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

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

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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.

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# FINAL BRIEF OF RESPONDENTS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases



### State Cases

**State Rules**

**Other Authorities**

## 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, Plantiffs 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.)

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[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), SCRCP." *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), SCRCP.

"'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. <u>Silence Does Not Create an Ambiguity.</u>**

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.

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[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

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[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

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[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.

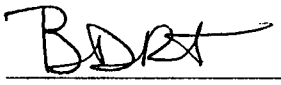
Appellants' counsel, who was also counsel for Rosen, asserted in the present matter that the contract was clear and unambiguous. (*See* R.p. 151-152, ¶ 2; R.p. 113, ¶ 2.) Appellants cannot maintain that collateral estoppel bars Respondents from arguing that the contract is clear and unambiguous when 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.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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Columbia, South Carolina

May 19, 2014

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

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

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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.

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**CERTIFICATE OF COUNSEL**

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

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