

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

The Honorable J. Martin Harvey, Special Referee

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Case No. 09-CP-02-958

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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 August is the Respondent

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AUG 12 2015

SC Court of Appeals

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RESPONDENT ELITE CONSTRUCTION, INC.'S RETURN TO APPELLANT'S PETITION  
FOR REHEARING

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As set forth in her Motion for Rehearing the Appellant contends that the Court misapprehended and misconstrued the decision of the Special Referee. The Appellant contends that the Court should view that decision as based on an erroneous legal conclusion and analysis, as opposed to one based on factual findings.

As set forth in its Appellant's Brief for this matter, 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).

The Respondent respectfully contends that the Special Referee's decision is not only supported by the facts presented at trial, but also by the legal principles applicable here.

The Special Referee found that the Parties' contractual document was not ambiguous, and clearly set forth the type, nature and specifications of the barn to be constructed. As he noted, the document, in fact, sets forth that the barn is to be built as "12 feet on center, not interior dimensions." Thus, there is no specific reference in the contract to the interior dimensions of the barn stalls.

The Appellant contends that the Respondent verbally promised that the interior dimensions of the stalls would actually measure "12 feet by 12 feet." The Respondent denies that such a specific promise was made, and any verbal communications regarding the actual interior stalls centered around the concept of nominal and not actual measurements. That is, the stalls would be "12 by 12".

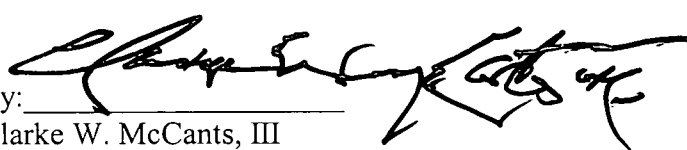
Both lay and expert evidence was offered to the Special Referee to assist him with understanding this concept. . Columbia East Associations v. Bi-Lo, 299 S.C. 515, 386 S.E. 2d 259

(Ct. App. 1989); Maddox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986). That evidence shows that the building specifications of the barn, as outlined in the Parties' written agreement, necessarily results in stall dimensions not measuring exactly "12 feet by 12 feet." In addition, evidence was offered to support the proposition that it is commonly known and accepted in the equestrian industry that the term "12 by 12" means that the interior of barn stalls are approximately "12 feet by 12 feet".

Thus, while the parties' written agreement as to building specifications is clear, parole or similar evidence is helpful in aiding the Court with an understanding of the type of structure involved in this case and expectations of the Parties. The Special Referee considered all of this evidence in reaching his rulings here, and specifically with respect to his finding that the Parties' agreement is not ambiguous.

Having made that finding, which is supported by the evidence, there is no reason to remand this matter to the Special Referee for further findings. The Respondent respectfully submits that the Appellant's Motion for Rehearing should be denied.

NANCE, MCCANTS & MASSEY

By:   
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August 10, 2015

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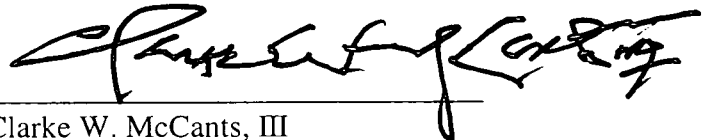
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PROOF OF SERVICE

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I certify that I have served a copy of the Respondent's Return to Appellant's Petition for Rehearing on counsel for the Appellant, Neal W. Dickert, Paul K. Simons, Jr, and T. Paul Timmerman by depositing a copy of it in the United States Mail, postage prepaid on August 10, 2015 addressed to Neal W. Dickert, Esquire, and Paul K. Simons, Jr., Esquire, Hull Barrett P.C., P. O. Box 1564, Augusta, GA 30903-1564 and T. Paul Timmerman, Esquire, Braithwaite Law Firm, P.O. Box 324, Aiken, S.C. 29802 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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