

**EXHIBIT A**

**RECEIVED**

**Oct 31 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF JASPER )  
  
JASPER COUNTY, )  
 )  
Plaintiff, )  
v. )  
 )  
WESTERN SURETY COMPANY )  
and DENISE SMITH, )  
 )  
Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
C.A. No.: 2019-CP-27-00674

ORDER

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This civil action was filed on December 17, 2019, following the theft of \$274,175.00 by former Jasper County Finance Department employee, Denise Smith (Smith), after Smith plead guilty to embezzlement of public funds greater than \$10,000. See Exhibit A. At the time of the theft, Jasper County held Public Employees Blanket Bond No. 70471756 with Western Surety, which was issued on April 17, 2008. Exhibit B. The Bond was renewed every year, Exhibit C, until cancellation in 2019, Exhibit D. Following the discovery of the theft, Jasper County made a timely demand to Defendant Western Surety Company for \$274,175.00 under the Bond and submitted its Sworn Statement and Proof of Loss on August 24, 2018. Exhibit E.

In this action, Jasper County alleges causes of action for Breach of Contract and Bad Faith against Western Surety. Western Surety counterclaimed for Declaration of Rights and Reformation of the Contract against Jasper County, asserting mutual mistake. Both Jasper County and Western Surety have claims against Smith, but Smith did not file a responsive pleading. Jasper County has not moved for a Default Judgment against Smith. Restitution was ordered by this Court

at Smith's guilty plea, however Smith relayed to the Court at her sentencing that she has no way to pay back the funds. Jasper County acknowledges that in the unlikely event Smith does pay back any of the funds, Western Surety is entitled to a set-off.

This case was assigned to me as a Business Court designation. A bench trial was held on June 1, 2023, at the Jasper County Courthouse in Ridgeland, South Carolina. After considering the law and the evidence presented, I make the following findings of fact and conclusions of law in favor of the Plaintiff Jasper County on the claim for Breach of Contract and in favor of the Defendant Western Surety on the claim of Bad Faith:

**1. THE WESTERN SURETY BOND LANGUAGE IS UNAMBIGUOUS.**

Western Surety's 30(b)(6) designee, Ginger Barnes, a claims consultant employed by Western Surety, testified at trial that the Blanket Bond is a contract between Western Surety and Jasper County, and that the Bond does not contain any ambiguities and the face amount of the Bond and every written provision in the Bond states that the available Limit of Liability for each employee is \$285,000.00. She further testified that Western Surety did not contest the claim submitted by the County and that the theft triggered the coverage provided by the bond, however Western Surety contested the amount it must pay to Jasper County is limited to \$20,000.00 for Smith's theft.

The plain language of the bond states that the "Limits of Liability" for "Insuring Agreement 4 Faithful Performance Blanket Position Bond Coverage" was \$285,000.00 See Exhibit B. As Surety, the Bond obligates Western Surety "to

indemnify the Obligee [Jasper County] for the use and benefit of the Insured [Jasper County] for . . . Faithful Performance Blanket Position Bond Coverage.” Exhibit B.

The Bond is unambiguous, and it is undisputed, that the claim filed with Western Surety is covered under the “Faithful Performance Blanket Position Bond Coverage.” It is also undisputed that Smith qualified as an “Employee” under the Bond. Barnes conceded in both her deposition testimony (Deposition of Barnes, page 39, lines 4-13) and trial testimony that “the way the bond reads,” Western Surety’s total liability under Insuring Agreement 4 is to each employee and to the applicable amount of the limit of liability of \$285,000.00. Western Surety admitted that nothing on the face of the Bond limited the coverage owed to Jasper County to \$20,000.00, which is the position Western Surety takes. Barnes further testified at trial that Western Surety did not have any issue or objection with Jasper County’s performance for the 11-year period of the Bond, and that the County timely paid all premiums, until Western Surety cancelled the Bond after Smith’s claim was filed by Jasper County.

Under South Carolina law, insurance policies are interpreted according to general rules of contract construction. A court must give unambiguous policy language its “plain and ordinary” meaning. Nationwide Mut. Ins. Co. v. Com. Bank, 325 S.C. 357, 360, 479 S.E.2d 524, 526 (1996). “If language used by a bond is plain and unambiguous the bond should be interpreted like any other contract to determine the intention of the parties.” Emp’rs Ins. of Wausau v. Constr. Mgmt. Engr’s of Fla. Inc., 297 S.C. 354, 357, 377 S.E.2d 119, 121 (Ct. App. 1989). Further,

[i]n construing and determining the effect of a written contract, the parties' intention and the meaning are gathered from the document itself. When the language of the contract is clear and unequivocal its meaning must be determined by its contents alone. The language determines the full force and effect of the document when it is perfectly plain and capable of legal construction.

Id. (citing Gilstrap v. Culpepper, 283 S.C. 83, 85, 320 S.E.2d 445, 447 (1984) (extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible)); see also Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013).

The plain language of the Bond here states that the “Faithful Performance Blanket Position Bond Coverage” is \$285,000.00. The Bond’s definition for this coverage provides that the amount of indemnity on each covered employee is the amount stated in the Table of Limits of Liability and that the Limits of Liability indicates that “[t]he Surety’s total liability under each such insuring agreement as to each Employee is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.” Accordingly, Jasper County has presented sufficient proof to substantiate its loss of \$274,175.00 for the acts committed by Smith. In addition, Western Surety did not provide that the loss of \$274,175.00 is inflated or incorrect, and this is the same amount to which Smith pled guilty. See Exhibit A.

**2. NEITHER A MUTUAL MISTAKE NOR A UNILATERAL MISTAKE EXISTS, AND THEREFORE, THE CONTRACT IS ENFORCEABLE AS IT IS WRITTEN.**

Western Surety’s defense is that a mutual mistake in the making of the bond occurred and that it would not have written a bond for \$285,000.00. At trial, after

being questioned by this Court, Barnes conceded that Western Surety *could* have written the bond for that amount but that they *would not* (emphasis added).

Beginning in 1989, Jasper County began purchasing individual fidelity bonds from Western Surety for certain employees (the “Prior Individual Bonds”). In 2005, the State of South Carolina allowed counties to purchase blanket bonds for their employees rather than individual bonds, as was previously required. See S.C. Code Ann. § 4-11-65(A)-(B) Act No. 58 of 2005.

In 2008, Jasper County replaced its individual employee bonds with one fidelity blanket bond and contacted their insurance agent, Cheryl Stolte (Stolte), who in turn obtained a Public Official and Employee’s Blanket Bond Application. It is apparent on the Bond Application that portions were filled out by Ronnie Malphrus (Malphrus), Jasper County’s Director of Administrative Services, and other portions were filled out by Stolte, as was testified to by both Malphrus and Stolte at trial. Testimony by both indicates the positions and amounts of excess coverage were written by Stolte and other information was written by Malphrus. Malphrus testified that Jasper County did not request any specific amount for the bond so long as the amounts for individual positions required by state statute were covered. The Bond issued by Western Surety satisfied that requirement and covered what the County needed. Significantly, the limits of liability on the Blanket Bond were not \$285,000.00 for each occurrence but was rather a combined limit for all claims each year that may arise from the County’s operation, which had previously been covered by the Prior Individual Bonds. Western Surety first issued this Blanket Bond to Jasper County in

2008, and renewed it annually from 2009 until it cancelled the Bond in 2019. Exhibit C; Exhibit D.

**A. No unilateral mistake exists to reform the contract under South Carolina law.**

Western Surety argued that it would not have written a bond for \$285,000.00. “Where a mistake is unilateral, equity will refuse to grant reformation except under strong and extraordinary circumstances showing imbecility or something which would make it a great wrong to enforce the agreement. These circumstances must be shown by competent testimony of the clearest kind.” Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Western Surety provided no testimony of “the clearest kind” of any “extraordinary circumstances” to reform the bond using this defense.

Moreover, the record does not support any claim that Western Surety made a mistake when it issued the Bond for \$285,000.00. No one from Western Surety contacted the person (Scott Reinke) who wrote the Bond, despite his information being provided in written discovery. Testimony from Barnes at trial indicated that she did not talk to Reinke about the bond; that she lacked involvement in writing the bond or the renewal process; and that she did not identify who from Western Surety was responsible for renewing the bond and issuing the renewals. Barnes also stated she did not know the internal steps or documents involved in the renewal process for this bond nor did she ask anyone what the renewal process entails. Thus, little to no information was provided at trial after requests by the Court about the underwriting file and the process Reinke followed and what information he considered in writing the Bond. Further, when this Court asked how Western Surety came up with the

premium for the bond, Barnes testified that was proprietary information to which she has no knowledge, nor would this information have been shared with Jasper County.

Barnes also stated that she did not talk with either the Western Surety corporate officer who sealed the Bond before it was issued or the Senior Vice President of Western Surety (Paul Bruflat, Sr.), who signed the Bond for Western Surety. In addition, Stolte, the commercial account manager for Kinghorn Insurance, testified that she relied on a card that lists the types of bonds and the dollar amount of coverage and premium or rate in which to follow.

In addition, Barnes provided that Western Surety would have undertaken a review process each year when it renewed the Bond. Yet, she did not speak with any person involved in renewing the Bond in 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, nor in 2018 prior to the cancellation. In each of those years, Western Surety employees reviewed the Bond and reviewed the charged premium before Western Surety submitted the Bond for renewal to Jasper County. None of those Western Surety employees ever informed Jasper County that Western Surety would not write the Bond or that there was some mistake with how Western Surety wrote the Bond. Moreover, Western Surety did not offer any documentation about what the company reviewed or the process the company undertook during the review process. The only inference that can be drawn here is that Western Surety employees for ten consecutive years approved the \$285,000.00 amount of the bond and the bond premium charged to Jasper County.

**B. There is no clear and convincing proof of mutual mistake and, therefore, the contract cannot be reformed.**

Under South Carolina law, contracts may be reformed when there exists a mutual mistake consisting of “the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the prior agreement which necessarily preceded it.” Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987) (citing Commercial Union Assurance Co. v. Castile, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984)). “A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.” Id. (citing Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981)). The standard for showing a mutual mistake is clear and convincing evidence. Id. “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 329 S.C. 371, 373, 496 S.E.2d 17, 18 (1998).

Western Surety argues that Jasper County was mistaken in its belief that it had coverage for all their employees in this amount of \$285,000.00 when the County knew or should have known that this was not the coverage they applied for nor what they paid a premium for. At trial, Barnes confirmed that the three pages of the Bond did not contain any provision that the bond coverage would be anything less than \$285,000.00. She further testified that Western Surety never disclosed to insurance agent Stolte or to Jasper County how Western Surety calculated the Bond premium it charged. She also stated that Western Surety never communicated the alleged

mistake during the decade that the Bond was in existence until Jasper County made the claim and the company decided to hire a lawyer “in an effort to reduce our loss.” See Exhibit F. Accordingly, Western Surety has not provided clear and convincing evidence that Jasper County had any knowledge that the quoted premium was for some other coverage than what the three pages of the Bond stated.

Moreover, trial testimony from Malphrus established that the bond premium charged was similar to the total bond premiums paid by Jasper County for the Prior Individual Bonds before they were combined into the Blanket. The Bond issued by Western Surety satisfied the statutory requirements and covered what the County needed. Finally, as previously indicated, Stolte also testified that the bond premium charged by Western Surety did not raise any issue to her.

Western Surety argued that the transmittal letter for the Bond and yearly premium invoices informed Jasper County that a mistake in the Bond existed. This argument fails. Stolte was asked by Western Surety’s counsel about the significance of the description in the transmittal page for the Bond and she stated that she just looked at the bond to get information. Stolte was then asked about two specific premium invoices for prior bonds, and she looked at the bond document itself to determine the amount of the bond and ignored the cover pages.

A review of the invoices fails to indicate that the terms or amount of coverage offered by the Bond had changed, and the Bond does not contain any language that says the Limits of Liability can be changed by a subsequent document or billing invoice. The Bond fails to make any reference that the face amount of the Bond was

controlled by any description on any invoice or that the face amount would be reduced by any factor.

For these reasons, Western Surety failed to demonstrate by clear and convincing evidence that a mutual mistake occurred. As such, the Court cannot reform the contract at issue and thus the contract is enforceable as it is written.

**3. S.C. CODE ANN. §4-11-65 DOES NOT BAR JASPER COUNTY'S CLAIM FOR BREACH OF CONTRACT.**

At trial, counsel for Western Surety referenced S.C. Code Ann. § 4-11-65 and argued that Jasper County's Breach of Contract claim was barred. This statute does not bar the present claim. First, all issues with the Bond and the funding by the County for the Bond were discussed with and approved by Jasper County Council, and the funding for the Bond is a budgeted item in the yearly County budget approved by County Council by Ordinance. Second, Western Surety lacks standing to challenge the statute because the statute does not give rise to a private cause of action. See Ballard v. Newberry Cty., 432 S.C. 526, 854 S.E.2d 848 (Ct. App. 2020) ("A private right of action will be implied only if the legislation was enacted for the special benefit of a private party." (internal citation omitted)). Finally, the statute of limitations has run for Western Surety to challenge purchase of the Bond.

**4. JASPER COUNTY HAS FAILED TO PROVE ITS BAD FAITH CAUSE OF ACTION AGAINST WESTERN SURETY**

In South Carolina, "[b]ad faith refusal to pay first party benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between plaintiff and defendant; (2) refusal by an insurer to pay benefits

due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; [and] (4) causing damage to the insured." Howard v. State Farm, 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994). "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim . . . An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001) (quoting Am. Fire & Cas. Co. v. Johnson, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998)).

At trial, Western Surety, through Barnes, testified upon receipt of Jasper County's claim in August of 2018, Western Surety immediately opened a claims file and commenced an evaluation and an investigation. After reviewing Jasper County's Claim and the Bond, Western Surety responded in October 2018 (just two months after receiving the claim) and offered Jasper County \$30,000.00 to resolve the claim, which is \$10,000.00 more than they believe is due, in an offer of good faith. The evidence at trial shows at least a scintilla of evidence that a justiciable controversy exists and does not therefore give rise to bad faith.

### CONCLUSION

For the above reasons, this Court hereby orders that judgment be entered in favor of Jasper County on its Breach of Contract claim in the amount of \$374,759.09, which is the amount of the Bond claim plus pre-judgment interest at the statutory rate from the date of denial of the Bond claim. Attorney's fees are denied pursuant to S.C. Code Ann. § 38-59-40 on the grounds that, under the totality of the

circumstances, Western Surety did not act without reasonable cause or in bad faith in handling the County's bond claim. Jasper County's claim for Bad Faith is denied. Based on this ruling, it is not necessary for this Court to address Western Surety's claim for Declaratory Judgment nor reformation of the contract.

IT IS SO ORDERED!

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Carmen T. Mullen  
Business Court Judge

Ridgeland, South Carolina  
July \_\_, 2023



Jasper Common Pleas

**Case Caption:** Jasper County VS Western Surety Company , defendant, et al

**Case Number:** 2019CP2700674

**Type:** Order/Other

So Ordered

s/Carmen T Mullen 2142

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF JASPER )  
  
JASPER COUNTY, )  
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Plaintiff, )  
v. )  
WESTERN SURETY COMPANY )  
and DENISE SMITH, )  
 )  
Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
C.A. No.: 2019-CP-27-00674

**ORDER DENYING DEFENDANT  
WESTERN SURETY COMPANY'S  
MOTION TO RECONSIDER**

A bench trial in this case occurred on June 1, 2023, at the Jasper County Courthouse and a final order was entered on July 28, 2023, finding that Western Surety Company failed to prove mutual mistake and breached its contract with Jasper County. Judgment was entered in the amount of \$374,759.09 in favor of Jasper County. The order also found that Western Surety Company did not act without reasonable cause or in bad faith in handling Jasper County's bond claim. Defendant Western Surety Company filed its Motion to Reconsider this Court's order on August 7, 2023. In lieu of a hearing and by permission of counsel for both parties, I decided this Motion to Reconsider on the memorandums filed by Jasper County and Western Surety Company.

After reviewing the evidence presented and the law applied at the bench trial, and after consideration of the parties' memorandums regarding this Motion to Reconsider, I find this Court's Order dated July 28, 2023, is an accurate recitation of my findings of fact and conclusions of law, and leave it to Western Surety to exercise its appellate rights.

Defendant's Motion to Reconsider is denied.

IT IS SO ORDERED!

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Carmen T. Mullen  
Business Court Judge

Ridgeland, South Carolina  
October 10, 2023



Jasper Common Pleas

**Case Caption:** Jasper County VS Western Surety Company , defendant, et al

**Case Number:** 2019CP2700674

**Type:** Order/Other

So Ordered

s/Carmen T Mullen 2142