

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
The Honorable James Martin Harvey, Esq.
Trial Court Case No. 2009-CP-02-000958

Appellate Case No. 2013-001624

Elite Construction, Inc., Respondent,

v.

Doris E. Tummillo and Georgia Bank and Trust
Company of Augusta, Defendants,

Of Whom Doris E. Tummillo is the Appellant,

And

Georgia Bank and Trust Company of Augusta is the
Respondent.

INITIAL BRIEF OF RESPONDENT
ELITE CONSTRUCTION, INC.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN ITS FINDING THAT THE CONTRACT WAS UNAMBIGUOUS, CLEAR AND EXPLICIT, IN REQUIRING A STALL SIZE OF 12' X 12' MEASURED CENTER POST TO CENTER POST, AS OPPOSED TO 12' X 12' INTERIOR SPACE?
2. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN REFUSING TO REDUCE THE RECOVERY OF RESPONDENT FOR ITS FAILURE TO DELIVER HORSE STALLS OF THE SIZE REQUIRED IN THE CONTRACT WITH APPELLANT IN THE CONSTRUCTION OF THE POLE BARN?
3. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN FINDING THAT TIME WAS NOT OF THE ESSENCE IN THE CONTRACT AND THAT APPELLANT'S PROOF OF DAMAGES WAS LEGALLY INSUFFICIENT?
4. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN AWARDING ATTORNEY'S FEES TO THE RESPONDENT IN LIGHT OF ITS CORRECT RULING ON THE ISSUES RAISED IN QUESTIONS I, II AND III?

STATEMENT OF THE CASE

On May 1, 2009 Elite Construction, Inc. brought this action alleging breach of contract against Doris E. Tummillo. (Plaintiff's Complaint). As part of its Complaint Elite Construction also sought to foreclose a mechanic's lien which was filed upon real property owned by Dr. Tummillo. (Plaintiff's Complaint and Notice and Certificate of Mechanic's Lien).

Dr. Tummillo answered Elite Construction's Complaint and filed a counterclaim also alleging breach of contract. (Dr. Tummillo's Answer and Counterclaim). Elite Construction replied to Dr. Tummillo's Conterclaim and denied her allegations. (Plaintiff's Reply to Counterclaim).

Georgia Bank and Trust Company of Augusta is also named as a Defendant in this matter. (Plaintiff's Complaint). The Parties agree that Georgia Bank and Trust possesses a valid

mortgage interest upon the real property identified in the Notice and Certificate of Mechanic's Lien.

This matter was referred to Special Referee J. Martin Harvey, Esquire by Order of the Honorable Doyet A. Early, III, Circuit Court Judge. (Order of Reference). A trial of the issues presented here was conducted by the Special Referee on July 12, 2012.

An Order of Judgment was filed in this case on September 13, 2012. (Order of Judgment). As part of that Order the Special Referee granted a judgment of foreclosure of Elite Construction's mechanic's lien in the amount of \$80,204.10. (Order of Judgment). The Special Referee further concluded that Elite Construction is the prevailing party in this case and is entitled to recover its attorney's fees, costs and expenses. (Order of Judgment). The Special Referee reserved a decision as to the amount of such fees, costs and expenses pending submission of additional information by Elite Construction. (Order of Judgment).

A Motion to Amend Judgment was subsequently filed by Dr. Tumillo. (Motion to Amend Judgment). A hearing to consider this Motion was conducted by the Special Referee, at which time he also considered an Affidavit of Attorney's Fees, Costs and Expenses submitted by Elite Construction. (Affidavit of Attorney's Fees, Costs and Expenses).

The Special Referee's Order on Motion to Amend was filed in this matter on June 24, 2013. (Order on Motion to Amend). By that Order the Special Referee denied Dr. Tumillo's Motion to Amend the Order of Judgment and also awarded Elite Construction attorney's fees, costs and expenses in the amount of \$19,794.40. (Order on Motion to Amend).

An Amended Order of Judgment was filed in this matter on July 22, 2013 and to correct a scrivener's error in the Order of Judgment filed in September 2012. (Amended Order of Judgment). A Notice of Appeal was then timely filed by Dr. Tumillo. (Notice of Appeal).

Arguments

I. THE TRIAL COURT DID NOT ERR IN ITS AMENDED ORDER OF JUDGMENT IN ITS FINDING THAT THE CONTRACT WAS UNAMBIGUOUS, CLEAR AND EXPLICIT, IN REQUIRING A STALL SIZE OF 12' X 12' MEASURED CENTER POST TO CENTER POST, AS OPPOSED TO 12' X 12' INTERIOR SPACE.

A proceeding for the enforcement of a statutory lien, such as a mechanic's lien, is legal in nature." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) (citing Willard v. Finch, 123 S.C. 56, 116 S.E. 96 (1923)). In an action at law tried without a jury, the trial court's findings of fact will be upheld on appeal when the findings are reasonably supported by the evidence. Butler Contracting, 369 S.C. at 126, 631 S.E.2d at 255. The trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or clearly influenced or controlled by an error of law. *Id.* at 126-28, 631 S.E.2d at 255-56. Taylor, Cotton & Ridley, Inc. V. Okatie Hotel Group, LLC, et al., 372 S.C. 89, 641 S.E. 459 (Ct. App. 2007).

Elite Construction filed this civil action to recover amounts due by Dr. Tummillo pursuant to a written contract between the Parties and by which Elite Construction agreed to build a horse barn for her. (Plaintiff's Complaint; Purchase Contract). When a dispute arose between the Parties Elite Construction had substantially completed construction of the barn and Dr. Tummillo had paid for a large portion of the work performed. (Transcript P. 20, L. 19 to P. 21, L. 9; P. 63, L. 22 to P. 65, L. 21) She contends that no further amounts are due to Elite Construction.

Dr. Tummillo alleges that Elite Construction failed in numerous respects to comply with the agreement to build her barn. (Dr. Tummillo's Answer and Counterclaim). As set forth in her Brief to this Court, however, her main complaint at this time centers around the size of the horse

stalls constructed by Elite Construction. Dr. Tummillo contends that the contract provides that all of the stalls in the barn should have interior dimensions of twelve actual feet by twelve actual feet. Put simply, she argues that Elite Construction promised that all of the horse stalls would measure that exact size.

The type of structure involved in this case is known as a “pole building” or a “pole barn”. As explained by Chris Key, the owner and operator of Elite Construction, and Jerry D. Cooper, an expert witness in the area of the construction of such structures, this type of barn is very common and economical to build. (Transcript P. 13, L. 14 to P. 14, L. 17; P. 98, L. 9 to P. 102, L. 1). Photographs of the barn involved here were introduced into evidence at the trial of this case. (Photographs of Barn).

The contract between Dr. Tummillo and Elite Construction, and the accompanying plans, set forth the dimensions of the barn involved in this case and the materials to be used as part of its construction. (Purchase Contract; Construction Plans). As set forth by the Special Referee in his orders for this case the contract and plans do not specifically state the interior dimensions of the stalls. (Order of Judgment; Order on Motion to Amend; Amended Order of Judgment).

As he noted, however, it is not difficult to ascertain the dimensions of the stalls by referring to both the contract and the plans. Basically, the contract and plans provide that the “poles”, which are wood posts that establish the four corners of a stall and also serve to support the roof of the barn, are “set on 12-foot centers”, which means twelve feet from each other measuring from the center of a post. (Transcript P. 25, L. 25 to P. 38, P. 13). The actual distance between the posts is dictated by the lumber to be used, and which is sold in standard lengths. (Id.). To complete

a stall, walls are affixed to the posts resulting in loss of interior space. (Id.). As a result, the inside of a stall does not measure exactly twelve feet by twelve feet. (Id.).

Mr. Cooper expounded on the concept that the dimensions of the entire structure and materials used dictate the resulting and actual size of the stalls. (Transcript, P. 117, L. 14 to P. 118, L. 1). Both he and Mr. Key testified that the cost of constructing a barn of the size involved here with actual twelve-foot by twelve-foot stalls would be substantially more than the price paid by Dr. Tummillo, and mainly because non-standard lumber lengths would have to be used. (Id.).

It is reasonable to believe that the interpretation of construction plans, dimensions and choice of materials may not be readily understandable to lay persons. Mr. Cooper testified that in the equestrian industry reference to the size of barn stalls is commonly made using nominal and not exact dimensions. (Transcript, P. 113, L. 8 to P.118, L. 10). For example, a barn with "12 x12 stalls" does not mean that the actual dimensions of the interior of the stalls are twelve-feet by twelve-feet, and all of the stalls in the barn may vary in interior size. (Id.). Similar concepts are found in other areas of construction and other businesses and industries, such as electronics and automobiles. (Transcript P. 33, 10 to P. 35, L. 25).

Since the contract between Dr. Tummillo and Elite Construction did not specifically set forth the size of the stalls to be built it is reasonable to believe that she and Mr. Key would have discussed this issue. Evidence of such conversations would then be beneficial to the Court in interpreting the parties' contract. Columbia East Associations v. Bi-Lo, 299 S.C. 515, 386 S.E. 2d 259 (Ct. App. 1989); Maddox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986).

Mr. Key testified that the during the time the contract involved here was negotiated

he and Dr. Tummillo discussed "12 by 12" stalls. (Transcript, P. 90, L. 14 to L. 16). He testified that he never promised Dr. Tummillo that the interior of the stalls would measure exactly twelve feet by twelve feet. (Transcript, 38, L. 2 to P. 38, L. 9).

Dr. Tummillo is a practicing physician and is also skilled in the area of boarding thoroughbred horses. (Transcript, P. 152, L. 10 to P. 162, L. 20). The facility where the barn in this case is located is operated as a business by her known as the Palmetto Thoroughbred Training Center. (Id.; Transcript P. 143, L. 14 to P. 144, L. 5).

Upon cross examination Dr. Tummillo admitted that when she and Mr. Key negotiated the contract between them, she asked him "Does this mean the stalls are going to be 12 by 12?". (Transcript, P. 160, L. 10 to P. 162, P. 23). She did not ask him if each of the stalls would measure exactly twelve-feet by twelve-feet. It is clear from this testimony that Dr. Tummillo either understood, or certainly should have understood, the concept that dimensions of this type do not refer to actual measurements, but are nominal terms for stalls of approximate sizes.

Mr. Key further testified that he trusted that Dr. Tummillo understood that the term "12 by 12" described the nominal and not the exact measurements of a stall. (Transcript 31, L. 20 to P. 32, L. 1). He based this belief given what he understood to be her experience in the horse industry. (Id.).

Also an expert in the boarding of horses, Mr. Cooper further testified that the stalls constructed by Mr. Key are certainly adequate to meet the requirements of boarding thoroughbred horses. (Transcript, P. 114, L. 14 to P. 117, L. 13). Thus, there is no basis in this case to suggest that the construction of the barn did not meet the terms of the parties' contract or the needs and

expectation of Dr. Tummillo.

Furthermore, after Elite Construction ended its involvement in the project in early 2009 two lists were prepared by Michael Tummillo, Dr. Tummillo's brother, and which set forth particular problems to be corrected by Elite Construction. (Transcript, P. 234, L. 12 to P. 236, L. 1; Plaintiff's Exhibit 15 and Defendant Tummillo's Exhibit 16). Dr. Tummillo reviewed both of these lists. (Transcript, P. 240, L. 2 to L. 8). Nowhere on these lists did Dr. Tummillo or her brother set forth that they had any concerns with the size of the stalls.

Of note, the evidence in this case shows that Mr. Tummillo added wood siding to some of the stalls after Elite Construction ended its involvement. (Transcript, P. 241, L. 7 to P. 241, L. 15; Transcript P. 92, L. 2 to L. 19). Such additions have further decreased the size of the stalls.

As noted, Dr. Tummillo operates Palmetto Thoroughbred Training Center as an ongoing business. (Transcript, P. 152, L. 10 to 154, L. 19). Upon questioning she admitted that she has marketed and advertised her business, and includes photographs of the entire barn constructed by Elite Construction. (Id.). She further testified that she has never included in such advertising any information to the effect that any of the stalls at the barn are unacceptable. (Id.).

For these reasons the decision of the Special Referee is supported by the evidence and should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN ITS AMENDED ORDER OF JUDGMENT IN REFUSING TO REDUCE THE RECOVERY OF RESPONDENT FOR ITS FAILURE TO DELIVER HORSE STALLS OF THE SIZE REQUIRED IN THE CONTRACT WITH APPELLANT IN THE CONSTRUCTION OF THE POLE BARN AT ISSUE.

There is further no basis to reduce or modify the judgment awarded to Elite

Construction by the Special Referee. As set forth above Elite Construction complied not only with the terms of the written contract, but also met the expectations of Dr. Tummillo by delivering what is commonly known as "12 by 12" stalls.

Further, and in the event that the Court were to determine that some of the stalls in the barn are unsuitable, there is no evidence in the record for this matter by which the Court may reliably calculate or determine the value of Dr. Tummillo's alleged loss.

III. THE TRIAL COURT DID NOT ERR IN ITS AMENDED ORDER OF JUDGMENT IN FINDING THAT TIME WAS NOT OF THE ESSENCE IN THE CONTRACT AND THAT APPELLANT'S PROOF OF DAMAGES WAS LEGALLY INSUFFICIENT.

The Special Referee correctly concluded that Dr. Tummillo should not recover damages based upon an alleged delay by Elite Construction in beginning or completing the construction project involved in this case.

The contract in this case is dated July 16, 2008. (Purchase Contract). It does not contain a provision establishing a date by which Elite Construction should have begun work or a date by which the project should have been completed. (Purchase Contract). The agreement provides, however, that Dr. Tummillo is responsible for "grading" and "fill". (Purchase Contract). The parties agree that these responsibilities include preparation of a concrete pad for the barn. (Transcript, P. 23, L. 13 to P. 24, L. 11). The agreement does not set forth a date by which the pad should have been completed. (Purchase Contract).

The concrete pad was completed approximately the first part of September 2008. (Transcript P. 181, L. 11 to P. 183, L. 13). Mr. Key was involved in another project that month and

only became aware that the pad was completed later that month. (P. 77, L. 16 to P. 78, L. 15). Contrary to Dr. Tummillo's contention, there was never any agreement to complete the project by November 2008 and certainly no agreement that "time was of the essence."

The Special Referee correctly concluded that absent an agreement the law implies that a contract should be concluded in a reasonable period of time. Faulkner v. Millar, 319 S.C. 216, 460 S.E. 2d 378 (1995). There is nothing in the record for this matter to suggest that given the size of the project involved here Elite Construction is responsible for any delay in performing its responsibilities under the contract. This is certainly true in light of the fact that a period of at least a month and one-half expired between the time the contract is dated, and the point when the concrete pad was completed and Elite Construction could even have begun its work. At a bare minimum, and as the Special Referee concluded, any delay involved here is not unreasonable. (Order of Judgment).

More importantly, if Elite Construction unreasonably delayed its performance under the contract, any damages sustained by Dr. Tummillo as a result of that delay must be proven within a reasonable degree of certainty. Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 371 S.E. 2d 532 (1988); S.C. Finance Corp. v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960). When asked upon direct examination regarding the amount of damages she sustained as a result of the alleged delay by Elite Construction, Dr. Tummillo testified as follows:

Q: And have you made any estimate of how much revenue you would have generated from the January through April period if the stalls had been completed in a timely fashion?

A: It would have been - I forgot - it's like, I think, \$33,000.00.

(Transcript, P. 150, L. 23 to P. 151, L. 3).

Upon cross-examination Dr. Tummillo admitted that she has no documents or records establishing the existence of such damages. (Transcript, P. 168, L. 6 to P. 169, L. 19). She further agrees that any numbers or figures proffered to the Court to support any damages are “estimates”. (Id.). Under the circumstances presented here such evidence does not reach a reasonable degree of certainty.

IV. THE TRIAL COURT DID NOT ERR IN ITS AMENDED ORDER OF JUDGMENT IN AWARDING ATTORNEY’S FEES TO THE RESPONDENT IN LIGHT OF ITS CORRECT RULING ON THE ISSUES RAISED IN QUESTIONS I, II AND III.

The Special Referee correctly ruled that Elite Construction is the “prevailing party” in this case, and is entitled to recovery of its attorney’s fees, costs and expenses pursuant to S.C. Code Ann. § 29-5-10 (1976).

In its Complaint Elite Construction prayed for judgment in the amount of \$126,160.37. (Plaintiff’s Complaint). Dr. Tummillo did not set forth a prayer for a specific amount in her Counterclaim, nor did she present a written offer of settlement before the trial of this case. (Dr. Tummillo’s Answer and Counterclaim). Despite the uncertainty of the value of her counterclaim at trial she asserts in her Brief to this Court that it is \$36,000.00. As noted, the Special Referee awarded judgment to Elite Construction in the amount of \$80,204.10.

Pursuant to § 29-5-10, and because she did not present an offer to settle this matter before trial, the value of Dr. Tummillo’s Counterclaim is considered to be a negative sum. See S.C. Code Ann. § 29-5-10(b) (2003); *see also* JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 364 S.E. 2d 629 (2005). As a result, Elite Construction is clearly the prevailing party and is entitled to an award of attorney’s fees, costs and expenses.

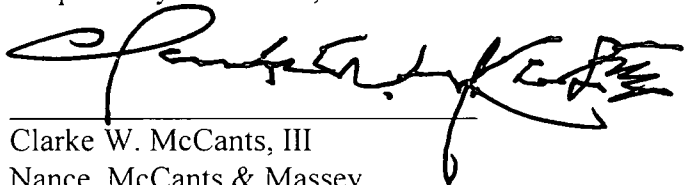
Dr. Tummillo's reliance upon Brazington Tile Co. v. Wooley, 327 S.C. 280, 491 S.E. 2d 244 (1997) is misplaced. Using that decision she argues that she should be given credit for the value of her Counterclaim in the amount of \$36,000.00. She then argues that \$36,000.00 is closer to the Special Referee's judgment of \$80,204.10 than Elite Construction's prayer for relief in the amount of \$126,160.37, and as a result she is the prevailing party.

In Brazington, the Court determined, in fact, that the Defendant was entitled to recover under its counterclaim, the value of which was used to decide the issue of who prevailed in that litigation. Here, the Special Referee determined that Dr. Tummillo is not entitled to recover under her Counterclaim. As such, she may not use the alleged value of that claim for purposes of overcoming his decision as to who is the prevailing party and be allowed to recover her fees, costs and expenses.

CONCLUSION

The Special Referee's decision in this matter is clearly supported by the evidence presented at the trial of this case. For the reasons stated, the Court should affirm his judgment.

Respectfully Submitted,



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January 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Martin Harvey, Special Referee

Case No. 09-CP-02-958

Elite Construction, Inc., Respondent

v.

Doris E. Tummillo and Georgia Bank and Trust Company of Augusta,
Defendants,

Of Whom Doris E. Tummillo is the Appellant,

And

Georgia Bank and Trust Company of Augusta is the Respondent

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL BY
RESPONDENT ELITE CONSTRUCTION, INC.

The Respondent, Elite Construction, Inc. requests the following be included in the Record on Appeal:

1. Transcript of Record, Pages 13, 14, 20, 21, 23 - 38, 63 - 65, 77, 78, 90, 92, 98 - 102, 113 - 118, 143, 144, 150 - 162, 168, 169, 181 - 183, 234 - 236, 240.
2. Complaint and Notice and Certificate of Mechanic's Lien
3. Answer and Counterclaim
4. Reply to Counterclaim

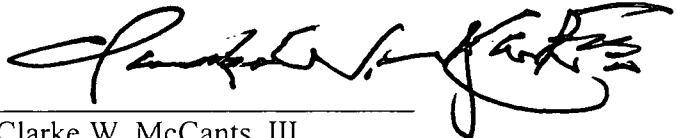
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SC Court of Appeals

5. Order of Reference
6. Order of Judgment
7. Motion to Amend Judgment
8. Affidavit of Attorney's Fees, Costs and Expenses
9. Order on Motion to Amend
10. Amended Order of Judgment
11. Purchase Contract
12. Construction Plans
13. Photographs of Barn
14. Plaintiff's Exhibit 15
15. Defendant Tummillo's Exhibit 16

I certify that this designation contains no matter which is irrelevant to this appeal.



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January 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Martin Harvey, Special Referee

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v.

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Defendants,

Of Whom Doris E. Tummillo is the Appellant,

And

Georgia Bank and Trust Company of Augusta is the Respondent

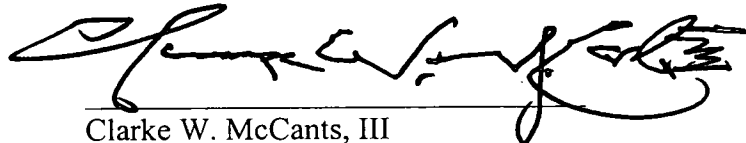
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SC Court of Appeals

I certify that I have served a copy of the Initial Brief of the Respondent and Designation of Matter to be Included in the Record on Appeal on counsel for the Appellant, Neal W. Dickert and Paul K. Simons, Jr., by depositing a copy of it in the United States Mail, postage prepaid on January 13, 2014 addressed to Neal W. Dickert, Esquire, Hull Barrett P.C., P. O. Box 1564, Augusta, GA 30903-1564 and Paul K. Simons, Jr., Esquire, Hull Barrett P.C., 111 Park Avenue, S.W., Aiken, S.C. 29801 and upon Counsel for Georgia Bank and Trust Company of Augusta addressed to James S. Murray, Esquire, Warlick, Tritt Stebbins & Murray, LLP, P.O. Box 1495, Augusta, GA 30903-1495.



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January 13, 2014

The Honorable Jenny Abbott Kitchings
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Columbia, SC 29211

IN RE: Elite Construction, Inc. v. Doris E. Tummillo and Georgia Bank and Trust Co.
of Augusta
Civil Action No: 09-CP-02-958
Our File No: M09-577

Dear Ms. Kitchings:

Please file in the above-referenced matter the Initial Brief of the Respondent, Elite Construction, Inc., Designation of Matter to be included in the Record on Appeal and Proof of Service thereof upon all Counsel of Record. By copy of this letter, I am serving all Counsel with a copy of the Initial Brief and Designation.

Thank you for your assistance in these regards.

With best regards, I remain

Very truly yours,



Clarke W. McCants, III

CWM,III/aps

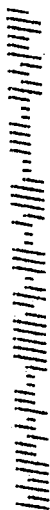
Enclosures

cc: Neal W. Dickert, Esquire
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