IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Alexander S. Macaulay, Circuit Court Judge

Indictment Nos. 2005-GS-47-15, 2005-GS-47-23, 2005-GS-47-24

State of South Carolina ..... Respondent,

v.

Mario Ramos Hinojos, Defendant,
and
Richard G. Thompson d/b/a All-Out Bail Bonding, as Surety, Accredited Property and Casualty Ins., Surety,
of Whom Richard G. Thompson d/b/a All-Out Bail Bonding and Accredited Property and Casualty Ins. are the ..... Appellants.

Appellate Case No. 2013-000567

FINAL BRIEF OF THE APPELLANTS

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STATEMENT OF THE CASE

On August 18, 2005 Defendant Mario Hinojos was arrested in Greenville County South Carolina and charged with several drug related offenses. Bond was set in the amount of Two Hundred Thousand Dollars ($200,000.00) Surety as reflected on a Surety Bond and Order dated August 22, 2005. Richard G. Thompson for All Out Bail Bonding (Accredited Surety and Casualty Company), Tracy Bowen with Bonds by Gaynell, and Leon Stowers for GiGi Bonding Company (with Palmetto Surety Company for the latter two) signed the bond as sureties on April 25, 2005.

On March 15, 2007 a hearing was held before the Trial Judge resulting in the removal of the electronic monitoring device on the Defendant. No surety was present.

On November 20, 2007, Defendant Hinojos entered his guilty plea to the criminal charges and was allowed to remain free from custody until sentencing was made. Only one bondsman was present, Mike Curlee, owner of All Out Bail Bonding.

On December 10, 2007 Defendant Hinojos failed to appear resulting in a bench warrant. Estreatment hearings were held on March 25, 2008 and November 7, 2008 resulting in the Order of Estreatment dated April 15, 2009.

In the Order of Estreatment the Trial Court Ordered a Bond Estreatment only against Richard G Thompson d/b/a All Out Bail Bonding, with Accredited Property and Casualty Insurance in the amount of Sixty-Six Thousand Six Hundred and Sixty Six Dollars and 66/100 ($66,666.66).

On July 6, 2011, the Court of Appeals filed an Opinion Affirming in part and Reversing in part the Court's ruling on April 15, 2009. In the Court of Appeals decision, the Court found

that at the time an estreatment was proper, however the amount estreated was done arbitrarily and without consideration of the proper factors.

On August 27, 2012, a hearing was conducted before the Honorable Alexander S. Macaulay, where both sides addressed the matter in accordance with the Court of Appeals ruling. At the hearing, the Court heard arguments and asked both parties for proposed orders.

On February 15, 2013, Judge Macaulay issued a written Order against Richard G Thompson d/b/a All Out Bail Bonding, with Accredited Property and Casualty Insurance in the amount of Sixty-Six Thousand Six Hundred and Sixty Six Dollars and 66/100 ($66,666.66). The Order was received by Counsel on March 4, 2013 and a Notice of Intent to Appeal was filed on March 13, 2013.

STATEMENT OF FACTS

In the interim between the Court of Appeals ruling on July 6, 2011 and the hearings conducted before Judge Macaulay on August 17, 2012, the State legislature passed bill A115. Bill A115, signed into law by the Governor, on February 1, 2012 statutorily modified SC Code Section 17-15-20 to clarify whether a surety remains obligated on a bond after a Defendant enters a plea. The Amended Statute acted more as clarification than a modification where it clearly answered the question as to when a Surety's obligation on a bond terminated.

ARGUMENT

1. **The Trial Court erred in estreating Mr. Hinojos's bond following the amendment to SC Code Section 17-15-20.**

The original bond contract signed by the Appellants as it related to the Defendant required that they act a surety to ensure the Defendant's appearance in Court to answer to the charges he faced. On November 20, 2007, the Defendant elected to forgo a trial on his charges and enter a plea to which he was facing a mandatory minimum active sentence of Seven (7) years and up to Thirty (30) years of active incarceration with a recommenced cap not to exceed Ten (10) years. (R. p. 48, l. 21-25, p. 49, l. 1-5) It was the combined obligation of the Three (3) sureties to secure the Defendant's appearance for his trial and or plea; not a duty falling on the Appellants solely. When the sureties, including the Appellants, secured the Defendant's appearance at Court for the call of his case, and the entering of his plea of guilty, they completed their obligation under their contract with the State, and in accordance with S.C. Code Section 17-15-20 as amended.

When the Court accepted Mr. Hinojos's plea, by statute he was absolutely required to be actively incarcerated at the Department of Corrections for a minimum of seven (7) years. Upon entry of the plea, defendant was released from the charge of the sureties and should have been placed in the custody of the Department of Corrections. At the plea the solicitor, with consent from the Defendant's counsel, requested that sentencing be deferred until some point when the Defendant could testify at a possible trial of his co-defendants. (R. p. 64, l. 16-17) Subsequent to the plea, the Defendant's counsel moved that the Court allow the Defendant to remain free from custody pending the later sentencing, to which the solicitor joined the motion so long as the

Defendant comply with his prior bond conditions.

When the Defendant entered a guilty plea on November 20, 2007, any and all contracts between the Defendant and the Respondents were completed. The purpose of a Bond Contract is to provide surety for a Defendant's appearance in court. On February 1, 2012. SC Code Section 17-15-20 was modified to include in the statute this exact concept that had been previously found in case law. SC Code Section 17-15-20 reads in pertinent part as follows:

> 17-15-20(B) Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by law.

This exact subsection was further made **retroactive** and applicable to all bonding situations by A286, which was signed into law by the Governor on June 29, 2012; which in pertinent part states as follows:

> Section 4: The provisions of Section 1 of Act 115 of 2012 which amended Section 17-15-20 of the 1976 Code and allow sureties to be relieved of an appearance bond under certain designated circumstances are retroactive and apply to all existing and future appearance bonds.

The Surety in this matter completed their obligation by having Mr. Hinojos appear for his plea, any subsequent actions were outside the scope of the Bond as it was completed per law under SC Code 17-15-20 as amended.

Where the bond obligations of a Surety have been completed, before any new bonding contract can be formed, all elements essential as provided by contract law must be completed. State v. McIntyre clearly establishes that a Bond is a contract that must be done in writing in compliance with the Statute of Frauds. State v. McIntyre, 307 S.C. 363, 415 S.E.2d 399 (1992) Specifically, S.C. Code 32-3-10(2), commonly known as the South Carolina Statute of Frauds

specifically requires that any contract or agreement by which one party is being called to answer for the debts of another must be made in writing and signed by the party to be bound. S.C. Code 32-3-10(2) as amended.

In its Order of February 15, 2013, the Court makes a finding that the S.C. Code Section 17-15-20 modifications, including its provisions on retroactivity have no bearing on the Court. In support of this position the Court ruled that since they had already Ordered the estreatment in 2009, the question of when a bond contract terminated is not at issue. The Appellants would disagree. The clear intent of the modifications of S.C. Code Section 17-15-20 was to clarify ambiguities existing in the statute as it was previously written. Specifically, there was a Statutory question as to when a bond terminated and the legislature provided an unambiguous direct answer. In addition, the Court placed a retroactivity clause in the amendment to provide an answer to situations like the present matter.

It has long been established that amendments to Statutes are proactive rather than retroactive unless specifically noted within the amendment, or if they are considered remedial or procedural in nature. Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990). This standard is subject to the paramount rule that the intent of the legislature determines whether a statute will have prospective or retroactive application. See South Carolina Nat'l Bank v. South Carolina Tax Comm'n, 297 S.C. 279, 376 S.E.2d 512 (1989). In this matter, the Appellants would argue even this analysis is moot because the Statute did include the retroactivity provision within 2012 Act No. 286. When a question of ambiguity arises, the primary function of the Court should be to interpret the statute with an effort to ascertain the intent of the legislature. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Although, the Appellants maintain

the Statute is clear on this matter, the Court must also be cognizant that the real purpose and intent of the lawmakers will prevail over the literal import of the words. S.C. Department of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984). Here the Legislature sought to provide guidance to a previously ambiguous area of statutory construction and did so with a retroactivity provision. To ignore the amended Statute was reversible error.

When this matter was originally heard by the Court of Appeals, and ruled upon in the July 6, 2011 Order, the Amendment to SC. Code Section 17-15-20 had not yet been signed into law, and the Statute remained vague regarding the termination of a surety's obligation. This matter comes before the Court as a case of first impression when dealing with the newly written law.

The Appellants maintain that at the time the Defendant entered their plea, the Bond contract was satisfied and the Appellants were relieved of any and all obligations. The Appellants further maintain that their was no enforceable contract in existence subsequent to the Defendant's guilty plea which the Court could order to be estreated to the State. For the creation of a new contract, all elements would have to comport with routine contract law, such as being placed into writing memorializing the meeting of minds between the parties, and was completed by exchange of consideration .

The State's position regarding Equitable Estoppel is untenable where it is clear that there was absolutely no benefit to the Surety and the only party who could suffer prejudice would have been the Surety. It was the State that requested the Defendant remain free from custody hoping for cooperation in testifying against other individuals at a later time. Equitable Estoppel requires the State establish they suffered a "definite, substantial, detrimental change of position in reliance on the proposed agreement." *citing* Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989)

Where it may be true that the State relied upon the continued modified bond relationship, the Appellants gained no benefit in this regard. It was the Defendant who requested he remain free from custody, not the bondsman. In order for Equitable Estoppel to apply there must be some showing of a benefit received by the party to the detriment of the other. As with any contract two essential elements must exist for its creation, first some meeting of the minds, all parties to the contract, and some consideration. When the original bond contract was formed between Mr. Hinojos and all three bondsmen, it was done in writing and the Respondents were paid a fee in consideration of their agreements to act as a sureties for Mr. Hinojos' debt to the State of South Carolina. The fee paid to the Respondents for their service of providing surety on Mr. Hinojos' debt was adequate consideration for the initial contract, and they complied with and completed their requirements and liabilities under that contract and Statute. For the detrimental reliance aspect contemplated by the state, the modification of contract must have coincided with some consideration paid for the Appellant's services and equally important some benefit from the alleged contract.

2. The Trial Court erred in estreating Mr. Hinojos's bond and ordering the estreatment of Sixty-Six Thousand Six Hundred and Sixty Six Dollars and 66/100 ($66,666.66) in that this determination amounted to an abuse of discretion.

Section 38-53-70 lays the foundation for what must be considered by the Court prior to ordering an estreatment:

> "In making a determination as to remission of the judgment, the court shall consider the costs to the State or any county or municipality resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant."

Section 38-53-70 of the 1976 Code of Laws of South Carolina, as amended.

The construct established by §38-53-70 has been scrutinized in several opinions, and solidified in Ex Parte Polk, 354 S.C. 8, 573 S.E.2d 329 (Ct. App 2003). In Polk, the Court looked to Section 38-53-70 as well as the cases of State v. Boatwright, 310 S.C. 281, 423 S.E.2d 139 (1992) and State v. Workman, 274 S.C. 341, 263 S.E.2d 184 (1980) to determine what must be addressed before ordering the estreatment. The Court overturned a bond estreatment saying that although some amount could be deemed appropriate by the Trial Judge, several factors must be examined to avoid an abuse of discretion.

In its ruling, the Polk Court determined that standard established by the 5th Circuit case U.S. v. Parr, 594 F.2d. 440 (1979) should be applied in South Carolina, and that at a minimum the trial Judge must consider the following Three (3) factors:

1. The purpose of the Bond.
2. The nature and wilfulness of the default.
3. Any prejudice or additional expense resulting the State stemming from the Default.

Ex Parte Polk, 354 S.C. 8, 13, 573 S.E.2d 329, 331 (Ct. App 2003).

Upon careful weighing of these Three (3) factors the Court is to use its discretion in determining a proper estreatment amount. It is the Appellant's position that the Court gave only a cursory examination of these factors and failed to properly address the requirements in its ruling that an estreatment be ordered in the amount of Sixty Six Thousand Six Hundred and Sixty Six dollars and 66/100 cents ($66,666.66).

While maintaining the Appellant's position that any estreatment was improperly ordered; the Appellant avers that the Trial Court failed to properly address the three (3) Polk elements to be considered during a bond estreatment. When examining the question of costs to the State,

Polk notes that Section 38-53-70 "unambiguously provides that the trial court must consider the costs to the state in determining remission of the judgement on a forfeited bond." State v. Polk, 354 S.C. at 12, 579 S.E.2d at 331 (2003). Any failure to weigh those costs would deem the Court's judgement arbitrary and capricious. Id. This exact issue was grounds for reversal and remand by the Court of Appeals in its July 6, 2011 Order.

Despite the Remand from the Court of Appeals, the Trial Court only cursorily considered the Polk factors when issuing its February 15, 2013 Order.

In the February 15, 2013 Order, the Trial Court fails to consider the first element of Polk, the purpose of the Bond. In its Order, the Trial Court states that the bond they were estreating "is to ensure the Defendant's presence at his sentencing." Through this statement, the Court **concedes** the Appellants first argument that the initial bond signed by the surety to ensure the Defendant's appearance for a trial, or in this case a plea, did terminate at the time of his plea. The Court only looks to create a secondary bond formed with the new purpose of ensuring Mr. Hinojos's appearance for a later sentencing. As such, this alleged new bond contract fails for the previously stated rules of contract formation as established in McIntyre.

If this Court wishes to conduct a Polk analysis and evaluate the purpose of the original $200,000.00 bond first given to Mr. Hinojos on April 22, 2005, it was to secure his appearance for a trial or plea. The Court cannot overlook the fact that this bond was a product of the State's request that Mr. Hinojos be out in order to assist them. (R. p. 137, l. 1-10) The State admits that it was an active participant in getting the Defendant released from pre-trial custody. This absolutely makes the original bond distinguishable from the normal bond where the Court would simply look to the elements of flight risk and danger to the community. Here, the State had an

immediate and ongoing desire to have the Defendant free from custody; this is a distinctive characteristic of the purpose of this bond. Failing to consider the foregoing in its analysis of Polk factors, the Trial Court fails to comply with the Order of the Court of Appeals and the estreatment is improper.

When considering the nature and wilfulness of the default, the Court's Order indicates that the Defendant promised to assist the State. There is no question the Defendant would desire to remain free from custody, however there was no showing that the Appellant in this matter did not do any and everything in their power to secure the Defendant's appearance. The greatest resource available to the Surety, electronic monitoring, was removed without notice by the Trial Court prior to even the plea. There remains no evidence showing that the Appellant willfully conducted any action to deny the Defendant's appearance in Court.

The major focus of the Trial Court's order centers around the issue of prejudice and costs to the State due to the Defendant's failure to appear. As previously noted, Lt. Dorsey of the South Carolina Law Enforcement Division testified that even before the Defendant was taken before a Judge for his initial bond setting he was approached and utilized as an confidential informant or agent for the State (R. pp. 136-137) While working for the State, the Defendant assisted in the arrest of two drug dealers who had been ongoing targets of the State. (R. p. 137, l. 13-25 and p. 138, l. 1-25) At no point in his testimony does Lt. Dorsey provide any quantitative or qualitative amount as to the time and/or resources used by the State to locate Mr. Hinojos following the entry of his plea. When asked directly he states he cannot give any measure of time or money spent, nor does he specify in what manner technological means were utilized. (R. p. 147, l. 3-20) Additionally, Lt. Dorsey cannot differentiate the time spent before and after Mr.

Hinojo's plea when dealing with him as a potential witness, in fact he infers most of the time was prior to his entry of a guilty plea. (R. p. 150, l. 8-22) Lastly, this witness does not even know whether the other two (2) Defendants had even entered their pleas prior to Hinojos being not available. (R. p. 146, l. 21-24.)

As it relates to costs spent by the State, the Appellants acknowledge that the State is not required to provide an exact dollar amount as to cost expended in locating an individual, however it would contend that some actual measure, be it qualitative or quantitative with some accounting must be provided. The only evidence offered by the State at hearing came through Lt. Dorsey's stating, that man hours, although no certainty as to before or after his plea, were used and that he procured an Order to check the Defendant's cell phone records. (R. p 150, l. 23-25 and p. 151, l. 1-2)

When combining the foregoing, the Order of estreatment in the amount of Sixty Six Thousand Six Hundred and Sixty Six dollars and 66/100 cents ($66,666.66) is arbitrary and amounts abuse of discretion.

CONCLUSION

The Trial Court erred in it's decision not to consider S.C. Code Section 17-15-20 as amended in its Order. By contract, and now by the Statute as amended by the legislature, the surety's obligations as they related to Mr. Hinojos terminated at the time he entered a plea with a deferred sentencing.

Finally, the Trial Court erred by abusing its discretion in failing to adequately consider the Polk factors when determining the amount of any estreatment to be ordered. The Court failed to consider the obligations and actions of all parties as it relates to this bond contract. The Court further failed to consider the State's actions in facilitating Mr. Hinojos's release before his original bond setting, and again after his plea and the creation of a new alleged bond. Additionally, there remains no specific qualitative or quantitative accounting of the actual costs to the State. In this matter the Court's ruling was arbitrary and capricious.

Respectfully submitted,

July 8, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b).

July 8, 2013

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PROOF OF SERVICE

I certify that on July 8, 2013 I have served three copies of the within Final Brief of the Appellants and Consent Motion to Change Header on Final Brief upon the individual(s) named below by hand delivering three copies of same to the address(es) below:

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I further certify that all parties required to be served have been served.

July 8, 2013

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