THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2015-002103
Unpublished Opinion No. 2015-UP-357 (S.C. Ct. App. filed July 15, 2015)

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

Of Whom George M. Lee, III, Mena H. Gardiner and John Love, are the Respondents,

v.

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

BRIEF OF RESPONDENTS

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I. DID THE COURT OF APPEALS CORRECTLY FIND THAT QUESTIONS OF FACT EXIST AS TO THE CLAIM OF EQUITABLE ESTOPPEL SUCH THAT SUMMARY JUDGMENT IS NOT APPROPRIATE?

INTRODUCTION

This case is about promises that were not upheld concerning parking spaces for the University of South Carolina home football games for certain Lifetime Members of the Gamecock Club ("Lifetime Members"). The Respondents, Mena Gardiner, George M. Lee, III, and John Love ("Respondents"), are Lifetime Members. The parties entered a Lifetime Membership Contract (the "Contract")[1] reached between the University of South Carolina and the University of South Carolina Gamecock Club ("Petitioners") and the Respondents as part of the Lifetime Membership program; as well as oral and documentary promises made to Respondents before, during and after the Contracts were executed.

The Respondents relied upon the promises and assurances of highest priority for parking made by Petitioners' employees in exchange for increased donations to USC. Even assuming that the Contract is unambiguous[2], Petitioners should be equitably estopped from denying Respondents the highest priority to available parking.

STATEMENT OF THE CASE

I. Procedural History

On June 7, 2012, Linda Rodarte, J. Perry Kimball, George M. Lee, Mena H. Gardiner, and Mitchell Bailey filed an action against the University of South Carolina and the Gamecock Club concerning a breach of their lifetime contract regarding their

[1] The Respondents entered into written contracts with Petitioners, which include an "Exhibit A" to the Contract with the term "Assigned Reserved Parking". (App. at 93-107).

[2] Respondents argue that the Contract is ambiguous as to the "assigned reserved parking" term. Respondents' petition on this issue was denied.

football parking spaces near Williams Brice Stadium.[3] On July 6, 2012, an Amended Complaint was filed wherein John Love was substituted for Mitchell Bailey. (App. at 195).[4] The parties filed cross-motions for summary judgment with the circuit court and both provided legal memoranda in support and opposition. (App. at 84-188).

On August 27, 2013, Judge Cooper filed an Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (App. at 13-27). Respondents filed a Motion for Reconsideration (App. at 9-12), which Judge Cooper denied by Order dated September 17, 2013. (App. at 7-8). Respondents filed a timely notice of appeal.

In an opinion filed July 15, 2015, the Court of Appeals affirmed in part and reversed in part the earlier decision. (App. at 547-556). The Court of Appeals affirmed the trial court's findings on ambiguity of the contract, the admissibility of extrinsic evidence and the parties' conduct after the execution, and collateral estoppel; however the Court of Appeals reversed and remanded as to equitable estoppel. Both parties filed separate Petitions for Rehearing on July 30, 2015. (App. at 557-600). On September 17, 2015, both Petitions for Rehearing were denied by the Court of Appeals. (App. at 601).

Both parties filed petitions for writs of certiorari on October 25, 2015, along with returns on November 30, 2015 and replies on December 10, 2015. This Court granted Petitioners' petition and denied Respondents' petition on September 8, 2016. Petitioners filed their brief on October 20, 2016.

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[3]For purposes of this Petition, the Respondents George Lee, Mena Gardiner and John Love are referenced herein as "Respondents"; and the Petitioners University of South Carolina and Gamecock Club are referenced herein as "Petitioners".

[4] Linda Rodarte voluntarily dismissed her claims on June 7, 2013 and she is no longer a party. Perry Kimball has resolved his issues with the Petitioners and is no longer a party to this appeal.

II. Statement of the Facts

The University of South Carolina ("USC" or "University") is a state university with an athletics program that includes 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." (App. at 196). 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")[5] 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 Respondents, George M. Lee, Mena H. Gardiner and John Love, are Lifetime Members of the Gamecock Club. (App. at 93-103).

Each contract included an attached "Exhibit A," which stated that, among other benefits, each Lifetime Full Scholarship member and Lifetime Scholarship (Silver Spur) member would receive "assigned reserved parking." (App. at 93-103). The advertising circular presenting the Lifetime Scholarship program listed "Priority on season Football Tickets and Parking" as one of the Lifetime Benefits. (App. at 304). For approximately 25 years, lifetime members such as Respondents parked on the apron of the football stadium in reserved parking spaces.

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[5] 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 certain rights and privileges than the Lifetime Scholarship Members.

Stuart Hope originally entered his Lifetime Contract in May 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, testified that he was active in handling the negotiations that his father had with the Gamecock Club concerning the Lifetime Membership Contract. (App. at 220-228). The Hopes were assured by representatives of the Petitioners that they would have top priority to the items set forth in Exhibit A, including "assigned reserved parking" for football games. *Id.*

John Love graduated from the University in 1982 and became a Gamecock Club member. (App. at 239). Love testified that he negotiated with Chip Clary and the Gamecock Club to get "the best parking spot available" among other items in exchange for a donation of $10,000.00 and annual payment of $1,000.00. (App. at 238-272). From approximately 1987 to 1990, Love held a parking space where the current End Zone was later built. *Id.* After discussions with his friend Harry Gregory, Jr., Love sought the Lifetime Scholarship Membership so they could park together next to the stadium. *Id.* Love executed his contract in 1990, and he was made assurances of his specific parking location as part of his Lifetime contract. *Id.* Love was given an improved parking space "right outside the gate where the players enter the stadium" where the order of parking spaces went as follows: the USC Athletic Director, Harry Gregory, Sr., John Love, and Harry Gregory, Jr. (App. at 246-247).

In May of 1990, George M. Lee executed his Lifetime contract, wherein he was given a specific parking space in exchange for a life insurance policy and was given assurances that he would be given excellent parking on the apron of the stadium. Lee was given priority in parking from the time he entered the contract until the summer of

2012. (App. at 229-233, 297-298).

Respondents' contracts were honored, collectively for decades, until the summer of 2012. (App. at 297, ¶ 5). Pursuant to their contracts, Respondents were given priority in parking assignments ahead of non-lifetime donors. (*Id.* at ¶¶ 5-6). However, through the recent actions taken by the Petitioners, the Respondents' priority in parking was rescinded by the Petitioners and numerous non-lifetime donors have been given priority ahead of each Respondent. (App. at 297-298, ¶¶ 6-7).

As referenced in the Final Brief on Appeal (App. at 490), 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. (App. at 302-305). These documents show that Lifetime Members were considered to have the highest priority in all matters including parking. In the March 5, 2008 letter sent to Lifetime Members including Respondents, Chris Wyrick states that "Life Members are at the top of all Gamecock Club priority." (App. at 305).

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

ARGUMENT

I. SUMMARY JUDGMENT WAS NOT APPROPRIATE BECAUSE QUESTIONS OF FACT EXIST AS TO EQUITABLE ESTOPPEL.

A. Estoppel is Applicable to the Promises and Assurances Given to Respondents Outside of the Alleged "Unambiguous" Contract.

The Petitioners' reliance on an unambiguous contract to preclude equitable estoppel is misplaced. "A contract and promissory estoppel are two separate and distinct

legal theories. They 'are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.'" *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (citing *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985)). Even if the court determined that the contract term was unambiguous, this does not preclude "finding a factual issue exists in this case as to whether USC was equitably estopped from denying [Respondents] the highest priority to available parking as Lifetime Scholarship Members." (App. at 556).

Petitioners argue that the four corners of the "unambiguous" contract control and that the written contract does not include any terms regarding parking priority. However, what the Petitioners fail to consider is that the promises and assurances given by employees of Petitioners to Respondents, on which the Respondents relied in exchange for their increased donations, are separate from the written contract itself.

In *Springob v. The University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014), the plaintiffs challenged the Gamecock Club's imposition premium seating fees on Gamecock Club members. *Id.* The premium seating was initially offered via a brochure to high-level members. The brochure offered these members the opportunity to purchase premium seating for the upcoming basketball seasons which included several amenities. *Id.* The brochure offered these members the opportunity to purchase these tickets over a five year term at $5,000 per seat for the first year and $1,500 per seat in years two through five. *Id.* The plaintiffs presented evidence that USC employees promised the plaintiffs that they would only have to pay the face value of the tickets and maintain their Gamecock Club membership level to maintain the premium seating after

year five. *Id.* After year five, USC demanded that the plaintiffs pay $1,500 per seat fee and instructed the plaintiffs they would have to pay $1,500 per seat to maintain the premium seating. *Id.* The plaintiffs filed an action for breach of contract and the circuit court granted USC's motion for summary judgment on the basis that there wasn't a written contract and the statute of frauds barred the plaintiffs' claims. *Id.* The Supreme Court affirmed that the agreement was barred by the statute of frauds, but reversed in part and remanded on the basis that a factual issue existed as to whether USC should be equitably estopped as it relates to the alleged oral promises. *Id.*

Similarly, in the present action, there is sufficient "proof supporting [Respondents'] estoppel claim, including [Respondents'] affidavits and depositions, which indicate [Respondents] relied on USC's assurances of first and second priority 'always' in exchange for the increased donations made to USC." (App. at 555). 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 (Ct. at 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). Sufficient evidence has been presented about Petitioners' representations to Respondents to raise a question of material fact as to whether the Petitioners should be

equitably estopped from denying the Respondents the highest priority to available parking as Lifetime Members. (App. at 556).

B. Estoppel is Used Appropriately.

Petitioners take the position that the Court of Appeals' holding as to equitable estoppel was in error because they used equitable estoppel as a sword instead of a shield. The Petitioners' argument is misplaced and the Court of Appeals properly relied on *Springob* in reversing summary judgment based on equitable estoppel. The courts have held that equitable estoppel or promissory estoppel may be used to preclude summary judgment, even where a valid contract is found to not exist. *See Bishop v. City of Columbia*, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013); and *Springob*, 407 S.C. 490. Similar to the present case, the plaintiff in *Springob* presented evidence of representations by the University of South Carolina and the court found that there were genuine issues of material fact such that summary judgment should have been denied based on equitable estoppel. *Id.*

The Petitioners are attempting to create a distinction without a difference. In the present action, equitable estoppel would act as a shield against the Petitioners defenses and assertions that the oral and written representations—outside of the Memorandum of Agreement—prevent any rights the Respondents have to the highest priority. In their Answer, the Petitioners raised a defense of statute of frauds as to oral representations or documents other than the Memorandum of Agreement and Exhibit A to support the breach of contract claim, as well as a defense that there is lack of consideration as to these representations. (App. at 218). Petitioners have argued that oral and documentary

representations made prior to the contract do not apply; and they have also argued that oral and documentary representations made after the contract was established similarly are barred from consideration as new contracts or modifications to the existing written Memorandum of Agreement. Reliance on equitable estoppel in this case is not merely for purposes of being an offensive weapon, but instead is being used as a shield against the Petitioners use of various defenses to escape the promises they made to the Respondents. The Court of Appeals properly found that there is sufficient evidence to equitably estop Petitioners such that summary judgment is inappropriate. The Court of Appeals' decision concerning estoppel prevents an unjust result and prevents the sanctioning of potential fraud or misrepresentation.

C. Estoppel Can Lie Against the Petitioners.

If an estoppel claim does not affect the due exercise of a government entity's police power then an estoppel claim can be brought against the governmental entity. *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (citing *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001)). "A party asserting estoppel against the government must prove '(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position.'" *Id.* In this case, Respondents' estoppel claim does not have any affect against Petitioners' police powers.

Petitioners erroneously argue that Respondents cannot establish they lacked knowledge or the means of knowledge as to the truth of their contractual rights because

of the "unambiguous" contract. The Petitioners themselves have argued that the term "assigned reserved parking" in Exhibit A to the Contract does not contain language on priority, and they further argued that silence of such a term does not create an ambiguity or create additional terms. Under this analysis, the written contract would not provide Respondents any means of knowledge as to the facts regarding priority of parking. However, the promises, assurances and conduct of the Petitioners all represented that the Respondents had top priority for football parking. Assurances were made by USC employees that Respondents would have first priority on football parking, Wyrick sent a letter confirming this top priority, and Respondents previously received parking spaces on the apron of the stadium until the incident giving rise to these claims. Nothing in the written Contract would provide knowledge or the means of knowledge that the Petitioners never meant to uphold the assurances and promises made outside of the written Contract.

Similarly, the Respondents have also established sufficient evidence that they justifiably relied upon the Petitioners' promises, representations and conduct. Even assuming the parking term is unambiguous and silent on the issue of priority for parking, then the mere terms are not instructive on priority; and the representations made by the Petitioners both prior to and after execution as to priority would be justifiably relied upon. Moreover, there is not a merger clause or a non-reliance clause in the contract that might preclude them from relying upon the representations. *See Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984).

The Petitioners incorrectly argue that statements made by their agents and officials regarding priority are erroneous and cannot be used to estop Petitioners. As an

initial matter, it seems as if the Petitioners are making a new argument that Chris Wyrick lacked authority to make statements on priority and the statements were incorrect. This spin on the Wyrick statement is unfounded, without merit and not preserved at this stage. Chris Wyrick sent a letter dated March 5, 2008 to the Lifetime Members, which included the Respondents. (App. at 305). The letter explicitly provides that "Life Members are at the top of all Gamecock Club priority." *Id.* Mr. Wyrick then goes on to sign the letter and provide his position as Executive Director of the Gamecock Club. It is inconceivable to believe that the Executive Director somehow lacked the authority to issue this statement. Nothing in the record supports Petitioners' contention that Mr. Wyrick somehow lacked authority or was erroneous.[6]

The Court of Appeals correctly held that there was sufficient evidence to raise questions of fact as to equitable estoppel and summary judgment was inappropriate.

CONCLUSION

There is sufficient evidence to find that a factual issue exists as to whether Petitioners are equitably and promissorily estopped from denying Respondents the highest priority to available parking as Lifetime Members. The decision of the Court of Appeals should be affirmed.

(SIGNATURE FOLLOWS ON NEXT PAGE)

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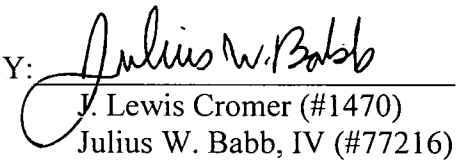
[6] The Petitioners reliance upon *Service Mgmt, Inc. v. State Health & Human Servs. Fin. Comm'n*, 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989) is misplaced. In that action, the written contract explicitly gave a reimbursement rate per patient day, but the nursing home received a higher payment due to an erroneous calculation based upon a contradictory rate. *Id.* When asked to be reimbursed, the nursing home opposed reimbursement for the error by claiming estoppel. *Id.* This is not remotely comparable to the present action. There was no exact rate for priority in the written agreement and the communications were not merely calculation errors but instead representations from Petitioners top officials.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, LLC

BY: 

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PROOF OF SERVICE

I certify that I have caused service of the Brief of Respondents by hand delivery, on December 12, 2016, to their attorneys of record, Robert E. Stepp and Bess J. DuRant, Esquire, of Sowell Gray at 1310 Gadsden Street, Columbia, SC 29201.

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