THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2011-UP-519 (S.C. Ct. App. Filed November 29, 2011)

Stevens & Wilkinson of South Carolina, Inc. . . . . Respondent,

vs.

City of Columbia, South Carolina . . . . . Petitioner.

BRIEF OF PETITIONER

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July 3, 2013
Columbia, South Carolina

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STATEMENT OF THE CASE

The issues addressed in this case arise out of litigation surrounding Petitioner City of Columbia's ("the City") efforts to encourage the construction of a headquarters hotel to support the Columbia Metropolitan Convention Center ("convention center hotel"). In December 2002, the City selected a project team, including Respondent Stevens & Wilkinson of South Carolina ("Stevens & Wilkinson"), to develop a publicly-funded convention center hotel. The City and the project team entered into a Memorandum of Understanding ("MOU"), the nature of which is the subject of a related appeal. The City ultimately determined that the publicly-funded hotel project proposed by the project team was not feasible, put out a new Request for Proposals (RFP) for a privately-funded hotel development, and selected a new developer, who undertook and completed the private development of the convention center hotel. Members of the project team including Stevens & Wilkinson made a proposal pursuant to the new RFP but were not selected and did not participate in the private development of the convention center hotel.

Following the City's decision to pursue development of the convention center hotel with a private developer, the Respondent filed an Amended Complaint against the City for breach of contract, asserting the MOU was a contract, along with other causes of action, on November 14, 2005.

On February 20, 2009, Stevens & Wilkinson filed a motion for partial summary judgment seeking a determination that "Stevens and Wilkinson and the City of Columbia created a contractual agreement – separate and apart from the Memorandum of Understanding – in July of 2003 for the performance of and payment for architectural and design services." (Motion for Partial Summary Judgment, Appx. pp. 21-22.) The basis

for Stevens & Wilkinson's motion for partial summary judgment was that a vote of the Columbia City Council on July 30, 2003, resulted in a contract between the City and Stevens & Wilkinson.

A hearing on Stevens & Wilkinson's motion for summary judgment was held on March 10, 2009. (Transcript of March 10, 2009 Hearing, Appx. pp. 124-156.) On March 23, 2009, the trial court issued an Order granting Stevens & Wilkinson's Motion for Partial Summary Judgment. (Order, dated March 23, 2009, Appx. pp. 4-9.) The trial court held that a contract existed between the City and Stevens & Wilkinson as a result of the vote of the City Council in July 2003. Id. The City filed a motion pursuant to Rule 59(e) requesting that the trial court alter or amend its Order. (Rule 59(e) motion, Appx. pp. 98-106.) In its Rule 59(e) motion, the City requested that the trial court find that the contract was formed by Stevens & Wilkinson's acceptance of a counteroffer contained within the City Council's July 2003 vote, that the counteroffer determined the terms of the contract, and that the City had complied with the terms of the contract by paying the only amount ever billed by Stevens & Wilkinson. Id. A hearing on the City's motion was held on July 1, 2009. (Transcript of July 1, 2009 Hearing, Appx. pp. 157-166.) The trial court issued an Order denying the City's 59(e) motion on July 23, 2009 but modifying its original Order. (July 23, 2009 Order, Appx. pp. 10-12.)

The City timely filed its Notice of Appeal of both Orders. The Court of Appeals issued its unpublished Opinion No. 2011-UP-519 (hereinafter referred to as the "Opinion") on November 29, 2011. Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia, South Carolina, Unpublished Opinion No. 2011-UP-519 (S.C. Ct. App. Filed November 29, 2011). It is this Opinion now on appeal.

In its Opinion, the Court of Appeals affirmed as modified the trial court's ruling, holding that a contract did exist as a result of the City Council's July 2003 vote and, more specifically, that the vote constituted a counteroffer that was subsequently accepted by Stevens & Wilkinson by performance. However, the Court of Appeals remanded the matter to the trial court for a determination by a jury of the terms of the contract, whether such terms were later modified, whether the City breached the contract and, if so, the damages for such breach.

The City timely filed a Petition for Rehearing pursuant to Rule 221(a) and Rule 240 of the South Carolina Appellate Court Rules. By Order dated January 27, 2012, the Court of Appeals denied the City's Petition for Rehearing on this matter. On February 24, 2012, the City filed and served its Petition for Certiorari, which this Court granted on May 2, 2013.

STATEMENT OF THE FACTS

The facts essential to this appeal are virtually undisputed. In April 2003, the City executed a Memorandum of Understanding ("MOU") with Stevens & Wilkinson and other members of a project team that the City had selected to propose a plan to develop the convention center hotel. (MOU, Appx. pp. 167-189.) The hotel project was to be financed by the issuance of hotel revenue bonds. (MOU, Appx. p. 170.) According to the terms of the MOU, the project team members would not be compensated for their work unless and until the bonds closed. (MOU, Appx. pp. 171-172.) A dispute exists, which is the subject of a related appeal, about whether the MOU was a contract or a non-binding agreement to work toward a contract.

After performing work in anticipation of a bond closing in the Summer of 2003, which was delayed by no fault of the City, Stevens & Wilkinson sought an advance payment for a portion of its services prior to the bond closing in order for it to continue its work pending a closing. Stevens & Wilkinson proposed that any payment, while non-refundable to the City if the bonds did not close, would be charged against any fee due to Stevens & Wilkinson if the bonds closed. (Letter from Bobby Lyles to Mark Alles, dated December 17, 2003, Appx. p. 195; Letter from Mark Alles to John Lumpkin, dated December 18, 2003, Appx. p. 196; Letter from John Lumpkin to Steve Gantt, dated December 18, 2003, Appx. p. 197.) Stevens & Wilkinson presented its request for payment to the City in the form of a "Cost Estimate," indicating fees it would incur on the hotel project from that date through October 13, 2003, the anticipated revised date for the bond closing. (Cost Estimate-Revised July 21, 2003, Appx. p. 192.) The total estimate for architectural and engineering fees and fees for special consultants through October 13, 2003, was $650,000. (Id.) Stevens & Wilkinson also included in its cost estimate "Estimated A/E fees to be incurred weekly after October 13, 2003 (anticipated bond closing date) . . . $60,000/week," along with an estimate of fees for special consultants for this subsequent period of $15,000 per week, for a total estimate of $75,000 per week after October 13, 2003. (Id.)

On July 30, 2003, the City Council considered Stevens & Wilkinson's proposal for interim fees and voted on the proposal. The minutes from the July 30, 2003 City Council meeting reflect that City Council responded to Stevens & Wilkinson's proposal with the following vote:

> ACTION: APPROVED $650,000 for Interim architectural design services for a period of 90 days prior to Bond Closing. Mr. Papadea and Mr. Osborne did not vote due to a conflict of interest.

(Minutes of July 30, 2003 Columbia City Council meeting, Appx. p. 194, line 20.)

Subsequent to the Council's vote, Stevens & Wilkinson performed additional work on the hotel project. On December 18, 2003, Stevens & Wilkinson submitted an invoice to the City for its work in the amount of $697,084.79 for the period July 10, 2003 to December 15, 2003. (Invoice from Stevens & Wilkinson, Appx. p. 198.) The City issued a check to Stevens & Wilkinson for the full amount of $697,084.79 on December 29, 2003. (Check from City of Columbia, Appx. p. 199.)

The City acknowledges that the payment of $697,084.79 is $47,084.79 more than the amount voted on by City Council on July 30, 2003. However, there is nothing in the record to explain the difference between the amount approved by the City and the amount invoiced by Stevens & Wilkinson other than the bill as presented and the fact that the City paid it.

The bond closing anticipated when Council took its vote did not occur on October 13, 2003; indeed, there never was a bond closing. Stevens & Wilkinson never sent the City another invoice, and the City paid no more money to Stevens & Wilkinson.

ARGUMENT

I. There Is No Remaining Question of Fact to Be Resolved by a Jury Regarding the Terms of the Contract Between the City and Stevens & Wilkinson Because, as a Matter of Law, the Terms of That Contract Are Limited to Those Expressly Stated in the City's Counteroffer, Which Stevens & Wilkinson Accepted by Performance.

As a matter of law, where the terms of a counteroffer and its acceptance are undisputed, the terms of the contract must be the terms presented in the counteroffer. This Court has addressed which terms constitute a contract where there is an offer, counteroffer, and acceptance.

> If the party who made the prior offer properly expresses his assent to the terms of the counter offer, a contract is thereby made **on those terms**. The fact that the prior offer became inoperative is now immaterial; and the terms of that offer are also immaterial except in so far as they are incorporated by reference in the counter offer itself.

Cain v. Noel, 268 S.C. 583, 587, 235 S.E.2d 292, 293 (1997) (quoting 1 Corbin on Contracts § 89, pp. 379-80) (emphasis added). This Court subsequently held, "The **offer identifies the bargained for exchange** and creates a power of acceptance in the offeree." Prescott v. Farmers Tel. Co-op., Inc., 516 S.E.2d 923, 926 (1999) (citing Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co., 313 S.C. 215 220, 437 S.E.2d 122, 125) (1993)) (emphasis added).

Accordingly, the terms of a contract are dictated by the terms of the offer or, in this case, the counteroffer. When the counteroffer is accepted, the only terms remaining to be accepted are those in the counteroffer, and **only** those terms can become the terms of the contract.

The trial court granted the Plaintiffs' motion for partial summary judgment holding that the vote of City Council was an acceptance of the Plaintiffs' offer to continuing work, "albeit on seemingly modified terms," rather than a counteroffer. In its order denying the City's motion to alter or amend pursuant to Rule 59(e), the trial court amended the previous Order "so as to delete this phrase." In neither Order did the trial

court determine the terms of the contract or state whether those terms had been fulfilled, stating in dicta that "an issue may remain as to whether the June 30, 2003 agreement was later modified by the parties." At no time, however, has the issue of any modification of the contract been asserted by either party.

On appeal, the Court of Appeals held that a contract was formed by Stevens & Wilkinson's performance following the counteroffer presented in the City Council vote.

After accepting the City's position that Stevens & Wilkinson had made an offer, the City by its July 30, 2003 vote made a counteroffer and that the City's counteroffer was accepted by performance, the Court of Appeals then inexplicably held:

> We remand for a jury to determine the terms of the contract based on all of the surrounding circumstances, including whether the terms of the contract were later modified. The jury must then determine whether the City breached the contract, and, if so, damages.

The Court of Appeals holding and directive are, in part, error. In this case, the terms of the counteroffer are simple and crystal clear: the City would pay $650,000 for interim architectural fees for a period of ninety (90) days prior to the anticipated bond closing, which it did. As the Court of Appeals points out in its Opinion, the terms of the counteroffer were dictated by the Columbia City Council vote as recorded in its minutes. Berkeley Electric Coop. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). The minutes of the Columbia City Council meeting are the only evidence of the City Council's decision, and parol evidence cannot be admitted to vary or contradict the terms in those minutes. Id. Thus, the terms of the City of Columbia's counteroffer are limited to those terms recorded in the City Council minutes of the July 30, 2003 vote.

As a matter of law, the terms of the contract were that the City would pay $650.000 for interim architectural services **and nothing more**. The Court of Appeals erred in holding that any question of fact remained regarding the terms of the contract between the City and Stevens & Wilkinson.

As a matter of law, the terms of the contract cannot be determined by looking beyond the Council's vote at facts "based on all of the surrounding circumstances" as directed by the Court of Appeals. The terms of the contract are only those terms contained in the Columbia City Council's vote on July 30, 2003. This Court definitively stated in Berkeley Electric Coop. that unless there is evidence that the minutes of a town council are incomplete or ambiguous, parol evidence cannot be admitted to "explain, enlarge, or contradict minutes of a proceeding of a town council." Id. at 208, 417 S.E.2d at 581. Where the terms of a contract are unambiguous, construction of a contract is a matter of law for the court. Rental Uniform Service of Florence, Inc. V. Dudley, 278 S.C. 674, 676, 301 S.E.2d 142, 142 (1983).

In this case, the minutes are complete and unambigous on their face, and they definitively state the terms approved by the City Council. There is absolutely no evidence in the record that the minutes are incomplete and neither party here has suggested they are ambiguous. Thus, no parol evidence of "surrounding circumstances" is admissible to explain, enlarge or contradict the terms of the City of Columbia's counteroffer as set forth in the recorded vote of Columbia City Council. Accordingly, the contract between the City and Stevens & Wilkinson provided only that the City was to

pay $650,000 for interim architectural design services, and the Court of Appeals erred by remanding the case for a determination of those terms by a jury.

II. There Is No Remaining Question of Fact to Be Resolved by a Jury Regarding Potential Modification of the Contract Because There Is No Evidence in the Record That Columbia City Council Ever Voted to Modify the Contract And, as a Matter of Law, the Contract Could Not Be Modified Without a Vote of Columbia City Council.

The Court of Appeals additionally remanded the case for a determination by a jury as to "whether the terms of the contract were later modified." Although the possibility of modification of the contract was not an issue before the trial court or the court of Appeals, the Court of Appeals has now created a jury issue regarding a possible modification, and this issue must be addressed.

The Court of Appeals' ruling that there exists a question of fact regarding the possibility of subsequent modification is error. Neither party asserted there had been a modification or presented evidence of such. Further, as a matter of law, the contract could not have been modified in any way other than a vote of the City Council, and there was no such vote.

Even if this had been an issue before the Court of Appeals, the record is devoid of any assertion by either party of a modification of the parties' agreement. That the Court of Appeals suggested there might have been and that this was an issue in the case is inexplicable. As a matter of state statute, the City can only take action through the City Council. S.C. Code Ann. § 5-7-160 states, "All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the

municipality by law." S.C. Code Ann. § 5-13-30 reiterates that "[a]ll legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council."

The Columbia City Code specifically provides that only the City Manager is authorized to bind the City in contract without City Council approval, but even this authority applies only to contracts of $10,000 or less. Columbia City Code Section 2-207. For contracts in excess of $10,000, the Columbia City Council must approve the contract. Id.

Neither state statute nor city ordinance provides any officer or employee of the City with authority to bind the City in contract greater than $10,000. If a City officer or employee cannot bind the City in contract, the actions of a City officer or employee are also insufficient to modify the terms of any contract entered into by the City.

The only other manner in which the contract could have been modified would have been by another vote of Columbia City Council convened as such and voting on the specific matter of contract modification. There is no evidence in the record suggesting that City Council voted to modify the contract because no such vote ever took place.

III. Applying Rule 56(d) of the South Carolina Rules of Civil Procedure, the Lower Courts Should Have Found and this Court Can Find That the City Has Fulfilled the Terms of the Contract Between it and the Stevens & Wilkinson.

Rule 56(d), SCRCP, provides that a court when ruling on a motion for partial summary judgment:

> **shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may**

> **thereupon make an order specifying the facts that appear without substantial controversy,** including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

Rule 56(d), SCRCP (emphasis added). There is almost no authority in South Carolina considering the purpose or application of Rule 56(d), SCRCP. However, the Reporter's Notes to Rule 56, SCRCP, do provide some guidance as to the purpose of the rule stating, "This Rule makes the findings of uncontested facts discretionary with the court rather than mandatory; but is valuable in disposing of uncontested issues at trial."

Federal courts have held that the purpose of the similar Rule 56(g), FRCP, (formerly Rule 56(d), FRCP) is to resolve before trial "matters wherein there is no genuine dispute" and to promote efficiency in litigation. Precision Industries v. Behnke Lubricants, Inc., 396 F. Supp. 2d 1012, 1016 (S.D. Iowa 2005); Ames v. The Rock Island Boat Club, 07-CV-4068, 2009 WL 400648 (C.D. Ill. 2009).

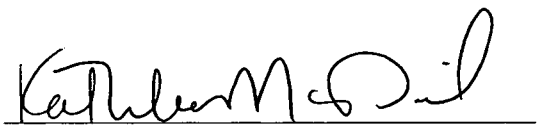
In cases such as this where the facts are susceptible to only one interpretation as a matter of law, application of Rule 56(d), SCRCP, is appropriate and should be strongly encouraged. If this Court determines that the contract between the City and Stevens & Wilkinson was for the payment of $650,000 for interim architecture services and that no subsequent modification was possible as a matter of law, then the City requests that this Court take those facts to their logical conclusion and determine that the City completed its obligation to Stevens & Wilkinson with its payment of $697,084.79 on December 29, 2003, which was accepted without controversy, and that Stevens & Wilkinson is precluded from seeking additional damages arising from the July 30, 2003 vote of

Columbia City Council. In the alternative, this Court could remand the matter to the trial court for a determination, pursuant to Rule 56(d), SCRCP, that the City has fulfilled its obligation to pay the agreed upon $650,000.

CONCLUSION

For the foregoing reasons, Petitioner City of Columbia respectfully requests that this Court determine that there is no question of fact that the contract between the City and Stevens & Wilkinson

Respectfully submitted,



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July 3, 2013

CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Petitioner complies with Rule 211(b), SCACR.

Respectfully submitted,

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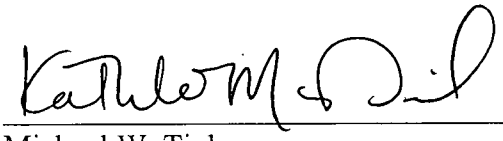
PROOF OF SERVICE

I certify that I have served the **BRIEF OF PETITIONER AND APPENDIX** on the Respondent herein, by causing copies of same to be hand-delivered to its attorneys of record, Richard A. Harpootlian and Graham L. Newman, at 1410 Laurel Street, Columbia, South Carolina 29202 on July 3, 2013:



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