

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

JUL 29 2015

SC Court of Appeals

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

MOTION FOR REHEARING OF APPELLANT

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MOTION FOR REHEARING

Now comes the Appellant, Doris E. Tummillo, and files her motion for rehearing in accordance with South Carolina Appellate Court Rule 221, and in support thereof states the following.

GROUND FOR THE MOTION

Appellant respectfully requests this Court grant rehearing from its decision dated July 15, 2015, in that the Court misapprehended and misconstrued the decision of the Special Referee as one based on factual findings as opposed to an erroneous legal conclusion and analysis. The decision of the Special Referee concluded, as a matter of law, that the contract at issue was not ambiguous as to stall size. This case should be reheard by this Court and the case remanded for the Special Referee to make appropriate factual findings to make a determination as to the meaning of this clearly ambiguous contract.

CITATION OF AUTHORITIES IN SUPPORT OF THE MOTION

In the Amended Judgment and Order dated July 22, 2013, the Special Referee made the following ruling with regard to the issue of stall size in the contract.

A court considering a case involving a contract must give effect to the intent of the parties as expressed by their written memorandum of their agreement. When a contract document is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. *C.A.N. vs. South Carolina Health and Human Services*, 296 S.C. 373, 373 S.E.2d 584 (1988).

The Document is clear in its terms. A combined reading of the Document, with its attached Specifications and the plans, indicates the stalls were to be built as 12 feet on center, not on interior dimensions. Had the parties intended for the stalls to have interior dimensions of 12 feet, the exterior perimeter would of necessity have had to measure larger than the Document provided (R at p. 005).

The Special Referee concluded, as a matter of law, that the contract was not ambiguous, and that there was no issue of fact for him to determine. The Special Referee concluded, in his interpretation of the contract, that stall size was to be 12 feet by 12 feet, center post to center post. The decision of this Court to uphold the Special Master's finding was based upon the Special Master making "**factual findings**" as to all the critical issues. The rule for reviewing factual findings, as cited by this Court, is that appellate courts do not disturb factual findings unless "wholly unsupported by the evidence." *Butler Contracting, Inc. vs. Court Street, LLC*, 369 S.C. 121,127, 631 S.E. 2d 252, 256 (2006). As is apparent from the ruling, the Special Referee did not make a factual finding, but made an incorrect legal conclusion that the contract was not ambiguous, and therefore not subject to consideration of parole evidence to explain this ambiguity.

Appellant is aware that petitions for rehearing must show points overlooked or misapprehended by the Court. Such motions are not intended to present points that counsel may have overlooked. *Arnold vs. Carolina Power and Light*, 168 S.C. 163, 167 S.E.2d 234 (1933). Here, the Court overlooked the rule that where a contract is subject to multiple interpretations as a result of an ambiguity, parole evidence is admitted to determine the true intentions of the parties. The Special Referee did not make factual

findings, but construed the contract as unambiguous. The Special Referee erred in his legal ruling. An ambiguity exists in this contract and the matter should be remanded to the Special Referee to make factual findings to interpret this ambiguity. It is this court's responsibility to recognize an ambiguity in a contract when determining whether the trial court appropriately relied on the contract language. *Wallace v. Day*, 390 S.C. 69, 700 S.E.2d 446 (2010). If a trial court erroneously concludes that a contract is unambiguous, this Court should remand the case for an error of law. See *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009).

As this court said in the *Day* case:

A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302. "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." *Pee Dee*, 381 S.C. at 242, 672 S.E.2d at 803. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303. "The determination of the parties' intent is then a question of fact." *Id.*

It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, the trial court needs to resolve this ambiguity from the evidence presented. The determination of the parties' intent is then a question of fact, as stated by the *Day* case.

Here the Special Referee made the determination that the language of the contract was unambiguous. Thus, he did not weight the evidence and make the required factual finding.

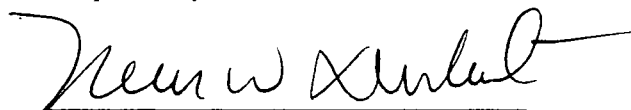
The parties agreed that the horse stalls were to be twelve (12) feet by twelve (12) feet (R- p. 110, line 17; R-p. 111, line 1; R-p. 112, lines 14-20; R-p.114, lines 20-22; R-p. 126; lines 19-21; R-p. 127, lines 2-4; R-p. 133, lines 1-20; R-p. 150, lines 18-21). The Special Referee determined that this term was unambiguous and could only mean from center post to center post. The issue was whether to measure the size from center post to center post or interior measurement of the stalls. The parties disagreed (R-p.150, lines 12-21; R-p.110, line 7; R-p. 111, line 12). Appellant contends that the determination of the meaning of this ambiguity was a factual issue that should have been determined by the Special Referee.

CONCLUSION

The agreement between the parties was ambiguous and the Special Referee's ruling that it was not cannot be supported.

July 28, 2015

Respectfully submitted,



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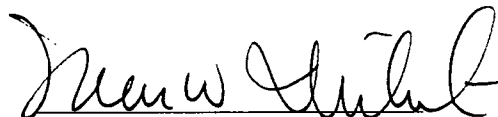
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CERTIFICATE OF SERVICE

I certify that I have served the *Motion for Rehearing 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 July 28, 2015, 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.

July 28, 2014



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