

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,

Plaintiffs

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.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN HOLDING THAT THE CONTRACT WAS UNAMBIGUOUS AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- II. DID THE TRIAL COURT ERR IN EXCLUDING EXTRINSIC EVIDENCE AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- III. DID THE TRIAL COURT ERR IN EXCLUDING EVIDENCE OF THE PARTIES' CONDUCT AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- IV. DID THE TRIAL COURT ERR REJECTING EQUITABLE ESTOPPEL AND COLLATERAL ESTOPPEL AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

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).

The Court held oral arguments on August 9, 2013 before the Honorable G. Thomas Cooper, Jr. in Richland County. (R. p. 30). Prior to the hearing, Harry Gregory (Lifetime member and served on the Gamecock Board) was subpoenaed by Respondents to appear for a deposition on August 20, 2013 and also provide documents pursuant to the subpoena *duces tecum*. (R. p. 270). After the hearing, opposing counsel produced to undersigned counsel approximately 261 pages of documents that Mr. Gregory provided in response to the subpoena. *Id.* The deposition of Mr. Gregory had been postponed around this time period. *Id.* Undersigned counsel notified the Court of this development by way of letter. *Id.*

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 and this appeal followed.

STATEMENT OF FACTS

The University of South Carolina ("USC") is a state university with an athletics program

¹ Linda Rodarte voluntarily dismissed her claims on June 7, 2013 and she is no longer a party. Perry

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 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 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

Kimball has resolved his issues with the Respondents and is not an Appellant to this appeal.

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

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).

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

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.³ Assuming for purposes of this argument that Respondents’ purported contractual interpretation of this term is reasonable for an ambiguity analysis, the Appellants’ interpretation is also reasonable and thus the term is ambiguous.

“The purpose of all rules of contract construction is to determine the parties’ intention.” *Lindsay v. Lindsay*, 328 S.C. 329, 337, 491 S.E.2d 583, 587-88 (Ct. App. 1997). To determine this intention, the courts “will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered into.” *Id.* “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) (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)). “It is a question of law for the court whether the language of a contract is ambiguous.” *Id.* An ambiguity is “determined from the entire contract and not from isolated portions of the contract.” *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

³ In their motion for reconsideration, the Appellants asked Judge Cooper to reconsider his Order granting summary judgment for several reasons, including that there was a prior inconsistent ruling in the *Timmons et al v. The University of South Carolina et al*, (2012-CP-40-03931), the defendant moved for summary judgment on the same issue concerning the “assigned reserved parking” term of Exhibit A to the same type of lifetime contract. Judge Cooper denied the defendants’ motion for summary judgment by order dated July 18, 2013. (R. pp. 307-481).

A contract is ambiguous when it is capable of more than one meaning when viewed objectively 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)).

The Respondents argued and the trial court erroneously held that the term “assigned reserved parking” is unambiguous and clearly means that the Respondents only have to provide “assigned reserved parking” somewhere and are free to change this parking at will. The trial court erred by refusing to acknowledge that there are other reasonable interpretations of the term in question. The Appellants contend that the contract provided a specific “assigned reserved parking” location which was on the “apron” of the stadium in the “shadow” of Williams-Bryce. This is the more reasonable interpretation, yet it was discarded by the trial court in error. The words “assigned” and “reserved” do not themselves convey some right to change the parking at any given moment or right to provide whatever parking the Respondents choose to give even if it is the worst parking available, yet this is what the trial court’s interpretation would allow. The use of “assigned” and “reserved” in this term is significant, as it indicated that the Respondents will be assigned a particular parking space that is reserved for their use. The term does not include other language that indicates this parking space may be changed at whim and relocated to wherever the Respondents choose.

Because the plain language of the contract does not provide for a change in the assigned reserved parking, the Court may look to the “customs, practices, [and] usages” of the Gamecock Club to interpret the term. This review quickly reveals that the lifetime members were assigned and reserved the best available parking on the apron of Williams-Bryce and the lifetime members kept

these same parking places until the parking around the stadium was removed completely for Gamecock Club members based on safety reasons (this is the event giving rise to this action). If these specific parking places no longer exist for any Gamecock Club member, then the Appellants as lifetime members should be given equivalent parking spaces, which would be the best available parking spaces that do still exist since they used to be parked against the stadium itself.

Under the trial court's view, the term "assigned reserved parking" essentially provides little to no benefit to the Appellants and makes it a meaningless term to the agreement—all interpreted from the face of the contract itself as the trial court found the term unambiguous:

Common sense and good faith are the leading touchstones of the inquiry. Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. An interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided.

Farr, 265 S.C. at 362, 218 S.E.2d at 434. The trial court's holding creates an absurd result that is unreasonable, unfair and unjust, but the Respondent's interpretation leads to a more reasonable result. Thus this term of the contract is ambiguous and the Respondents' motion for summary judgment should have been denied. Moreover, extrinsic evidence can be used to explain this ambiguity.⁴ Any ambiguity in the term "assigned reserved parking" should be construed against the Respondents as drafters of the lifetime contracts. *Myrtle Beach Lumber Co. v. Willoughby*, 274 S.E.2d 423, 426 (S.C. 1981) (stating that, "an ambiguity in a written contract should be construed most strongly against the drafters").

⁴ The trial court indicates that silence as to an issue does not create an ambiguity, and also that "a court cannot look to evidence of custom or usage to contradict, vary, or explain the terms of an unambiguous contract." (R. p. 16). These arguments are unpersuasive and inapplicable in the

Based on the aforementioned reasons, the trial court erred in ruling that the contract was unambiguous and the Respondent's motion for summary judgment should be 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 trial court held that they will not consider extrinsic or parol evidence offered by the Appellants. (R. pp. 17-19). The trial court holds that the Appellants' offering of extrinsic evidence fails for two reasons: 1) that the contract is clear and unambiguous thus the court will not look outside the four corners of the agreement and 2) evidence of prior or contemporaneous understandings may not be used to vary, contradict or explain the terms of the written agreement. *Id.* This exclusion of extrinsic evidence is clear error and should be reversed.

First, the contract is ambiguous for the reasons set forth in Section I above, thus it was appropriate to look at 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. at 623, 550 S.E.2d at 303 (citing *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878). "The determination of the parties' intent is then a question of fact." *Id.* Because the contract is ambiguous, the trial court should have considered the extrinsic evidence and denied the Respondents' motion for summary judgment so that the questions of fact could be determined at trial.

Second, the court could look at extrinsic or parol evidence "for the purpose of determining the intent of the parties and clearing up any ambiguity." *Lindsay*, 328 S.C. at 337, 491 S.E.2d at 587-88. For the reasons previously discussed above, the contract term is ambiguous, thus it is appropriate

present matter for the reasons set forth in Sections II and III.

to look at the extrinsic or parol evidence to determine intent and clear up the ambiguity. This is different than using such evidence to vary or contradict the terms of the agreement. The trial court notes that the term “assigned reserved parking” does not promise that parking would be in any location nor does it provide for priority, thus they cannot use extrinsic evidence to supply language. This argument fails when one considers that the contract is equally devoid of language allowing the Respondents to reassign the lifetime members parking when there has already been parking spaces “assigned” and “reserved” and there is also no language allowing them to assign them to assign and reserve any parking place that the Respondents so choose. Thus the contract is ambiguous and extrinsic or parol evidence is necessary to determine intent of the parties. *See Ebert v. Hill*, 320 S.C. 331, 338; 465 S.E.2d 121, 125 (Ct. App. 1995) (“An ambiguous contract is one capable of being understood in more ways than one, an agreement obscure in meaning through indefiniteness of expression, or having a double meaning.”).

The trial court argues that silence on a specific issue does not create an ambiguity and does not permit the court from looking at extrinsic evidence to determine the parties intent. (R. p. 16).

However, where an agreement is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract. In such instance, parol evidence is admissible not to contradict the terms of the written agreement, but to determine the intent of the parties as to that particular matter.

Ebert, 320 S.C. at 339-40, 465 S.E.2d at 126 (citing *U.S. Leasing Corp. v. Janicare Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988)). The ambiguous term of “assigned reserved parking” neither states how the football parking would be assigned and reserved nor does it include language allowing the Respondents to alter or change the assigned reserved parking. Further, the agreement is silent as

to what the parties would do should the assigned reserved parking on the apron of the stadium was ever gone for security reasons. Because of the nature and character of this matter an ambiguity arises thus extrinsic and parol evidence is allowed to supply a deficiency and determine the parties' intent. *Id.* The evidence in this case shows that the parties intended for the assigned reserved parking to be the best available on the apron of the stadium. Moreover, the course of dealing between the parties supports the Appellants' interpretation of the contract. The trial court erred by failing to consider extrinsic and parol evidence, and the order granting Respondent's motion for summary judgment should be denied.

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 after the execution of the contract could not be considered to determine their intent as the contract is unambiguous. (R., pp. 19-20). As an initial matter, the contract is ambiguous as discussed above, thus evidence of the parties' conduct may 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 parties' conduct, including custom and usage, may be used to determine this intent of the parties' for this ambiguous agreement. *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am.Jur.2d *Contracts* § 338, at 345 (1991)).

“The 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, 265 S.C. at 363, 218 S.E.2d at 434. The Appellants, as contractual lifetime members, were provided assigned reserved parking spaces on the apron of the football stadium, which was the best parking at the time, and they kept these spaces for nearly 25 years until the events giving rise to this dispute. The letter from Mr. Wyrick discussing priority of lifetime members and the Gamecock Club Board Meeting Minutes both show that Respondents intended for the lifetime members to have top priority of all Gamecock Club members and come before the non-lifetime members. (Letter and Minutes). Interestingly, the Board Minutes indicate that the purchase of the Farmer's Market was already being considered in the same meeting where Mr. Wyrick addressed lifetime members. Further, discussions held prior to the agreement with the lifetime members helps to determine the parties' intent, where the lifetime members were assured they would receive the best parking available.

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.

"Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dible*, 279 S.C. 592, 595-96, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983). Assuming *arguendo* that there was no valid contract or a clear breach of the same, the defendants are equitably estopped, by their conduct, from disclaiming liability for their actions. Where a party exercises "(1) conduct which amounts to a false representation, or conduct calculated to convey the impression that the facts are otherwise, (2) the

intention that such conduct shall be acted upon by the other party, and (3) knowledge of the facts” they may be estopped from arguing in contravention of their actions, intention and knowledge. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (S.C. Ct. App. 1994). To assert equitable estoppel that party must show “(1) a lack of knowledge or the means of knowledge of truth as to facts in question, (2) justifiable reliance upon the conduct of the party estopped; and (3) prejudicial change in the position of the party claiming estoppel. *Walton v. Walton*, 282 S.C. 165, 168, 318 S.E.2d 14, 16 (1984). Here the Respondents made numerous assurances to the Appellants that they would have highest priority as Lifetime Members and would have the parking on the apron of the stadium which is the best available parking. The Respondents should be equitably estopped from now claiming that they can change the Appellants’ parking at their leisure and may provide parking wherever they choose even if substandard to what was promised and given to Appellants for the last 20 plus years.

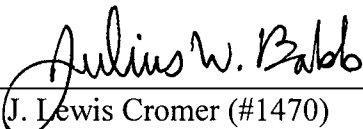
The Respondents should also be collaterally estopped from asserting that the term “assigned reserved parking” is not ambiguous. In *Harvey J. Rosen, Joseph B. Rosen and Rebecca Nurick v. The University of South Carolina and The University of South Carolina Gamecock Club*, Op. No. 2011-UP-331 (S.C.CT.APP. 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. Therefore, to the extent the defendants assert a position contrary to the Court of Appeals holding in that case they are collaterally estopped from doing so. 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.

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