THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
James Martin Harvey, Jr., Special Referee

Case No. 2009-CP-02-000958

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 a Respondent.

Appellate Case No. 2013-001624

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S.C. Code Ann. § 29-5-10(a) (1976)

STATEMENT OF ISSUES ON APPEAL

I. 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?

II. 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 BY THE CONTRACT WITH APPELLANT IN THE CONSTRUCTION OF THE POLE BARN AT ISSUE?

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

IV. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN AWARDING ATTORNEY'S FEES TO THE RESPONDENT IN LIGHT OF ITS ERRONEOUS RULING ON THE ISSUED RAISED IN QUESTIONS I, II, AND III?

STATEMENT OF THE CASE

This case involves a contractual dispute over the construction of a pole barn by the Respondent, Elite Construction, Inc. (hereafter, "Elite"), for the Appellant, Doris E. Tummillo (hereafter, "Tummillo"). Appellant intended to use the barn for boarding horses (R. p. 149, lines 2-11). Most of the provisions of the parties' agreement are set forth in a written document dated July 16, 2008 (R. pp. 183-187). Tummillo contends that additional provisions were agreed to by the parties, and those provisions remain in much dispute in this case.[1]

After a disagreement arose between Tummillo and Elite over the payments Elite was claiming to be due under the contract, Elite left the job site on January 5, 2009, and subsequently filed a mechanic's lien on February 13, 2009 (R. pp. 33-36; R. p. 20, line 16–p. 21, line 9). This action was filed by Elite on May 1, 2009, against Tummillo and Georgia Bank and Trust Company of Augusta, for breach of contract and foreclosure of the mechanic's lien previously filed on February 13, 2009 (R. pp. 37-50). The Respondent, Georgia Bank and Trust Company of Augusta, was joined in the case by virtue of a mortgage given by Tummillo to the property which was the subject of the lien (R. p. 39, ¶3).

In Elite's complaint, it sought recovery for breach of contract, contending that it had complied with the terms of the contract with Tummillo. Elite claimed a breach of this contract in its first cause of action, and for the foreclosure of its lien filed in its second cause of action (R. pp. 37-50). Tummillo filed her answer and counterclaim on

[1] One additional provision not in dispute is that the contract initially required 45 stalls at a price of $358,379. By agreement of the parties, the number of stalls was reduced to 40 and the contract amount was adjusted accordingly (Transcript, p. 17, 64, 86).

May 29, 2009, in which she alleged that Elite had abandoned the contract before it was completed and denied any breach of contract as alleged in the complaint (R. pp. 51-56). Tummillo also filed a counterclaim against Elite and contended that she had incurred considerable expense to complete the contract after Elite abandoned the job, and that the delay caused by Elite's failure to promptly complete the job resulted in consequential damages in the form of lost rental income for the stalls which were the subject of the contract (R. pp. 51-56).

The case was ultimately referred with finality to Special Referee Martin Harvey in an order filed July 11, 2012 (R. pp. 28-32). The trial occurred before the Special Referee on July 12, 2012. At the trial, all parties stipulated that Respondent, Georgia Bank and Trust Company, had a valid mortgage lien on the property, which was the subject of this action, and that such lien was prior to and superior to the lien asserted by Elite. A stipulation was so entered July 12, 2013 at the beginning of the trial confirming this issue (R. p. 60). No issue is raised by either Tummillo or Elite relative to the legal standing or position of Georgia Bank and Trust Company of Augusta.

An order of judgment was filed on September 13, 2012, finding for Elite in the amount of Eighty Thousand, Two Hundred Four and 10/100's ($80,204.10) Dollars and reserving the issue of attorney's fees to be awarded at a subsequent hearing (R. pp. 17-28). On September 24, 2012, Tummillo filed its motion to alter or amend the judgment by requesting a reduction in the judgment based on deficiencies in stall size, asking the Court to afford Tummillo some relief on her counter claim for consequential damages, and requesting that the claim for attorney's fees to Elite be denied. (R. pp. 61-64).

On June 24, 2013, the court issued an order denying Tummillo's motion to alter and/or amend (R. pp. 12-16). The court thereafter issued an order to correct a clerical error in the order and judgment filed September 13, 2012, and issued an amended order and judgment filed on July 22, 2013 (R. pp. 1-11). Tummillo, after having been served with the order denying its motion to alter and/or amend, served her notice of appeal on July 24, 2013, both as to the amended order of judgment and the order denying Tummillo's motion to alter and/or amend.

The amount involved in this appeal involves the judgment of Eighty Thousand, Two Hundred Fourteen and 10/100's ($80,214.10) Dollars reflected in the amended order of judgment (R. pp. 1-11) and attorney's fees in the amount of Nineteen Thousand, Seven Hundred Ninety-Four and 40/100's ($19,794.40) Dollars (R. pp. 12-16).

ARGUMENT

I. 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?

Perhaps the most crucial issue in this case and the issue over which the parties most vehemently disagree is a provision concerning the stall size for the various horse stalls to be used for boarding horses. Tummillo contended throughout the case that the parties had agreed that the stall size was to be twelve (12) feet by twelve (12) feet, to be measured by the interior dimension of each stall (R. p. 150, lines 12-21; R. p. 154, lines 7-24; R. p. 155, lines 8-25; R. p. 171, lines 3-20). There appears to be no dispute that the written contract itself is silent as to the stall size (R. pp. 183-187). The law is quite clear, however, that where a contract is ambiguous or silent as to a particular provision, parole evidence is admissible to supplement (not contradict) the terms of a written agreement. Parole evidence is admissible to supply a portion of the agreement to which the written contract is silent and to explain the true meaning and intention of the parties. ***Columbia East Associations vs. Bi-Lo***, 299 S.C. 515, 386 S.E. 2d 259 (Ct. App. 1989); ***Maddox vs. Cassady***, 289 S.C. 57, 344 S.E. 2d 620 (Ct. App. 1986).

There is no dispute that the parties agreed that the forty (40) stalls were to be constructed in the pole barn, and that the stalls were to be 12' x12'. (R. p. 110, line 17–p. 111, line 1; R. p. 112, lines 14-20; R. p. 114, lines 20-22; R. p. 126, lines 19-21; R. p. 127, lines 2-4; R. p. 133, lines 1-20; R. p. 150, lines 18-21). There is further no dispute that a 12' x 12' stall is the standard in the industry for full-size

thoroughbreds, as testified to by Elite's expert and as written in a reliable article from by Penn State University (R. p. 143, lines 3-11; R. p. 146, lines 15-22). The dispute is not whether the parties, through their amended contract, intended a 12' x 12' stall. The issue is how to measure the stall. As most thoroughbred horses are seven (7) to eight (8) feet in length, the standard recommended stall (12' x 12') is 1½ times the length of the horse (R. p. 146, lines 19–p. 147, line 12). Tummillo testified that she clearly agreed that the stalls would be measured by interior space (R. p. 150, lines 12-21). Elite, on the other hand, contends the measurement should be center post to center post (R. p. 110, line 17–p. 111, line 12). When adding the thickness of the post and interior boards, the ultimate stall dimensions for such size would be less than 12' x 12' (R. p. 112, lines 2-18). Elite estimated that this difference would be 3'' to 9" (R. p. 119, lines 9-19). While this amount of reduction might not seem significant, Tummillo believes it is with horses. A one foot reduction in stall size amounts to a twenty-five (25%) percent reduction in available space for an eight (8) foot horse (R. p. 147, lines 7-12). The Special Referee concluded that the contract (with the drawings attached) was unambiguous (R. pp. 183-196) and stated its conclusions as follows:

> The Document is clear in its terms. A combined reading of the document with its attached specifications and plan indicates the stalls were to be built as 12 feet on center not interior dimensions. Had the parties intended for the stalls to have interior dimensions of 12 feet, the exterior perimeter would have essentially had to measure larger than the Document provided (R. p. 5).

Tummillo contends that the "Document" is far from clear. No stall size is given. While the court extrapolates from the drawing the size of the pole barn, there

is nothing upon which the Court can conclude the precise dimensions of the barn. This is a "U" shaped configuration (R. p. 110, line 4-11). The thirty (30) stalls are located under one roof and the ten (10) stalls are attached in separate wings (R. pp. 201-204). For the court to conclude that the measurement of 204' or 136' (as contained in the drawing) necessarily represents the confines of the building, is not supported by the testimony and is speculative. There is nothing upon which the court can conclude that the ten (10) stalls on the two (2) wings have any measurement at all (R. pp. 188-196).

The trial court erred in not considering the evidence of the parties on the stall size, and in concluding the parties' intention with regard to stall size solely from the documents tendered.

II. 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 BY THE CONTRACT WITH APPELLANT IN THE CONSTRUCTION OF THE POLE BARN AT ISSUE?

If the Court correctly interpreted the contract by concluding that the stall size was 12' x 12', center post to center post, the Court ignored the fact [as reflected in Defendant's Exhibit Eighteen (18)], that only three of the forty stalls had center post measurements of at least twelve (12) feet (R. p. 270; R. p. 177, lines 1-15).

There is no dispute that stall size was critical. As testified by Elite's expert, most horses are seven (7) to eight (8) feet in length from the tip of the nose to the end of the tail (R. p. 142, lines 8-9). This expert relied upon a study at Penn State

University, which suggests stalls be one and one-half (1½) times the length of the horse (R. p. 142, line 7; R. p. 147, lines 3-6). Consequently, an eight (8) foot horse would require a twelve (12) foot stall. Horses need room to move around, stand up, sit down, and room for the trainer to bring it food. A small size also creates potential danger for a horse (R. p. 155, lines 14-25). Mr. Key, the president of Elite, suggested that the twelve (12) foot center post to center post measurement would result in stall sizes between 11'3" and 11'9" (R. p. 119, lines 9-19). The actual measurements of the various stall sizes constructed by Elite show that the sizes of the stall do not meet Mr. Key's criteria (R. p. 207). Twelve (12) of the stalls have at least one interior measurement less than eleven (11) feet. None of the stalls have a measurement greater than 11'6" (R. p. 207). As reflected by Defendant's Exhibit Eighteen (18), thirty-seven (37) of the forty (40) stalls show center post to center post measurements of substantially less than the 12' x 12'. Only three stalls meet or exceed 12' (R. p. 270).

The Court ignored this clear breach of the agreement by Elite. This issue was raised by Tummillo in her motion to alter or amend (R. p. 61-65). When addressing the issue raised by Tummillo's post-trial motion, the Court stated,

> A. Stall Size. Plaintiff agreed to construct "12 by 12" stalls for Tummillo. The testimony of certain witnesses, including the Plaintiff's expert witness, which I find to me more credible than conflicting evidence of other witnesses, shows that the term "12 by 12", as used in the construction and equestrian industry, does not refer to actual measurements, but rather to nominal dimensions. The term "12 by 12" is used to describe (sic) stalls of an approximate, but not exact, size. While it is undisputed that a number of the stalls constructed by the Plaintiff do not actually measure "12 feet by 12 feet" there is nothing in the Parties' written agreement which sets

forth a requirement that the stalls be so precisely constructed. (R. pp. 12-13).

The irony is that the trial court used very precise mathematical calculations to determine that the contract was unambiguous and required 12' x 12', center post to center post. In paragraph six (6) of the Order of Judgment and Amended Order of Judgment, the court stated the following:

> It is not difficult to ascertain the interior dimensions by referring to Exhibits 1 and 2. The drawings provide for 10 groups of three stalls each in the main section, separated by 4 interior aisles allowing access to the stalls, with 2 aisles on each end. Two aisles run the length of the main structure. Building Specifications attached to Ex. 1 provide the aisle-ways to be 14 feet in width. Six total short aisles on the main section at 14 feet each amounts to 84 feet, leaving 120 feet to account for the 10 stalls [120 feet ÷ 10 stalls = 12 feet/stall]. Two long aisles of 14 feet each on the main section amounts to 28 feet, leaving 36 feet to account for the rows of 3 stalls [36 feet ÷ 3 stalls = 12 feet/stall]. I accept as credible and consistent with the plans Chris Key's explanation that the posts of each stall were placed at 12 feet on center and that interior dimensions of each would necessarily be smaller due to the diameter of the support posts and the thickness of the material used to construct the interior walls (R. p. 3; R. p. 19).

If the court concluded with precise certainty that the contract was unambiguous, and required 12' x 12', center post to center post, it is antithetical for it to also say that this dimension is merely "nominal." This deviation from the required amount varies from six (6%) percent to twelve (12) percent, depending upon the calculation, which are pure mathematical square foot calculations that could have been made by the court and were presented throughout the testimony of Dr. Tummillo and the trial exhibits (R. p. 207; R. p. 270; R. p. 157, line 8–p. 158, line 12).

The case of ***McPherson v. J.E. Sirena and Company***, 206 S.C. 183, 33 S.E.2d 501 (1945) is instructive. ***McPherson*** involved the removal of a partner to a partnership. The issue in the case related to the valuation of the partner's interest. Different valuations were used depending upon the circumstances surrounding the termination. Since the partner was removed by vote of the partnership, he argued that his being paid an amount substantially less than the value of his interest was harsh, oppressive, and confiscatory. The court rejected this argument. In the words of the court,

> As we have hereinbefore stated, the action is founded on the partnership contract and of course, when it is found that the language of the contract covers the matter in controversy, the issue is decided by merely applying the language of the contract to the facts. 206 S.C. at 204, 33 S.E.2d at 510.

The trial court has used the language of the agreement, and the specifications attached, to conclude the precise measurements of the stalls. It cannot now conclude that these measurements are merely "nominal." As stated in ***McPherson***, the court must apply the "language of the contract to the facts."

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

A critical issue relating to Appellant's counterclaim relates to the issue of "time being of the essence" in the agreement.

It is true that there is no provision in the written contract that spells out a date of completion. The absence of that date in the written contract does not preclude the parties entering into an oral agreement, so long as it does not contradict the written terms (See Section I of Argument). The evidence supports the conclusion that such occurred. Both Mr. Key and Tummillo testified that construction was to begin "as soon as possible" with the project completion date of November, 2008 (R. p. 105, lines 20-22; R. p. 128, lines 1-7; R. p. 151, lines 5-22). One case decided by the Supreme Court has facts very similar to this dispute and lays out the applicable legal principles to consider. ***Kline Iron and Steel Co. vs. Superior Trucking***, 261 S.C. 542, 201 S.E. 2d 388 (1973), involved an agreement between Kline Iron and Steel Co. and Superior Trucking for the transportation of a truckload of fabricated steel from Casey, South Carolina, to Shoreview, Minnesota. The shipment was consigned to Hamilton Erection Company, who was in the process of erecting a television tower for Kline at Shoreview, Minnesota. The shipment was coordinated through Kline's traffic manager. The necessity for urgent delivery by August 26, 1970, was emphasized to Superior Trucking. When the shipping documents were signed, they contained the notation "8/26 Delivery or ASAP." The evidence further revealed Kline had advised the shipper that if the materials were not delivered in a timely fashion, they had employees on the job site that would not be able to work, and that Kline

would incur "standby time" for these workers. Evidence was introduced as to the value and cost of this standby time. Superior Trucking argued that the term, "as soon as possible" meant "as soon as possible after August 26th" and not "by August 26th or sometime before that." The jury heard the evidence and awarded damages to Kline in that the materials did not arrive until September 1st. The Supreme Court affirmed. The Court initially addressed the issue of the meaning of "ASAP". In the words of the Court,

> The phrase 'or as soon as possible' was susceptible of more than one interpretation, that is, whether 'as soon as possible' prior to August 26th or after that date. Its meaning depended upon the intention of the parties, and under the conflicting testimony on the issue, was properly submitted to the jury for determination. The contention that there was no evidence to show that defendant failed to deliver the goods as agreed is without merit. 261 S.C. at 546, 201 S.E.2d at 390.

The court further went on to say,

> There was testimony from which it was reasonably inferable that defendant accepted the shipment of structural steel knowing that it was urgently needed by the consignee and that the delivery of the shipment not later than the agreed date was absolutely necessary to the uninterrupted construction of the television tower. There was also testimony that construction of a television tower was a highly specialized business requiring specially qualified workmen who, in order to have them available, had to be employed on a full-time basis. 261 S.C. at 546, 201 S.E.2d at 391.

The evidence presented by Tummillo and Mr. Key is strikingly similar to the evidence presented in the ***Kline*** case. Both Tummillo and Mr. Key testified that there was a sense of urgency about completing this barn (R. p. 105, lines 20-22; R. p. 128, lines 1-7; R. p. 151, lines 5-22). Tummillo testified that the time to rent the stalls was during

the winter months, and that it was essential for the job to be completed during the month of November (R. p. 151, lines 5-22). She testified that she paid a premium to Elite for this benefit (R. p. 152, lines 1-3). While Mr. Key denied in his testimony that any premium was paid on the contract, he did clearly state that November was the date for the job to be finished (R. p. 128, line 1–p. 129, line 15). The barn was not completed on January 5, 2009, when Elite left the job.

It is important to note that Elite did not begin the job until October 2, 2008 (R. p. 106, lines 5-12). It was clear that the concrete pad upon which the barn would be constructed had to be completed before Elite could begin work and the building permit needed to be obtained (R. p. 102, lines 13-16; R. p. 102, lines 4-11; R. p. 130, line 17–p. 131, line 2). The unrefuted testimony from Tummillo is that the site work was completed before September 4, 2008, and the contractor who did the site work was paid on September 4, 2008 (R. p. 269; R. p. 174, line 11–p. 175, line 1).

The Court made an erroneous finding in addressing this issue. It found in the amended order and judgment,

> Elite's commencement of construction was predicated on Tummillo's completion of site preparation and obtaining the building permit (R. p. 6).

In its order denying the motion to amend, the Court concluded that,

> The evidence taken as a whole indicates that the Plaintiff was not able to commence construction of the barn until the building site was fully prepared and a building permit was obtained. Tummillo was responsible for satisfying these requirements, both of which were delayed to some degree (R. p. 13).

Tummillo was responsible for the site work. It was completed by September 4, 2008 (R. p. 174, line 11–p. 175, line 23). The building permit was solely the responsibility under the contract of Elite. Paragraph six (6) of the Terms of Sale (R. p. 185) provides, "Builder is responsible for obtaining any required building permits prior to erection." On page one (1) of the Purchase Contract, "Miscellaneous" provides, "Building permitted (sic) will be provided by Elite Construction" (R. p. 184). Mr. Key testified that he did obtain the building permit and started construction on October 2, 2008 (R. p. 102, lines 13-16; R. p. 106, lines 5-12; R. p. 197-200). Tummillo, in unrefuted testimony, stated that Elite delayed the start of this time sensitive job by a month because Mr. Key told her his firm was "busy" (R. p. 153, lines 3-8). The court made the erroneous conclusion that the month delay was the responsibility of Tummillo.

Elite contends that it did not complete the job because it was not paid (R. p. 122, lines 20-25). The contract provided that Elite's third draw from Tummillo was not due until all the outside walls had been erected (R. p. 183-187). While Mr. Key contends that had occurred, the photographs and testimony of Mr. Mike Tummillo show that the outside walls had not been finished (R. p. 178, lines 15-20; R. p. 208-212). This breach of the contract by Elite not only caused a delay in the work, but Elite's decision to walk off the job of a half-finished project in the middle of the rental season caused damages in lost rental income. The entire winter season – estimated to be three months – was lost (R. p. 159, line 14–p. 160, line 11). Each stall, according to Tummillo's testimony, rents for $10 per day. Forty (40) stalls would rent for $400 per day, which would equal $12,000 per month (R. p. 160, lines 4-11). Since the barn was ultimately completed, Dr. Tummillo does have experience in renting these stalls and, therefore, a basis from which

to give this opinion (R. p. 160, lines 12-17). Dr. Tummillo considers herself a person with knowledge of and familiarity with renting stalls for boarding horses (R. p. 159, line 14–p. 160, line 17; R. p. 165, lines 12-25).

The court denied Tummillo damages based upon the erroneous conclusion that Tummillo breached the contract first, which cannot be supported (R. p. 6). Elite breached the contract first by not starting in a timely fashion, and the rule set forth in ***Silver v. Aabstract Pools & Spas, Inc.***, 376 S.C. 585, 658 S.E.2d 539 (Ct.App. 2008), should not bar Tummillo's recovery.

The trial court's conclusion that Tummillo's claim for damages is too speculative also does not stand scrutiny. To recover lost income, three criteria must be met: (1) The profits must have been lost as a natural consequence of the breach; (2) The damages must be foreseeable; and (3) The profits must be established with reasonable certainty. ***Drews Co. vs. Ledwith-Wolfe Associates, Inc.***, 296 S.C. 207, 371 S.E.2d 532 (1988). This case clearly held that the fact that a business is new is not an absolute bar to recovery, so long as the profits are established with "reasonable certainty." ***Drews***, 296 S.C. at 214, 371 S.E.2d at 536.

The case of ***S.C. Federal Savings Bank vs. Thornton-Crosby Development Co.***, 310 S.C. 232, 423 S.E.2d 114 (1992) is analogous to this dispute. In ***Thornton-Crosby***, a developer entered into a contract for the construction of a high-rise condominium unit at Garden City. The financing was provided in the form of a construction loan. The builder fell behind in the project, liens were filed by subcontractors, and eventually the builder entered an option to purchase the development. Ultimately, the builder abandoned the project and the lender foreclosed. The developer cross-claimed against the builder and

surety. It offered evidence of pre-sales of the condominiums (approximately half of the units), expenses, and anticipated sales. The Master-in-Equity awarded damages, which was affirmed by the Supreme Court.

Vortex Sports and Entertainment, Inc. vs. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), involved a claim of breach of fiduciary duty and tortious interference with contracts. Essentially the claim involved an agent of one sports agency firm (Vortex) leaving that firm, working for a competitor (CSMG) and taking clients (professional athletes) with him in the process. The issue of lost profits was raised in an appeal of an award of "lost profits" against the agent leaving his former company and his new company (CSMG). Evidence of the athletes who actually left Vortex was presented. The Court affirmed the award of damages.

In the present appeal, Dr. Tummillo testified to her familiarity with the horse boarding rental business, her knowledge of boarding rates based upon her knowledge of the business and subsequent rental of her stalls after the pole barn in dispute was completed (R. p. 159, line 14–p. 160, line 14; R. p. 165, lines 12-25). This should be legally sufficient to support an award. The Court below should have considered and allowed damages to Tummillo.

IV. DID THE TRIAL COURT ERR IN ITS AMENDED ORDER OF JUDGMENT IN AWARDING ATTORNEY'S FEES TO THE RESPONDEN IN LIGHT OF ITS ERRONEOUS RULING ON THE ISSUES RAISED IN QUESTIONS I, II, AND III?

A suit for the foreclosure of a mechanic's lien provides for the recovery of reasonable attorneys' fees by the "prevailing party." SC Code, Ann. §29-5-10(a) (1976).

In determining the award for attorneys' fees, one of the issues becomes who is the "prevailing party." This decision is based upon the verdict in the action. The party whose offer is closer to the verdict is deemed to be the prevailing party. Where no written offers of settlement are made, the amount prayed for in the complaint is considered the plaintiff's offer of settlement. Elite claimed a lien in the amount of $126,160.37. No amount was pled in the counterclaim of Tummillo. The request at trial was for three months of rentals at $12,000 per month. An award that it is closer to the amount which Tummillo requested would have resulted in Tummillo having been the prevailing party and entitled her to attorneys' fees. In the case of ***Brazington Tile Co. vs. Wooley***, 327 S.C. 280, 491 S.E.2d 244 (1997), the homeowner was awarded attorneys' fees against a contractor in an action to foreclose a lien. In the complaint, the contractor asserted the amount of $34,000. While the homeowner did not make a settlement demand, his offer was considered to be zero under the Statute. When the contractor was awarded $15,000 by the jury, the homeowner was considered to be the prevailing party and entitled to attorneys' fees. Although this case has received some negative treatment due to the amendments to the Statute, the relevant parts still continue to be good law. See ***J.R.S. Builders, Inc. vs. Neunsinger***, 364 S. C. 596, 614 S.E.2d 629 (2005).

Given the overstatement of the Elite's claim, the fact that the court erred in its treatment of the issues raised in Section I, II, and III, the amount awarded should be closer to Tummillo's request than the amount of Elite's claim of lien. If the Court remands this case to the trial court as requested, the issue of attorneys' fees should be reconsidered.

CONCLUSION

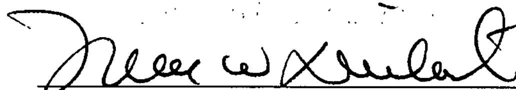
The trial court erred in not considering the testimony of the parties to determine the true intention of the parties relating to stall size. If the trial court did not err in its conclusion that the contract was clear on its face, the decision to "overlook" the deficiency in stall size as mere "nominal" was erroneous.

The decision by the trial court finding fault on Tummillo for the delay in beginning construction on the contract and the finding that Tummillo's lost profit evidence was legally insufficient cannot be supported.

The issues raised in Section I, II, and III should be remanded. Upon remand, the claim of attorney's fees based upon which party is "prevailing" must be revisited.

March 21, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
James Martin Harvey, Special Referee

Case No. 2009-CP-02-0958

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

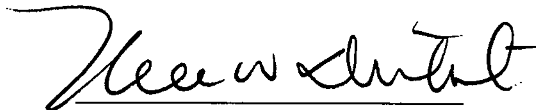
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

PROOF OF SERVICE

I certify that I have served the ***Final Brief of Appellant*** on Elite Construction, Inc. and Georgia Bank and Trust Company of Augusta, by delivery by the U. S. Mail with sufficient postage thereon, on March 21, 2014, addressed to each parties' respective attorney of record: Mr. Clarke W. McCants, III, Esq.; Nance McCants & Massey; 218 Newberry Street, S.W.; Aiken, South Carolina; 29801 and Mr. James S. ("Jeb") Murray; Warlick, Tritt, Stebbins & Murray; 209 7th Street, Suite 300; Augusta, Georgia; 30901.

March 21, 2014



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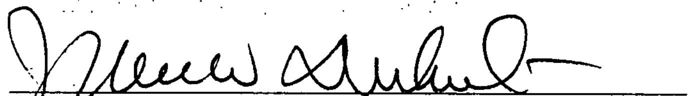
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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