

**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

FINAL REPLY BRIEF OF APPELLANT

**Neal W. Dickert
T. Paul Timmerman
Hull Barrett, PC
P. O. Box 1564
Augusta, Georgia 30901-1564
(706) 722-4481
Attorney for Appellant, Doris E. Tummillo**

**Clarke W. McCants, III
Nance McCants & Massey
218 Newberry Street, S.W.
Aiken, South Carolina 29801
(803) 649-6200
Attorney for Respondent, Elite Construction, Inc.**

**James S. ("Jeb") Murray
Warlick Tritt Stebbins & Murray
P. O. Box 1495
Augusta, Georgia 30903-1495
(706) 722-7543
Attorney for Respondent, Georgia Bank and
Trust Company of Augusta**

RECEIVED
MAR 21 2014
SC Court of Appeals

TABLE OF CONTENTS AND CASES

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Arguments.....	2
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?.....	2
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?.....	3
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?.....	5
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 ISSUES RAISED IN QUESTIONS I, II, and III?.....	6
Conclusion.....	7

TABLE OF AUTHORITIES

CASES

<u>Columbia East Associations vs. Bi-Lo,</u> 299 S.C. 515, 386 S.E. 2d 259 (Ct. App. 1989).....	5
<u>Maddox vs. Cassady,</u> 289 S.C. 57, 344 S.E. 2d 620 (Ct. App. 1986).....	5
<u>Drews Co. vs. Ledwith-Wolfe Associates, Inc.,</u> 296 S.C. 207, 371 S.E.2d 532 (1988)	15
<u>Kline Iron and Steel Co. vs. Superior Trucking,</u> 261 S.C. 542, 201 S.E. 2d 388 (1973)	11

STATUTES

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 ISSUES RAISED IN QUESTIONS I, II, AND III?

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?

The law is clear that where a contract is subject to multiple interpretations as a result of an ambiguity, parole evidence is admissible to determine the true intentions of the parties *Columbia East Associates 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). The contract between the parties does not contain language detailing the interior dimensions of the forty (40) stalls. The parties had a fundamental disagreement. Appellant, Doris E. Tumillo (hereafter, "Tumillo") testified that, in her opinion, the agreement required twelve (12) feet by twelve (12) feet interior space for each stall (R. p. 150, lines 12-21). Mr. Key, president of the Respondent, Elite Construction, Inc. (hereafter, "Elite"), disputed this contention, contending that the 12' x 12' was to be measured center-post to center-post, which means the interior dimension would be less than 12' x 12' (R. p. 110, lines 17-24; R. p. 112, lines 2-24; R. p. 119, lines 6-19). The Special Referee should have considered the testimony of the parties and made a determination as to the true intention of the parties. In his finding, he failed to do that, concluding that the contract was unequivocal in setting forth interior dimensions of 12' x 12' measured on center posts (R. p. 5).

The contract documents and specifications do not support the Special Referee's finding. While it is true that a portion of the stalls are diagrammed

in the attachments to the contract, it is important for this Court to recognize that the shape of this barn involves forty (40) stalls, thirty (30) of which are located under one roof, with five (5) stalls each attached in separate wings off of the thirty (30) stalls across the front of the barn (R. pp. 188-196; p. 201, p. 202, p. 203, and p. 204). There is absolutely nothing from the drawing that would allow the court to conclude that the stalls on the wings have any measurement at all (R. pp. 188-196).

The court should have concluded that the contract was ambiguous considering the language of the contract, the diagram and the dimensions. The Special Referee should have made a factual and legal finding as to whether the interpretation placed upon the contract by Tummillo, or the interpretation placed upon the contract by Mr. Key, was a correct way to measure the stall dimensions of the pole barn. Having failed to do so, this case should be remanded to the Special Referee to make that assessment and finding consistent with the law and the facts of the case.

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?

Even if the Special Referee correctly ruled that the contract was clear and unambiguous in determining the stall size (center post to center post), his order failed to recognize or consider the unequivocal evidence that Elite failed to comply with its version of the contract.

The evidence is uncontradicted that Elite did not deliver stalls that measured 12' by 12', "center-post to center-post." The Court ignored the evidence that revealed that only three of the forty stalls had measurements of twelve feet from center post to center post (R. p. 270). Tummillo testified as to the importance of the stall size in construction of this barn and the risk to the safety of the horses from stalls too small (R. p. 155, lines 14-25). The trial court totally ignored this deficiency. While Elite's president, Mr. Key, testified that the use of the measurement center-post to center-post would only reduce the interior stall size by a matter of three (3) to nine (9) inches, some of the stalls had interior dimensions that were less than eleven (11) feet, more than a foot shy of the promised amount (R. p. 119, lines 6-19; R. p. 207). While Tummillo's argument that the agreement provided for 12' by 12' interior dimensions was rejected, the court cannot completely disregard the unqualified deficiency in Elite's work, as measured by Elite's version of the agreement.

Elite wants to argue that this contractual agreement of 12' x 12' was only a "nominal" measurement. Yet, their expert testified this size to be an industry standard (R. p. 142, lines 1-18). While it could be argued that a ten (10%) to fifteen (15%) percent reduction in the agreed-upon size of certain construction might be inconsequential, it is hard to make that claim when seventy-five (75%) percent of the usable space in a horse stall is taken up by a horse that is seven (7) or eight (8) feet in length. A one-foot deduction in the stall size essentially constitutes a considerable reduction in the available space for the horse to move around, get up and down, and otherwise occupy the stall.

Tummillo respectfully requests that this Court remand this case to the trial court to determine the amount of offset or credit to which Tummillo should be entitled.

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?

Elite accepts the premise that the damages from the loss of revenue need to be proven to a "reasonable certainty." *Drews Co. vs. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988). Tummillo respectfully submits that the required level of certainty was met by her testimony. Any testimony as to future loss of income is, by virtue of its nature, "an estimate." Tummillo testified to this estimate based upon her experience in renting these stalls and her knowledge as to the reasonable rental value of the stalls in the community (R. p. 159, line 8–p. 160, line 14; R. p. 165, lines 12-25).

The decision of the trial court ignored the fact that the parties had an agreement to complete this project "as soon as possible." Elite's contention that there was not an agreement that time was of the essence is belied by the record. As pointed out in our initial brief, an agreement to complete a project "as soon as possible" can be enforced. See *Kline Iron and Steel Co. vs. Superior Trucking*, 261 S.C. 542, 201 S.E.2d 388 (1973). The testimony of Mr. Key and Tummillo is substantially the same. Both acknowledged the urgency to finish the job in November ahead of the winter boarding season (R. p. 128, line 1–p. 129, line 10;

R. p. 151, lines 5-22). The site work was completed and paid for in early September and a month passed before Elite began work (R. p. 174, line 10–p. 175, line 23; R. p. 269).

The entire winter season of 2008-2009 was lost to Tummillo, and Elite left the job unfinished on January 5, 2009 (R. p. 103, lines 5-23). The estimate of lost revenue was based upon three months of lost income that would have been received had the job been completed in a timely fashion (R. p. 159, line 14–p. 160, line 11; R. p. 165, lines 12-22). Elite should not be allowed to ignore its agreement. There was clearly enough evidence for the Special Referee to make a finding of some assessment of responsibility on Elite for the tardiness in starting the project and leaving Tummillo with a half-finished barn in the middle of the boarding season.

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?

Tummillo does not dispute that the determination as to the award of attorneys' fees is based upon which party is the "prevailing party." S.C. Code Ann. §29-5-10(a) (1976). The problem with Elite's position is that the Special Referee's error in his consideration of the issues raised above raises doubt as to the correctness of the decision concluding that Elite was the prevailing party. Elite sued for One Hundred Twenty Six Thousand, One Hundred Sixty and 37/100's (\$126,160.37) Dollars. Without consideration of any possible offset, the Special Referee ordered the judgment of Eighty Thousand, Two Hundred Four

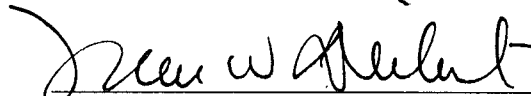
and 10/100's (\$80,204.10) Dollars, or a difference of a few dollars shy of Forty-Six Thousand (\$46,000) Dollars of the amount requested. With any consideration at all of even a nominal loss because of the delay, or the deficiency in the stall size produced under Elite's version of the facts, the question of which party is prevailing may be different. This issue needs to be reassessed in light of the error committed in other substantive questions presented.

CONCLUSION

The Court should remand this case in consideration of the foregoing issues addressed in the brief of Tummillo.

March 27, 2014

Respectfully submitted,



Neal W. Dickert
Paul K. Simons
HULL BARRETT, PC
P. O. Box 1564
Augusta, Georgia 30901-1564
(706) 722-4481
Attorneys for Appellant, Doris E. Tummillo

**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

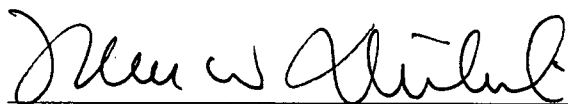
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

CERTIFICATE OF COUNSEL

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

March 21, 2014



Neal W. Dickert
Paul K. Simons
Hull Barrett, PC
P. O. Box 1564
Augusta, Georgia 30901-1564
(706) 722-4481
Attorneys for Appellant, Doris E. Tummillo

RECEIVED

MAR 21 2014

SC Court of Appeals

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

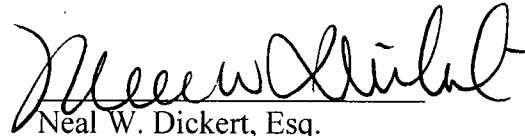
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

PROOF OF SERVICE

I certify that I have served the *Final Reply 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



Neal W. Dickert, Esq.

Paul K. Simons

HULL BARRETT, P.C.

P.O. Box 1564

Augusta, GA 30903

Phone: 706-722-4481

Facsimile: 706-722-9779

Attorneys for Appellant

RECEIVED

MAR 21 2014

SC Court of Appeals