

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No. 2008-CP-40-5518

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Les Springob, Paul Trussell, Barton  
Dumas, Stanley Harpe, and John Yenco,

Of Whom Paul Trussell, Barton Dumas, and John Yenco  
are the Appellants,

v.

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

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FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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### **STATEMENT OF ISSUES ON APPEAL**

- I. In Cross-Motions for Summary Judgment, Did the Lower Court Err in Denying Appellants' Motion for Summary Judgment and Request for Specific Performance?
- II. In Cross-Motions for Summary Judgment, Did the Lower Court Err in Dismissing Appellants' Claims Based Upon the Statute of Frauds?
- III. In Cross-Motions for Summary Judgment, Did the Lower Court Err in Dismissing Appellants' Claims Based Upon the Statute of Limitations?

### **STATEMENT OF THE CASE**

Appellants, long standing supporters of the University of South Carolina and each a member of the University of South Carolina Gamecock Club, filed a Complaint with the lower court on July 31, 2008 and Amended Complaint on August 1, 2008 alleging causes of action against Respondents for breach of contract. Respondents answered the complaint on September 30, 2008. The issue in this case is whether Appellants entered into an Agreement with Respondents whereby Appellants were required to pay a sum of money over a period of five years at the end of which Appellants had in essence purchased a right to a seat so long as they complied with other annual conditions.

Appellants and Respondents filed competing motions for summary judgment, motions which were heard by the Honorable Judge Alison Lee on September 4, 2009. The Court signed an Order Granting the Respondents' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment on October 18, 2011. Appellants thereafter filed a Motion for

Reconsideration/Rule 59(e) on November 7, 2011 which was denied by Order dated December 1, 2011. This appeal followed.

### **STATEMENT OF FACTS**

The present lawsuit originates from Respondents' fundraising efforts during the USC Athletic Director Mike McGee's Administration in 2001-2002 during the construction of the Colonial Center Basketball Arena which was intended to replace the old Carolina Coliseum. The Colonial Center was meant to double the seating capacity and to be a show-place for the basketball program. The size and cost of the facility presented both financial and re-seating difficulties and resulted in a new round of promotional offers being presented to various levels of boosters as new support opportunities. (R. p. 096, lines 10-12, p. 097, lines 9-19, p. 005).

At issue here is the Founders Club/Courtside Seating promotional opportunity. In or around 2002 as construction on the Colonial Center was being finished, Respondents distributed brochures to a variety of Gamecock Club level donors including the Silver Spur, Golden Spur, and Lifetime Levels (Appellants fall within these donor levels) with an offer of newly available courtside seats, i.e. folding seats placed on the actual basketball floor offering the seat holder the "reach out and touch the game" seating experience. (R. pp. 043-048, pp. 111-112, p. 088, line 3-p. 089, line 4, pp. 060-069, p. 073, paragraph 9).

The brochure refers to a "five year term" with up front premiums of \$5,000 per seat in year one and additional \$1500 premiums for years two through five per seat. (R. Id.). No further payments are referenced in the brochure. (R.

Id.). While the brochure sets out various amenities, the essence of the brochure was the right to specific seating after premium payments for five years. (R. Id.). USC produced the brochure in discovery as did several Plaintiffs. (R. Id.). The portion setting out a renewable option in year six is inapplicable to Appellants as that portion of the brochure deals with the Golden Spur level who received a benefit other levels did not receive – Appellants belonged to other donor levels. (R. p. 112, p. 219, line 4-p. 220, line 7, pp. 060-069, p. 005).

As seen on the last page of the brochure, Respondents appointed Chris Massaro (“Massaro”), the Senior Associate Athletic Director, to be one of two persons meeting with donors and authorized to enter into these Founders Club/Courtside Seating agreements with donors on behalf of Respondents. (R. Id.). There is no dispute that by sometime in 2002, all of the Appellants had met with Massaro concerning the Courtside Seating opportunity offered in the brochure. (R. p. 098, pp. 104-107, pp. 060-069). There is likewise no dispute Massaro had Respondents’ authority to offer these ticket deals and was appointed as Respondents’ designee to enter into these agreements. (R. p. 005).

Each Appellant in Support of his Motion for Summary Judgment filed an affidavit establishing what each was promised in the meeting with Massaro, and the affidavits are consistent in what each was promised. (R. pp. 060-069, p. 006). The explanation by Massaro, as testified to consistently by Appellants, was that in exchange for a one-time fee of \$5,000 per seat in the first year and \$1500 per seat for the next four years, no more seat fees would be required for Appellants to keep their seats so long as they paid their annual Gamecock level dues and paid

for season tickets at the generally announced price. (R. Id.). As Plaintiff Stan Harpe testified, the agreement with the University as set by Massaro was “specifically that as long as I kept the maintenance, as you described it, of my scholarship and I paid for my tickets, at the end of the fifth year, I was done.” (R. p. 116, lines 8-12). As Appellant Paul Trussell confirmed, “It was discussed [with Massaro] point blank that it was a five-year situation, and after that, all I had to do was buy my tickets.” (R. p. 127, lines 8-14) When one of the Plaintiffs, accompanied by local attorney Mike Montgomery, asked for a written agreement, Massaro stated, “Your check will be your receipt.” (R. p. 134, lines 13-19; pp. 060-069). Respondents as offeror made the decision not to produce any written contract or memorialization as to the parties’ agreements. (Respondents’ Office Manager, R. p. 190, lines 7-14, p. 191, lines 11-25, p. 113, lines 18-23, p. 114, lines 4-13, pp. 005-007).

Massaro explained that in planning for the new Carolina Center, Respondents were trying to figure out “what assets we had to sell” and knew that the seats were one of the assets. (R. p. 088, line 13-p. 089, line 4). Respondents were concerned with generating as much revenue as they could, and Massaro was assigned to actively promote the sale of the courtside seat opportunities. (R. p. 096, lines 10-12, p. 097, lines 9-19). Massaro testified that the brochure for the Courtside Seats was mailed out to Silver Spur members and above (to which all Appellants belong). (R. p. 091, lines 1-4, p. 073, paragraph 9; p. 005) Massaro testified that during the meetings with Appellants, he explained to each Appellant that \$5,000 was required in the first year and \$1500 per seat for the remaining

four years. Massaro – Respondents’ only witness to these agreements, does remember meeting with Appellants but does not remember what he specifically agreed to nor does he remember what he represented to Appellants to as to payments after the fifth year. As Massaro testified:

McCulloch: Did [Appellant Barton Dumas] ultimately agree to enter into some agreement with the university or through you, with you?

Massaro: Yes

McCulloch: And did you discuss with him what the terms of the agreement were?

Massaro: I did.

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McCulloch: Now, in all these many conversation with Mr. Dumas, did you or did you not ever tell him there would be expected of him payments annually after the fifth year? I think you’ve said no. I’m simply asking the question once more. This is not a trick question. I want to make sure, because –

Massaro: **I don’t remember specifically if I’ve said that specifically to Barton Dumas.**

(R. p. 098, lines 7-13, p. 103, lines 16-25). Mr. Massaro had similar meetings with the other Plaintiffs/Appellants:

McCulloch: Did you talk with Mr. Harpe about the financial obligation that the university expected of him?

Massaro: Sure.

McCulloch: Do you remember whether you and Mr. Harpe discussed the specifics of payments expected of Mr. Harpe in the sixth and thereafter years?

Massaro: **I don’t remember specifically.**

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McCulloch: Do you remember – in any of your meetings with Mr. Springob and Mr. Montgomery, do you remember at least Mr. Springob, ever having discussions with him about the expectation of the university or the requirement of payments after the fifth years?

Massaro: **No, I don’t remember.**

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McCulloch: And the same question I asked you before, do you recall discussing with Mr. Trussell the specific issue of whether or not payments to him would be required in the sixth year and thereafter? Do you know whether that discussion was had with Mr. Trussell?

Massaro: **I don't know the specifics.**

(R. p. 104, line 22-p. 105, line 5, p. 106, lines 4-10, p. 107, lines 9-15).

All of the elements of this Agreement between the parties are set forth in the affidavits filed with the Court and the deposition testimony. Respondents offered no witnesses to dispute the definite terms of the Agreement and as set forth in the Affidavits and deposition testimony, there is evidence of an Agreement and meeting of the minds at the time the contract was entered into. (R. Id.; pp. 060-069; pp. 005-011). As such, there is no real dispute that a contractual understanding with all necessary terms were presented and accepted.

In addition to the specified courtside seating purchased by Appellants, Respondents promised Appellants a series of additional perquisites (including complimentary tickets to womens' basketball, banqueting in a private lounge, etc.), and Respondents failed to continue to offer some of those perquisites. (R. Id.; pp. 076-086; p. 073, paragraph 10). After the meeting with Massaro and based on Respondents' offer as communicated by Massaro, Appellants entered into these agreements with Respondents, made all required payments over the five years, maintained their Gamecock level dues, and paid for seat season tickets. (R. Id.). This Agreement was sufficient for Respondents to send a bill to Appellants each year, and Respondents readily accepted Appellants' payments for five years. (R. Id.; p. 74, paragraphs 12, 14). Appellants made the required payments annually and annually received their tickets and seats from Respondents. (R. Id.).

In August or September of 2007 (the sixth year), the athletic department (under the direction of a new athletic director, Eric Hyman) notified Appellants and presumably others with courtside seats that they would need to forward a sixth year of premiums to maintain their seats and would be expected to continue additional annual payments to preserve their seating rights, in violation of the agreement between the parties (R. Id., p. 074, paragraph 14). After receiving objections from some Appellants and others with the courtside seats, the Athletic Department in the summer of 2007 indicated to Appellants that the matter was under review and sent out a letter in November 2007. (R. pp. 049-050). In December 2007, a memorandum authored by Chris Wyrick of the Athletic Department ticket office, indicated that after “researching the intent of the Founders Club,” Respondents had determined the Appellants were mistaken in their understandings and that those who had withheld their payments would not be allowed access to their seats for the first home SEC basketball game unless payment was forthcoming. (R. pp. 051-053). After Appellants were unable to resolve the controversy, this suit followed.

### ARGUMENT

- I. In Cross-Motions for Summary Judgment, Did the Court Err in Denying Appellants’ Motion for Summary Judgment and Request for Specific Performance?

The evidence is undisputed that in 2002, Respondents sent out an invitational brochure for Courtside Seating to Appellants who were qualified Gamecock Club members. Respondents invited the agreement with Appellants and directed them to Chris Massaro, Respondents’ authorized representative.

**There is no dispute that there was a contract** with clearly delineated terms which have all been acknowledged by Massaro and Barber, the Respondents' agents, and Respondents readily accepted Appellants' payments for five years. Instead of denying the agreement, Respondents argue that it was not their intent for seat payments to end after five years and advance the defense of the Statute of Frauds and statute of limitations. However, Respondents have submitted no affidavits and produced no relevant testimony to dispute Appellants' testimony and affidavits that they each entered into a contract with Respondents for basketball courtside seating whereby if they paid a \$5,000 per seat premium in the first year and \$1500 per seat thereafter for four years, the seats were theirs so long as they bought season tickets and kept up their donor level.<sup>1</sup> (R. pp. 060-069, pp. 005-011). Appellants are consistent that "it was discussed [with Massaro] point blank that it was a five-year situation, and after that, all I had to do was buy my tickets." (R. Id., p. 127, lines 8-14). Appellants are consistent that they were required to pay seat costs terminating after five years but season tickets and booster club fees continued annually. (R. Id.). The only other witness to these agreements, Massaro, cannot recall what he told Appellants in terms of a payment after year six. (R. p. 098, p. 103, lines 16-25, p. 104, line 22-p. 105, line 5, p. 106, lines 4-10, p. 107, lines 9-15).

While Respondents now claim they "intended" for the Appellants to continue paying each year for the seats – even after year five – that "intent" was never memorialized or communicated to Appellants. (R. p. 006). The law is clear

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<sup>1</sup> This premium payment concept to obtain a right to a specific seat was very similar to other college and professional sports programs across the country that were occurring at the time – such as Panthers Football arena in Charlotte.

that intent is not relevant unless it is communicated and agreed to by the other contracting party. “[The] ‘meeting of minds’ required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.” Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

Moreover, to the extent Respondents argue an ambiguity, (“[W]here a contract is ambiguous, the fact finder must ascertain the parties’ intentions from the evidence presented.” Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788,790 (S.C. 2009)); *see also* Charles v. B&B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455 (1959)(“[w]hen the written contract is ambiguous in its terms . . . parol and other extrinsic evidence will be admitted to determine the intent of the parties.); Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976)(“When the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent.”) Moreover, it is axiomatic in contract law that **ambiguities are construed against the drafter.** McGill v. Moore, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). As the Court stated in Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)(quoting 17A C.J.S. Contracts § 324:

[A]mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who

prepared the contract or is responsible for the verbiage.

Id.

Respondents now argue they do not have to live up to their bargain because of the Statute of Frauds or the statute of limitations and do not believe that a deal is a deal. There is no dispute there was a contract. For the reasons set forth more fully below, this contract falls outside of the Statute of Frauds and the statute of limitations does not preclude Appellants' claims. Appellants performed per the terms of the contract to the Respondents' benefit, and Respondents accepted the performance (money) by Appellants. Respondents thereafter materially breached the contracts by requiring sixth year payments.

Based on the agreement between the parties, the Court erred in denying specific performance of the contract requiring Respondents to provide the specified seats to Appellants without any additional per seat payments after the fifth year. Specific performance may be granted where there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004). Here, given the unique nature of the seats, there is no adequate remedy at law and specific enforcement is equitable. As the brochure itself describes, "there's never been a seat like this before!," "with these prime seats, you'll actually feel like you're a part of the big time action!," "the ultimate basketball experience," and "sound too good to be true?" (R. pp. 043-048). The brochure and indeed, Massaro's pitch to Appellants, focused on the seating experience and the unique nature of the seating experience.

Specific performance may be compelled where there is “(1) clear evidence of an agreement, (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract.” Gibson v. Hrysikos, 293 S.C. 8, 13, 358 S.E.2d 173, 176 (Ct. App. 1987).

Here, there is clear evidence of an agreement and the agreement has been fully or, at the very least, partially carried out by Appellants with Respondents willfully receiving five years of payments, and Appellants remain willing and able to continue with the purchase of season tickets and maintaining their Gamecock Club membership levels.

As such, this Court should find that the lower court erred in denying Appellants’ Motion for Summary Judgment and in denying Appellants’ request for specific performance in holding Respondents to their promises.

**II. In Cross-Motions for Summary Judgment, Did the Lower Court Err in Dismissing Appellants’ Claims Based upon the Statute of Frauds?**

As the lower court states in its October 2011 Order, “Defendants appointed Senior Associate Athletic Director Chris Massaro (“Massaro”) as their designee to enter into agreements regarding the premium seats.” (R. p. 005) Importantly, **Defendants have offered no evidence of Chris Massaro’s representations, written or verbal, that in any way refute Plaintiffs’/Appellants’ affidavits.** Respondents, not denying the existence of an agreement, conducted a one year internal investigation “researching the intent of

the Founders Club” but were unable to offer any documents or witnesses to impeach the Appellants’ sworn statements of their meeting of the minds with the Respondents’ authorized agent, Chris Massaro. “Understandings” of the new Athletic Director Eric Hyman and others who were not at USC at the time these contracts were offered and accepted and/or who did not meet with Appellants in forming the agreements are irrelevant and should not be relied upon by the Court in reaching its decision.

(a) **The Statute of Frauds Does Not Apply, and the Agreement is Outside the Statute of Frauds**

This Court in its Order found that the Statute of Frauds applies because the agreement cannot possibly be performed within a year and there is no “agreement upon which such action shall be brought or some memorandum or note thereof . . . in writing” as required by South Carolina Code §32-3-10. Contrary to those findings, the agreement/offer was, on its face, contained in the brochure. The brochure contained all of the essential terms although Respondents argue there was an ambiguity as to what would occur in year six and beyond. The brochure set forth an up front premium of \$5,000, an additional premium of \$1500 for years 2-5 per seat, and the requirement that it was for “Founders’ Club or Courtside Club season ticket holders.” There is no dispute that all parties have pointed to this brochure in their arguments as to the intent of the parties, and there is no dispute that Appellants were billed and paid the premiums set out in the brochure for the seats for five years. The USC logo which is featured on the middle and the last page of the brochure is the authorized signature of the University of South Carolina and is the quintessential signature of all

Respondents' official documents, and there is no dispute an agreement was made. (R. pp. 043-048, p. 073, paragraphs 9-10). The offer and the authority to make the offer is not a disputed issue.

This Court should find that the brochure along with Appellants' cancelled checks and subsequent numerous letters annually from Respondents confirming Appellants' rights to the seats at the payment time and requesting money (which Respondents then accepted), constitute, at the very least, "some memorandum or note thereof" in writing of the agreement between the parties.

This Court should take cognizance of the subsequent written acknowledgement rule by which written acknowledgements signed by a party may satisfy the Statute of Frauds. Computer Servicers, Inc., of Greenville v. Beacon Mfg. Co., 328 F.Supp. 653, 656 (D.S.C. 1970), aff'd 443 F.2d 906 (4th Cir. 1971)("It is well settled that subsequent written acknowledgement signed by the party to be charged on an oral contract is sufficient to satisfy the statute of frauds with respect to that earlier contract").

Moreover, the agreement was capable of being performed in one year as the contract required a contingency. Specifically, had Appellants chosen not to purchase season tickets which was a requirement of the contract each year, the contract would have been fully performed within a year. Conversely, if Appellants had accelerated the proposed payment plan of five years and paid in the first year, then performance would have occurred within the first year. "If there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds. The fact that performance within a year is highly

improbable or not expected by the parties does not bring a contract within the scope of this clause.” Roberts v. Gaskins, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (S.C. App. 1997)(internal citations omitted). Further, under South Carolina law, an arrangement or contract that is terminable at will falls outside the Statute of Frauds. Center State Farms v. Campbell Soup Co., 58 F.3d 1030, 1032 (4<sup>th</sup> Cir. 1995)(citing Weber v. Perry, 201 S.C. 8, 21 S.E.2d 193 (1942)).

Based on these reasons, Appellants ask this Court to find the lower court erred in granting summary judgment on the issue of the Statute of Frauds and find that Respondents breached the contract with Appellants as Respondents have offered no evidence to refute Appellants’ Affidavits as to the agreement between the parties.

**(b) If this Court Finds the Statute of Frauds Applies, Exceptions Overcome the Statute of Frauds**

Even if this Court finds that the one year rule applies and that the brochure and other documents do not constitute a writing, which Appellants argue is not the case, Appellants have fully and partially performed under the contract. “The theory of the equitable doctrine of part performance . . . is that a **‘court of equity will not permit a statute designed to prevent frauds to be used as an instrument to effect a fraud.’** Aust v. Beard, 230 S.C. 515, 522-523, 96 S.E.2d 558, 562 (1957)(emphasis added); *see also* Wright v. Trask, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997). A court may compel specific performance of an oral contract where: (1) there is clear evidence of an oral contract; (2) the contract had been partially executed; and (3) the party who requested performance had completed or was willing to complete his part of the oral contract. Fesmire v.

Digh, 385 S.C. 296, 683 S.E.2d 803, 811 (S.C.App. 2009). Respondents instigated the offer, chose to make it partially in writing and chose to finalize the deal without a written memorialization. Respondents have not disputed the fact that Appellants made all payments for the five years including seat payments, Gamecock Club membership payments and season ticket payments which is the sum total of performance by Appellants under the agreements shown to exist by Appellants.

The evidence establishes the University through its written solicitations and the face to face “meeting of the minds” by Respondents’ agent Massaro entered into a contract with Plaintiffs. Plaintiffs submitted sworn Affidavits which are unchallenged by Respondents’ only witness to these transactions, Chris Massaro. As the lower court correctly observed, “An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other.” Graham v. Prince, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987). Here, each Appellant made the required payments over the 5 year term and Appellants continued to make additional payments to maintain their required Gamecock Club status and annually purchase their required season tickets. Respondents’ “sellers’ remorse” under a new athletic administration not around at the time of the formation of these contracts should not be rewarded or permitted by law or equity to defeat Appellants’ right to enforce the Respondents’ unambiguous agreements.

(c) **Respondents are Estopped from Asserting the Statute of Frauds**

Even if this Court finds that the Statute of Fraud applies, Respondents should be estopped from asserting it. “Our Supreme Court has acknowledged that, in a proper case, the doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds.” Collins Music Co., Inc. v. Cook, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984); *see also* Atlantic Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (S.C. App. 1984). The crux of estoppel is the essential concept of fairness. Estoppel may overcome the Statute of Frauds where “the party asserting the estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position.” Id. Here, the facts support the application of this equitable axiom:

- If this Court finds there was an ambiguity or if its finds part of the contract was oral, Respondents were the ones who determined to create the offer through the brochure, and Respondents allowed their authorized representative to make the contracts but make no other writings. Respondents made promises to Appellants that Respondents are unable to refute, and each Appellant paid Respondents \$11,000 per seat over the five year period in addition to the thousands they paid to maintain their Gamecock Club status and season ticket seating, all in addition to the seat payments. These payments are memorialized in checks sent by Appellants and cashed by Respondents. Only after full performance by Appellants did Respondents argue they are not bound by the agreements made.
- The Appellants have submitted affidavits evidencing a “meeting of the minds” between Appellants and Respondents’ authorized representative, Chris Massaro, which affidavits remain undisputed by Chris Massaro who at his deposition admitted he cannot recall what he told Appellants on this issue.
- This Court can take notice that to some sports fans, advantageous and preferential seating opportunities to sporting events has an intangible and irreplaceable value exactly the value and mystique exploited by Respondents

in their ticketing pitches, i.e. “the opportunity of a lifetime,” all to raise millions of dollars from die hard USC sports fans.

In its Order, the lower court did “not find Plaintiffs’ [Appellants’] change of position definite and substantial enough to rule that the enforcement of the bargain between the parties is the only remedy adequate to restore Plaintiffs’ [Appellants’] previous position.” However, the lower court respectfully misconstrued the significance of this aspect of the overall argument. The substantial detrimental change of circumstance is not merely the loss of seating, but rather the 5 years of payments induced by Respondents’ promises, payments which would not have been made under a different offer. Why indeed would someone pay \$11,000.00 per seat each year only to obtain a future right to pay more after five years?

The change of circumstance and detrimental reliance encompasses not just the loss of the bargain, but the fact that Appellants would not have agreed to the “bargain” as Respondents now define it. If anything, Appellants fell prey to a “bait and switch.” Furthermore, while the lower court noted that there was no “meeting of the minds,” the Appellants and only third party witness to the Agreement – who all submitted sworn affidavits – were consistent in what the Respondents’ authorized representative promised. Respondents’ authorized representative, Chris Massaro, could not remember what he had promised Plaintiffs. Given the unique nature of the seats, there is no remedy except enforcement of the bargain adequate to restore Appellants to their former positions.

Based on the arguments above, this Court should find the lower court erred in applying the Statute of Frauds and dismissing Appellants' claims.

**III. In Cross-Motions for Summary Judgment, Did the Lower Court Err in Dismissing Appellants' Claims Based Upon the Statute of Limitations?**

In their cross-motion for summary judgment, Respondents allege the statute of limitations as a basis for their motion. Respondents' material breach of the contract by requiring a payment after year five occurred in the summer of 2007, well within the three year statute of limitations as the lawsuit was filed in September 2008. (R. pp. 060-069, pp. 076-086, p. 074, paragraph 14).

Indeed, as soon as the breach occurred, Appellants put Respondents on notice. The controversy first arose when Respondents sent a sixth year bill to all Founders Club members. Some paid later requesting their money back when they realized the error, some objected. Respondents, in the summer of 2007, per a promise to Appellants, began "its investigation" which consisted of two e-mails to the former executive director of the Gamecock Club Jeff Barber and former ticket manager, Chris Massaro, which only revealed recollections of what they claim was intended, not what was done. Respondents continued to claim they were "investigating" despite Appellants' repeated demands for resolution, ultimately requiring the filing of this lawsuit in September of 2008.

The essence of the bargain here is premium seating. To the extent Respondents claim that minor breaches as to certain benefits under the contract (access to McGuire room, etc.) caused the running of the statute of limitations, minor breaches do not trigger the statute of limitations as they do not justify

repudiation of a contract. See Ackerman v. McMillan, 314 S.C. 268, 271, 442 S.E.2d 618, 619-620 (Ct. App. 1994)(“in order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract.”); see also Gibbs v. G.K.H., Inc., 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993). If it were otherwise, then any minor breach would allow a party to get out of a contract by making minor breaches once they had received their benefit. Here, the side benefits – McGuire room, etc. – were all minor benefits. The essence of this contract is courtside seating at the men’s games. The first material breach by Respondents was when they refused to abide by the contract and demanded money after year six in the 2007-2008 season.

Not only is the statute of limitations defense inapplicable, but Respondents should be estopped from asserting it. “It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.” Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 217, 332 S.E.2d 555, 561 (Ct. App. 1985). “A defendant will be estopped to assert the statute of limitations in bar of a plaintiff’s claim when the delay that otherwise would give operation to the statute has been induced by the defendant’s conduct.” Id. Here, the minor breaches were caused by Respondents. Respondents are further estopped as Respondents were made aware of the controversy, conducted no real investigation (the investigation consisted of one e-mail) and told Appellants for one year that the matter was under investigation and continued to look into the situation from

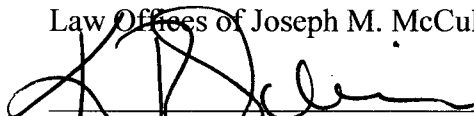
the summer of 2007 until Appellants filed the lawsuit in September 2008. (R. pp. 049-053, pp. 076-085, p. 196, lines 10-25).

Based on the above, the statute of limitations defense is inapplicable. Even if it did apply, Respondents should be estopped from asserting it and this Court should find the lower court erred in granting Respondents' Motion for Summary Judgment.

### **CONCLUSION**

Based on the above, in the cross motions for summary judgment, the lower court erred in dismissing the Appellants' claims based on the Statute of Frauds and statute of limitations defenses and erred in denying Appellants' Motion for Summary Judgment and request for specific performance.

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November 20, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No. 2008-CP-40-5518

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Les Springob, Paul Trussell, Barton  
Dumas, Stanley Harpe, and John Yenco,

Of Whom Paul Trussell, Barton Dumas, and John Yenco  
are the Appellants,

v.

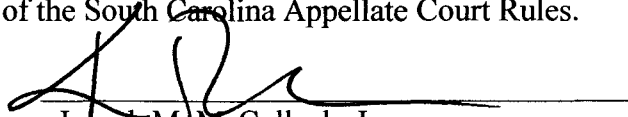
The University of South Carolina and  
the University of South Carolina Gamecock  
Club, Respondents.

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RULE 211(b) Certificate

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The undersigned certifies that the Final Brief of Appellants and Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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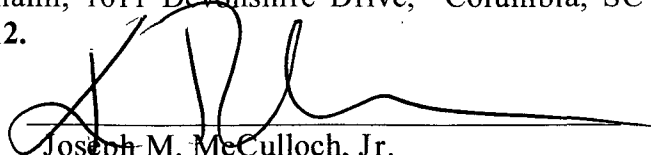
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PROOF OF SERVICE

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I certify that I have served the **FINAL BRIEF OF APPELLANT AND FINAL REPLY BRIEF OF APPELLANT and Certificate of Rule 211(b) Compliance** on William Davidson, Esq. by hand delivery on November 20, 2012 to William Davidson, Esq., Davidson & Lindemann, 1611 Devonshire Drive, Columbia, SC 29204 this **20th day of November, 2012.**



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