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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA COURT OF COMMON PLEAS FOR
JASPER COUNTY

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2023-001708

Jasper County,

Respondent,

v.

Western Surety Company and Denise Smith,

Defendants,

Of which Western Surety Company is the Appellant.

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 5

STATEMENT OF FACTS 7

 1. Jasper County Begins Buying Employee Fidelity Bonds from Western Surety. 7

 2. Jasper County Switches to a Blanket Employee Fidelity Bond with the Intent to Bond General Employees like Smith for \$20,000 and Specific Employees for Higher Amounts..... 8

 3. Based on Jasper County’s Bond Application, Western Surety Offers to Issue a Blanket Bond for Amounts Subject to the General Employee Limit and Specific Employee Excess Limits, Which Jasper County Accepts..... 15

 4. The Bond Contains a Mutual Mistake that Does Not Reflect the Parties’ Intent that the Bond Amount Be Subject to the General and Specific Employee Limits. 16

 5. From Issuance of the Bond in 2008 until Cancellation in 2019, Jasper County Never Requested Any Increase or Change to the Amount of Coverage for Its Employees, and Western Surety Never Increased or Changed the Amount of Coverage..... 18

 6. Jasper County Makes a Claim on the Bond after Smith’s Embezzlement. 19

ARGUMENT 19

 I. THE TRIAL COURT ERRED BY REFUSING TO REFORM THE BOND TO CONFORM TO THE PARTIES’ INTENT IN LIGHT OF THE CLEAR AND CONVINCING EVIDENCE SHOWING THAT THE \$285,000 FIGURE IN THE BOND WAS A MUTUAL MISTAKE 20

 A. The Trial Court Ignored or Did Not Properly Consider the Parol Evidence Presented at Trial, Which Must Be Evaluated for the Mutual Mistake Analysis 21

 B. At Trial, Western Surety Presented Clear and Convincing Evidence that the Bond Contained a Mutual Mistake Consisting of the Erroneous Insertion of the \$285,000 Figure, Which Was Inconsistent with the Parol Evidence that Preceded the Bond As Neither Party Intended the Bond to Cover Any Employee for \$285,000 23

 C. The Trial Court Made Erroneous Findings Not Supported by the Evidence in Determining Jasper County’s Intent and the Existence of a Mutual Mistake..... 29

 D. The Trial Court Made Findings That Were Irrelevant or Otherwise Contradicted by the Evidence in Determining Western Surety’s Intent and the Existence of a Mutual Mistake 34

 II. THE TRIAL COURT ERRED BY REFUSING TO ISSUE OR CONSIDER A DECLARATORY JUDGMENT DECLARING THAT THE GENERAL AND SPECIFIC EMPLOYEE LIMITS AGREED TO BY THE PARTIES ARE VALID, BINDING, AND DETERMINATIVE OF ANY AMOUNT OWED BY WESTERN SURETY TO JASPER COUNTY FOR SMITH’S EMBEZZLEMENT 37

CONCLUSION..... 39

TABLE OF AUTHORITIES

Cases

<u>Anderson v. Aetna Cas. & Sur. Co.</u> , 175 S.C. 254, 178 S.E. 819 (1935).....	6
<u>Auto-Owners Ins. Co. v. Rhodes</u> , 405 S.C. 584, 748 S.E.2d 781 (2013).....	37
<u>Bundy v. Shirley</u> , 412 S.C. 292, 772 S.E.2d 163 (2015).....	6
<u>Crewe v. Blackmon</u> , 289 S.C. 229, 345 S.E.2d 754 (Ct. App. 1986).....	20
<u>Doe v. Clark</u> , 318 S.C. 274, 457 S.E.2d 336 (1995).....	5, 7
<u>Dupont v. S. Nat’l Bank of Hous.</u> , 288 S.C. 312, 342 S.E.2d 590 (1986).....	6
<u>Elias v. Firemen’s Ins. Co. of Newark, N.J.</u> , 309 S.C. 129, 420 S.E.2d 504 (1992).....	38
<u>George v. Empire Fire & Marine Ins. Co.</u> , 344 S.C. 582, 545 S.E.2d 500 (2001).....	passim
<u>Glasscock, Inc. v. U.S. Fid. & Guar. Co.</u> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....	6
<u>Goldman v. RBC, Inc.</u> , 369 S.C. 462, 632 S.E.2d 850 (2006).	5, 7
<u>Laser Supply & Servs., Inc. v. Orchard Park Assocs.</u> , 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009).....	24, 29, 30, 36
<u>Levy v. Outdoor Resorts of S.C.</u> , 304 S.C. 427, 405 S.E.2d 387 (1991).....	21
<u>Lewin v. Lewin</u> , 396 S.C. 349, 721 S.E.2d 1 (Ct. App. 2011).....	5
<u>Lewis v. Lewis</u> , 392 S.C. 381, 709 S.E.2d 650 (2011).....	5
<u>Lowcountry Open Land Tr. v. Charleston S. Univ.</u> , 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008).....	5, 7
<u>May v. May</u> , 428 S.C. 131, 833 S.E.2d 78 (Ct. App. 2019).....	passim
<u>McCready v. Atl. Coast Line R. Co.</u> , 212 S.C. 449, 48 S.E.2d 193 (1948).....	26
<u>McGill v. Moore</u> , 381 S.C. 179, 672 S.E.2d 571 (2009).....	22
<u>N. River Ins. Co. v. Claar</u> , 299 S.C. 8, 382 S.E.2d 8 (Ct. App. 1989).....	37
<u>Progressive Max Ins. Co. v. Floating Caps, Inc.</u> , 405 S.C. 35, 747 S.E.2d 178 (2013) ...	20, 21, 22
<u>Regions Bank v. Wingard Props., Inc.</u> , 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011).....	5, 6
<u>Sims v. Tyler</u> , 276 S.C. 640, 281 S.E.2d 229 (1981).....	6
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	5
<u>St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co.</u> , 251 S.C. 56, 159 S.E.2d 921 (1968).....	26
<u>Town of Hilton Head Island v. Coalition of Expressway Opponents</u> , 307 S.C. 449, 415 S.E.2d 801 (1992).....	37
<u>Townes Assocs., Ltd. v. City of Greenville</u> , 266 S.C. 81, 221 S.E.2d 773 (1976).....	5, 7
<u>U.S. Bank Tr. Nat’l Ass’n v. Bell</u> , 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).....	6

Statutes

S.C. Code Ann. § 15-53-20 (2005).....	37
S.C. Code Ann. § 15-53-30 (2005).....	37
S.C. Code Ann. § 15-53-40 (2005).....	37
S.C. Code Ann. § 4-11-65 (2021).....	8

Other Authorities

66 Am. Jur. 2d <u>Reformation of Instruments</u> § 6.....	20
Restatement (Second) of Contracts § 155.....	21

STATEMENT OF ISSUES ON APPEAL

- I. Should the \$285,000 amount of Faithful Performance Blanket Bond Coverage in the Bond be reformed to \$20,000 because it was a scrivener's error that does not reflect the General and Specific Employee Limits agreed to by Jasper County and Western Surety as demonstrated by the parol evidence presented at trial?

- II. Should the trial court have declared the General and Specific Employee Limits valid, binding, and determinative of any coverage owed to Jasper County under the Bond for the losses from Smith's embezzlement because this declaratory judgment will settle Jasper County and Western Surety's dispute and afford relief from uncertainty and insecurity to the parties with respect to their rights under the Bond?

STATEMENT OF THE CASE

This appeal arises out of a dispute regarding Public Employees Blanket Bond No. 70471756 (the “Bond”) issued by Appellant-Defendant Western Surety Company (“Western Surety” or “Appellant”) to Respondent Jasper County (“Jasper County” or “Respondent”) in 2008 until cancellation in 2019. (Order 1; Bond; Cancellation Notice). After Jasper County’s employee, Defendant Denise Smith (“Smith”), embezzled \$274,175.00 from Jasper County between August 2012 and December 2017, Jasper County made a claim on the Bond for this amount. (Order 1; *State v. Smith* Tr. of Record at 7:1–17; Sworn Statement in Proof of Loss). Although Jasper County had requested coverage for “\$20,000.00 per employee” for general employees like Smith, the Bond erroneously listed coverage as \$285,000.00. (Bond Application 1; Bond 1). Western Surety offered Jasper County \$30,000.00 to settle the claim, which Jasper County rejected. (Order 11; Offer). This litigation ensued.

On December 17, 2019, Jasper County filed the Complaint in the South Carolina Court of Common Pleas for Jasper County, asserting two causes of action against Western Surety for breach of contract and bad faith. (Compl. ¶¶ 18–25). On December 20, 2019, Western Surety accepted service of process and timely filed its Answer and Counterclaims on January 21, 2020, denying Jasper County’s allegations, raising affirmative defenses, including mutual mistake, and asserting two counterclaims for declaratory judgment and reformation. (Answer & Countercls.). On February 7, 2020, Jasper County filed a Reply to Western Surety’s Counterclaims, denying the counterclaims. (Reply to Countercls.). On July 6, 2020, the case was assigned to the Business Court for Jasper County with exclusive jurisdiction to the Honorable Carmen T. Mullen. (Order for Case Assignment to the Business Court).

Following the trial court's denials of the parties' cross-motions for summary judgment on February 13, 2023, the trial court held a bench trial on June 1, 2023, where the trial court heard the parties' arguments and received evidence and testimony from witnesses. (Form 4 Order Denying Mots. For Summ. J.; Order 2; Trial Tr. 5:3–5). On July 27, 2023, the trial court issued the Order with its findings of fact and conclusions of law. (Order). As to Jasper County's bad faith claim, the trial court found in favor of Western Surety:

[U]pon 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.

...

[U]nder the totality of the circumstances, Western Surety did not act without reasonable cause or in bad faith in handling the County's bond claim.

(Order 11–12). The trial court found in favor of Jasper County as to its breach-of-contract claim, finding that: (1) the “Bond language is unambiguous”; (2) “neither a mutual mistake nor a unilateral mistake exists, and therefore, the contract is enforceable as it is written”; and (3) “S.C. Code Ann. § 4-11-65 does not bar Jasper County's claim for breach of contract.” (Order 2–10). The trial court ordered 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.” (Order 11). Finally, the trial court held “it is not necessary for this Court to address Western Surety's claim for Declaratory Judgement nor reformation of the contract.” (Order 12). On July 28, 2023, judgment in the amount of \$374,759.09 was entered for Jasper County against Western Surety.

On August 7, 2023, Western Surety timely filed a Motion for New Trial or in the Alternative to Alter or Amend Judgment with a Memorandum in Support filed on October 6, 2023, arguing, *inter alia*, that the trial court should “grant a new trial on the grounds that the Order and Judgment of July 29, 2023, are unsupported by, and inconsistent with, the evidence presented at trial” or, alternatively, should “amend its Judgment of July 28, 2023, and reform [the Bond] to conform to the evidence received at trial, which taken as a whole, demonstrates the parties mutually intended for fidelity bond coverage in the amount of \$20,000 per employee—not \$285,000—the latter being a clear scrivener’s error at the time of contract formation.” (Mot. for New Trial; Mem. in Supp. of Mot. for New Trial 1). On October 6, 2023, Jasper County filed a Response to Western Surety’s Post-Trial Motion. (Resp. to Western Surety’s Post-Trial Mot.). Jasper County did not file any post-trial motions. On October 11, 2023, the trial court issued its Order Denying Western Surety’s Motion to Reconsider¹, stating:

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.

(Order Denying Mot. to Reconsider 1).

On October 31, 2023, Western Surety timely filed its Notice of Appeal, appealing the trial court’s July 27, 2023 Order. (Notice of Appeal 1). On the same date, Western Surety served Jasper County with the Notice of Appeal. (Proof of Service on Jasper County). On November 7, 2023, Jasper County filed its Notice of Cross-Appeal, appealing only the portions of the July 27, 2023 Order that denied Jasper County’s claims against Western Surety for bad faith and attorney’s

¹ In this order, the trial court styled Western Surety’s Motion for New Trial or in the Alternative to Alter or Amend Judgment” as a “Motion to Reconsider. (See Order Denying Mot. to Reconsider 1).

fees. (Notice of Cross Appeal 1). On the same date, Jasper County served Western Surety with its Notice of Cross-Appeal. (Proof of Service on Western Surety).

STANDARD OF REVIEW

Because Western Surety's counterclaims for a declaratory judgment and reformation based on mistake are actions in equity that were tried by a trial court judge, this Court reviews the trial court's findings and conclusions on these equitable counterclaims de novo and may find facts in accordance with its own view of the preponderance of the evidence, owing no deference to the trial court's findings or conclusions on Western Surety's equitable counterclaims.

For an action in equity tried by a judge without a jury, the appellate court owes no deference to the trial judge's findings and may find facts in accordance with its own view of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), abrogated on other grounds by Matter of Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018); Goldman v. RBC, Inc., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006); Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995); Lowcountry Open Land Tr. v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). In other words, the appellate court reviews both "factual findings and legal conclusions in an equitable action de novo." Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011) (citing Lewis v. Lewis, 392 S.C. 381, 388–89, 709 S.E.2d 650, 653–54 (2011)). De novo review is the broadest form of appellate review as it "permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Lewis, 392 S.C. at 390, 709 S.E.2d at 654–55; Lewin v. Lewin, 396 S.C. 349, 354, 721 S.E.2d 1, 3–4 (Ct. App. 2011); see also Smalls v. State, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018) ("We clarify that appellate courts review questions of law de novo, with no deference to trial courts.").

The appellant has the burden of showing to the appellate court that the trial judge made erroneous findings. U.S. Bank Tr. Nat'l Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). If the appellant shows that the preponderance of the evidence is against the trial court's findings in an equity case, the appellate court will reverse the trial court. Wingard Props., 394 S.C. at 249, 715 S.E.2d at 352 (citing Lewis, 392 S.C. at 388–89, 709 S.E.2d at 653–54).

Western Surety's counterclaim for reformation of the Bond based on mistake is an equitable cause of action. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (reformation of a contract is a specific cause of action in equity); Sims v. Tyler, 276 S.C. 640, 642, 281 S.E.2d 229, 230 (1981) (an action to reform or set aside a written instrument based upon mutual mistake is an action at equity); Dupont v. S. Nat'l Bank of Hous., 288 S.C. 312, 313, 342 S.E.2d 590, 590 (1986) (an action alleging mistake is in equity); Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 178 S.E. 819, 826 (1935) (citation omitted) (“A bond is an obligation—a contract. . . . A bond is nothing more than an agreement or contract under seal to pay money, or to do some other thing.”).

A claim for a declaratory judgment is neither legal nor equitable but is determined by the nature of the underlying issue. Bundy v. Shirley, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). Here, Western Surety's counterclaim for a declaratory judgment sounds in equity because the basis for this counterclaim was that the \$285,000 amount of coverage stated in the Bond was a mistake and that the General and Specific Employee Limits providing for \$20,000 in coverage for general employees like Smith was the amount of coverage intended by the parties. (Answer & Countercls. ¶¶ 67–74); see Sims, 276 S.C. at 642, 281 S.E.2d at 230 (an action to reform or set aside a written instrument based upon mutual mistake is an action at equity); Dupont, 288 S.C. at 313, 342 S.E.2d at 590 (an action alleging mistake is in equity).

Therefore, this Court applies the same de novo standard of review to both of Western Surety's equitable counterclaims for reformation and a declaratory judgment. See Townes, 266 S.C. at 86, 221 S.E.2d at 775; Goldman, 369 S.C. at 465, 632 S.E.2d at 851; Clark, 318 S.C. at 276, 457 S.E.2d at 337; Lowcountry Open Land Tr., 376 S.C. at 407, 656 S.E.2d at 779.

STATEMENT OF FACTS

1. Jasper County Begins Buying Employee Fidelity Bonds from Western Surety.

Western Surety is a commercial property and casualty insurance company and a wholly owned subsidiary of CNA Surety ("CNA"). (Trial Tr. 38:13–15, 39:8–15). Within the CNA umbrella, Western Surety writes individual and blanket bonds for public employees of federal, state, and local governments, such as Jasper County. (Jan. 31, 1989 Bond; Bond). Public employee fidelity bonds provide coverage for losses resulting from fraudulent or dishonest acts of public employees. (Jan. 31, 1989 Bond; Bond).

In 1989, Jasper County began purchasing individual fidelity bonds from Western Surety for certain of its employees (the "Prior Individual Bonds"). (Jan. 31, 1989 Bond; July 25, 2007 Bond for Resh; July 25, 2007 Bond for Gadson; July 24, 2007 Bond for Watson; July 19, 2007 Bond for Nimmer; July 8, 2007 Bond for Fulghum; Trial Tr. 224:1–14, 225:23–231:7, 233:1–20).

In 2007, right before switching to a blanket bond, Jasper County bonded most of its general employees for \$20,000. (July 25, 2007 Bond for Resh; July 25, 2007 Bond for Gadson; July 24, 2007 Bond for Watson; July 19, 2007 Bond for Nimmer; Trial Tr. 227:15–235:2). \$100,000 was the highest bond amount that Jasper County had ever obtained from Western Surety for an individual employee, which was for Andrew Fulghum, the Administrator of Jasper County. (July 8, 2007 Bond for Fulghum; Trial Tr. 232:23–25, 233:10–20, 235:10–12, 245:7–11). Western Surety would not undertake the risk of issuing employee fidelity bonds with \$285,000 in coverage

without performing due diligence on the employees, such as credit checks. (Trial Tr. 26:16–30:19).

2. Jasper County Switches to a Blanket Employee Fidelity Bond with the Intent to Bond General Employees like Smith for \$20,000 and Specific Employees for Higher Amounts.

In 2005, South Carolina began allowing counties to purchase blanket bonds for their employees rather than individual bonds, as was previously required. S.C. Code Ann. § 4-11-65 (2021). The relevant statute provides:

(A) When bonding of county officials or employees is statutorily required, the governing body of a county may purchase a fidelity bond to cover all or a portion of the county officials and employees. A fidelity bond may be used instead of specific statutory bond requirements including, but not limited to, those found in Sections 12-39-10, 12-45-10, 14-17-40, 14-17-60, 14-17-350, 14-23-1050, 17-5-20, 17-5-70, 22-1-150, 22-1-160, 23-11-30, and 23-13-20. Any officials or employees not covered by a fidelity bond must be bonded as required by statute.

(B) The purchase of a fidelity bond as provided in subsection (A) or the replacement of an existing bond with a fidelity bond covering one or more county officials or employees must be evidenced by passage of a resolution by the county's governing body. A fidelity bond must meet or exceed the minimum value of the bond required by the statute or statutes for the covered officials or employees.

Id.

For this reason, Jasper County decided to replace the Prior Individual Bonds with one blanket bond to cover all employees. (Trial Tr. 174:23–175:9, 218:8–219:1, 222:19–23, 225:1–2, 231:8–232:17). In a blanket bond, all employees are listed, even though they need not be bonded for the same amount; rather, the blanket bond provides a base amount of coverage for all employees and any additional excess coverage may be listed for other specific employees whose positions require higher bond amounts. (Trial Tr. 174:23–175:9, 219:11–220:6, 220:18–23, 235:16–22).

In or around March 2008, Ronnie Malphrus (“Malphrus”), Jasper County’s Deputy Administrator of Finance, contacted Cheryl Stolte (“Stolte”), an insurance agent at Kinghorn of Ridgeland (“Kinghorn”), to inquire about renewing Jasper County’s bonds and consolidating them into one blanket bond. (Trial Tr. 163:1–165:15, 174:23–175:9, 219:11–22, 220:1–6, 225:9–19, 231:24–232:14, 235:3–9, 235:13–22).

According to Malphrus, during this process of switching to a blanket bond, Jasper County never requested that any employee be bonded for \$285,000; rather, Jasper County sought a blanket bond to cover its employees “up to” the amounts required by law but did not provide Stolte with exact figures:

Q: Tell us what you recall as far as the conversations with Ms. Stolte or the communications with Ms. Stolte about what the County needed.

A: My recollection is I probably would have sent an email to her requesting a blanket bond that would cover all of our employees. I did send her a list of the individuals that were required by statute to be covered for a higher amount. And I asked that we get a blanket bond to cover all employees, but it had to be enough to cover the . . . highest amount of those individual positions.

Q: Did you give her a specific dollar figure for that blanket bond?

A: I did not.

...

Q: [G]oing into the spring of 2008, tell me what you did in your job . . . to try to change the individual bonds over to a blanket bond?

A: It was our intention to get one blanket bond that would cover all employees and not have to have any individual bonds at all.

Q: Even for the eight people that were listed?

A: That’s correct.

Q: [W]hat did you based you decision to do this on?

A: The statutory change did allow us to do the blanket bond for all employees so long as it was enough to cover the highest limit that was required by the statute.

Q: And in doing this, who did you contact, or . . . what did you do next to try to do this?

A: I reached out to Cheryl Stolte at Kinghorn.

Q: And every time you needed to get . . . an employee bond, . . . who would you have contacted?

A: Cheryl Stolte.

Q: And so when you contacted her in spring of 2008, . . . what did you ask her that you were looking for?

A: To the best of my recollection, I just simply asked for a blanket bond to cover all employees, with enough coverage to cover all employees, with enough coverage . . . to cover up to that highest required limit.

Q: And that highest required limit would have been something in the statute?

A: Correct.

Q: [A]nd in your experience of working in the County and obtaining all these bonds, did you ever see a statute, or know of a requirement that had \$285,000 listed as the highest amount?

A: No.

Q: What was the highest amount that you believed you would ever have to bond someone?

A: 100,000.

(Trial Tr. 219:11–25, 231:8–232:25). In procuring a blanket bond, Stolte calculated the bond amounts that Jasper County needed based on the amounts listed in the Prior Individual Bonds, which she had previously handled for Jasper County:

Q: [W]hile you were at Kinghorn in Ridgeland, did you have an opportunity to do any business, or to write any business, or to . . . offer any business to Jasper County regarding their insurance needs?

A: Yes.

Q: And who did you work with? Did you work with more than one person, or one person in particular?

A: Pretty much Ronnie Malphrus. I started out, the only thing I handled was bonds.

...

And I started out doing individual bonds. . . . [T]hey were requiring at that time that their employees be bonded for \$20,000. . . . I did some for the Deputy Sheriffs, and new employees that came in. . . . I must have just taken over the bonds that they already had with . . . someone else, because at that point, is when we started discussing doing a blanket, because there were so many individual bonds. But to my knowledge at that time, they were requiring that we do 20,000 on each employee, with the exception of specific ones.

...

And those were the ones that . . . they gave me the amounts that they wanted them bonded for, and that's what I got for them.

Q: [W]ere you involved in helping Mr. Malphrus obtain individual bonds before the blanket bond period came into being?

A: I think probably. I can't say for 100% that it was Ronnie [Malphrus] that I first talked to, but they were sent to me from somebody in the County Administration, because otherwise I would not have known to do them.

...

So somebody sent them to me to do the bonds[.]

(Trial Tr. 163:17–165:12). In fact, Stolte knew that Jasper County sought to bond their general employees for \$20,000 because that was the amount Jasper County had told her to procure; Stolte had no independent knowledge of what the laws required for the minimum bond amounts:

Q: When you were helping Jasper County obtain their bonds before the blanket bond request came in . . . what is your recollection of what the average amount was for a bond for an employee that wasn't specifically identified as having to need extra coverage?

A: Every employee outside of those specified were required to carry \$20,000. Now, that's what I was told. I don't know where that figure came from, don't know anything about laws and all that. I know it was 20,000.

(Trial Tr. 171:2–12). Malphrus informed Stolte of the amounts for her to procure based on the Prior Individual Bonds:

Q: [D]o you remember testifying that you sent her the individual amounts for each of the positions so that she would know what amounts that you wanted to get for these individuals?

A: I believe I did send her a list of the individual amounts.

Q: . . . Cheryl [Stolte] would have gotten that information from you?

A: Yes.

...

Q: [Y]ou told me earlier that you had told Ms. Stolte about those positions that are listed there [in the Bond Application] that you need to have separate bonds for, different amounts?

A: Needed coverage up to Yes.

...

Q: She would not have known about those positions if you hadn't told her?

A: Well, they were on the previous bond that we already had in place. . . . I believe I did provide her with these positions . . . but she probably already had them because they were individually bonded under the current arrangement.

Q: . . . It's your testimony here today that you more likely than not gave her those?

A: Yes.

(Trial Tr. 235:23–236:9, 246:19–247:14).

Based on Malphrus's instruction, the amounts in the Prior Individual Bonds, and Jasper County's intent to bond its general employees for \$20,000 with excess coverage for the specific employees who required higher bonds, Stolte filled out an application for a blanket bond titled "Form 40 Public Official and Employee's Blanket Bond Application" (the "Bond Application"), listing the bond amounts Jasper County sought for its employees. (Initial Bond Application; Trial Tr. 174:20–9, 179:16–183:17, 245:15–250:18). Stolte then sent the Bond Application to Malphrus who completed several fields before reviewing and signing it on March 3, 2008. (Initial Bond Application; Trial Tr. 180:9–182:5, 192:10–12, 206:14–17, 236:10–13, 246:2–9, 248:2–11).

On March 6, 2008, Stolte submitted the Bond Application to CNA on behalf of Jasper County. (Initial Bond Application). On the same date, CNA responded to the Bond Application, requesting a revised bond application because two of the positions, Tax Collector and Treasurer,

were specifically excluded positions from blanket bonds that needed to be kept on individual bonds. (Mar. 6, 2008 Memo from CNA to Kinghorn; Trial Tr. 192:13–194:19). Accordingly, Stolte revised the Bond Application by whiting out the positions for Tax Collector and Treasurer, then resubmitted the Bond Application to CNA on March 7, 2008. (Bond Application; Trial Tr. 186:12–19, 188:21–189:19). Jasper County did not intend for Stolte’s revision to the Bond Application to change anything other than these modifications regarding the Tax Collector and Treasurer. (Trial Tr. 250:5–18).

BOND INFORMATION		
Amount of Bond \$ 20,000	Effective date	Premium payable: Installments <input type="checkbox"/> 3 yrs, <input type="checkbox"/> 4 yrs prepaid <input type="checkbox"/> 1 yr, <input type="checkbox"/> 2 yrs, <input type="checkbox"/> 3 yrs, <input type="checkbox"/> 4 yrs
TOTAL NUMBER OF EMPLOYEES 280		
TYPE OF COVERAGE Insuring Agreement 1 <input type="checkbox"/> Honest Blanket Bond Coverage — Covers all public employees for a stated amount. Insuring Agreement 2 <input type="checkbox"/> Honest Blanket Position Bond Coverage — Covers each public employee for a stated amount. Insuring Agreement 3 <input type="checkbox"/> Faithful Performance Blanket Bond Coverage — Covers all public employees for a stated amount. Insuring Agreement 4 <input checked="" type="checkbox"/> Faithful Performance Blanket Position Bond Coverage — Covers each public employee for a stated amount.		
Give specifics on any additional indemnity desired under any Insuring Agreement on any position.		
Position		AMOUNT OF EXCESS COVERAGE (if any)
Deputy Adm - Finance	(1) - 50,000	30,000
J		
Sheriff	(1) - 50,000	30,000
Clerk of Court	(1) 75,000	55,000
Magistrates - (4) x 30,000	50,000 ea	120,000
Probate Judge	(1) 50,000	30,000

In the revised Bond Application submitted to CNA, excerpted above, Jasper County requested a general employee limit of “\$20,000 Per Employee” for 280 employees (the “General Employee Limit”) and specific employee excess limits for the specific employees who required higher coverage (the “Specific Employee Excess Limits”): (1) \$30,000 for the Deputy Administrator of Finance to bond that position for \$50,000; (2) \$30,000 for the Sheriff to bond that position for \$50,000; (3) \$55,000 for the Clerk of Court to bond that position for \$75,000; (4)

\$30,000 per magistrate judge to bond those positions for \$50,000 each; and (5) \$30,000 for the Probate Judge to bond that position for \$50,000. (Bond Application; Trial Tr. 245:24–248:15). In other words, for these specific employees, Jasper County sought to have them bonded for \$20,000 plus the excess amount listed for each of them. (Bond Application; Trial Tr. 188:2–191:11). Otherwise, Jasper County sought to bond normal employees for \$20,000. (Bond Application; Trial Tr. 187:9–188:10).

Notably, when Stolte submitted the revised Bond Application, she included a cover sheet where she wrote, “[w]e require \$20,000 per employee,” in explaining that the excess amounts requested for the specific employees were in addition to the \$20,000-per-employee figure. (Mar. 7, 2008 Cover Letter from Stolte to CNA; Trial Tr. 194:13–195:17).

In fact, Plaintiff’s Bond Application did not include a request for any bond in the amount of \$285,000. (Bond Application). At trial, Malphrus admitted that he never requested any employee be bonded for \$285,000:

Q: [D]o you recall where the number \$285,000 ever came from if you didn’t ask for that amount to be on the bond?

A: I do not. The first time I saw that number is when the bond was issued and sent to me.

...

Q: [T]he highest amount, you’ve already said, was \$100,000?

A: Correct.

Q: It was not \$285,000.

A: Correct.

Q: And they [(Fulghum)] were not listed on that bond, even whatever the highest amount was.

A: Correct.

(Trial Tr. 237:17–21, 245:7–14).

3. Based on Jasper County’s Bond Application, Western Surety Offers to Issue a Blanket Bond for Amounts Subject to the General Employee Limit and Specific Employee Excess Limits, Which Jasper County Accepts.

On March 7, 2008, CNA issued a quote (the “Quote”) for an annual premium of \$1,601.50, which was calculated based on the General Employee Limit and Specific Employee Excess Limits (collectively, the “General and Specific Employee Limits”) requested by Jasper County in the Bond Application. (Quote; Premium Calculation; Trial Tr. 144:3–17, 201:21–203:15, 208:21–209:14). The Quote specifically states that it is subject to the General and Specific Employee Limits of “50k Deputy Admin. Finance, Sheriff, Magistrate (4) And Probate Judge, 75k Clerk of Court, 20k All Others,” which is the exact amount of coverage Jasper County intended to obtain and, indeed, applied for in the Bond Application. (Quote (emphasis added)). The Premium Calculation sets forth the method used to calculate the premium based on the information provided by Jasper County in the Bond Application:

278 employees @ \$20k = \$674.00
Dep. Adm. Finan. \$30k x 3.50 = \$105.00
Sheriff \$30k x 3.50 = \$105.00
Clerk of Court \$55k x 3.50 = 192.50
Magistrates (4 @ \$30k ea.) \$120k x 3.50 = \$420.00
Probate Judge \$30k x 3.50 = \$105.00
674.00+105.00+105.00+192.50+420.00+105.00 = \$1,601.50 prem.

(Premium Calculation (emphasis added); Trial Tr. 140:17–141:11, 142:9–143:3, 144:3–145:5, 159:5–14).

On April 21, 2008, after Jasper County accepted the Quote, CNA mailed the Bond, effective April 17, 2008, until cancellation, to Jasper County. (Apr. 21, 2008 Letter from CNA to Jasper County; Bond). Enclosed with the Bond was a cover letter that again specified that coverage would be subject to the General and Specific Employee Limits, stating:

50k Deputy Admin. Finance, Sheriff, Magistrate (4) and Probate Judge, 75k Clerk of Court, 20k All Others.

(Apr. 21, 2008 Letter from CNA to Jasper County (emphasis added)). The cover letter also stated, “[i]f your policy is not needed, please write the word ‘Cancel’ directly on the documents, and return it to CNA Surety.” (Apr. 21, 2008 Letter from CNA to Jasper County).

In conjunction with the Bond, CNA mailed Jasper County an initial “Notice of Premium Due” (the “Initial Premium Notice”). (Initial Premium Notice; Trial Tr. 250:25–253:21). The Initial Premium Notice included the same, correct description of the General and Specific Employee Limits as the letter and the Bond Application, stating:

50K DEPUTY ADMIN. FINANCE, SHERIFF, MAGISTRATE (4) AND PROBATE JUDGE, 75K CLERK OF COURT, 20K ALL OTHERS.

(Initial Premium Notice (emphasis added); Trial Tr. 250:25–253:21). Jasper County paid the premium as provided in the Initial Premium Notice. (Payment of Initial Premium; Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 253:22–256:13, 275:18–23).

4. The Bond Contains a Mutual Mistake that Does Not Reflect the Parties’ Intent that the Bond Amount Be Subject to the General and Specific Employee Limits.

The Bond, effective April 17, 2008, until cancellation or termination, provides, in pertinent part:

INSURING AGREEMENTS

...

FAITHFUL PERFORMANCE BLANKET BOND COVERAGE

4. Loss caused to [Jasper County] through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period, the amount of indemnity on each such Employees being the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 4.

(Bond).

The amount stated in the Bond’s Table of Limits of Liability for Insuring Agreement 4, Faithful Performance Blanket Bond Coverage is “\$285,000.00.” (Bond). Based on the parties’

mutual understanding leading up to the Bond's issuance, this figure was a mistake and should have been "\$20,000.00," which was the amount Jasper County requested in the Bond Application for general employees and the amount Western Surety used in its Premium Calculation to provide the Quote that Jasper County accepted. (Trial. Tr. 61:4–7; Bond Application; Quote). In other words, the \$285,000 figure was a mutual mistake that did not reflect the parties' intent because Jasper County requested \$20,000 in coverage per employee via the Bond Application and Western Surety offered \$20,000 in coverage per employee via the Quote, which Jasper County accepted. (Id.).

Notably, the \$285,000 figure is the sum of the General and Specific Employee Limits requested by Jasper County in the Bond Application and is the most logical explanation for why this figure was mistakenly written into the Bond.² (Bond Application; Bond). Jasper County never requested \$285,000 for any employee. (Trial Tr. 163:17–165:12, 171:2–12, 219:11–25, 231:8–232:25, 235:23–236:9, 237:17–21, 245:7–14, 246:19–247:14).

The Bond also includes an "Additional Indemnity Rider," which should have set out the Specific Employee Excess Limits purchased by Jasper County for the eight positions listed on the Bond Application. (Bond; Trial Tr. 60:22–61:7, 93:24–95:2). However, the Specific Employee Excess Limits were mistakenly omitted from the Additional Indemnity Rider. (Trial Tr. 60:22–61:7, 93:24–95:2).

² \$20,000 per employee + \$30,000 excess coverage for the Deputy Administrator of Finance + \$30,000 excess coverage for the Sheriff + \$120,000 excess coverage for the four Magistrate Judges (\$30,000 each) + \$30,000 excess coverage for the Probate Judge + \$55,000 excess coverage for the Clerk of Court = \$285,000.

5. From Issuance of the Bond in 2008 until Cancellation in 2019, Jasper County Never Requested Any Increase or Change to the Amount of Coverage for Its Employees, and Western Surety Never Increased or Changed the Amount of Coverage.

Over the subsequent years, CNA mailed Jasper County premium notices (the “Subsequent Premium Notices”) with the same language noting the General and Specific Employee Limits for the Bond: “50K DEPUTY ADMIN. FINANCE, SHERIFF, MAGISTRATE (4) AND PROBATE JUDGE, 75K CLERK OF COURT, 20K ALL OTHERS.” (Subsequent Premium Notices; Trial Tr. 250:25–258:17, 260:21–265:22, 267:10–272:17, 275:18–277:1). Each year, Jasper County accepted the General and Specific Employee Limits by paying the Subsequent Premium Notices. (Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 275:18–23). Jasper County never requested any increase or change the General and Specific Employee Limits. (Trial Tr. 204:23–206:1, 268:25–269:7).

Western Surety also sent Jasper County correspondences confirming the premium payment on several occasions. (Correspondences from CNA to Jasper County Confirming Premium Payments; Trial Tr. 250:25–258:17, 260:21–265:22, 267:10–272:17, 275:18–277:1). Each of these correspondences include the same General and Specific Employee Limits listed on the Bond Application and the Subsequent Premium Notices, stating: “50k Deputy Admin. Finance, Sheriff, Magistrate (4) And Probate Judge, 75k Clerk Of Court, 20k All Others.” (Correspondences from CNA to Jasper County Confirming Premium Payments; Bond Application; Bond). With few exceptions, each time Western Surety corresponded with Jasper County, the General and Specific Employee Limits were included in the communication. (Bond Application; Quote; Bond; Initial Premium Notice; Subsequent Premium Notices; Correspondences from CNA to Jasper County Confirming Premium Payments).

6. Jasper County Makes a Claim on the Bond after Smith's Embezzlement.

Jasper County discovered that Smith had embezzled \$274,175 from the county between August 2012 and December 2017. (Sworn Statement in Proof of Loss; *State v. Smith* Tr. of Record at 7:1–17). On August 20, 2018, more than eight months after discovering the theft and contacting law enforcement, Malphrus notified Western Surety that Jasper County needed to file a claim on the Bond for the entire amount stolen and subsequently provided a Sworn Statement in Proof of Loss to Western Surety on August 27, 2018. (Aug. 20, 2018 Email from Malphrus to Western Surety; Sworn Statement in Proof of Loss; Trial Tr. 63:17–64:9, 148:9–11). Because Smith's position was not one for which Jasper County had purchased excess coverage, she was covered for \$20,000 as a general employee pursuant to the General Employee Limit, as intended by the parties. (Trial Tr. 140:17–141:19, 150:5–151:13; Aug. 29, 2018 Letter from Barnes to Malphrus; Sept. 10, 2018 Email from Barnes to Tedder). Nevertheless, after investigating the claim and the Bond coverage, in a show of good faith, Western Surety offered Jasper County \$30,000 to settle the matter, which Jasper County did not accept. (Oct. 25, 2018 Letter from Barnes to Burgess; Dec. 4, 2018 Letter from Tedder to Barnes; Trial Tr. 64:13–19).

While Western Surety does not dispute that Smith's embezzlement from Jasper County triggered the Bond, Western Surety disputes the amount owed to Jasper County under the Bond, which should be \$20,000 pursuant to the General Employee Limit as Smith was a general employee. (Trial Tr. 91:3–14).

ARGUMENT

This Court should reverse the trial court's Order and Judgment awarding Jasper County \$374,759.09 in damages for its breach of contract claim because the Bond contained a mutual mistake by stating that the Faithful Performance Blanket Position Bond Coverage was for

\$285,000.00, which did not reflect the parties' intent for the Bond to be subject to the General and Specific Employee Limits, as demonstrated by parol evidence offered at trial, which the Court ignored or did not properly consider.

Further, this Court should remand the case, directing the trial court to issue an order reforming the Bond to reflect the General and Specific Employee Limits and a declaratory judgment that the General and Specific Employee Limits agreed to by the parties were valid, binding, and determinative of any coverage owed to Jasper County for Smith's embezzlement.

I. THE TRIAL COURT ERRED BY REFUSING TO REFORM THE BOND TO CONFORM TO THE PARTIES' INTENT IN LIGHT OF THE CLEAR AND CONVINCING EVIDENCE SHOWING THAT THE \$285,000 FIGURE IN THE BOND WAS A MUTUAL MISTAKE.

Reformation of a contract or written instrument like a bond is an equitable remedy by which writings are rectified to conform to the actual agreement of the parties. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013) (citing Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987)); Crewe v. Blackmon, 289 S.C. 229, 234, 345 S.E.2d 754, 757 (Ct. App. 1986); see also 66 Am. Jur. 2d Reformation of Instruments § 6 ("The purpose of reformation is not to make a new contract for the parties that they did not make, or alleviate a hard or oppressive bargain, but to cause an instrument to reflect the intent of the parties as to the contents of the instrument, giving effect to one actually made by the parties and not accurately reflected in their written agreement.").

"A contract may be clear and unambiguous as far as it goes and yet may not express the agreement of the parties, by reason of mutual mistake." Progressive Max, 405 S.C. at 49, 747 S.E.2d at 186 (quoting S. Realty & Constr. Co. v. Bryan, 290 S.C. 302, 309, 350 S.E.2d 194, 198 (Ct. App. 1986)). A mutual mistake occurs where "both parties intended a certain thing and by mistake in the drafting did not obtain what was intended." May v. May, 428 S.C. 131, 138, 833

S.E.2d 78, 81 (Ct. App. 2019) (citing George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001)); see also Restatement (Second) of Contracts § 155 (“Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the content or effect of the writing, the court may at the request of a party reform the writing to express the agreement . . .”).

Accordingly, a court will reform a contract based upon mutual mistake when there is clear and convincing evidence that the mistake: (1) “is mutual”; (2) “consists of the omission or insertion of some material element affecting the subject matter or the terms of and stipulations of the contract”; and (3) is “inconsistent with the parol agreement that preceded it.” Empire Fire, 344 S.C. at 590, 545 S.E.2d at 204 (citing Crosby, 293 S.C. at 206, 359 S.E.2d at 300).

A. The Trial Court Ignored or Did Not Properly Consider the Parol Evidence Presented at Trial, Which Must Be Evaluated for the Mutual Mistake Analysis.

Importantly, in assessing a claim for reformation based on mistake, courts look to parol evidence of the parties’ intent to determine whether the writing contains a mistake. See May, 428 S.C. at 141, 833 S.E.2d at 83 (“[O]ur courts have made clear the parol evidence rule does not preclude extrinsic evidence in cases involving mistake and reformation.”); Progressive Max, 405 S.C. at 49, 747 S.E.2d at 185 (“Although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply.”); see also Levy v. Outdoor Resorts of S.C., 304 S.C. 427, 433, 405 S.E.2d 387, 389 (1991) (citation omitted) (emphases added) (“Where the terms of a contract are unambiguous, clear and explicit, parol evidence cannot be admitted to contradict or add to the terms of a contract absent fraud, accident, or mistake in its procurement.”).

Indeed, “without parol evidence,” it “would be virtually impossible to prove mutual mistake as a ground for reformation[.]” Progressive Max, 405 S.C. at 50, 747 S.E.2d at 186 (citing S. Realty, 290 S.C. at 309, 350 S.E.2d at 198; 27 Richard A. Lord, Williston on Contracts § 70:52 (4th ed. 2003)). Parol evidence is extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument. See McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) (citation omitted) (emphasis added) (“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.”).

Here, despite the South Carolina Supreme Court’s “confirm[ation] [of] . . . the general principle that extrinsic evidence is admissible to prove mutual mistake in cases seeking reformation[.]” Progressive Max, 405 S.C. at 50, 747 S.E.2d at 186, the trial court improperly analyzed whether the Bond was ambiguous, concluding it was not and holding that “[t]he plain language of the Bond here states that the ‘Faithful Performance Blanket Bond Coverage’ is \$285,000.00.” (Order 2–4). To reach this conclusion, the trial court erroneously relied on case law providing the general rule that “extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.” (Order 4 (citing 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)).

As indicated above, this general rule does not apply to interpretation of a contract where a mistake is alleged because “ambiguity or uncertainty has nothing to do with the reformation of a written instrument, but rather reformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties.” Progressive Max, 405 S.C. at 49, 747 S.E.2d at 185 (citing S. Realty, 290 S.C. at 309, 350 S.E.2d at 198). Therefore, the trial court’s

judgment in favor of Jasper County using an ambiguity analysis was premised on an error of law and should be reversed. As explained below, the parol evidence presented in the case clearly demonstrates that reformation is warranted and was erroneously declined by the trial court.

B. At Trial, Western Surety Presented Clear and Convincing Evidence that the Bond Contained a Mutual Mistake Consisting of the Erroneous Insertion of the \$285,000 Figure, Which Was Inconsistent with the Parol Evidence that Preceded the Bond As Neither Party Intended the Bond to Cover Any Employee for \$285,000.

The Bond Application submitted by Jasper County, through Malphrus and Stolte, to Western Surety clearly shows that Jasper County intended to purchase a blanket employee fidelity bond that covered its employees for \$20,000, the Deputy Administrator of Finance for an additional \$30,000, the Sheriff for an additional \$30,000, four Magistrate Judges for an additional \$30,000 each, the Probate Judge for an additional \$30,000, and the Clerk of Court for an additional \$55,000. (Bond Application). Furthermore, when Stolte submitted the revised Bond Application on March 7, 2008, her cover letter stated, “[w]e require \$20,000 per employee[.]” (Mar. 7, 2008 Cover Letter from Stolte to CNA). Additionally, the fact that Jasper County never purchased Prior Individual Bonds for \$285,000 and only purchased a blanket bond in order to convert its individual bonds into one bond for administrative ease, shows that Jasper County’s intent for the Bond was not higher policy limits. (Trial Tr. 163:1–165:15, 174:23–175:9, 218:9–219:1, 219:11–22, 220:1–6, 225:9–19, 231:24–232:14, 235:3–9, 235:13–22).

The trial court’s Order omits any discussion of the Bond Application—the lynchpin evidence of Jasper County’s intent. Instead, the Order erroneously places emphasis on the Subsequent Premium Notices that Western Surety sent to Jasper County each year after issuance of the Bond as the primary evidence to reject finding a mutual mistake because Stolte “ignored the cover pages” of the Subsequent Premium Notices. (Order 7, 9–10).

However, the Subsequent Premium Notices are not relevant to the mutual mistake analysis with respect to what the parties intended at the time of contract formation because the Subsequent Premium Notices did not precede and were not contemporaneous with the Bond. See Empire Fire, 344 S.C. at 590, 545 S.E.2d at 204 (emphasis added) (providing that third element of reformation based on mutual mistake is the mistake is “inconsistent with the parol agreement that preceded it”); see also Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143–44 (Ct. App. 2009) (emphasis added) (citation omitted) (“Interpretation of a contract is governed by the objective manifestation of the parties’ assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.”). Accordingly, the trial court’s reliance on the Subsequent Premium Notices was erroneous and improper in determining the parties’ intent at the time of contract formation in 2008.

The Quote that Western Surety provided in response to Jasper County’s Bond Application clearly shows Western Surety’s intent to bond Jasper County’s general employees like Smith for \$20,000 in exchange for Jasper County’s payment of a \$1,601.50 annual premium. (Quote). The Quote specifically states that it is subject to the General and Specific Employee Limits of “50k Deputy Admin. Finance, Sheriff, Magistrate (4) And Probate Judge, 75k Clerk of Court, 20k All Others,” which is the exact amount of coverage Jasper County intended to obtain and, indeed, applied for in the Bond Application. (Quote (emphasis added); Bond Application).

Jasper County accepted the Quote by requesting Western Surety issue the Bond and paying the annual premium as provided in the Initial Premium Notice. (Payment of Initial Premium; Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 253:22–256:13; 275:18–23). Again, the Initial Premium Notice stated: “50K DEPUTY ADMIN. FINANCE, SHERIFF, MAGISTRATE (4) AND PROBATE JUDGE, 75K CLERK OF COURT, 20K ALL OTHERS.” (Initial Premium

Notice; Trial Tr. 250:25–253:21). Further, in issuing the Quote, Western Surety calculated the \$1,601.50 annual premium based on the figures provided by Jasper County in the Bond

Application:

278 employees @ \$20k = \$674.00
Dep. Adm. Finan. \$30k x 3.50 = \$105.00
Sheriff \$30k x 3.50 = \$105.00
Clerk of Court \$55k x 3.50 = 192.50
Magistrates (4 @ \$30k ea.) \$120k x 3.50 = \$420.00
Probate Judge \$30k x 3.50 = \$105.00
674.00+105.00+105.00+192.50+420.00+105.00 = \$1,601.50 prem.

(Premium Calculation; Trial Tr. 140:17–141:11, 142:9–143:3, 144:3–145:5, 159:5–14).

Based on the Bond Application, the Quote and Premium Calculation, and Jasper County’s acceptance of the Quote, and the Initial Premium Notice and Jasper County’s payment of the same, Western Surety issued the Bond. (Bond). However, the Bond as written did not reflect the parties’ intent as shown by this parol evidence that the trial court did not properly consider. The parties intended for the Bond to be subject to the General and Specific Employee Limits and, by a scrivener’s error in the drafting of the Bond, the parties’ intent was not correctly reflected in the Bond.

The most logical explanation for why the \$285,000 figure was mistakenly written into the Bond is that \$285,000 is the exact sum of the General and Specific Employee Limits requested by Jasper County in the Bond Application.³ (Bond Application; Bond). The fact that the \$285,000 figure equals exactly the sum of the requested coverage limits is significant evidence of Western

³ \$20,000 per employee + \$30,000 excess coverage for the Deputy Administrator of Finance + \$30,000 excess coverage for the Sheriff + \$120,000 excess coverage for the four Magistrate Judges (\$30,000 each) + \$30,000 excess coverage for the Probate Judge + \$55,000 excess coverage for the Clerk of Court = \$285,000.

Surety's mistake. In fact, it is the only reasonable explanation for why \$285,000 is arbitrarily listed on the Bond since this figure is not linked to any other document or individual involved in the bond application process. Jasper County never requested \$285,000 for any employee. (Trial Tr. 163:17–165:12, 171:2–12, 219:11–25, 231:8–232:25, 235:23–236:9, 237:17–21, 245:7–14, 246:19–247:14). Yet, the trial court failed to consider or assess this significant circumstantial evidence, and the Order omits any discussion this simple and obvious explanation for the mathematical error. See St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co., 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968) (“Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts.”); McCready v. Atl. Coast Line R. Co., 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948) (“A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence, and may outweigh opposing direct testimony.”).

Furthermore, after issuance of the Bond in 2008, there is no evidence that Jasper County ever requested any increases or changes to the amounts of coverage for its employees. From 2008 until the Bond's cancellation in 2019, Western Surety sent Jasper County the Subsequent Premium Notices confirming that if Jasper County paid the same annual \$1,601.50 premium for the General and Specific Employee Limits, the Bond would remain in force. (Subsequent Premium Notices). Notably, the Subsequent Premium Notices all contain the same language stating the General and Specific Employee Limits for the Bond:

50K DEPUTY ADMIN. FINANCE, SHERIFF, MAGISTRATE (4) AND
PROBATE JUDGE, 75K CLERK OF COURT, 20K ALL OTHERS.

(Subsequent Premium Notices (emphasis added); Trial Tr. 250:25–258:17, 260:21–265:22, 267:10–272:17, 275:18–277:1).

Each year, Jasper County accepted the General and Specific Employee Limits by paying the same annual premiums in the amount of \$1,601.50 per year, and Western Surety renewed the Bond until cancellation. (Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 275:18–23). Western Surety also sent Jasper County correspondences confirming the premium payment on several occasions. (Correspondences from CNA to Jasper County Confirming Premium Payments; Trial Tr. 250:25–258:17, 260:21–265:22, 267:10–272:17, 275:18–277:1). Each of these correspondences recites the same General and Specific Employee Limits listed in the Bond Application and the Subsequent Premium Notices, stating:

50k Deputy Admin. Finance, Sheriff, Magistrate (4) And Probate Judge, 75k Clerk Of Court, 20k All Others.

(Correspondences from CNA to Jasper County Confirming Premium Payments (emphasis added)).

With few exceptions, each time Western Surety corresponded with Jasper County, the General and Specific Employee Limits were included in the communication. (Bond Application; Quote; Bond; Initial Premium Notice; Subsequent Premium Notices; Correspondences from CNA to Jasper County Confirming Premium Payments).

In summation, the parties' intent for the Bond to provide \$20,000 in coverage for general employees like Smith, as demonstrated by the parol evidence leading up to the time of contract formation, was clearly demonstrated at trial by: (1) the Bond Application where Jasper County unequivocally requested \$20,000 in coverage from Western Surety for general employees plus the excess coverage amounts for the eight other employees, (Bond Application); (2) the Quote where Western Surety offered Jasper County the coverage requested in the Bond Application in exchange for Jasper County's payment of the \$1,601.50 annual premium, (Quote); (3) the Premium Calculation showing that Western Surety calculated the \$1,601.50 annual premium based on the coverage amounts requested by Jasper County in the Bond Application, (Premium Calculation);

(4) the Initial Premium Notice where Western Surety requested that Jasper County pay the annual premium in exchange for the coverage amounts requested in the Bond Application, which were re-stated in the Initial Premium Notice, (Initial Premium Notice); and (5) Jasper County's payment of the annual premium pursuant to the Initial Premium Notice in exchange for the coverage amounts it requested in the Bond Application. (Payment of Initial Premium; Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 253:22–256:13, 275:18–23). There is no parol evidence that Jasper County ever requested or intended to obtain a bond covering an employee for \$285,000.

In summation of the events after contract formation until cancellation, the evidence presented at trial clearly shows: (1) Jasper County never requested any increases or changes to the amount of coverage, (Trial Tr. 204:23–206:1, 268:25–269:7); (2) each year, Jasper County continued to renew the Bond by paying the same \$1,601.50 annual premium requested in the Subsequent Premium Notices in which Western Surety re-stated the correct amounts of coverage that were identical to the figures requested by Jasper County in the Bond Application, (Subsequent Premium Notices; Bond Application; Trial Tr. 39:16–19, 112:18–22, 113:6–9, 251:25–252:8, 275:18–23); and (3) Western Surety confirmed Jasper County's payments of the annual premium in several correspondences re-stating the correct amounts of coverage that were identical to the figures requested by Jasper County in the Bond Application. (Correspondences from CNA to Jasper County Confirming Premium Payments). In other words, although this post-Bond extrinsic evidence is not relevant to what the parties intended at the time of contract formation, this evidence shows that the parties never sought to alter the terms of their agreement after contract formation. See Empire Fire, 344 S.C. at 590, 545 S.E.2d at 204 (third element of reformation based on mutual mistake is the mistake is “inconsistent with the parol agreement that preceded it”); Laser Supply, 382 S.C. at 334, 676 S.E.2d at 143–44 (citation omitted) (“Interpretation of a contract is governed

by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.”).

Accordingly, the trial court should have reformed the Bond to reflect the true terms of the parties' actual agreement as reflected by the clear and convincing parol evidence presented at trial.

C. The Trial Court Made Erroneous Findings Not Supported by the Evidence in Determining Jasper County's Intent and the Existence of a Mutual Mistake.

In spite of all this clear and convincing evidence, the trial court erroneously found 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[,]” (Order 5), ignoring the fact that Jasper County, through Malphrus and Stolte, specifically requested only \$20,000 in coverage for its general employees like Smith in the Bond Application. (Bond Application; Mar. 7, 2008 Cover Letter from Stolte to CNA; Trial Tr. 163:17–165:12, 171:2–12). In reaching this erroneous conclusion, the trial court appears to have relied exclusively on Malphrus's equivocal testimony at trial that he never gave Western Surety a specific amount of coverage to obtain, so long as coverage was “up to the highest required limit” for certain employees, and that he was satisfied with the \$285,000 figure in the Bond—despite its discord with the Bond Application he signed—because this figure covered the highest amount required, which was \$100,000. (Trial Tr. 232:8–25, 237:17–238:19).

Critically, however, Malphrus's subjective, after-the-fact satisfaction with the erroneous figure on the Bond—which was grossly in excess of the coverage requested in the Bond Application—does not transform Jasper County's objective intent at the time of contract formation, which was to obtain coverage in the amount of \$20,000 per employee as plainly requested by Jasper County in the Bond Application Malphrus signed. (Bond Application); see Laser Supply, 382 S.C. at 334, 676 S.E.2d at 143–44 (citation omitted) (emphasis added)

(“Interpretation of a contract is governed by the objective manifestation of the parties’ assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.”).

Malphrus’s testimony claiming he did not know what specific amount of coverage Jasper County applied for is disingenuous and directly contradicted by the Bond Application itself and Malphrus’s own admission at trial that he signed the Bond Application requesting \$20,000 in coverage for Jasper County’s general employees. (Bond Application; Trial Tr. 180:9–182:5, 206:14–17, 236:10–13, 246:2–9, 248:2–11). Accordingly, the trial court should not have accorded such weight to Malphrus’s dubious testimony in refusing to find a mutual mistake. See May, 428 S.C. at 139–141, 833 S.E.2d at 81–82 (affirming family court’s reformation of written agreement between husband and wife that “inadvertently omitted” a payment term based on clear and convincing evidence including wife’s “equivocal” affidavit attesting to “no error, clerical or otherwise, in the agreement . . . that was drafted [and] signed [and] [wa]s precisely to what [she] agreed” yet “d[id] not deny she consent[ed] to the [inadvertently omitted payment term] at the time of the drafting of the [a]greement”).

Moreover, there was no evidence presented at trial that Jasper County ever requested \$285,000 in coverage for any one employee. Malphrus, who was the only Jasper County employee involved in purchasing the Bond, admitted he does not know where the \$285,000 figure came from, conceding that Jasper County never requested a bond covering a general employee for \$285,000. (Trial Tr. 217:20–219:10, 237:17–23, 239:12–25, 244:20–245:14, 246:19–247:16). He testified that Jasper County only applied for bond coverage sufficient to comply with statutory requirements and that he never applied for more than the statutory minimum. (Trial Tr. 237:17–23, 239:12–25, 244:20–245:14). None of the statutes relating to bond requirements for certain

specific county employees referenced by the relevant statute, S.C. Code § 4-11-65, require a bond greater than \$100,000, which is for a probate judge. S.C. Code Ann. § 4-11-65 (2021); S.C. Code Ann. § 14-23-1050 (2017) (requiring “bond in the sum of one hundred thousand dollars” for probate judge).

Additionally, the vast incongruity between the \$20,000 requested by the Jasper County in the Bond Application and the \$285,000 figure erroneously listed in the Bond clearly indicated a mutual mistake that should have prompted Jasper County to question the glaring discrepancy between what Jasper County requested and what was written in the Bond. See May, 428 S.C. at 139, 833 S.E.2d at 81 (inconsistency in written agreement “suggest[ing] a mistake[,]” combined with other clear evidence showing that the written agreement omits what the parties actually intended, makes “clear” evidence of a mutual mistake). Jasper County should not be allowed to capitalize on a drafting mistake to obtain a windfall amount that was never intended by the parties.

South Carolina has addressed the tension between the principle that “a party’s failure to read a contract does not vitiate the contract or that party’s obligations under it” with the “concomitant” tenet that “our courts attempt to avoid outcomes in which a party receives a windfall”:

[I]t would be a monstrous perversion of justice to deny the right of reformation upon the ground that the defendant was negligent in not reading the contract before signing it. It was as much the duty of the plaintiff to read the contract and see that it conformed to the agreement as it was the defendant’s. If the plaintiff read it and discovered the discord and allowed the execution to proceed intending to take advantage of it, he does not assume a position that commends him to a [c]ourt of [e]quity.

...

[I]f when presented for their signatures [the parties] thought or assumed that no discord existed, their signing would be the result of their co-operative fault; if one of them discovered the discord and remained silent, it would be a fraud upon the other not to call attention to it. In any conceivable event, therefore, reformation would be decreed.

May, 428 S.C. at 139–40, 833 S.E.2d at 82 (Ct. App. 2019) (emphases added) (other citations omitted) (quoting Jumper v. Queen Mab Lumber Co., 115 S.C. 452, 465, 464, 106 S.E. 473, 478, 477 (1921)). Accordingly, for Jasper County to have read the Bond with the \$285,000 figure—knowing that it had only applied for \$20,000 in coverage for general employees in its Bond Application—yet remain silent about the discord was fraud upon Western Surety, and the trial court should have ordered reformation.

This conclusion is compelled by May v. May, where the South Carolina Court of Appeals applied this equitable principle from Jumper to order reformation of a settlement agreement arising out of a mediated divorce based on a mutual mistake. 428 S.C. 131, 833 S.E.2d 78. There, the Court held that Husband presented clear and convincing evidence of mutual mistake based on the parties’ parol agreement prior to execution of the written settlement agreement. Id., 428 S.C. at 138–39, 833 S.E.2d at 82. More particularly, before executing the written agreement, the parties agreed that Wife would refinance or assume the debt of the couple’s house and remove Husband’s name from the mortgage, and that if Wife was able to refinance the house, she would pay Husband \$60,000 for his share of equity in the home. Id., 428 S.C. at 135, 833 S.E.2d at 79. Both parties signed the settlement agreement, then appeared in court and informed the judge that they had read and understood the contract. Id. However, after the hearing, the parties discovered that the provision providing for Wife’s equity payment to Husband was inadvertently left out of the settlement agreement. Id., 428 S.C. at 134–35, 833 S.E.2d at 79–80.

Next, “[h]aving concluded Husband presented clear and convincing evidence of mutual mistake in the record,” the Court addressed Wife’s argument as to “whether Husband’s own negligence in failing to read the Agreement precludes a finding of mutual mistake permitting reformation of the Agreement.” Id., 428 S.C. at 139, 833 S.E.2d at 82. The Court rejected Wife’s

arguments that there was no mistake and that, even if there was a mistake, it was unilateral on Husband's part for failing to read the written agreement. Id., 428 S.C. at 138, 833 S.E.2d at 81–82. The Court pointed out that since “the issue of mutual mistake arises only when alleged by one party and denied by the other,” “[a]greement on the matter would eliminate it as an issue to be tried.” Id., 428 S.C. at 139, 833 S.E.2d at 82 (citing Steffens v. Steffens, 422 So. 2d 963, 964 n. 1 (Fla. Dist. Ct. App. 1982)). Citing Jumper, the Court rejected Wife's argument that Husband was not entitled to reformation because he failed to ensure that the written agreement correctly reflected the parties' parol agreement at mediation, holding “[a]lthough Husband should have read the Agreement more carefully, Wife either neglected to read the Agreement herself or recognized Husband's error and elected to remain silent.” Id., 428 S.C. at 140–41, 833 S.E.2d at 82 (citing Jumper, 115 S.C. at 465, 106 S.E. at 478). Consequently, the Court affirmed the family court's decision to set aside the judgment and reform the agreement to correct the parties' mutual mistake. Id., 428 S.C. at 141, 833 S.E.2d at 82.

Similarly, here, regardless of whether Jasper County failed to notice Western Surety's scrivener's error in drafting the Bond, or noticed but did not inform Western Surety of the mistake, it does not transform Jasper County's or Western Surety's intent leading up to contract formation. Likewise, the fact that Western Surety did not notice the mistake in the Bond is not grounds for refusing reformation of the Bond. Reformation is the proper remedy that should have been ordered by the trial court to prevent the monstrous perversion of justice of allowing Jasper County to gain a windfall based on a mutual mistake when it never requested \$285,000 in coverage for any employee.

D. The Trial Court Made Findings That Were Irrelevant or Otherwise Contradicted by the Evidence in Determining Western Surety's Intent and the Existence of a Mutual Mistake.

The trial court also erroneously found that “the record does not support any claim that Western Surety made a mistake when it issued the Bond for \$285,000.00.” (Order 6). In so finding, the trial court’s Order relies on several immaterial points regarding events that occurred after issuance of the Bond, which are not relevant to determining the parties’ intent at the time of contract formation. See Empire Fire, 344 S.C. at 590, 545 S.E.2d at 204 (emphasis added) (third element of reformation based on mutual mistake is the mistake is “inconsistent with the parol agreement that preceded it”). The trial court’s Order also emphasizes several extraneous details regarding the events leading up to issuance of the Bond that are inconsequential or otherwise clearly contradicted by the evidence.

For one, the trial court’s Order states that Ginger Barnes (“Barnes”), who was Western Surety’s representative who testified at trial, “lacked involvement in writing the bond” and “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 . . . who signed the Bond.” (Order 7).

However, the absence of testimony from the officer who sealed the Bond or the senior vice president who signed the Bond does not alter the other clear evidence showing a mistake by Western Surety. As previously discussed, Western Surety’s mistake is indicated by: (1) the Quote where Western Surety offered Jasper County the coverage requested in the Bond Application in exchange for Jasper County’s payment of the \$1,601.50 annual premium, (Quote); (2) the Premium Calculation showing that Western Surety calculated the \$1,601.50 annual premium based on the coverage amounts requested by Jasper County in the Bond Application, (Premium Calculation); and (3) the Initial Premium Notice where Western Surety requested that Jasper

County pay the annual premium in exchange for the coverage amounts requested in the Bond Application, which were re-stated in the Initial Premium Notice, (Initial Premium Notice). Accordingly, the trial court erred in ignoring this evidence.

Second, the trial court's Order states "[w]hen th[e] [trial] [c]ourt 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." (Order 6-7). However, the Premium Calculation, admitted at trial, clearly shows that Western Surety used the General and Specific Employee Limits provided by Jasper County in the Bond Application to calculate the \$1,601.50 annual premium that was offered to Jasper County in the Quote. (Bond Application; Premium Calculation; Quote; Trial Tr. 140:17-141:11, 142:9-143:3, 144:3-145:5, 159:5-14).

Third, the trial court's Order found that Barnes "lacked involvement in . . . the renewal process," "did not identify who from Western Surety was responsible for renewing the bond and issuing the renewals," and "did not know the internal steps or documents involved in the renewal process"; and, thus, "little to no information was provided at trial after requests by the Court about the underwriting file and process [Western Surety] followed and what information [Western Surety] considered in writing the Bond." (Order 6-7). The Order also notes: (1) Barnes "provided that Western Surety would have undertaken a review process each year when it renewed the Bond[,] [y]et 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"; and (2) "Western Surety did not offer any documentation about what the company reviewed or the process the company undertook during the review process." (Order 6-7).

Again, however, these post-contract-formation events (*i.e.*, the renewal process, who was responsible for renewing the Bond and issuing the renewals, and the internal steps or documents involved in the renewal process) are not relevant to what the parties intended for their agreement. See Empire Fire, 344 S.C. at 590, 545 S.E.2d at 204 (emphasis added) (third element of reformation based on mutual mistake is the mistake is “inconsistent with the parol agreement that preceded it”); Laser Supply, 382 S.C. at 334, 676 S.E.2d at 143–44 (citation omitted) (“Interpretation of a contract is governed by the objective manifestation of the parties’ assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.”).

Although post-contract events are not relevant to the parties’ intent at the time of contract formation, the evidence presented at trial clearly shows that Western Surety continued to mistakenly believe the Bond was subject to the General and Specific Employee Limits per (1) the Subsequent Premium Notices containing the same language noting the General and Specific Employee Limits for the Bond and (2) the Correspondences from CNA to Jasper County Confirming Premium Payments that included the same General and Specific Employee Limits listed on the Bond Application and the Subsequent Premium Notices. (Subsequent Premium Notices; Correspondences from CNA to Jasper County Confirming Premium Payments; Trial Tr. 250:25–258:17, 260:21–265:22, 267:10–272:17, 275:18–277:1).

In summation, contrary to the trial court’s Order erroneously holding that “the record does not support any claim that Western Surety made a mistake when it issued the Bond for \$285,000.00,” Western Surety offered sufficient evidence clearly demonstrating that Western Surety intended for the Bond to be subject to the General and Specific Employee Limits requested by Jasper County and, by a mistake in the Bond, its intent was not correctly reflected by the Bond.

II. THE TRIAL COURT ERRED BY REFUSING TO ISSUE OR CONSIDER A DECLARATORY JUDGMENT DECLARING THAT THE GENERAL AND SPECIFIC EMPLOYEE LIMITS AGREED TO BY THE PARTIES ARE VALID, BINDING, AND DETERMINATIVE OF ANY AMOUNT OWED BY WESTERN SURETY TO JASPER COUNTY FOR SMITH'S EMBEZZLEMENT.

South Carolina's Uniform Declaratory Judgments Act, S.C. Code §§ 15-53-10 through 15-53-140, (the "Act") provides courts with the "power to declare rights, status and other legal relations" of parties when a dispute arises. S.C. Code Ann. § 15-53-20 (2005). Courts are directed to liberally construe the Act to achieve its intended purpose to "settle and afford relief from uncertainty and insecurity to a party with respect to that party's rights, status, and other legal relations." Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 454, 415 S.E.2d 801, 804 (1992) (citing S.C. Code § 15-53-130). Specifically, the Act provides:

Any person interested under a . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . [or] contract . . . and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (2005).

For a declaratory judgment to be issued, "there must be a real or actual controversy between the litigants at the time of the institution of the [declaratory judgment] action." Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 595, 748 S.E.2d 781, 787 (2013) (citing S.C. Code Ann. § 15-53-40 (2005); Nelson v. Ozmint, 390 S.C. 432, 702 S.E.2d 369 (2010)); see also S.C. Code Ann. § 15-53-40 (2005) ("A contract may be construed either before or after there has been a breach thereof."). A declaratory judgment is proper in disputes involving bonds. See N. River Ins. Co. v. Claar, 299 S.C. 8, 9, 382 S.E.2d 8, 8-9 (Ct. App. 1989) (affirming trial court's application of the Act to dispute as to whether language of surety bond meant that surety's maximum liability under the bond was a certain amount).

There is no doubt that a declaratory judgment regarding the Bond is proper here as the parties fundamentally disagree on the amount owed by Western Surety to Jasper County under the Bond. While Western Surety does not dispute that Smith's embezzlement from Jasper County triggered the Bond, Western Surety disputes the amount owed to Jasper County under the Bond, which should be \$20,000 pursuant to the General Employee Limit as Smith was a general employee. (Trial Tr. 91:3-14). As such, the issue here is not whether Smith's embezzlement and Jasper County's claim implicate the Bond or whether Western Surety is required to pay the limits of the Bond; rather, whether the limits of the Bond are \$20,000 per employee per the parties' intent, as clearly demonstrated by the evidence presented at trial, or \$285,000—a figure for which there is no evidence, direct or circumstantial, that Jasper County ever requested or purchased or that Western Surety intended to provide.

As explained in Section I, *supra*, the trial court should have reformed the Bond due to the parties' mutual mistake. A declaratory judgment is part and parcel of reformation. See Elias v. Firemen's Ins. Co. of Newark, N.J., 309 S.C. 129, 131-32, 420 S.E.2d 504, 505 (1992) (equitable action where insured brought declaratory judgment seeking to reform insurance contract to provide coverage). Issuance of the requested declaratory judgment will settle Jasper County and Western Surety's dispute and afford relief from uncertainty and insecurity to the parties with respect to their rights under the Bond by informing them of the amount owed by Western Surety to Jasper County for Smith's embezzlement. Accordingly, the trial court should have issued a declaratory judgment declaring the General and Specific Employee Limits agreed to by the parties valid, binding, and determinative of any coverage owed to Jasper County under the Bond for the losses sustained from Smith's embezzlement.

CONCLUSION

For the foregoing reasons, the Court should **REVERSE** the trial court's Order and Judgment awarding Jasper County \$374,759.09 in damages for its breach of contract claim.

Further, the Court should **REMAND** the case to the trial court and **ORDER** the trial court to (1) issue a declaratory judgment that the Bond is subject to the General and Specific Employee Limits and, thus, provides \$20,000.00 in coverage for Jasper County's claim arising from Smith's embezzlement and (2) issue an order reforming the Bond to reflect that the parties' intent for the Bond to be subject to the General and Specific Employee Limits and, thus, provides \$20,000.00 in coverage for Jasper County's claim arising from Smith's embezzlement.

Respectfully submitted,

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