the Appellate Court's reversal on the issue of Equitable

in *Lee*. The outcome in *Lee* would have been the same regardless of the determination of the ambiguity of the term, “assigned reserved parking.” Furthermore, because the determination of the ambiguity of the term, “assigned reserved parking,” was not necessary to the holding, the issue did not receive the attention it deserved from either party or the Court, thus the issue was not actually litigated. Therefore, the Appellate Court should not have affirmed the trial court’s finding that the term is unambiguous based on the holding in *Lee*.

In addition, the Appellate Court erred when it affirmed the trial court’s holding, because, although the Court in *Lee* ruled that the contract is unambiguous as to the terms concerning the opportunity to purchase tickets, the Court in *Lee* never addressed whether the term, “assigned reserved parking,” is unambiguous in favor of the Appellants’ or the Respondents’ meaning of the term. Once a court finds that a contract is unambiguous, the court’s function is to interpret the agreement’s lawful meaning and the intent of the parties as found within the agreement. *Miles v. Miles*, 393 S.C. 111, 116, 711 S.E.2d 880, 883 (2011) (citing *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001)). The court in *Lee* only addressed the meaning of the term that gave Gamecock Club members the opportunity to purchase tickets, not the term that gave Gamecock Club members “assigned reserved parking.” *Lee* at 518, 757 S.E.2d at 398. Even assuming, *in arguendo*, that the court in *Lee* may have interpreted the “assigned reserved parking” term to be unambiguous, the court may have interpreted the plain language of the contract in the same sense that the Appellants interpreted it instead of the Respondent’s interpretation. The Appellants’ final briefs set forth the arguments as to their interpretation, which the Appellate Court should have considered. Therefore, the judgment in *Lee* does not support the trial court’s decision to

Estoppel and are not seeking rehearing on this issue.

grant the motion for summary judgment, and the Appellate Court should have reversed and remanded the trial court's decision to determine the meaning of the term.

II. BECAUSE THE APPELLATE COURT ERRED WHEN IT AFFIRMED THAT THE CONTRACT IS UNAMBIGUOUS, THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE EXTRINSIC EVIDENCE.

Because the Appellate Court erred when it affirmed the trial court's decision that the contract is unambiguous, the Appellate Court also erred when it affirmed the trial court's decision to exclude extrinsic evidence. "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)). Because the contract is ambiguous, extrinsic evidence should have been admitted to show the intent of the parties. Therefore, the Appellate Court erred when it affirmed the trial court's decision to exclude extrinsic evidence and overlooked the Appellants' arguments.

III. BECAUSE THE APPELLATE COURT ERRED WHEN IT FOUND AFFIRMED THAT THE CONTRACT IS UNAMBIGUOUS, THE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE THE PARTIES' CONDUCT.

Because the Appellate Court erred when it affirmed the trial court's decision that the contract is unambiguous, the Appellate Court also erred in affirming the trial court's decision to exclude evidence of the parties' conduct. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *Id.* Because the contract is ambiguous, evidence concerning the parties' conduct after the execution of the contract should have been considered to determine the parties' intent. Therefore, the Appellate Court erred when it affirmed the trial court's

decision to exclude evidence concerning the parties' conduct and overlooked the Appellants' arguments.

IV. THE APPELLATE COURT ERRED WHEN IT AFFIRMED THE TRIAL COURT'S REJECTION OF COLLATERAL ESTOPPEL.

Because the Appellate Court misapprehended the holding in *Rosen v. the Univ. of S.C.*, the Appellate Court 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 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 Appellate Court 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 Appellants from asserting collateral estoppel. The Appellants' 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 Appellants' argument that there are numerous ways to interpret the term. It is also worth noting that the Appellate Court's 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 Appellate Court as a basis to hold that this term must also be unambiguous; however the Appellate Court 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 Appellate Court erred when it affirmed the trial court’s rejection of collateral estoppel.

V. THE APPELLATE COURT ERRED IN NOT FINDING THE CONTRACT TO BE UNAMBIGUOUS IN FAVOR OF THE APPELLANTS.

The Appellate Court erred in affirming the trial court’s finding that the contract is unambiguous in favor of the defendant’s 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). Assuming, *in arguendo*, that the Respondent’s interpretation is reasonable, the Appellants have argued that the parking terms of the contract are ambiguous because their interpretation is reasonable under the law surrounding contractual interpretation. However, the Appellants have also asserted that they do not believe the Respondent’s interpretation is reasonable and that to the extent the contract is determined to be unambiguous then it should be interpreted as unambiguous in their favor. Even assuming the *Lee* holding applies to the parking term, the Appellate Court should have then found that the term was unambiguous in Appellants’ favor.

The trial court’s interpretation of the “assigned reserved parking” term would mean that

the University could designate parking for the lifetime members to even the farthest reaches of Gamecock Club parking and still be in compliance. Similar to the *Lee* case, "it would mean [the Appellants'] received little or nothing in the bargain," for the University could designate parking wherever they want and change it at any time. *Lee* at pp. 5-6. The Appellants' were given assigned reserved parking on the apron of the stadium, which is considered to be the closest and best parking places. Nothing in the contract allows the Respondents to change the assigned parking place at will, much less to allow them the ability to change it to an inferior parking place. To the extent the University had to shut down parking on the apron of the stadium (which is questionable), they should have provided the best equivalent parking places to comply with the contractual terms.

To the extent the Appellate Court finds the contract unambiguous, it should be determined to be unambiguous in favor of the Appellants.

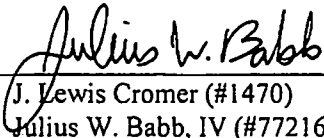
CONCLUSION

Based on the foregoing discussion and analysis, the Appellants respectfully request that the Court grant Appellants' Petition for Rehearing.

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July 30, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
Appellate Case No. 2013-002295

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SC Court of Appeals

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

of which

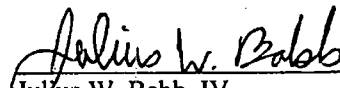
George M. Lee, III, Mena H. Gardiner and John Love.....Appellants,

v

The University of South Carolina & The University of
South Carolina Gamecock Club,.....Respondents.

PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., caused to have served the Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on July 30, 2015, addressed to Robert E. Stepp, Esquire & Bess J. DuRant, Esquire, Sowell Gray Stepp & Lafitte, LLC, P. O. Box 11449, Columbia, SC 29211.


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July 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
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RECEIVED

JUL 30 2015

SC Court of Appeals

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

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

Appellants,

v.

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

Respondents.

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Respondents the University of South Carolina and the University of South Carolina Gamecock Club (collectively, “Respondents” or “USC”) submit this Petition for Rehearing of this Court’s unpublished opinion filed July 15, 2015, which affirmed in part and reversed in part the circuit court’s order and remanded this matter “as to whether USC was equitably estopped from denying Appellants the highest priority to available parking as Lifetime Scholarship Members.” *Rodarte v. University of South Carolina*, Op. No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015).

The grounds for this petition are two-fold. First, the doctrine of equitable estoppel is a defensive doctrine that does not create or impose contractual rights with respect to an unambiguous contract. Second, even if the legal principle of equitable estoppel were applicable, the record contains no evidence to support an equitable estoppel claim. As affirmed by this Court, the Lifetime Membership contract is unambiguous, and consequently, neither extrinsic evidence nor the parties’ conduct is instructive in determining the parties’ rights, which are entirely controlled by the terms of the unambiguous contract. *See N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015) (“If a contract’s language is unambiguous, the plain language will determine the contract’s force and effect.”). Equitable estoppel cannot be imposed on the unambiguous contract to afford rights to Appellants.

I. EQUITABLE ESTOPPEL DOES NOT SERVE TO CREATE RIGHTS WITH RESPECT TO AN UNAMBIGUOUS CONTRACT.

Equitable estoppel may not be used by a party offensively to establish contractual rights that are not part of the written agreement between the parties. Similarly, a party cannot use equitable estoppel to modify a contract. The modification of a contract requires proof of the same elements necessary to create a valid contract, including consideration. This record does not contain

any such evidence. Finally, *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014) is not instructive in this matter because equitable estoppel was being used as a shield, rather than a sword, in *Springob*. In sum, the Court's reliance on equitable estoppel principles to reverse the circuit court was erroneous.

A. **Equitable estoppel is not an offensive weapon that confers rights upon contractual parties.**

Appellants may not resort to equitable estoppel to avoid the unambiguous terms of the Lifetime Membership contract or to create new contractual rights. Equitable estoppel is a defensive measure. As elucidated by the South Carolina Supreme Court,

Estoppel and waiver are *protective only*, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons.

Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992) (citations omitted) (emphasis added). "Equitable estoppel is *the inhibition to assert such right* by reason of mischief following one's own fault and may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right." *Id.* at 344, 415 S.E.2d at 387 (emphasis added). "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.'" *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (emphasis added) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)).

Here, equitable estoppel is not being used as a shield or defense to a claim, but it is being used improperly as a sword to "write in" new contractual terms or modify the existing ones. As determined by this Court, the contract and its term "assigned reserved parking" are unambiguous.

If equitable estoppel were to be applied in this case, it would serve to prevent Respondents from enforcing the terms of the unambiguous contract, while bestowing new rights to Appellants. Such a result flies in the face of the defensive nature of equitable estoppel.

B. Equitable estoppel cannot modify the terms of an unambiguous contract.

Both the Supreme Court and this Court have found this contract is unambiguous. *See Lee v. University of South Carolina*, 407 S.C. 512, 518-19, 757 S.E.2d 394, 397-98 (2014); *Rodarte v. University of South Carolina*, Op. No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015). When a contract is unambiguous, “the contract’s language determines the instrument’s force and effect.” *Lee*, 407 S.C. at 518, 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, 184 (2013)). “A court *must enforce* an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Id.* (emphasis added) (quoting *S.C. Dep’t of Transp. v. M&T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

Courts cannot alter, modify, or write new contracts when the parties have an unambiguous contract. *Lee*, 407 S.C. at 518, 757 S.E.2d at 398. Consequently, estoppel “cannot be applied in the presence of an unambiguous contract . . .” 28 Am. Jur. 2d *Estoppel and Waiver* § 31 (2011); *see also Zarrella v. Minnesota Mut. Life Ins. Co.*, 824 A.2d 1249, 1260 (R.I. 2003) (“[Q]uasi-contractual remedies such as equitable estoppel are inapplicable when the parties are bound by an express contract.” (citing numerous cases)). The parties to an unambiguous contract must be able to rely on their agreed upon terms. Equitable estoppel cannot be used to avoid this Court’s obligation to enforce the terms of the unambiguous contract. Nor can the Appellants use equitable estoppel in an attempt to modify unilaterally the unambiguous terms of the contract. *Lee*, 407 S.C. at 518, 757 S.E.2d at 398 (“Indeed, ‘[o]nce [a] bargain is formed, and the obligations set, a contract

may only be altered by mutual agreement and for further consideration.” (quoting *Layman v. State*, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2005))). The Court has held that the written Lifetime Membership agreement does *not* provide that Appellants are entitled to the highest, or indeed any, priority with respect to parking. Resort to equitable estoppel, however, invites the result that Appellants are entitled to priority expressly not provided in the agreement. This impermissibly alters the agreement in the absence of any legal basis for the modification. The parties are bound by the unambiguous contract, and the record is devoid of any written evidence of mutual agreement, supported by further consideration, that modifies the unambiguous terms.¹

C. ***Springob* is not instructive because its application of equitable estoppel is defensive, not offensive.**

This Court errs in relying on *Springob* to reverse the circuit court regarding equitable estoppel. In *Springob*, the Supreme Court held that a question of fact existed as to whether Respondents were equitably estopped from asserting the defense of the statute of frauds to the purported oral contract. *Springob*, 407 S.C. at 497, 757 S.E.2d at 387-88. In the present case, equitable estoppel is being applied to create rights that otherwise would not exist. This is quite different from the defensive application of equitable estoppel in *Springob*. This dichotomy illustrates the distinction drawn in *Janasik*. Equitable estoppel is protective only and cannot be used by parties to gain or profit. *Janasik*, 307 S.C. at 345, 415 S.E.2d at 388. Being estopped from relying on the statute of frauds is permissible; being estopped from relying on the terms of an unambiguous contract is not.

¹ Any evidence of modification would have to be in writing because the Lifetime Membership contract is subject to the Statute of Frauds. As held by the Supreme Court, “a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

II. THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT EQUITABLE ESTOPPEL.

Even if equitable estoppel could apply to the present matter, Appellants have offered no evidence that Respondents should be estopped from relying on the terms of the unambiguous contract. Generally, “estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel, however, can be available against the government in certain situations.

A. The law of equitable estoppel against the government.

In these situations, the party claiming estoppel against the government “must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government’s conduct, and (3) a prejudicial change in position.” *Id.* at 236-37, 692 S.E.2d at 506. “The party asserting estoppel bears the burden of establishing all its elements.” *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting *Estes v. Roper Temp. Servs.*, 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991)). “Absent even one element, estoppel will not lie against a government entity.” *Id.* at 320, 659 S.E.2d at 267.

“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.” *Quail Hill, LLC*, 387 S.C. 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)). Similarly, “[a]n erroneous misconstruction of the contract by a State employee does not change its explicit terms” *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). “[P]arties entering into agreements with the state assume the risk of ascertaining that he who purports to act for the state stays within the bounds of his authority.” *Id.* at 238, 379 S.E.2d at 444. Additionally, “citizens are presumed to know the law and are charged with exercising ‘reasonable care to protect [their] interest[s].’” *Morgan*, 377 S.C. at 320, 659 S.E.2d at 267 (alterations in original) (quoting *Smother v. U.S. Fidelity & Guar. Co.*, 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996)).

B. Appellants fail to prove any of the elements of equitable estoppel.

A review of the record shows that Appellants have offered no evidence to support their claim for equitable estoppel. First, this Court has already held that the contract is unambiguous, and therefore, neither extrinsic evidence nor the parties’ conduct may be considered. Consequently, the only pertinent representations would occur after the parties had entered into the contracts. There is no lack of means of knowledge or justifiable reliance because the parties had the unambiguous contract to inform them of their rights and obligations. Additionally, there is no evidence of any prejudicial change. Finally, even if the Appellants could offer the requisite proof to substantiate an equitable estoppel claim, any representations by Respondents concerning priority were simply incorrect, and Respondents cannot be estopped from enforcing the terms of the contracts.

1. Appellants had the means of knowledge of the truth as to the facts in question because they were parties to an unambiguous contract.

The first element of equitable estoppel against the government is lack of knowledge and of the means of knowledge of the truth as to the facts in question. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. Here, the unambiguous contract would contradict any statement suggesting that Appellants had the highest priority with respect to parking. The contract states that Appellants

have “assigned reserved parking” – nothing more, nothing less. (*See, e.g.*, R. pp. 90-93.) It does not mention priority, unlike the some of the other benefits, which are “Four Season Football Tickets (Best Available),” “Second Priority on Away and Bowl Game Tickets,” “Second Priority on Away and Tournament Game Tickets,” and “Second Priority on Any Tickets Involving Any Other South Carolina Athletic Events.” (R. p. 93). Even if Respondents caused Appellants to believe they had the best priority for parking, a review of their contracts would inform them that they do not.

2. There is no justifiable reliance upon the Respondents’ representations or conduct.

The second element of equitable estoppel against the government is justifiable reliance upon the government’s conduct. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. “The right to rely must be determined in light of the plaintiff’s duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him.” *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). Like the first element, Appellants cannot establish that they justifiably relied upon the Respondents’ representations or conduct because there is nothing before this Court that shows any change in position in reliance on the alleged statements. Contracting parties are presumed to know the contents of their contracts, and they cannot look to equitable estoppel to protect their interests.

Moreover, there is absolutely no evidence in the record that any of the Appellants relied (justifiably or not) on any conduct or statements of Respondents after they signed their contracts. They may claim that they were told that, prior to the execution of the contracts, they would have the highest priority, but those representations are merged into final, unambiguous contract. These representations cannot support an equitable estoppel claim.

3. Appellants have not suffered any prejudicial change in position.

The third element of equitable estoppel against the government is a prejudicial change in position. *Quail Hill, LLC*, 387 S.C. at 236-37, 692 S.E.2d at 506. Appellants have not offered a shred of evidence that they have changed their position in reliance on Respondents' representations made after the parties entered into the contracts. Even if Appellants could use representations purportedly made before they entered into the contracts, they have offered no evidence of any detrimental change in reliance on statements by Respondents' agents. Appellants carry the burden of establishing each element of equitable estoppel. *See Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (providing the party asserting estoppel bears the burden of proving the elements of equitable estoppel and "[a]bsent even one element, estoppel will not lie against a government entity."). Here, Appellants have not established any of the three elements, much less all of them.

C. Any statements by Respondents regarding priority for parking were erroneous and cannot be used to estop Respondents.

This Court's only reference to statements made by Respondents after the executions of the contracts was the Chris Wyrick letter, dated March 5, 2008. (*Rodarte Op.* at *3.) In the record, none of the Appellants state that they saw, knew of, or relied on the Wyrick letter. But even if they did, his statement in the letter is simply erroneous and 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."). Even if the Appellants read Wyrick's statement, they could have reviewed their unambiguous contracts and seen that his statement does not comply with the contract's terms.

For example, in *Service Management, Inc. v. State Health and Human Services Finance Commission*, this Court held that equitable estoppel does not trump the written contractual terms between a nursing home and the State. *Service Mgmt, Inc. v. State Health & Human Servs. Fin. Comm'n*, 298 S.C. 234, 237-38, 379 S.E.2d 442, 444 (Ct. App. 1989). In *Service Management, Inc.*, this Court affirmed a trial court's decision that a nursing home had to reimburse the State for overpayment of Medicaid funds erroneously calculated by State employees. *Id.* at 237-38, 379 S.E.2d at 444. The nursing home and the State entered into a written contract which provided that the nursing home would be reimbursed \$7.79 per patient day. *Id.* at 236, 379 S.E.2d at 442. State employees, however, calculated that the nursing home should be reimbursed \$9.36 per patient day for a period of time and then \$8.78 per patient day. *Id.* The State employees arrived at these figures by adding an inflation factor. *Id.* The State sought to recover the overpayments. *Id.* The nursing home replied by stating "the rate computation was made by State employees and [the nursing home] had a right to rely on it; therefore, the State is bound by the computation." *Id.* at 237, 379 S.E.2d at 443.

This Court disagreed with the nursing home and concluded that the contract "clearly states" that the nursing home was entitled to \$7.79 per patient day and that an "erroneous misconstruction of the contract by a State employee does not change its explicit terms and the State is not bound by the act of its officer in making an unauthorized payment." *Id.* at 237, 379 S.E.2d at 444. "Accordingly, estoppel will not bar recoupment of overpayments obtained as a result of the error of a state's officer." *Id.* at 238, 379 S.E.2d at 444.

The contract bound the nursing home and the State in *Service Management, Inc.*, and equitable estoppel was not allowed to create new contractual terms or alter the existing terms. Likewise, equitable estoppel should not be allowed to create or modify terms in the present

unambiguous contract. The statement made by Chris Wyrick was incorrect, and he had no authority to modify the clear and unambiguous terms of the contract. Consequently, his statement should not be used to bar the Respondents from enforcing the contracts.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court grant a rehearing in this matter or reconsider this matter and affirm the circuit court's decision.

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Columbia, South Carolina

July 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

JUL 30 2015

SC Court of Appeals

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

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

Appellants,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have caused service of the Respondents' Petition for Rehearing of Time to File a Petition of Rehearing on the Appellants by hand delivery, on July 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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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

RECEIVED

AUG 10 2015

SC Court of Appeals

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

Appellants,

v.

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

Respondents.

RESPONDENTS' RETURN TO
APPELLANTS' PETITION FOR REHEARING

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Attorneys for Respondents

Respondents the University of South Carolina and the University of South Carolina Gamecock Club hereby respond to Appellants' Petition for Rehearing ("Appellants' Petition"). For the reasons outlined below, the Appellants' Petition should be denied.

I. THE SOUTH CAROLINA SUPREME COURT HAS ESTABLISHED THAT THE CONTRACT IS UNAMBIGUOUS.

In *Lee v. University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014), the South Carolina Supreme Court held that the contracts at issue are unambiguous. This Court is bound by the Supreme Court's decision. Appellants are attempting to conflate precedent with collateral estoppel to avoid *Lee*. Appellants argue that the *Lee* Court "only addressed the meaning of the term that gave Gamecock Club members the opportunity to purchase tickets" (Appellants' Pet. For Reh'g 6.) Appellants assert that *Lee* does not collaterally estop Appellants because the Supreme Court did not address the term "assigned reserved parking," and thus, the term was not necessary to the holding and was not actually litigated. (*Id.*)

Appellants misunderstand the relevance of *Lee*. The *Lee* opinion serves as precedent, not as a basis for collateral estoppel. Moreover, the *Lee* Court's decision is not as narrow as Appellants claim. The *Lee* Court did not limit its holding to the terms regarding Lee's opportunity to purchase tickets. In fact, the *Lee* 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 this Court. 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

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).

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 this Court is constrained to follow the Supreme Court’s ruling.

II. NO EXTRINSIC EVIDENCE OR PARTIES’ CONDUCT MAY BE CONSIDERED BECAUSE THE CONTRACT IS UNAMBIGUOUS.

Because this Court is bound by *Lee*’s holding that the contract is unambiguous, Appellants cannot rely on any extrinsic evidence, including the parties’ conduct, to construe the agreement. *See, e.g., 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, this Court correctly concluded that the circuit court properly excluded extrinsic evidence and parties’ conduct.

III. THIS COURT'S UNPUBLISHED OPINION CANNOT SERVE AS THE BASIS FOR COLLATERAL ESTOPPEL.

Unlike *Lee, Rosen v. The University of South Carolina, et. al.*, Op. No. 2011-UP-331 (S.C. Ct. App. filed June 27, 2011) has neither precedential value nor any preclusive effect in this matter. 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)).

First, because this Court chose to not publish *Rosen*, it has no precedential value. *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, the meaning of “assigned reserved parking” was never litigated in *Rosen*, and therefore, it cannot serve to collaterally estop Respondents from maintaining that they provided Appellants 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 overrule a published Supreme Court opinion. Appellants’ argument to the contrary is fallacious and unsupported.

IV. THE TRIAL COURT'S INTERPRETATION OF "ASSIGNED RESERVED PARKING" WAS CORRECT.

Contrary to Appellants' argument, the plain, ordinary meaning of "assigned reserved parking" is not "best available parking space." 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)). Appellants want to stray from the plain and ordinary meaning of "assigned reserved parking" and impose additional terms on the contract. If the parties contemplated Appellants 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* R.p. 225, R.p. 269, R.p. 234.) Appellants 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. It only follows that the parties did not agree Appellants would have the "best available" parking.

The Lifetime Membership 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 Appellants. The Court cannot read "best available" or priority into "assigned reserved parking." Appellants' interpretation of "assigned reserved parking" deviates from the plain and ordinary meaning of the term, and the trial court properly rejected it.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court deny Appellants' Petition for a Rehearing.

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Columbia, South Carolina
August 10, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2012-CP-40-03924
Appellate Case No.: 2013-002295

RECEIVED

AUG 10 2015

SC Court of Appeals

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

Appellants,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have caused service of the Respondents' Return to Appellants' Petition for Rehearing on the Appellants by hand delivery, on August 10, 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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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
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AUG 10 2015
SC Court of Appeals

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
Mena H. Gardiner and John Love,

Of whom

George M. Lee, III, Mena H. Gardiner and John LoveAppellants,
are the

v.

The University of South Carolina & The University of
South Carolina Gamecock Club,Respondents.

APPELLANTS' RETURN TO RESPONDENTS' PETITION FOR REHEARING

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Attorneys for Appellants

Appellants hereby respond to Respondents' Petition for Rehearing ("Respondents' Petition"). For the reasons set forth below, the Respondents' Petition 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 incorrectly argue that the Court's reliance on equitable estoppel principals is erroneous. In support of their contention, Respondents 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 Appellants assert that the Court of Appeals correctly held that summary judgment was inappropriate under equitable estoppel principals.

The Respondents seek to use the unambiguity issue to squirm out of their assurances and promises made to Appellants 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 argument that the Appellants are somehow using promissory estoppel as an offensive weapon is unfounded.

Even assuming for purposes of this argument that the "assigned reserved parking" is unambiguous, this would not preclude reliance upon promissory or equitable estoppel. Defendants 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. (R. p. 215). They have argued that oral and documentary representations made prior to the contract do not apply because of defenses such as, for example, statute of frauds. 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 because of defenses such as statute of frauds or lack of consideration. Reliance on equitable estoppel in this case is not for purposes of being an offensive weapon, but instead is being used as a shield against the Respondents use of various defenses to escape the promises they made to the Appellants. The Court properly found that there is sufficient evidence to equitably estop Respondents such that summary judgment was inappropriate.

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

Finally, the Respondents assert that the Court 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 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 are attempting to create a distinction without a difference. In the present action, equitable estoppel would act as a shield against the Respondents defenses and assertions that the oral and written representations—outside of the Memorandum of Agreement—prevent any rights the appellants have to top priority. The Court’s finding in favor of 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 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. Appellants have established sufficient evidence as to all the elements of equitable estoppel and summary judgment was inappropriate.

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

The record reflects that the Respondents made representations and promises to the Appellants both prior to and after the execution of the Memorandum of Agreement to which they reasonably relied to their detriment with a lack of knowledge as to the truth of the facts in question.

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

The Respondents incorrectly argue that Appellants had the means of knowledge because of the purportedly unambiguous contract. The Respondents 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 contract, the University made representations about the top priority they held as lifetime members and about the best parking 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 to 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.

2. Appellants justifiably relied upon Respondents representations and conduct.

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

The Respondents incorrectly assert that the Appellants did not suffer a prejudicial change in position. A review of the record, in the light most favorable to Appellants, 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 Appellants justifiably relied upon the representations of the Respondents to enter the written contract 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 contract, 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 contract led to the Appellants further justifiable reliance. Further, because they now are competing with non-lifetime members as to priority they will have to pay more money to reach higher priority points or risk losing further priority ranking and being designated worse parking places into the future.

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

The Respondents incorrectly argue that statements made by Respondents regarding priority are erroneous and cannot be used to estop Respondents. 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 includes the Appellants. (R. p. 302). 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 contract to the extent the Court finds the original term unambiguous and silent on priority. It is signed by the Respondent which is the party that Appellants seek to estop.

The Respondents 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 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 Appellants respectfully request that this Court deny Respondents' Petition for Rehearing.

[Signature Block on Following Page]

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Attorneys for Appellants

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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-3924
Appellate Case No. 2013-002295

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AUG 10 2015
SC Court of Appeals

Linda Rodarte, J. Perry Kimball, George M. Lee, III,
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of which

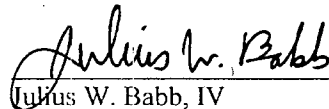
George M. Lee, III, Mena H. Gardiner and John Love.....Appellants,

v

The University of South Carolina & The University of
South Carolina Gamecock Club,.....Respondents.

PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., caused to have served the Appellant's Petition for Rehearing by having a copy of it hand-delivered, on August 10, 2015, addressed to Robert E. Stepp, Esquire & Bess J. DuRant, Esquire, Sowell Gray Stepp & Lafitte, LLC, 1310 Gadsden Street, Columbia, SC 29201.



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August 10, 2015

**J. LEWIS CROMER
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ATTORNEYS AND COUNSELORS AT LAW

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ASHLEY C. STORY • RYAN K. HICKS • SHANNON M. ALLEN

August 10, 2015

RECEIVED
AUG 10 2015
SC Court of Appeals

VIA HAND DELIVERY

Hon. Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Linda Rodarte, et al. vs. USC*
Appellate Case No. 2013-002295

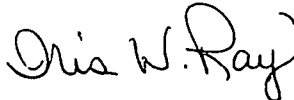
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant's Return to Respondent's Petition for Rehearing in connection with the above referenced matter, along with the Proof of Service. Please file and return the clocked-in copies to our courier.

By copy of this letter to counsel of record, we are serving a copy of same to them. Thank you for your assistance in this matter. Should you have any questions, please feel free to contact our office.

With kind regards, I remain

Sincerely,



Iris W. Ray
Litigation Paralegal

/iwr
Enclosures

cc: Robert E. Stepp, Esquire (via hand delivery)
Bess J. DuRant, Esquire (via hand delivery)
Clients

The South Carolina Court of Appeals

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 Appellants,

v.

University of South Carolina and University of South
Carolina Gamecock Club, Respondents.

Appellate Case No. 2013-002295

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

Paul E. Short, Jr. J.

James E. ...
Samuel L. ... J.

Columbia, South Carolina

FILED

cc:

September 17, 2015

J. Lewis Cromer, Esquire
Julius Wistar Babb, IV, Esquire
Robert E. Stepp, Esquire
Bess Jones DuRant, Esquire
The Honorable G. Thomas Cooper, Jr.