

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED
OCT 16 2015

S.C. Supreme Court

[Unpublished] Opinion No. 2015-UP-351 (S.C. Ct. App. filed July 15, 2015)

Elite Construction, Inc., Respondent

v.

Doris E. Tummillo and Georgia Bank and Trust Company of Augusta, Defendants,
Of Whom Doris E. Tummillo is the Petitioner,

And

Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

APPENDIX

VOLUME II

Neal W. Dickert
Paul K. Simons
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Augusta, Georgia 30901-1564
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Attorney for Petitioner,
Doris E. Tummillo

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Clarke W. McCants, III
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218 Newberry Street, S.W.
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James S. ("Jeb") Murray
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P. O. Box 1495
Augusta, Georgia 30903-1495
(706) 722-7543
Attorney for Respondent, Georgia Bank and Trust Company of Augusta

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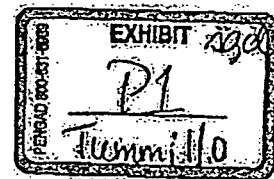
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2009CP0200958

ELITE CONSTRUCTION, INC.

PURCHASE CONTRACT

9-13-12
[Signature]
2:50
[Signature]
Lupoli



Name Doris Tummlillo Date 7-16-08

Address Shiloh Church Road State, Zip S.C.

Directions to Site _____

Building Use Barn Building Size W 64' L 204' H 10'

Wall Color _____ Gable _____ Roof _____ Trim _____ Doors _____

Power on site? ☒ Yes ☐ No

Miscellaneous Building has three 72' long by 24' wide extensions with five stalls centered in each. Building permitted will be provided by Elite Construction. Electrical, plumbing, and two coats of polyurethane will be included in the price.

Building permit - Grading - Fill furnishing by owner unless specified.

We shall furnish all labor and material as described above and in accordance with the specifications and conditions shown on reverse side of this contract unless otherwise specified.

Total Contract \$358,379.00

Financing by _____

Terms _____

30% of total cost of project due upon signing.

30% of total cost of project due after roof completion.

30% of total cost of project due after exterior walls completed.

10% of total cost will be due when job is completed, and be paid within 10 days of completion.

If amount due is not paid within 10 days of completion, there will be a 5% late charge added to the total.

Any change orders shall be in writing and approved by the builder.

Amount due at signing \$107,513.70 30%

Amount due after roof completion \$107,513.70 30%

Amount due at completion of exterior walls \$107,513.70 30%

Amount due at completion of job \$35,837.90 10%

Buyer

Elite Construction Representative

Tummlillo
Printed Name

Chris Key
Printed Name

[Signature]
Signed Name

[Signature]
Signed Name

GENERAL SPECIFICATIONS CUSTOM POLE BUILDINGS

1. Foundation columns and other lumber which comes in contact with the ground will be pressure treated to resist rot, decay and insect damage.
2. Standard spacing of side wall columns is 10' on center.
3. Truss lumber will be stress rated 1500 F.
4. Each building will have pressure treated splash boards at the bottom of the wall.
5. Truss designs are by licensed professional engineers and are certified as to load capacity. Standard spacing is 10' on center.
6. All trusses to be bolted as well as spiked into wall columns.
7. Hardware items such as door track, hinges, bolts, connector plates, door handles, hooks, etc., will be plated with zinc or equal.
8. Minor changes, which would not adversely affect the strength or appearance, may be made without notification.
9. Walls of this building are not designed to withstand the lateral loads imposed by the contact storage of bulk goods, such as fertilizer, grain, chopped or baled hay, or any loads that tend to settle or spread in storage.
10. All untreated lumber on the building exterior will be covered with pre-formed moldings.
11. Guarantee on pressure treated wood, workmanship and material becomes effective upon full payment of invoice. Craftsmanship and all other materials not covered under any other warranties will be covered for six months after completion date of the job.

TERMS OF SALE

1. Building will be Custom Structure and will be erected according to the above specifications. Builder will furnish all materials, labor and supervision for the building, but will not perform, furnish or install any electrical wiring, plumbing, heating, painting, glazing, concrete work, grading or filling, unless otherwise specified.
2. A service charge of 5% per month shall accrue to all accounts more than 30 days past invoice date. Should it be necessary to force collection of any monies due under this agreement, buyer shall be liable for service charges and reasonable attorney fees.
3. Buyer agrees to insure building for the amount of the contract price with the following coverage: fire, lightning, windstorm and hail. Such coverage is to be put into effect on date material is delivered to site and will remain in effect until contract price has been paid in full. The risk of any such casualty is assumed by the owner. In the event of loss, payment will be made to the owner and/or builder as their interests may appear.
4. Builder will carry adequate insurance to protect owner against any negligence by builder or his workmen.
5. Builder will carry workers' compensation on all workmen he employs on the job.
6. Builder is responsible for obtaining any required building permits prior to erection.
7. If possible, buyer will be at the building site at the start and finish of construction.
8. Buyer is responsible for and agrees to clear and level building site prior to scheduled date of erection. Leveling shall be performed so the site will not vary more than 6 inches from high to low points.
9. Buyer and builder assume that the building site is free from underground obstructions. Where rock, stumps, concrete or other unforeseen obstruction hinder digging holes for foundation columns, a charge will be made in accordance with additional time required. The builder reserves the right to decline jobs where underground obstructions are too severe, unless buyer can have site prepared.
10. Builder is not responsible for damage to underground utilities, such as tile, water lines, electric lines, etc.
11. Certain construction items, such as ventilators, roof hatches, eave troughs, doors, windows, etc., are to be installed in a workmanlike manner in proper adjustment. However, such items are not sold with the understanding that they will never leak or need adjustment. This future maintenance and adjustment is the responsibility of the buyer.
12. If buyer or his agent requests change from specifications, any extra costs for such changes will be added to the purchase price.
13. This agreement is subject to verification by office of the builder.
14. This quotation is automatically withdrawn and is void after 30 days.
15. Occupancy or use of the building by purchase before completion will constitute acceptance of the building and payment in full is required at that time.

Building Specifications

Size

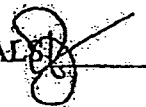
1. Length 204'
2. Width 64'
3. Overhang N/A
4. Other (3) 24' x 72' wings

Concrete and Insulation

1. Aisle way 14'
2. Aprons N/A
3. Bags N/A
4. Insulation Roof
5. Other _____

Color and Material

1. Roof 40 yr. Ag panel
2. Exterior Walls 40 yr. Ag panel (where applicable)
3. Stalls T&G
4. Bars (will be included in change order)
5. Doors Double Dutch 4' x 4' wood with cross bucks
6. Windows Dutch 4' x 4' wood with cross bucks
7. Interior Walls T&G
8. Other _____

INITIALS 

Exterior

1. Cupolas N/A
2. Windows N/A
3. Doors N/A
4. Sky Lights 24" ridge
5. Front Posts N/A
6. Hydrants N/A
7. Other _____

Interior

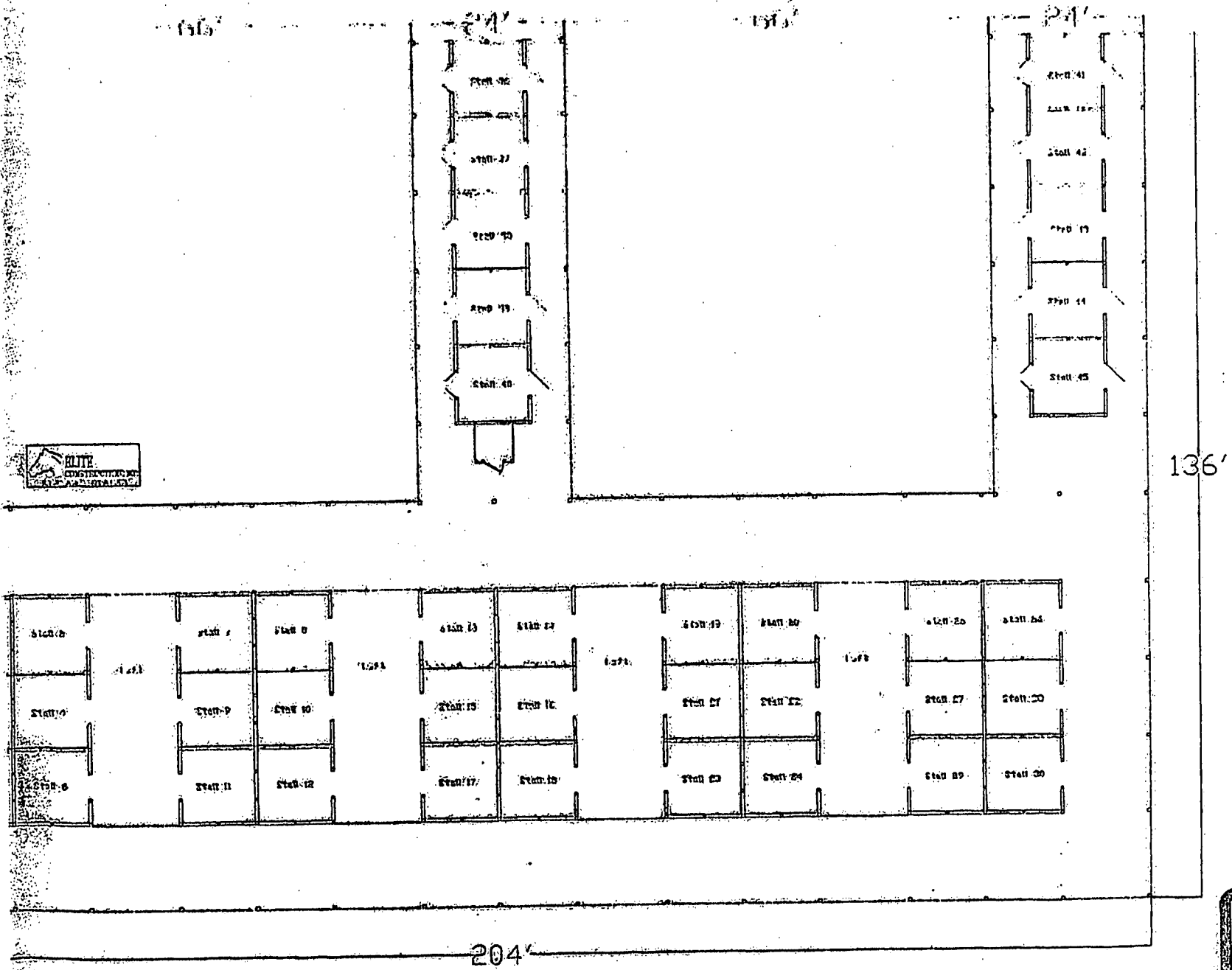
1. Hydrants 9 frost freeze
2. Water Heaters N/A
3. Washer/Dryer N/A
4. Other _____

Stalls

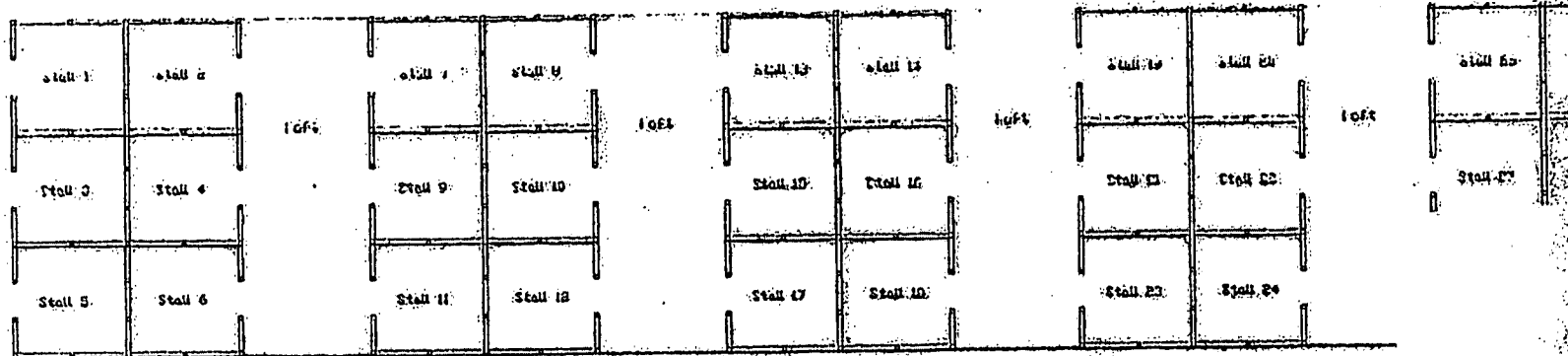
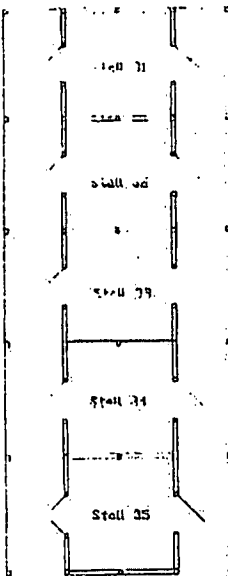
1. Automatic Water Dispensers N/A
2. Feeder N/A
3. Mats N/A
4. Fans 45
5. Cribbing Metal Yes
6. Doors 4' x 4' Wooden Dutch with cross bucks
7. Divider Grill Work (will be included in change order)
8. Aisle Way Grill Work (will be included in change order)
9. Other _____

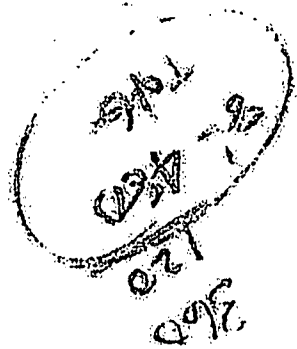
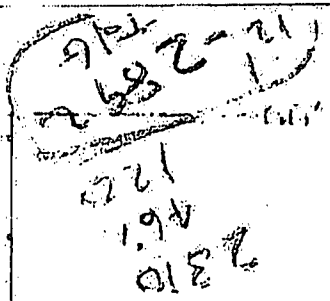
INITIALS

(4)



PLAINTIFF'S
EXHIBIT
2





360
@ 11' 10 1/4"
120
@ 13' 10 1/4"
24
@ 14 1/2"



156'

24'

Stall 41

Stall 42

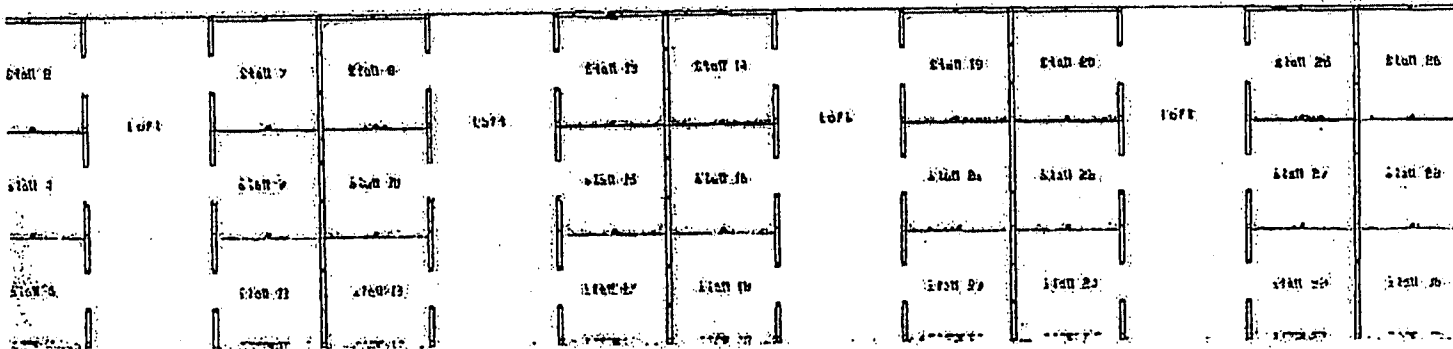
Stall 43

Stall 44

Stall 45



136'

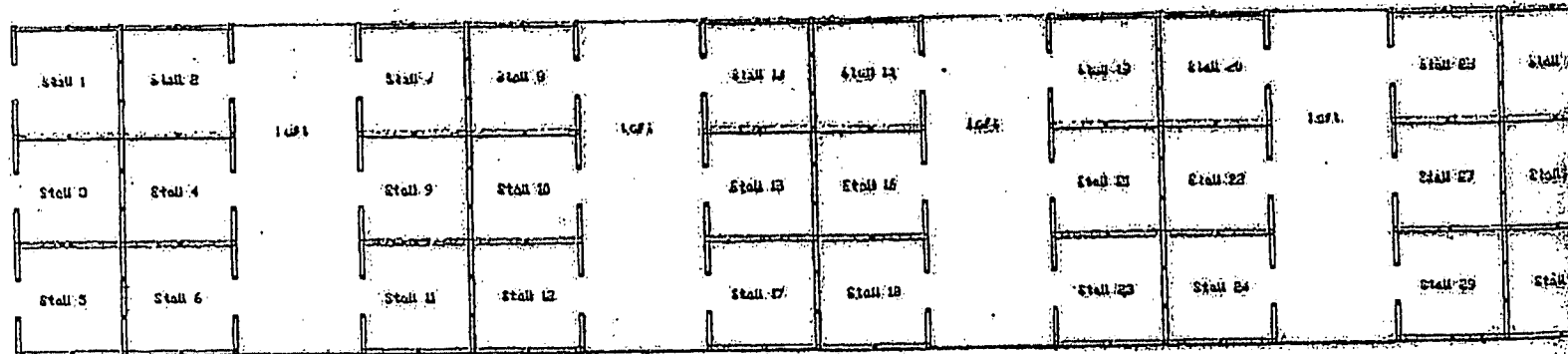


192'

156'

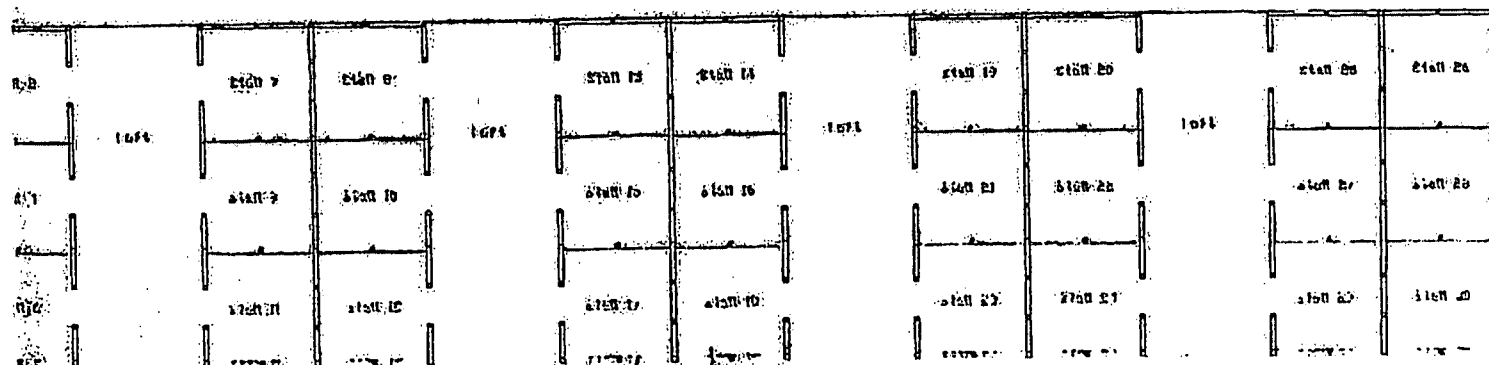
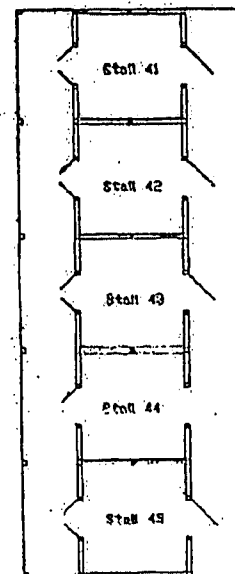
PORCH RAILS TO BE 36" H.,
MINIMUM AND MUST SUPPORT
A 200 LB. LOAD AT ANY POINT.
PICKETS MUST NOT ALLOW
PASSAGE OF A 4" SPHERE.

DATE 7/20/08
SIGNATURE [Signature]
IN RED INK
CONSTRUCTION SUBJECT TO
ANY CHANGES INDICATED
FOR PLANS
8/1/08



204'

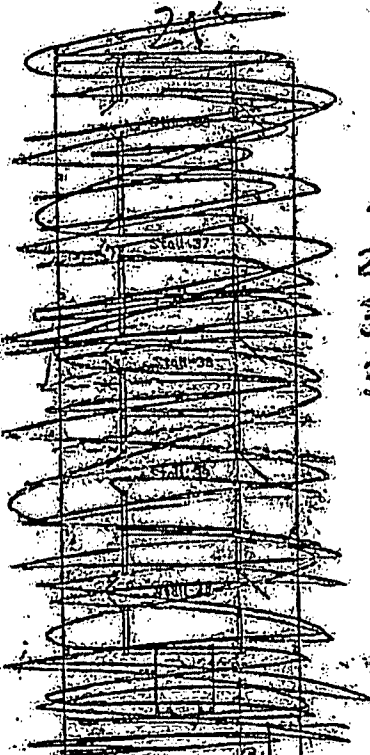
PORCH RAILS TO BE 36" H.,
 MINIMUM AND MUST SUPPORT
 200 LB. LOAD AT ANY POINT.
 PICKETS MUST NOT ALLOW
 PASSAGE OF A 4" SPHERE.



200

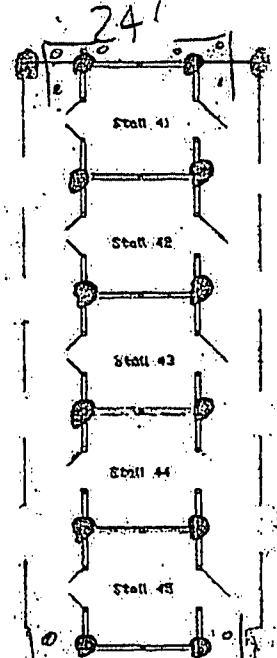
66'

48 stakes
30 flats



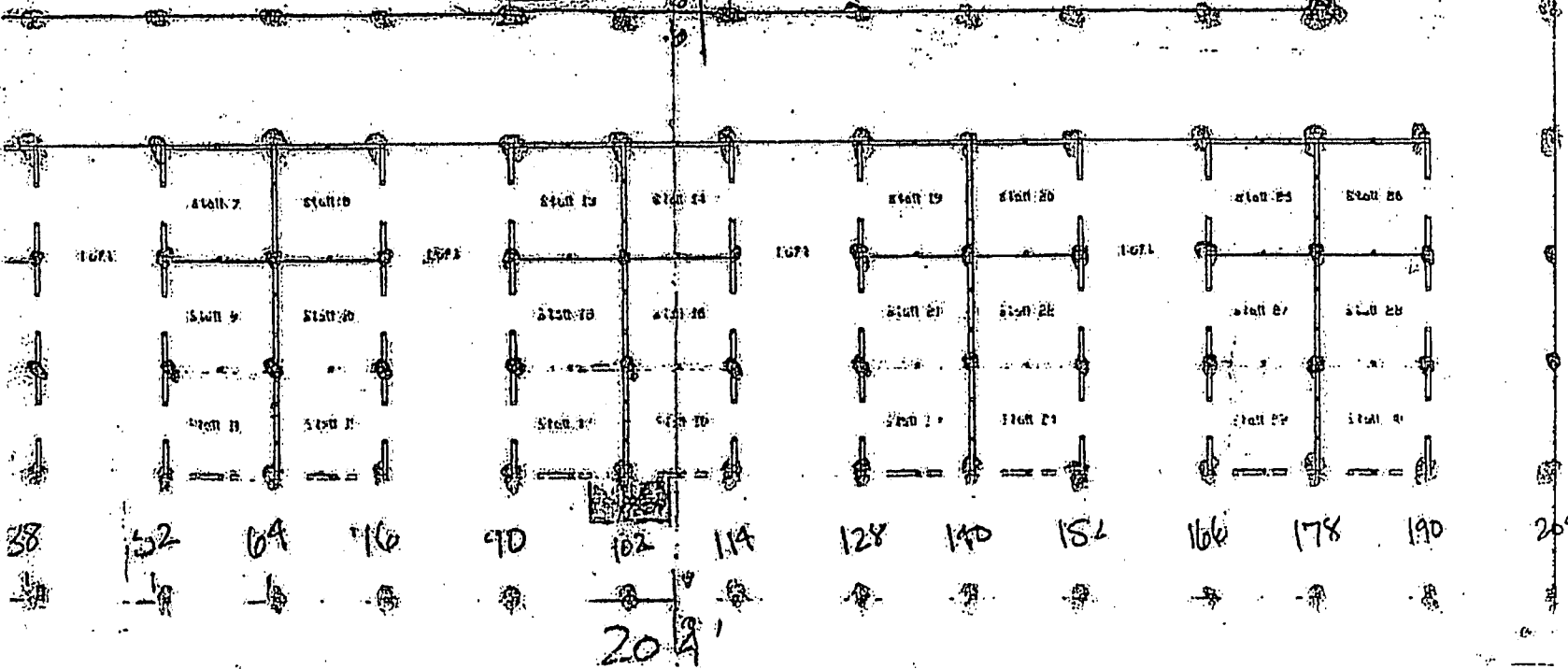
66'

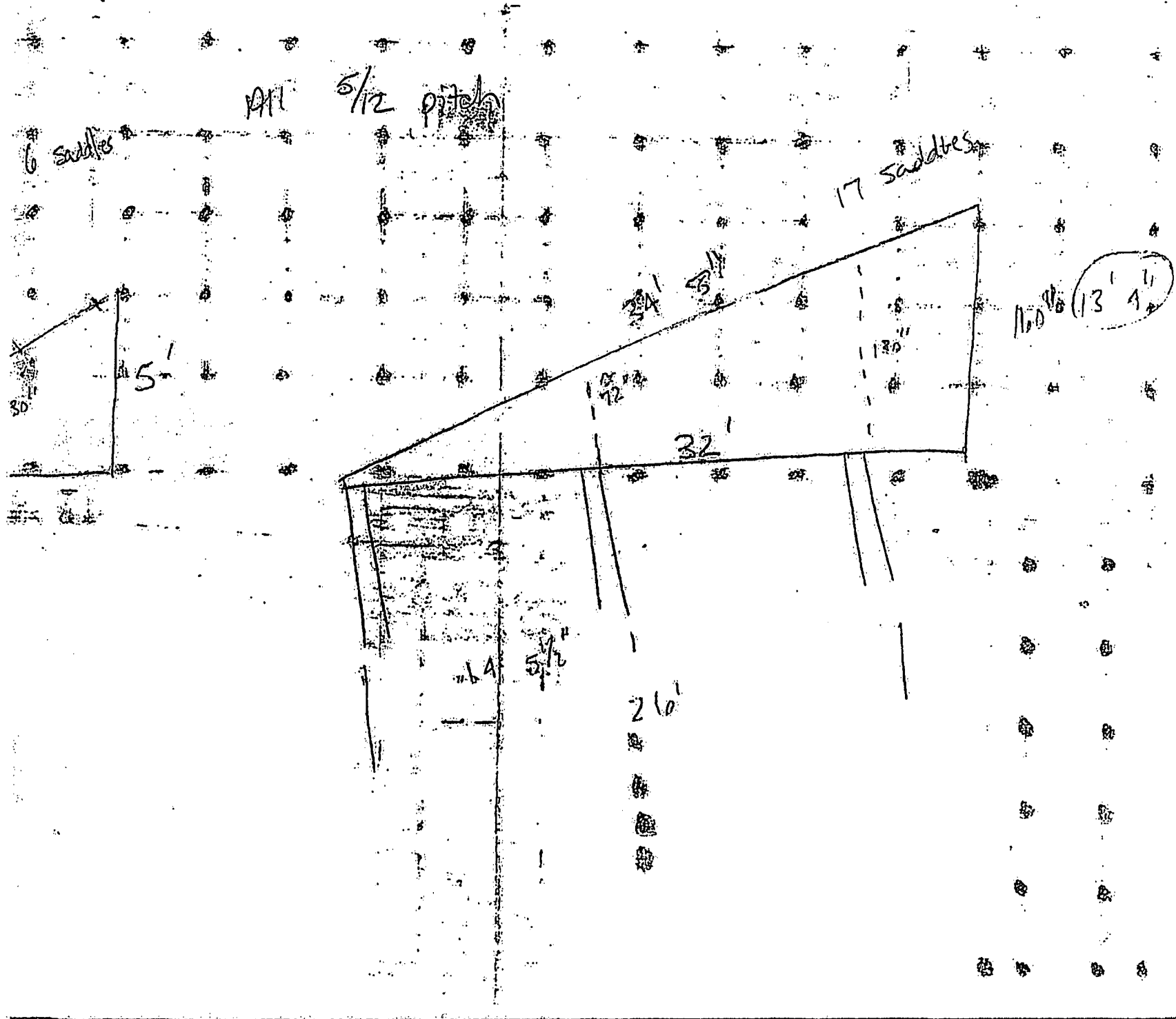
- 30 6x6x14'
- 24 6x6x16'
- 34 6x6x24'
- 34 6x6x20'



36'

BLAKE
CONSTRUCTION INC.
2015 2016 2017 2018 2019





Tax Parcel No.

Septic Tank Permit No.

NAME OF OWNER:

PROPERTY ADDRESS:

MAILING ADDRESS:

NAME OF CONTRACTOR:

CONTRACTOR ADDRESS:

SUBDIVISION:

BLOCK NO:

TYPE IMPROVEMENT:

- ☒ New Structure
☐ Addition
☐ Other

☒ ALSO PERMIT REQUIRED

- ☐ Multi-Family
☐ Commercial
☐ Other

TO BE USED AS:

CONTRACTORS:

ELECTRICAL

MECHANICAL

PLUMBING

LOCATION: Atlas Page

DIRECTIONS:

TOTAL SQUARE FEET:

VALUATION:

CENTRAL AIR CAPACITY:

TYPE OF HEATING SYSTEM:

BUILDING PERMIT Aiken County, South Carolina

Tel. No. 706-394-9737

Zip Code 29805-0000

Zip Code 29805-0000

S.C. License No. 19734

Tel. No. 803-645-8890

Issue Date 10/02/2008

Permit Expires

Receipt No. 692842

Permit No. 2000-1312

Permit Fee \$ 2014.00

CERTIFICATE OF OCCUPANCY

☒ Required for Power

☐ Not Required

ZONING

UD RIM

FLOOD DISTRICT

RC

☒ Yes

RD

☐ No

IND

AIRPORT DISTRICT

RUD

☐ Yes

SPI

☐ No

PUD

Number of Stories

1.0

Number of Rooms

45

Number of Bedrooms

0

Number of Bathrooms

0

Number of Water Closets

0

Number of Bath Tubs

0

Number of Sinks

0

Number of Showers

0

Number of Smoke Alarms

0

Fireplaces: Conventional

0

Pre-fab

0

Raw Space

0

Roof: Ceiling

MIN. R-30

Walls

MIN. R-13

Floor

MIN. R-19

Test of Foundation Vents

One within 3 ft. each corner

0

I, the owner of this property and/or undersigned agrees to conform to all applicable laws of Aiken County. In the case of an owner acting as his own builder, a Disclosure Statement provided by Aiken County, stating that a licensed builder did not build the dwelling, must be filed as a matter of public record with the register of deeds.

Property Owner or Agent

Date

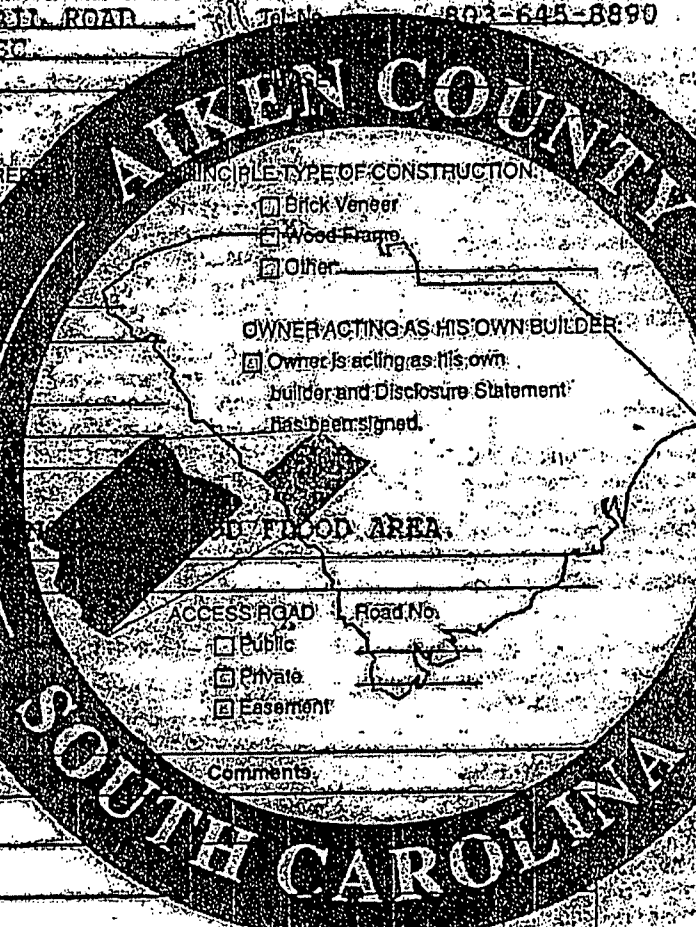
Building Official

Date

TURN OVER FOR MORE INFORMATION

White - Office
Pink - Tax Assessor

Yellow - Office
Gold - Customer



OWNER ACTING AS HIS OWN BUILDER

☒ Owner is acting as his own builder and Disclosure Statement has been signed.

ACCESS ROAD Road No.

- ☐ Public
☐ Private
☐ Easement

Comments

Inspections	Date	Time	By	Comments
Foundation/Fig.				
Foundation/Wall				
Roughing-In				
- Electrical				
- Plumbing				
- Mechanical				
Final				
C.O.F.				



Tax Parcel No.
 Septic Tank Permit No.
 NAME OF OWNER:
 PROPERTY ADDRESS:
 MAILING ADDRESS:
 NAME OF CONTRACTOR:
 CONTRACTOR ADDRESS:

101-00-02-002-8001

TUMMELLO DORIS
 4201 SHILOH CHURCH ROAD
 AIKEN, SC
 ELITE CONSTRUCTION INC.
 512 CUMBER TRAIL ROAD
 RIDGE SPRING, SC

SUBDIVISION:
 BLOCK NO:

TYPE IMPROVEMENT:

- ☒ New Structure
☐ Addition
☐ Other:

LMR PERMIT REQUIRED FOR:

- ☐ Multi-Family
☐ Commercial
☐ Other:

PRINCIPLE TYPE OF CONSTRUCTION:

- ☒ Brick Veneer
☐ Wood Frame
☐ Other:

TO BE USED AS:

CONTRACTORS:

ELECTRICAL

MECHANICAL

PLUMBING

119 HORSE STABLES

LOCATION: Atlas Page

DIRECTIONS:

10

PERMIT IS CLOSED OUT WORK HAS BEEN COMPLETED WITH
 OUT INSPECTIONS-OWNER TO TRANSFER

14722

TOTAL SQUARE FEET:

462,900

VALUATION:

\$

CENTRAL AIR CAPACITY:

Tons

TYPE OF HEATING SYSTEM:

ACCESS ROAD Road No.

- ☐ Public
☐ Private
☐ Easement

BUILDING PERMIT **Aiken County, South Carolina**

Tel. No.

706-204-9737

Zip Code

29805-0000

Zip Code

19734

S.C. License No.

802-645-8890

Tel. No.

PHASE:

LOT NO:

10/02/2008

Issue Date

Permit Expires

CERTIFICATE OF OCCUPANCY

- ☐ Required for Power
☐ Not Required

FLOOD DISTRICT

- ☐ Yes
☐ No

AIRPORT DISTRICT

- ☐ Yes
☐ No

Receipt No.

Permit No.

Permit Fee \$

92842

2008-1312

2014-00

RUD

ZONING

UD

RC

RD

IND

RUD

SPI

PUD

1.0

45

Number of Stories

Number of Rooms

Number of Bedrooms

Number of Bathrooms

Number of Water Closets

Number of Bath Tubs

Number of Sinks

Number of Showers

Number of Smoke Alarms

Number of Fireplaces

- Conventional
 - Pre-fab

Height of Crawl Space

INSULATION

- Ceiling:
 - Walls:
 - Floor:

MIN. R-30

MIN. R-13

MIN. R-19

Number of Foundation Vents

(One within 3 ft. each corner)

The owner of this property and/or undersigned agrees to conform to all applicable laws of Aiken County. In the case of an owner acting as his own builder, a Disclosure Statement provided by Aiken County, stating that a licensed builder did not build the dwelling, must be filed as a matter of public record with the register of deeds.

Property Owner or Agent

Date

Building Official

Date

TURN OVER FOR MORE INFORMATION

White - Office
 Pink - Tax Assessor

Yellow - Office
 Gold - Customer

Inspections	Date	Time	By	Comments
Foundation/Ftg.				
Foundation/Wall				
Roughing-in				
- Electrical				
- Plumbing				
- Mechanical				
Final				
C.O.				

AIKEN

Inspect

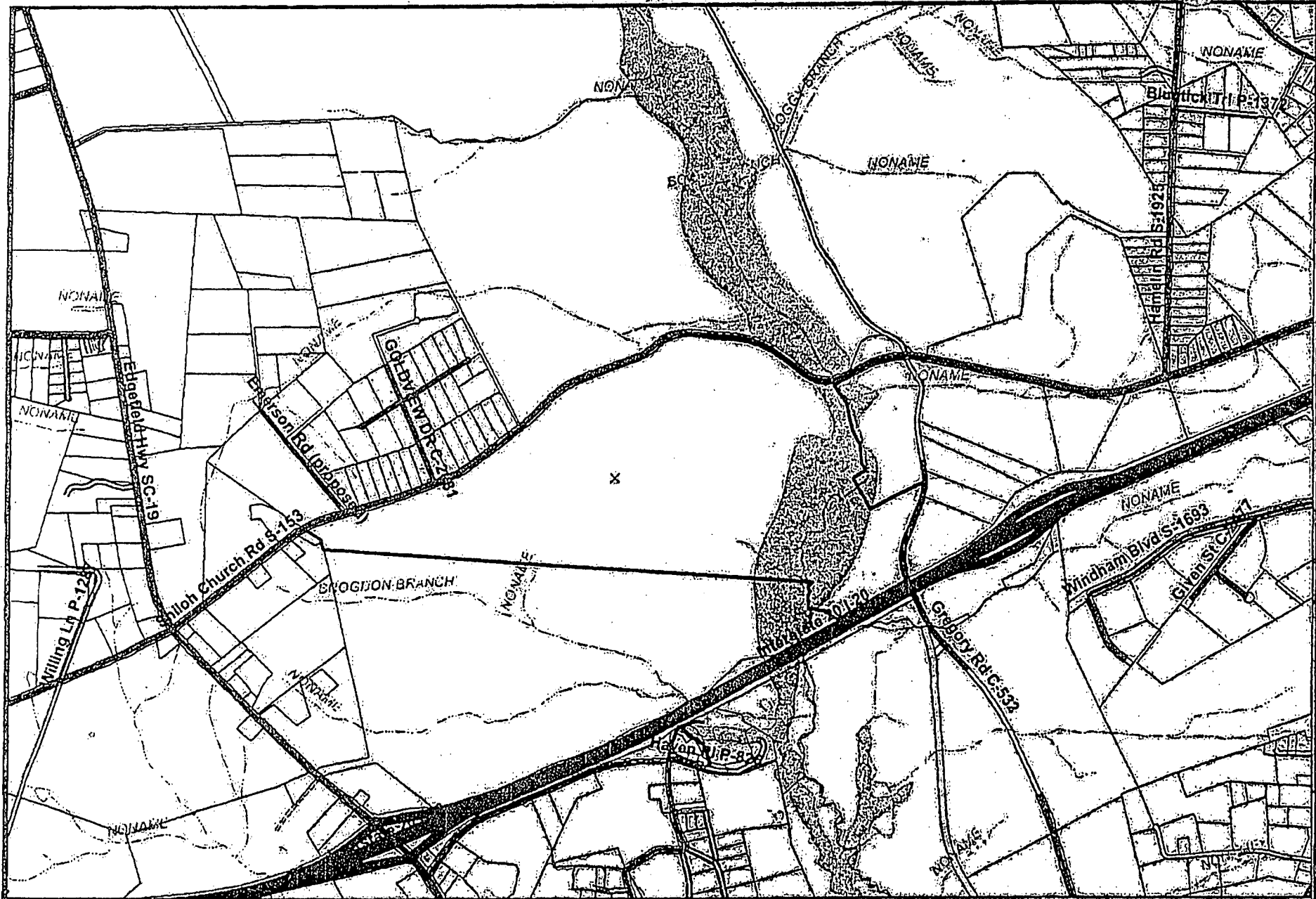
- 48 Hour Notice must be given
- NO WORK WILL BE STARTED
 - NO WORK WILL BE CONTINUED

Card Must Be Protected By
BY ORDER OF AIKEN COUNTY GOV

Building Permit No. 6-1312
Job Address 42 Shiloh Church
Date Issued 10/1/08
Nature of Work NEW
Use of Building for Stables
Owner Doris Turner
Contractor Elite Construction

NOTICE TO BUILDERS

Any builder constructing residences or any other type construction at the above stated address will be held accountable and responsible for any damages by reason of said construction to curbs, gutters, man holes, catch basins, water mains, etc.

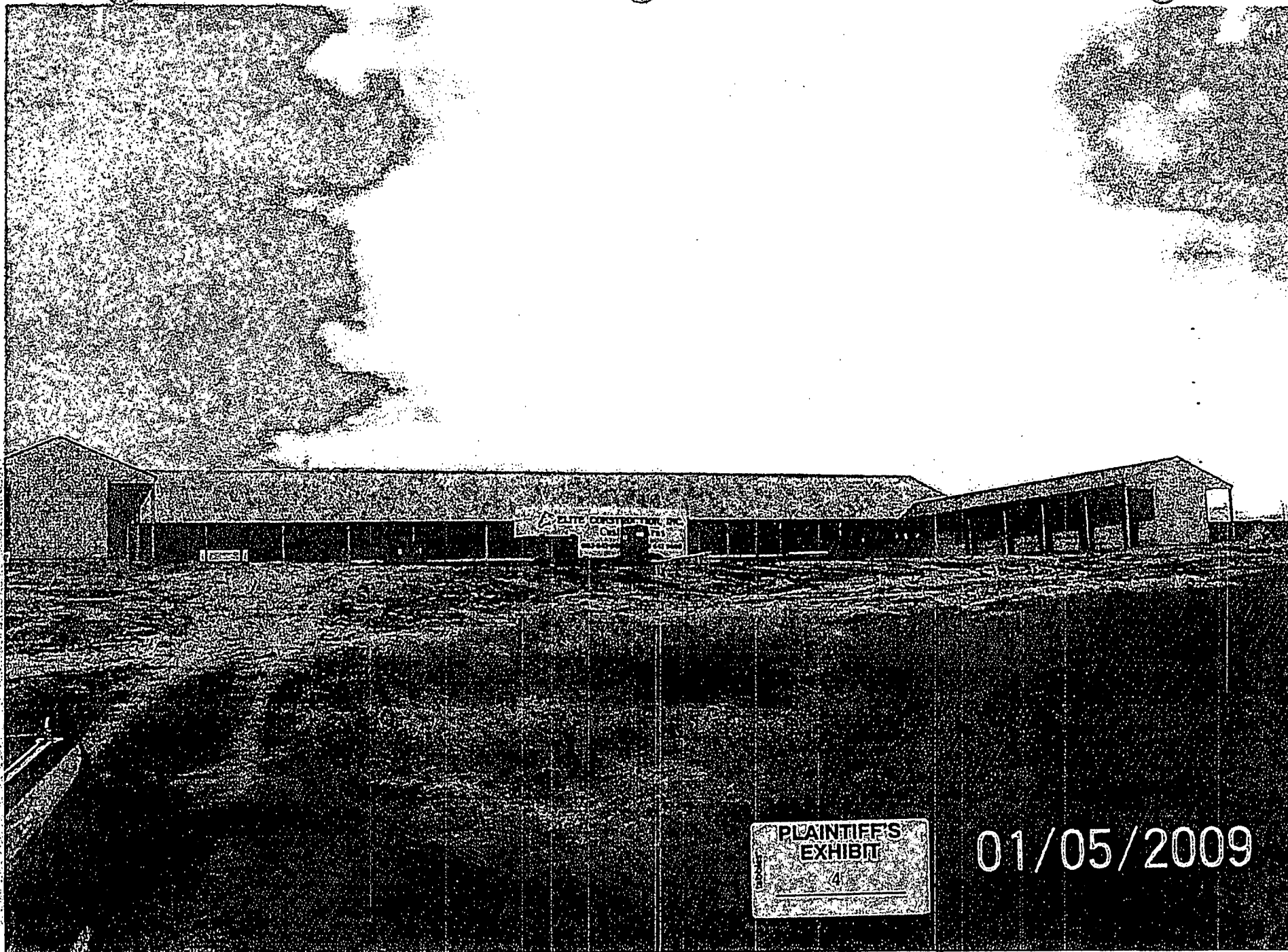


Parcel Map

Scale:
1 Inch equals 2,000 feet

Prepared by:
Aiken County Planning & Development
GIS Mapping Division

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Aiken County makes no warranty, representation or guarantee as to the content, accuracy, or reliability of the data provided herein. The data is provided "as is" without any warranty, representation, or guarantee. Aiken County assumes no liability for any errors, omissions, or inaccuracies in the information provided regardless of how caused, or for any damages, losses, or actions taken or not taken by any person in reliance upon the information or data provided herein.

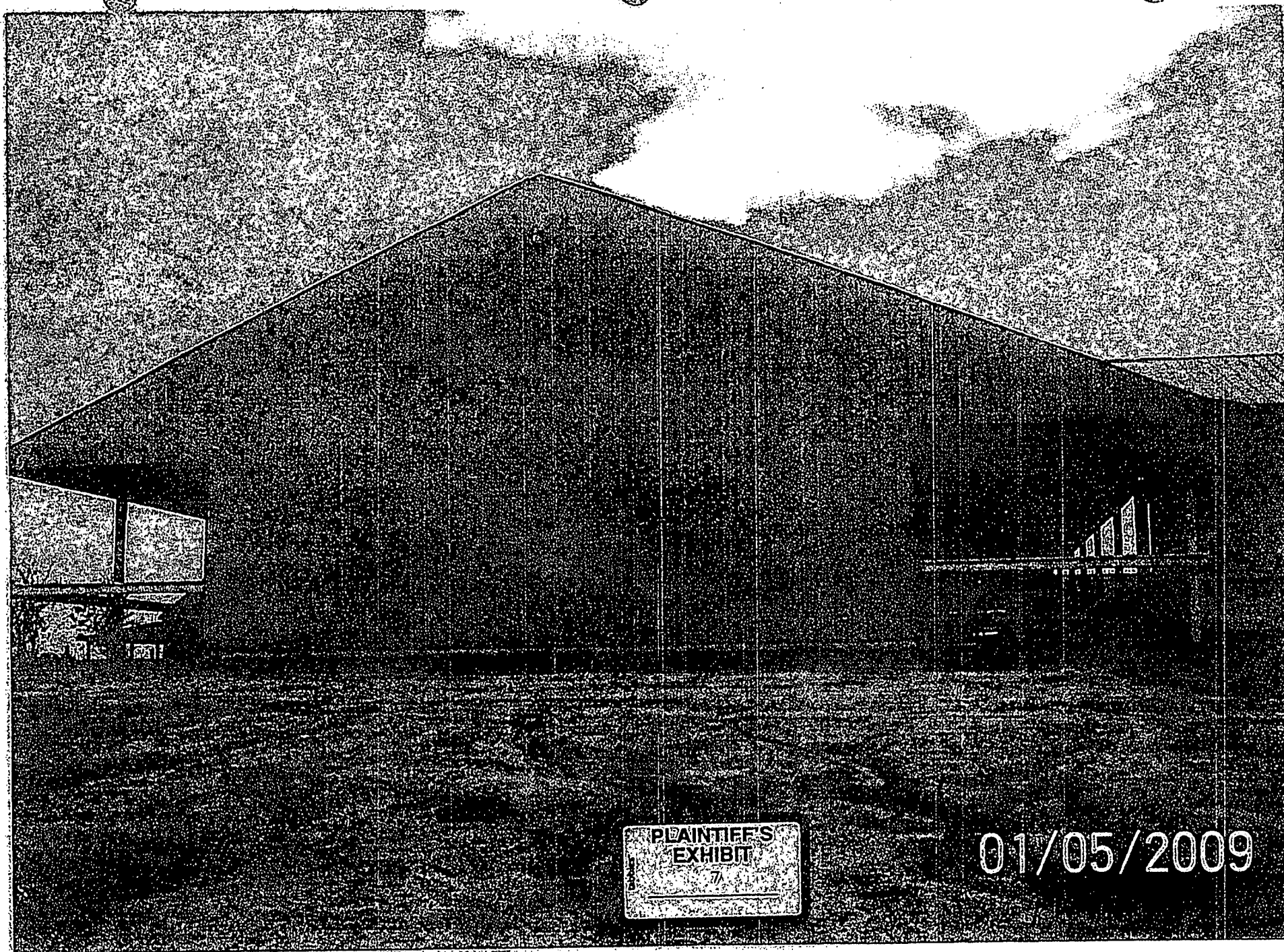


PLAINTIFF'S
EXHIBIT
5

01/05/2009

01/05/2009





PLAINTIFF'S
EXHIBIT
7

01/05/2009

9-13-12
[Signature]
 Clerk
 29

DORISE TUMMILLO TUMERKI ACCOUNT 4201 SHILOH CHURCH ROAD AIKEN, SC 29801		REGIONS: 8923025091 1844
Pay to the order of <i>[Signature]</i>		Date <u>7/24</u> 63-2927113
<i>[Signature]</i>		\$ 107,53.70
T ☐ Morgan Keegan E ☒ MOR account		Dollars <i>[Signature]</i> Mellon Trust of New England, F.S.C., Boston, MA
For _____ 1:0		<i>[Signature]</i>

PLAINTIFF'S
 EXHIBIT
 R

EXHIBIT *[Signature]*
 Tummiello

Estimate to complete unfinished work on 40 stall barn

Remove trash that contractor left on site

Piles of scrap wood

Boards with nails sticking out of it

Paint stalls with 2 coats of polyurethane

Install gutters

Complete electrical work

Install 2 sets of door locks

Finish exterior siding and interior siding

Install bracing above stalls to straighten out the wall

Install doors for stalls

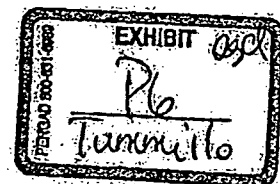
Grade dirt in front of every stall so horse does not trip while entering or leaving

Install access hole for overhead storage areas

There are at least a dozen roof leaks do to substandard installation

In order to properly repair the leaks the entire metal panel for every leak will have to be replaced including any and all panels where leaks and or improperly installed screws were caulked as a temporary fix .

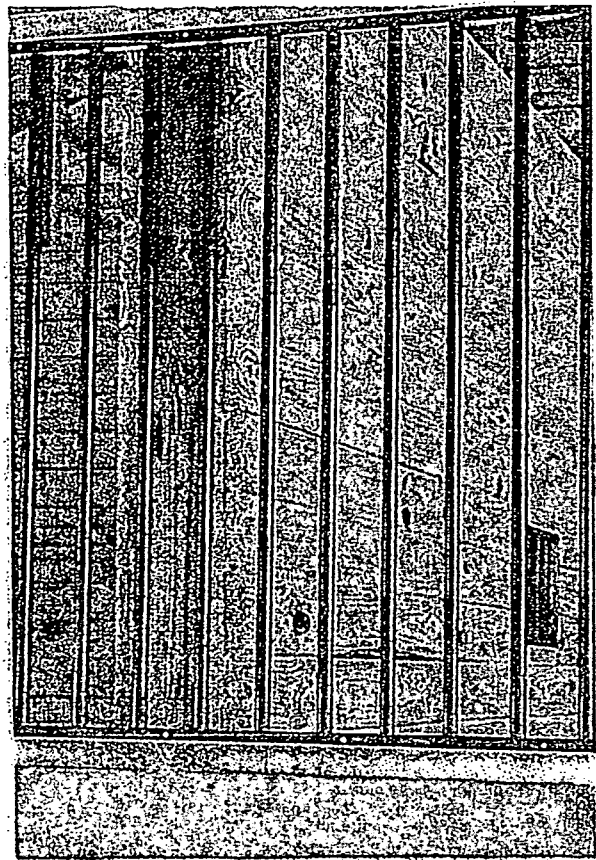
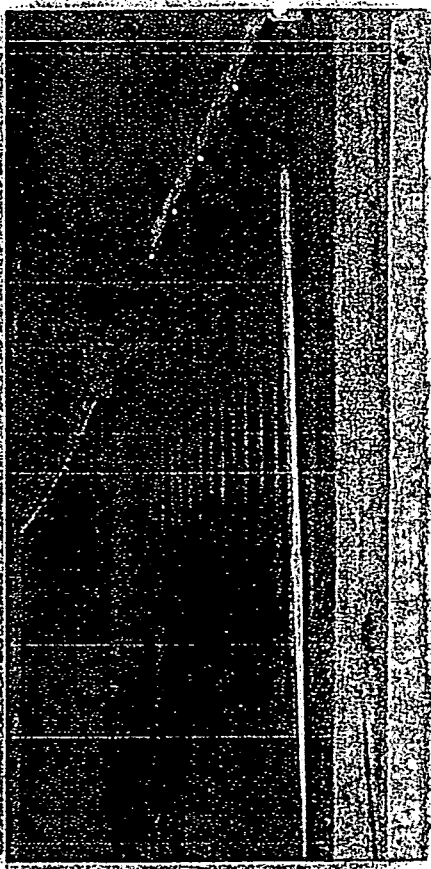
FINISH SIDING AROUND ELECTRICAL PANELS



STALL	DEPTH	WIDTH	STALL		
1	11-4"	$\times$ 11- $\frac{1}{2}$ "	21	11-3 $\frac{3}{8}$ "	$\times$ 10-9 $\frac{3}{4}$ "
2	11-3 $\frac{1}{4}$ "	$\times$ 11-3 $\frac{3}{4}$ "	22	11-3 $\frac{3}{8}$ "	$\times$ 10-11 $\frac{3}{8}$ "
3	11-3 $\frac{1}{2}$ "	$\times$ 11- $\frac{1}{4}$ "	23	11-2 $\frac{7}{8}$ "	$\times$ 11-4 $\frac{1}{8}$ "
4	11-4 $\frac{1}{2}$ "	$\times$ 11- $\frac{1}{4}$ "	24	11-2 $\frac{5}{8}$ "	$\times$ 11- $\frac{1}{4}$ "
5	11-3 $\frac{1}{8}$ "	$\times$ 11-3 $\frac{3}{4}$ "	25	11-3 $\frac{7}{8}$ "	$\times$ 11- $\frac{3}{8}$ "
6	11-3 $\frac{1}{8}$ "	$\times$ 11-3 $\frac{7}{8}$ "	26	11-3	$\times$ 11-3 $\frac{1}{8}$ "
7	11-3 $\frac{1}{8}$ "	$\times$ 11-1"	27	11-3 $\frac{1}{4}$ "	$\times$ 11- $\frac{3}{4}$ "
8	11-3 $\frac{3}{4}$ "	$\times$ 11-3 $\frac{1}{2}$ "	28	11-4 $\frac{1}{8}$ "	$\times$ 11- $\frac{1}{2}$ "
9	11-3 $\frac{5}{8}$ "	$\times$ 11-0	29	11-3 $\frac{3}{4}$ "	$\times$ 11-3"
10	11-3 $\frac{1}{4}$ "	$\times$ 11-3 $\frac{1}{8}$ "	30	11-3 $\frac{1}{2}$ "	$\times$ 11- $\frac{3}{4}$ "
11	11-3 $\frac{3}{8}$ "	$\times$ 11-3 $\frac{3}{8}$ "	31	10-9 $\frac{3}{4}$ "	$\times$ 11-3 $\frac{3}{8}$ "
12	11-3 $\frac{1}{8}$ "	$\times$ 11-2 $\frac{1}{2}$ "	32	10-10"	$\times$ 11-3 $\frac{3}{4}$ "
13 12 A	11-3 $\frac{1}{2}$ "	$\times$ 11- $\frac{1}{2}$ "	33	10-10"	$\times$ 11-3 $\frac{3}{8}$ "
14	11-3 $\frac{3}{8}$ "	$\times$ 11-3 $\frac{3}{8}$ "	34	10-10 $\frac{1}{4}$ "	$\times$ 11-3 $\frac{3}{8}$ "
15	11-3 $\frac{7}{8}$ "	$\times$ 11-3 $\frac{5}{8}$ "	35	10-10"	$\times$ 11-3 $\frac{3}{8}$ "
16	11-3 $\frac{5}{8}$ "	$\times$ 11-5 $\frac{1}{8}$ "	36	10-9 $\frac{3}{4}$ "	$\times$ 11-2 $\frac{1}{2}$ "
17	11-3 $\frac{3}{8}$ "	$\times$ 11-3 $\frac{1}{2}$ "	37	10-9 $\frac{3}{8}$ "	$\times$ 11-2 $\frac{1}{8}$ "
18	11-3 $\frac{1}{2}$ "	$\times$ 11-5 $\frac{1}{8}$ "	38	10-10 $\frac{3}{8}$ "	$\times$ 11-3 $\frac{3}{8}$ "
19	11-4 $\frac{7}{8}$ "	$\times$ 11- $\frac{1}{4}$ "	39	10-10"	$\times$ 11-3 $\frac{3}{8}$ "
20	11-3 $\frac{3}{8}$ "	$\times$ 11-4 $\frac{1}{8}$ "	40	10-10 $\frac{1}{4}$ "	$\times$ 11-3 $\frac{3}{8}$ "

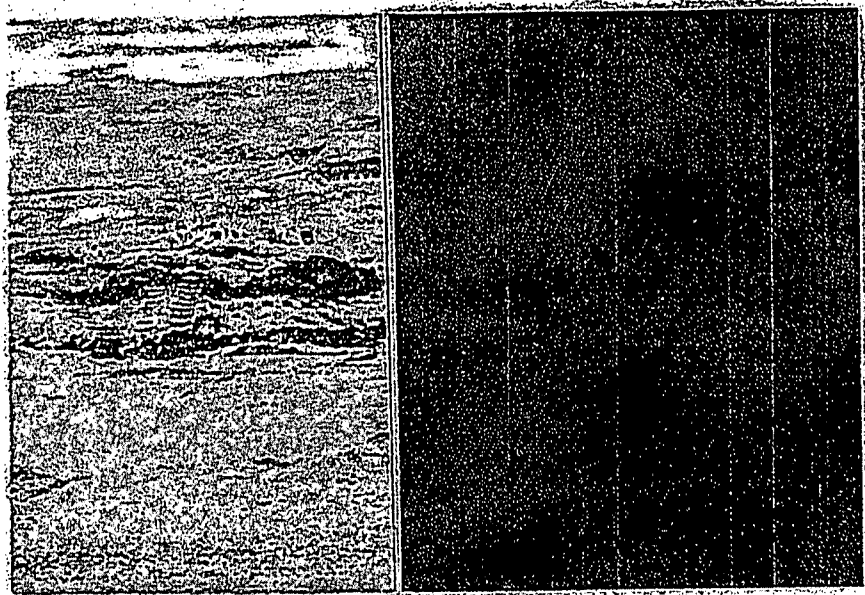
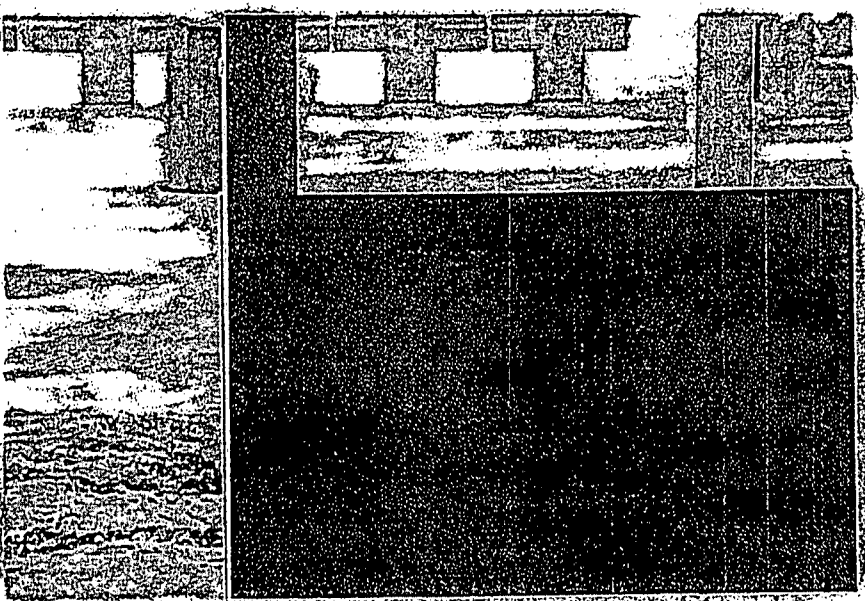
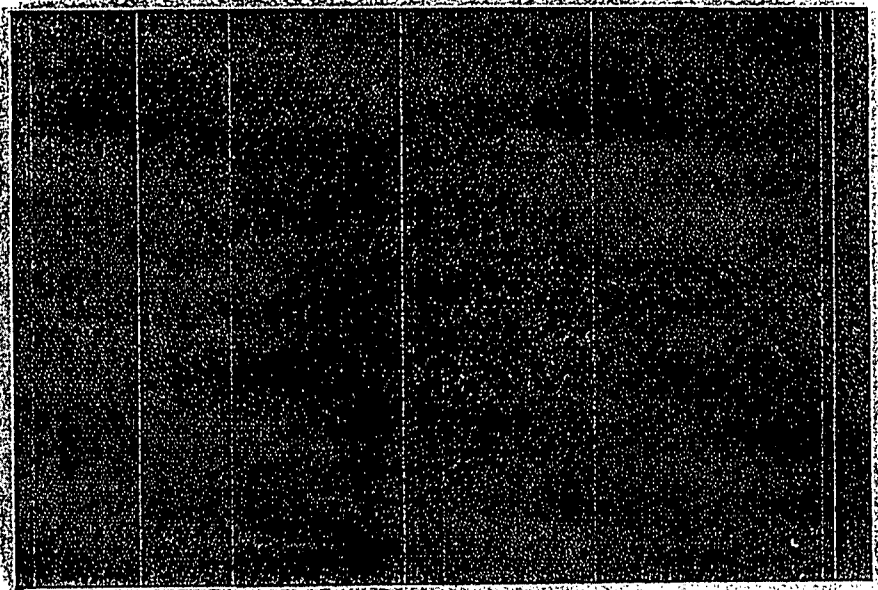
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 11-11-12
 11-11-12
 11-11-12

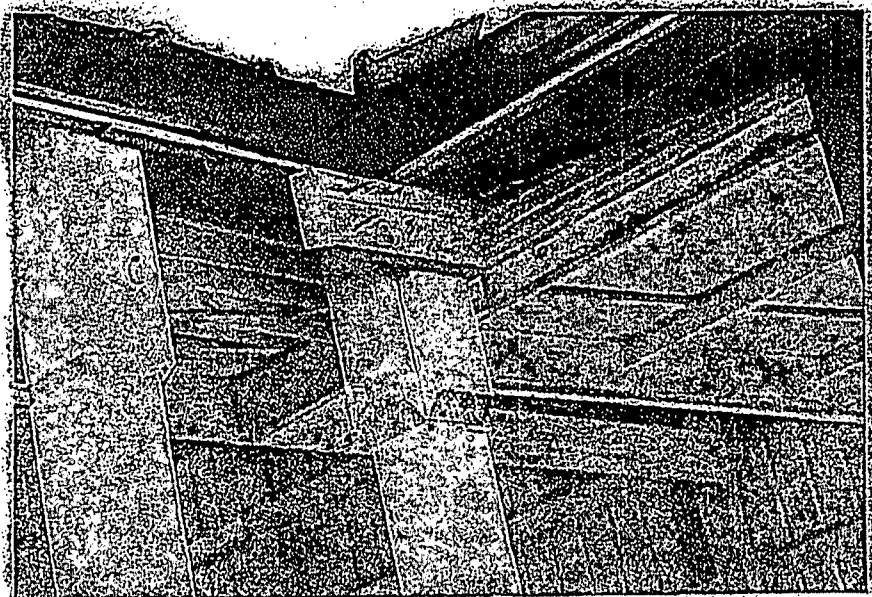
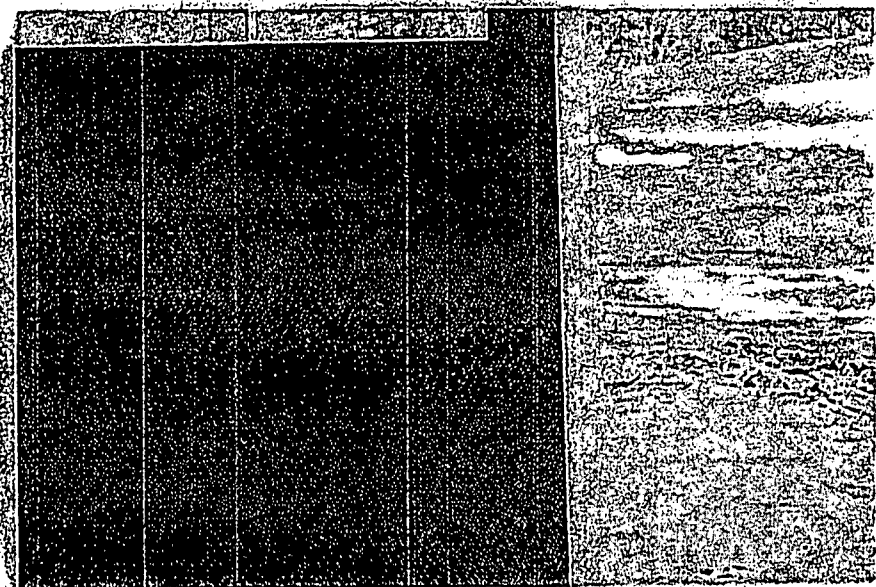


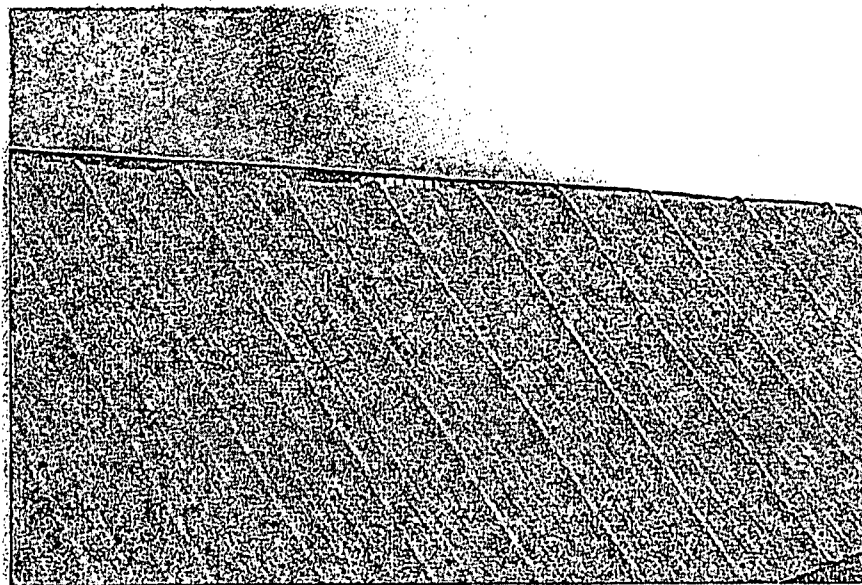
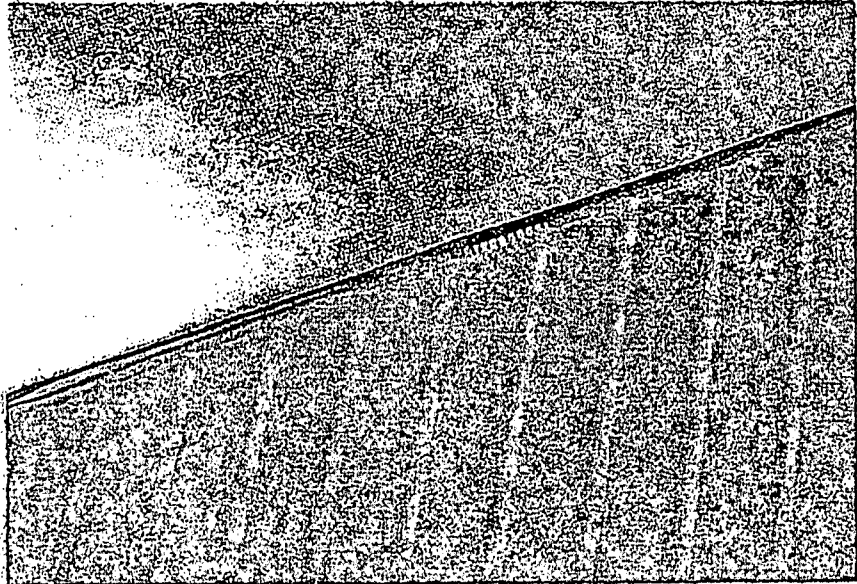
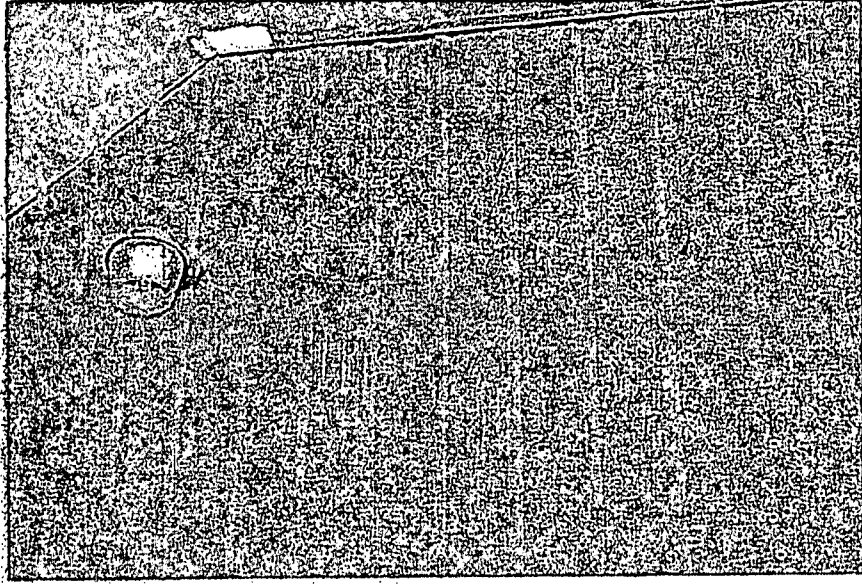


943
H. H. H. H. H.
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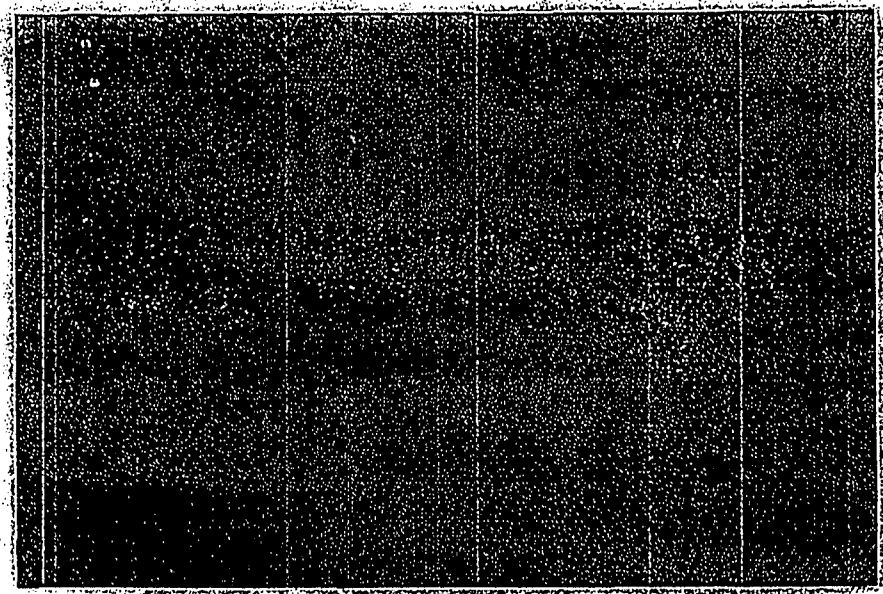
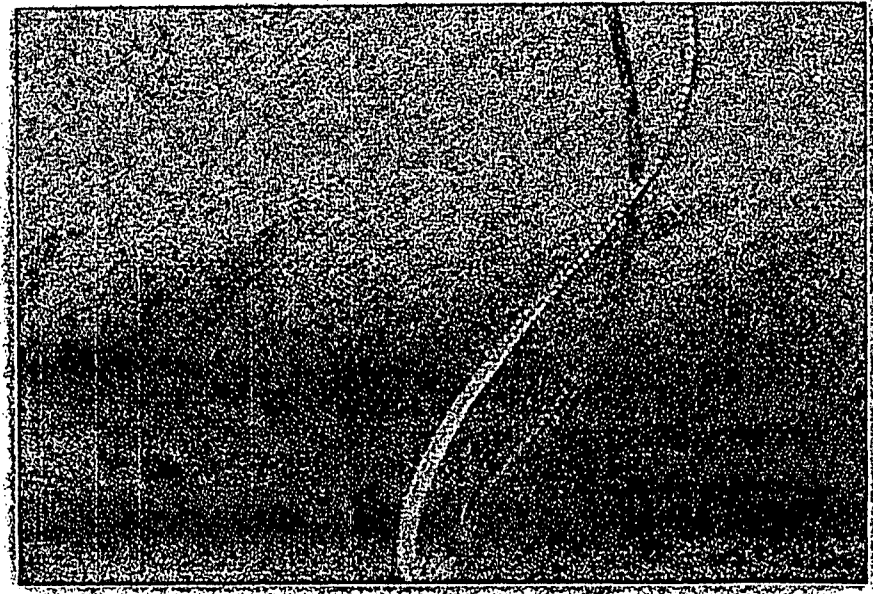
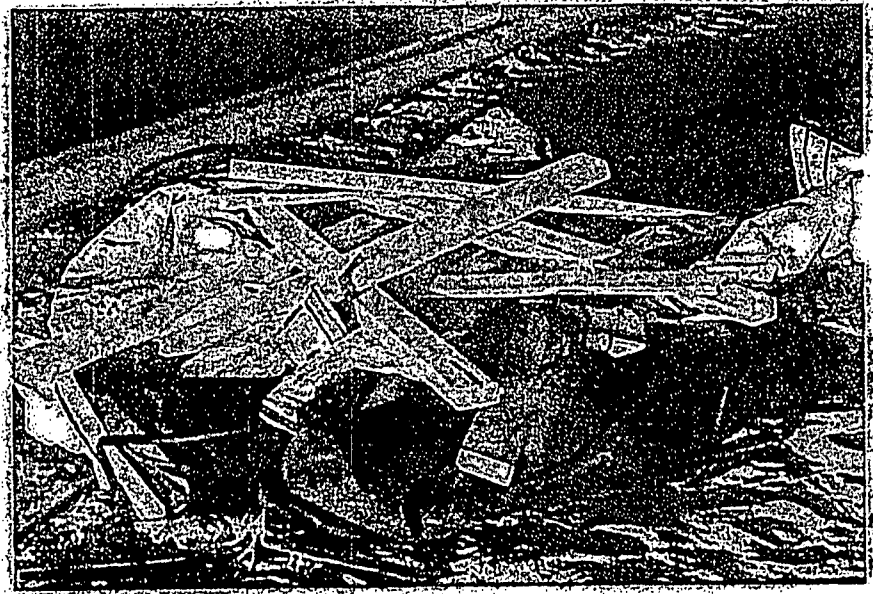
DEFENDANT'S
EXHIBIT
3

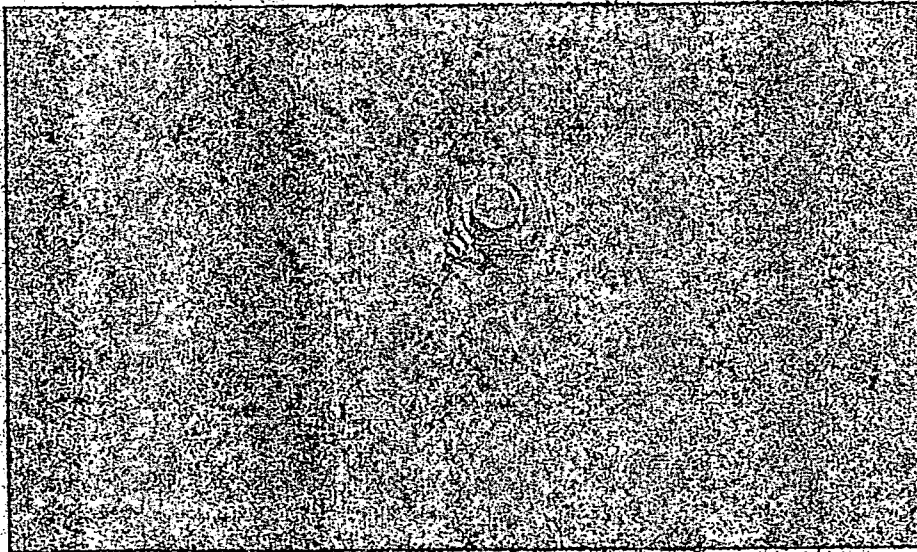
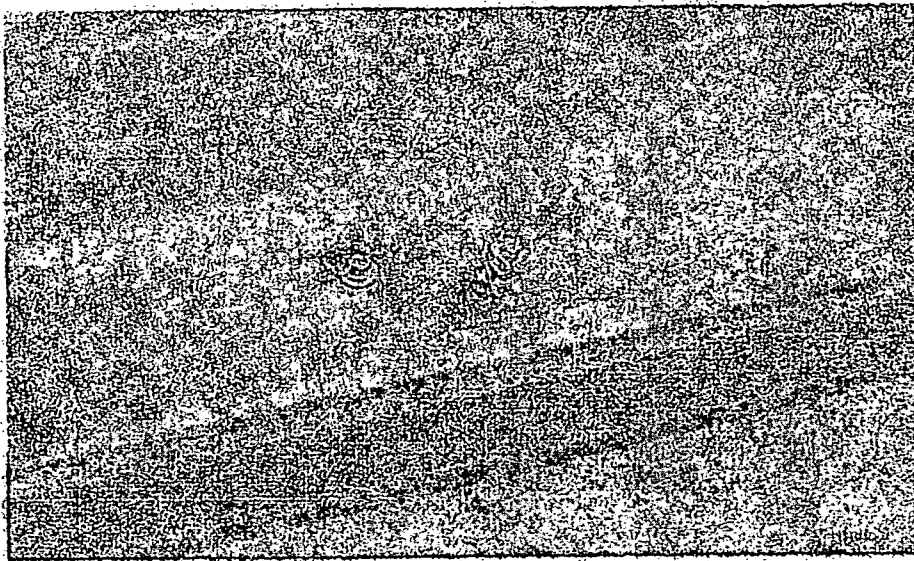
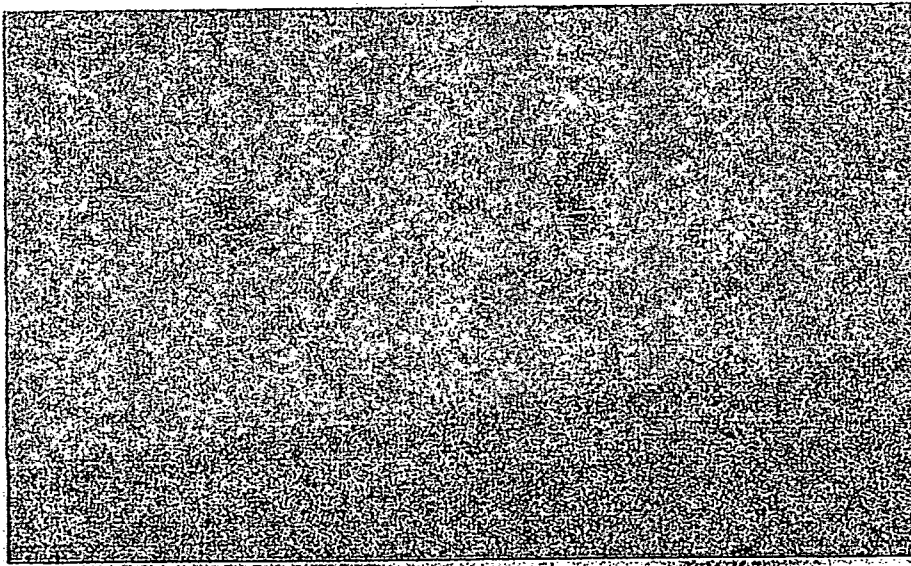






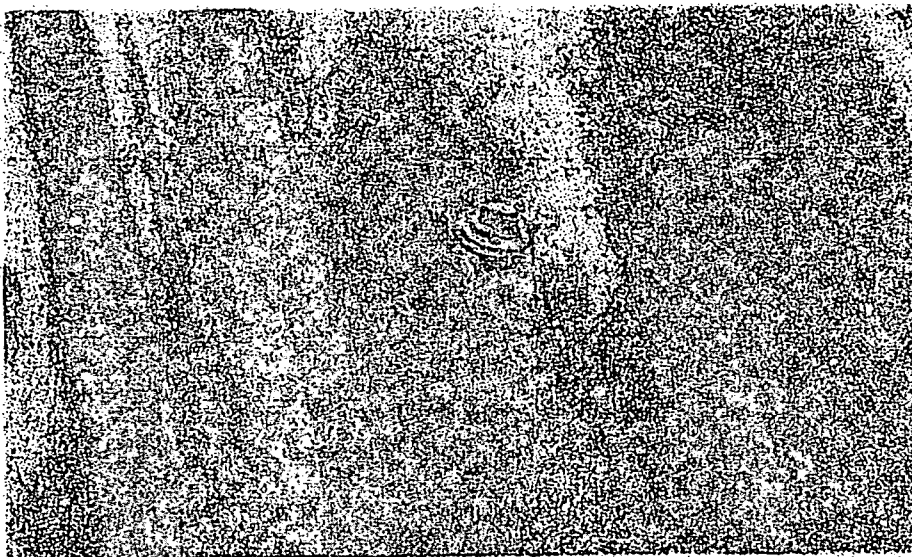
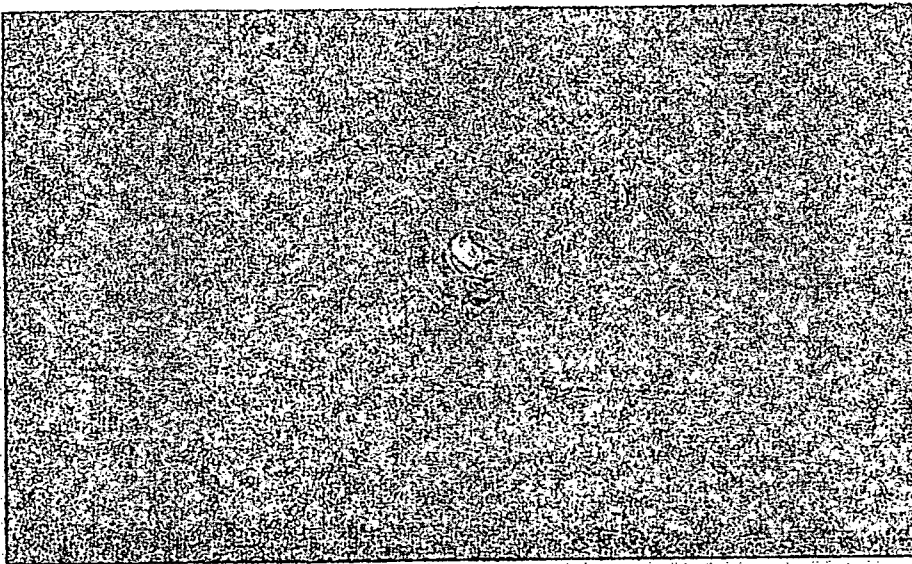
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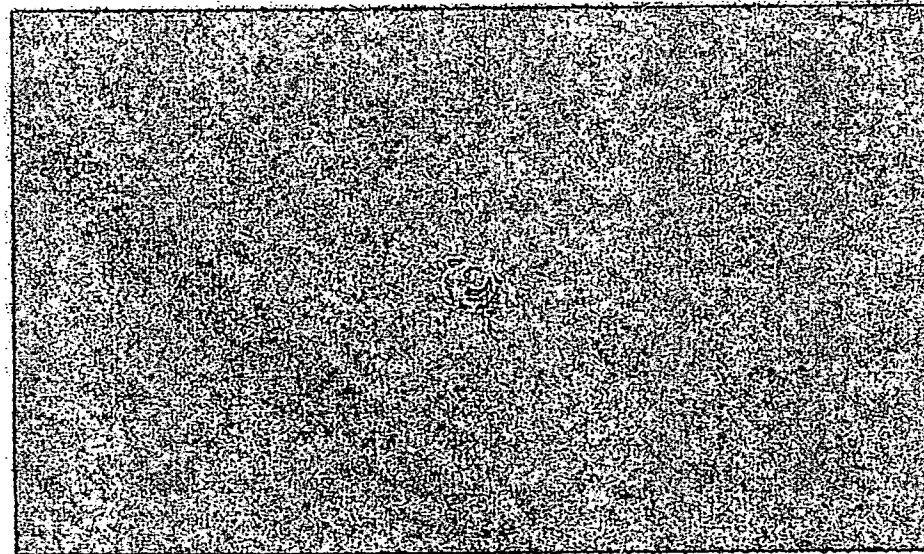
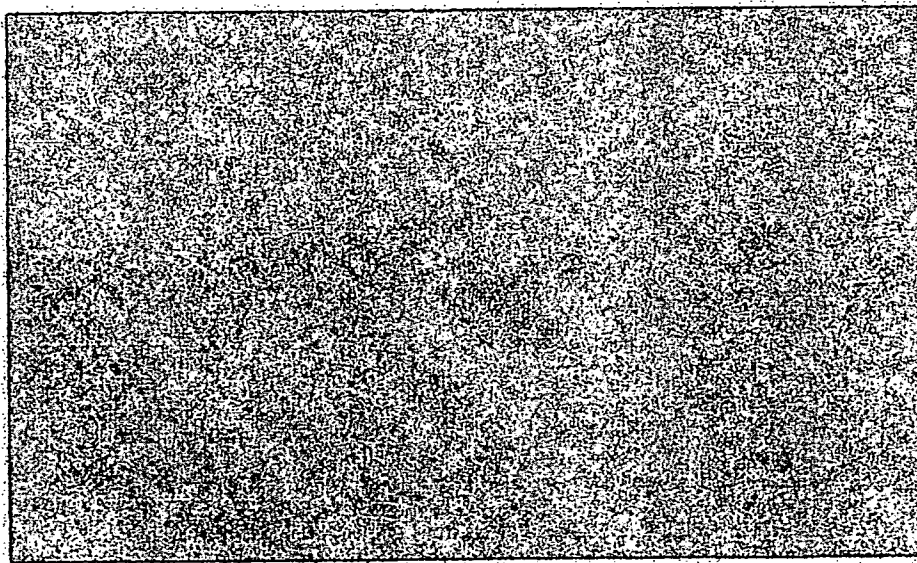


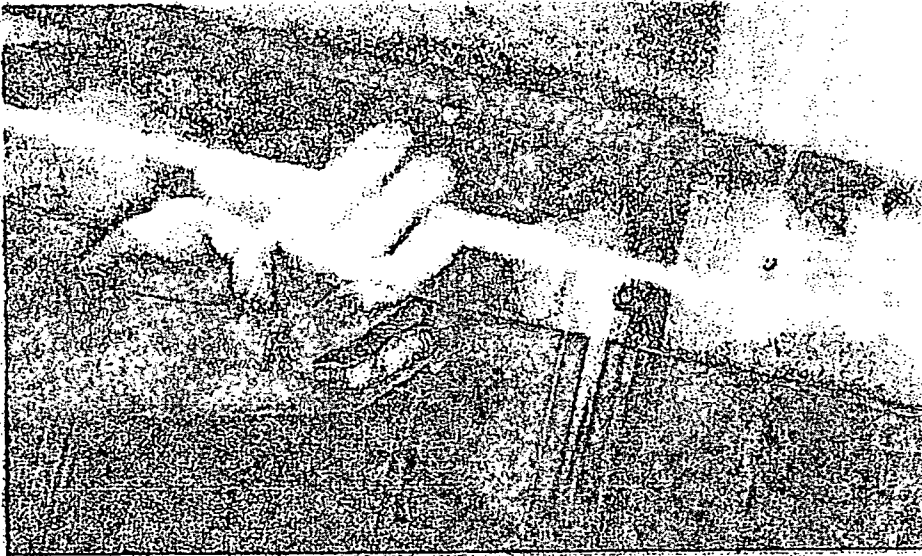
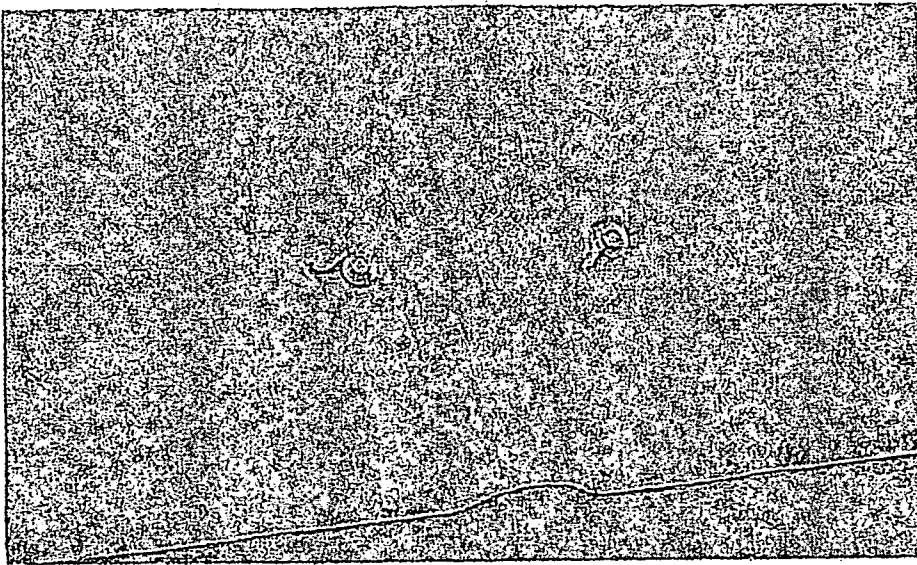


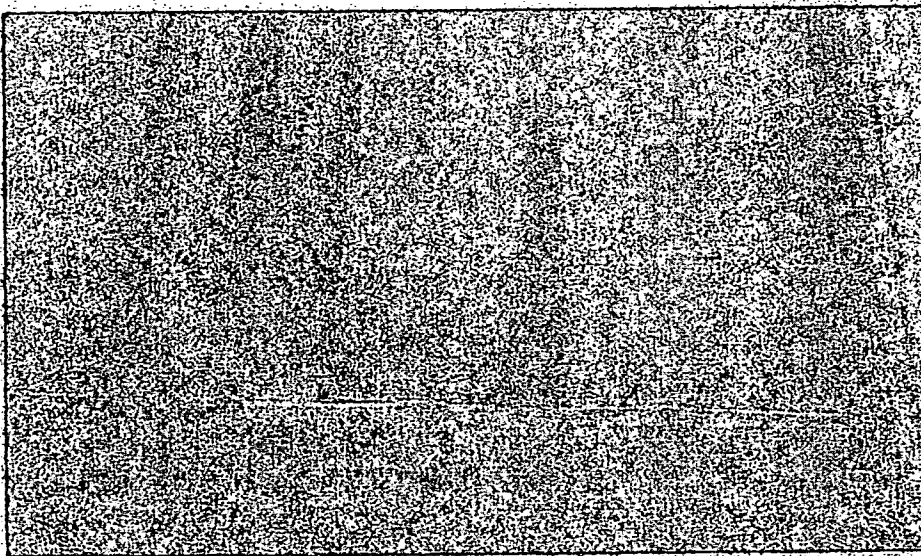
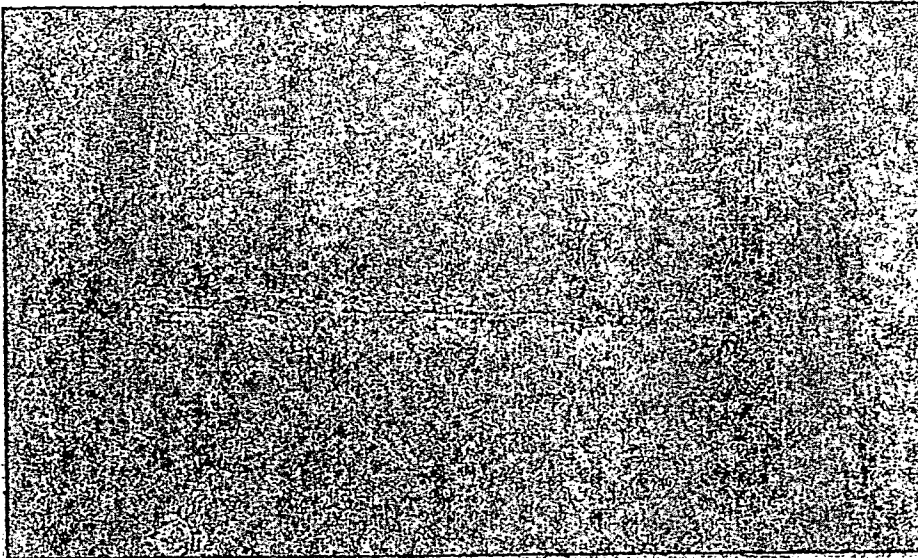
913 12
Q 2 1/2
860

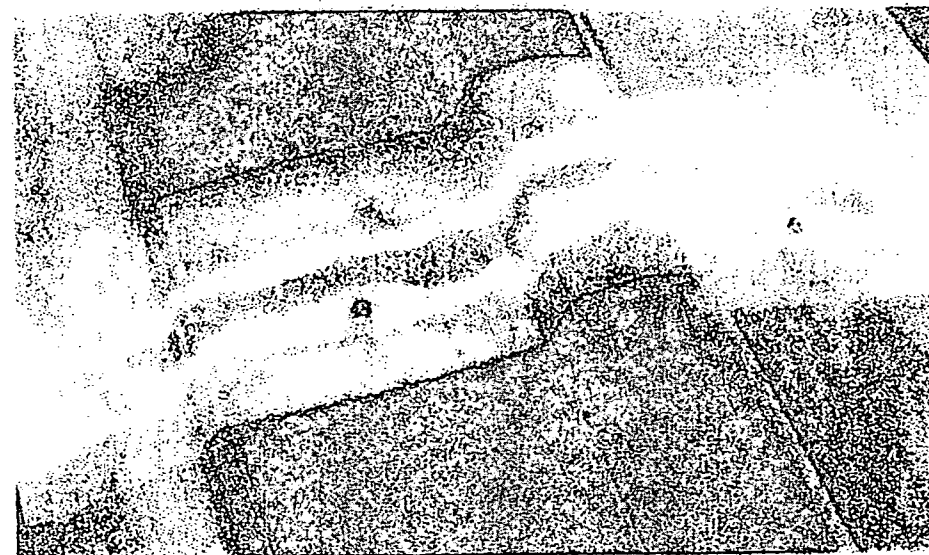
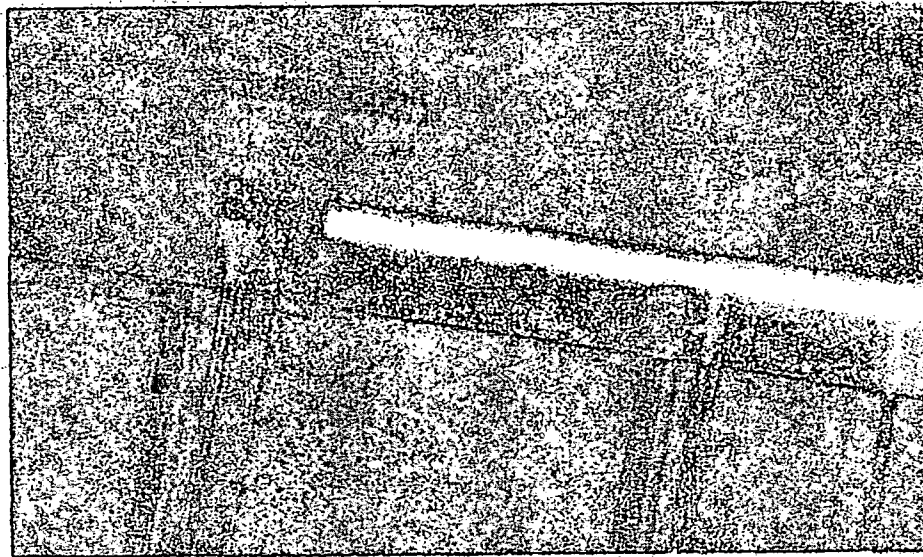
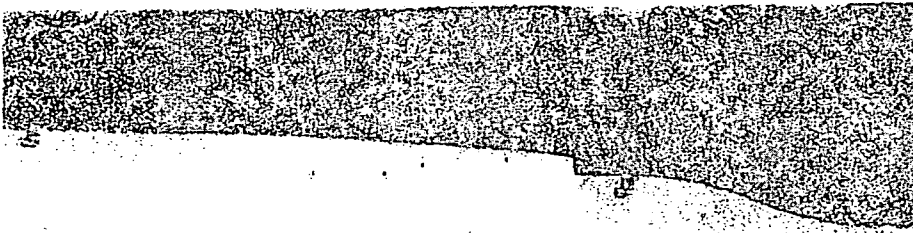
DEFENDANT'S
EXHIBIT
24

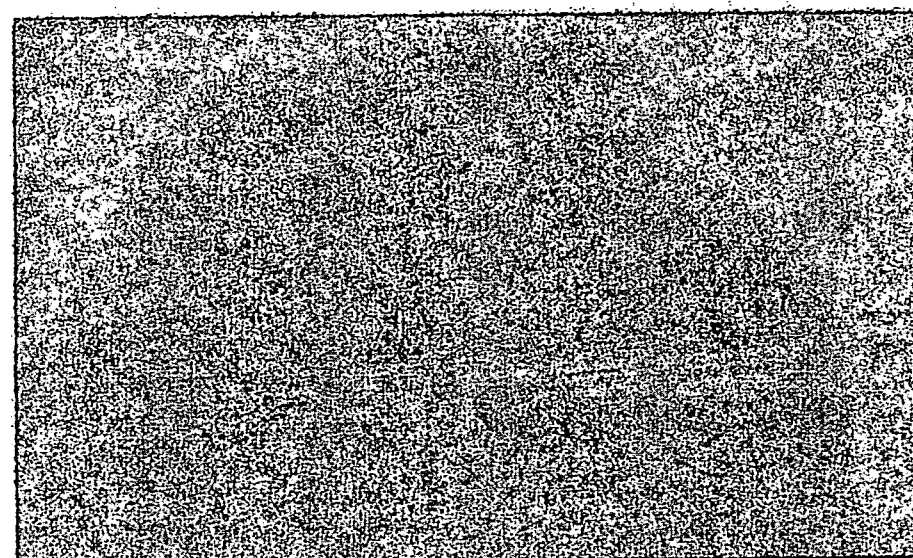
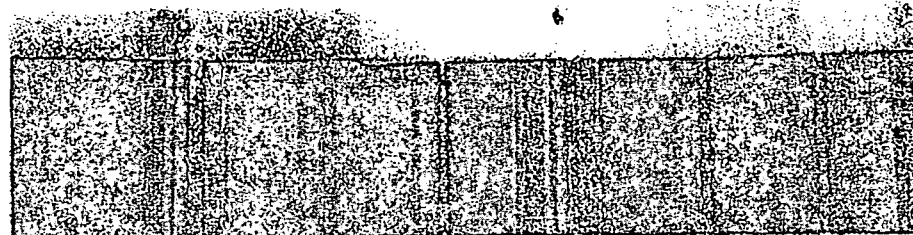
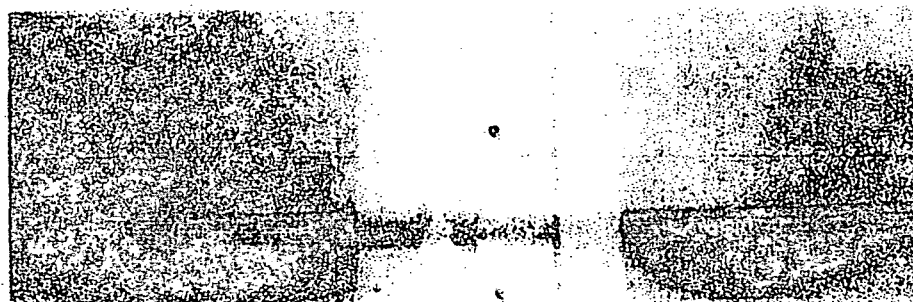
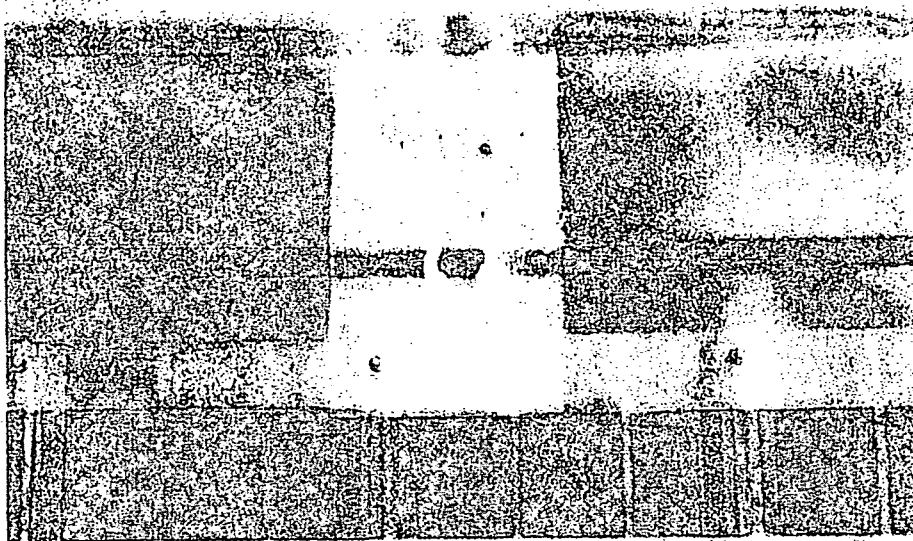


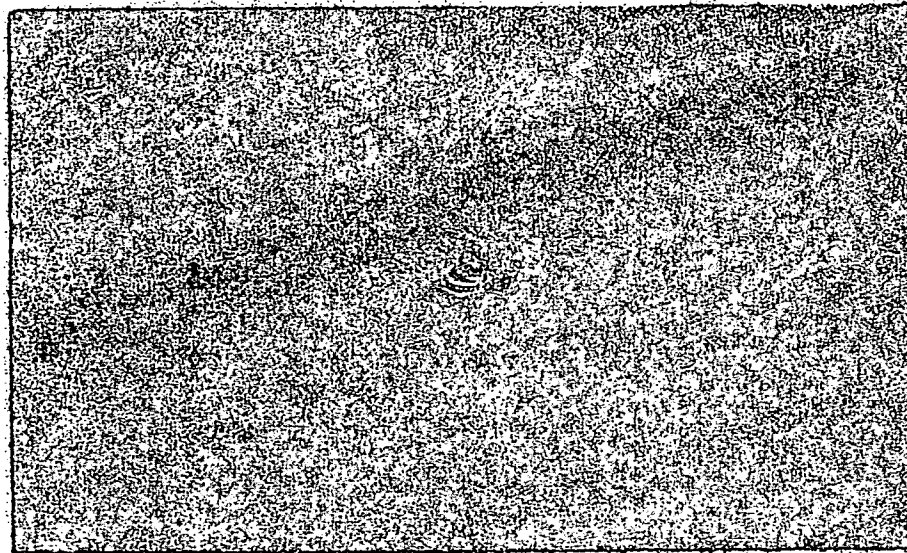
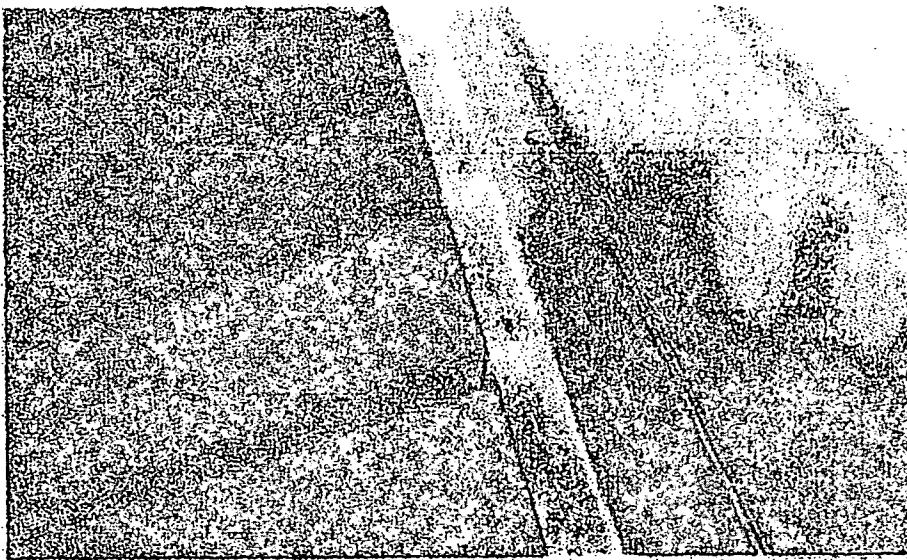
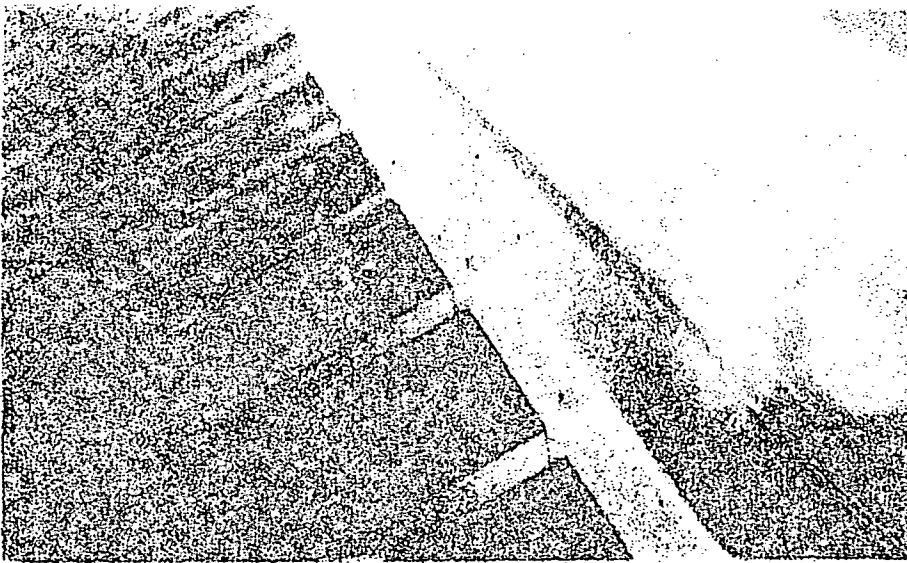


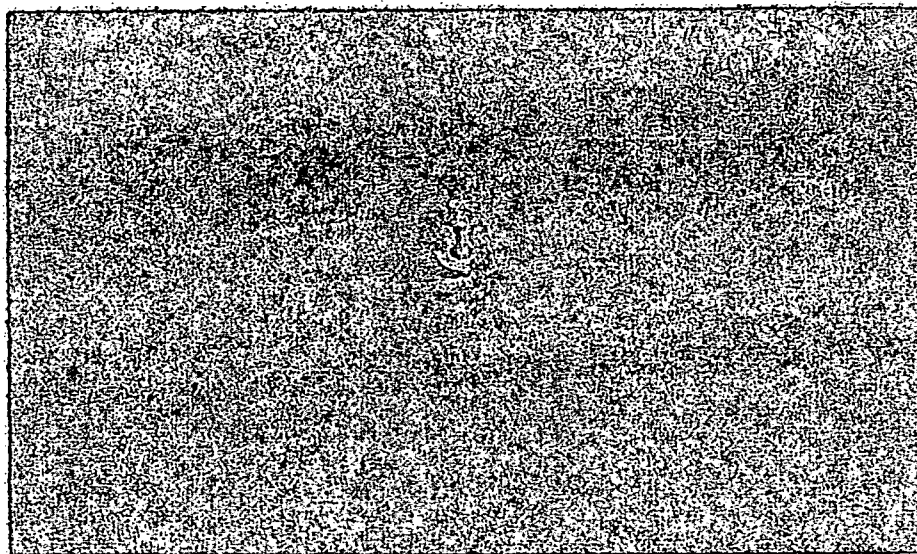
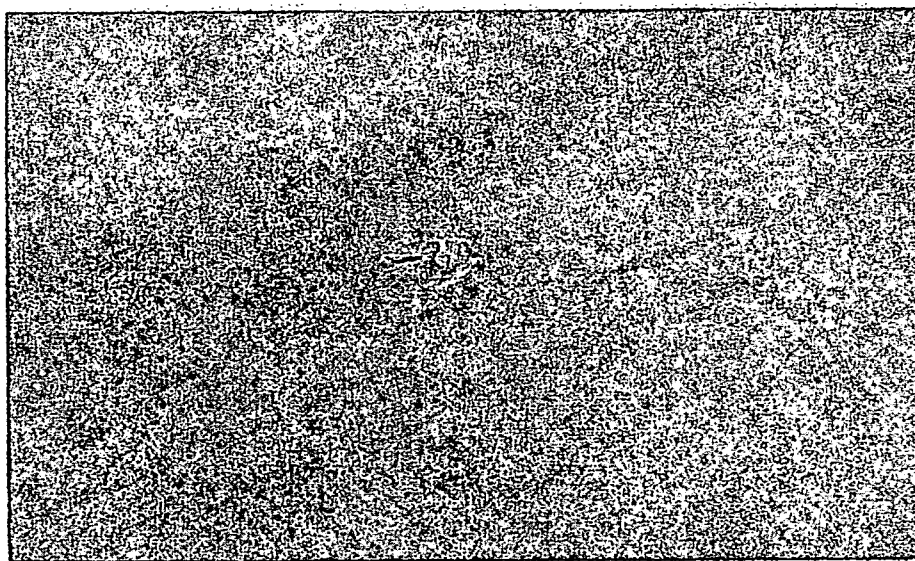


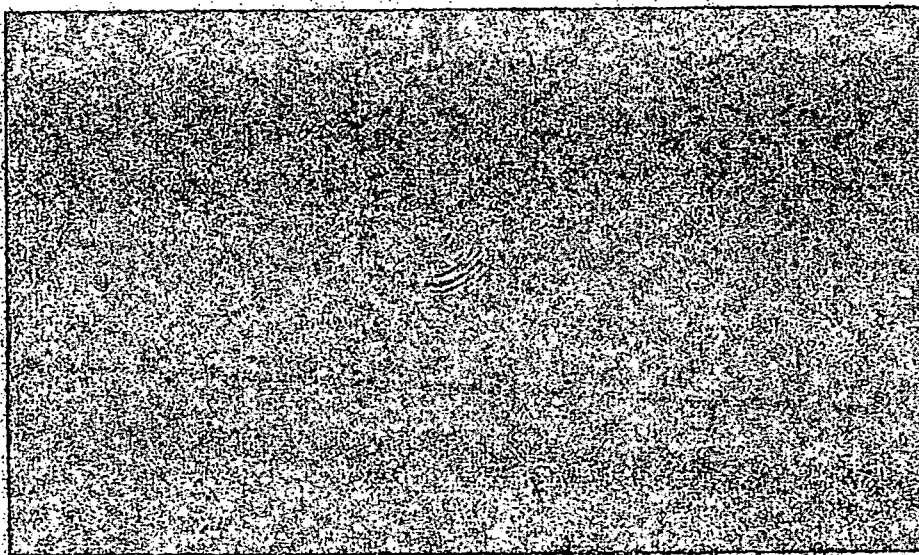
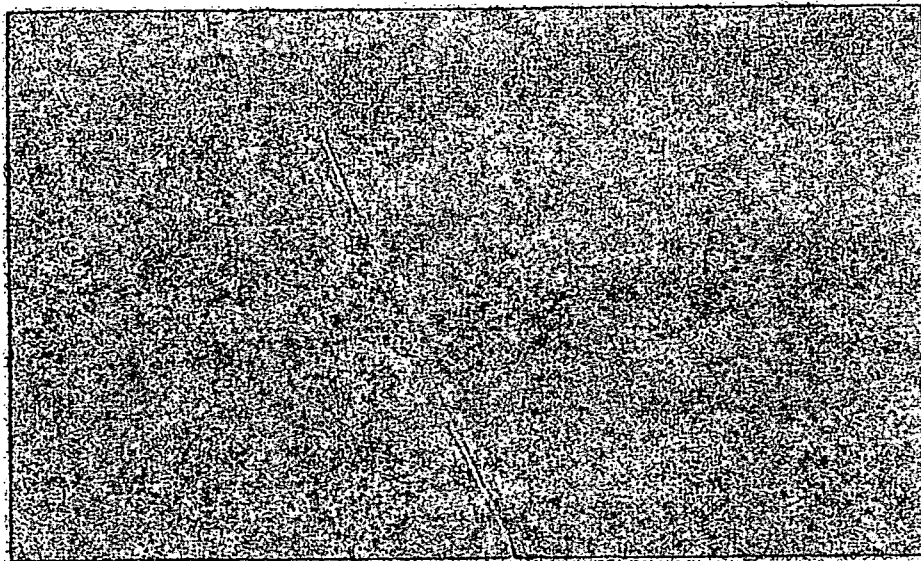
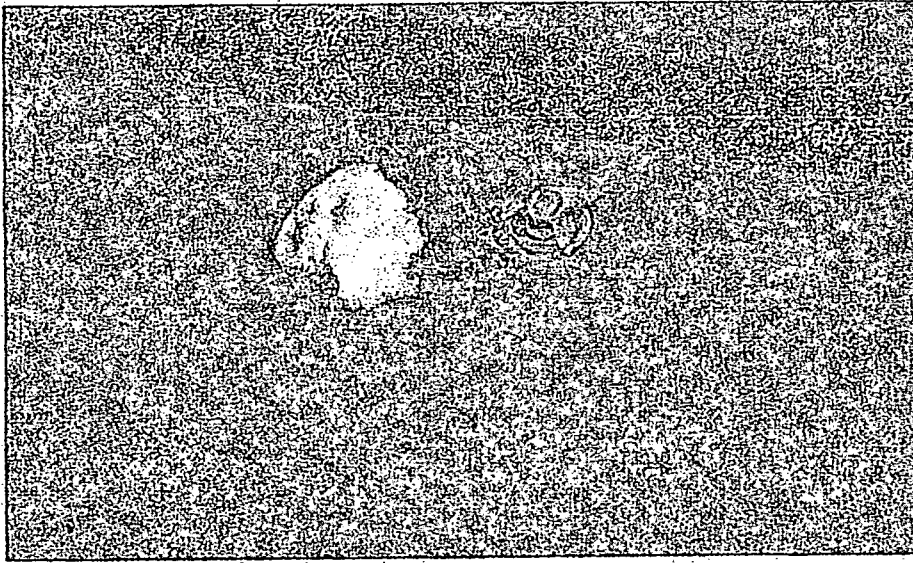


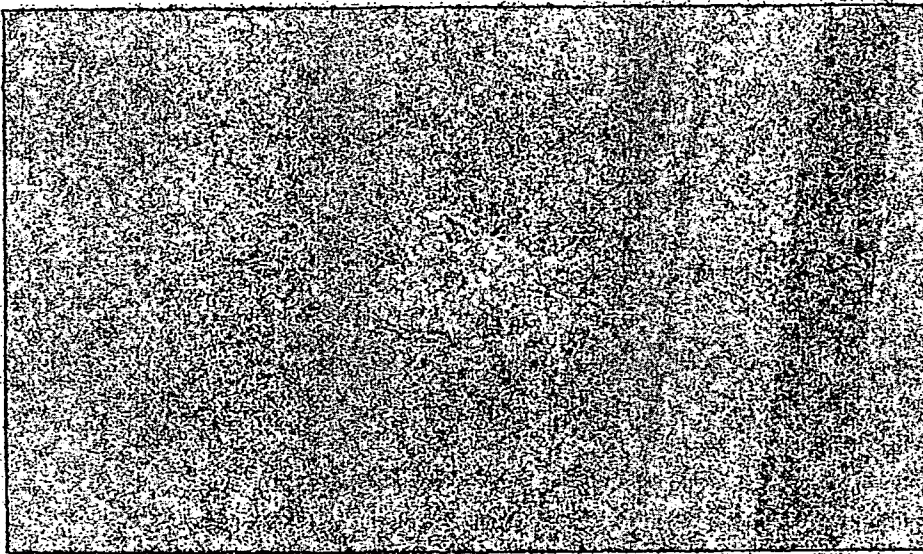
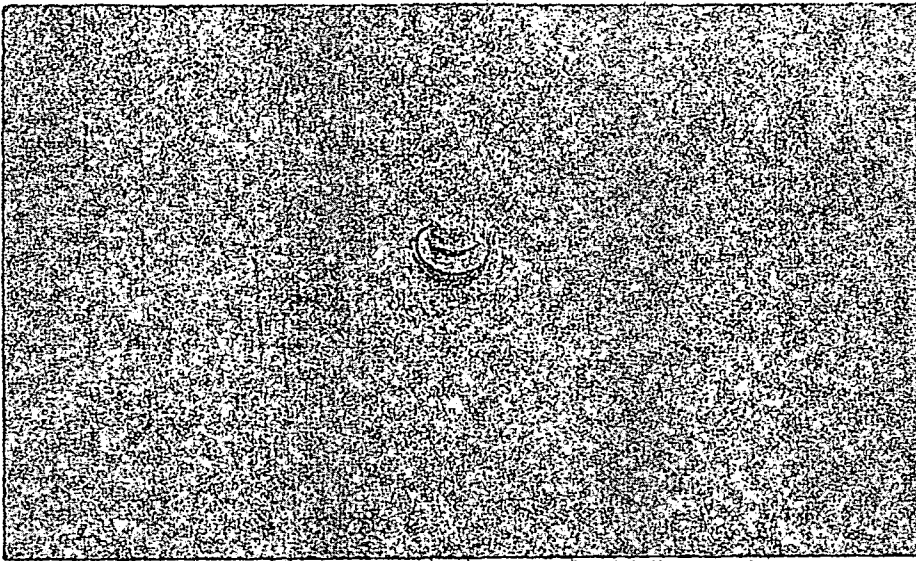












MR CLARK McCANTS



PUT AREA WHERE ELECTRICAL PANS WERE
NOT REVERSED INTO THE WALL
SEVERAL PLUMBING LEAKS

& HOSE FAUCETS - UNDERGROUND LEAKS

SCREWS AND NAILS LEFT ON THE GROUND
WHERE PEOPLE AND HOMIES WALLS
SWEEP THE BARN NUMEROUS TIMES

REPLACED WARPED BOARDS

STRUCTURAL REINFORCEMENT
SAFETY RAILS FOR STORAGE AREAS

ANY ROTTEN WOOD FROM THE ROOF LEAKING
NEEDS TO BE REPLACED

ANY WET INSULATION SHOULD BE REPLACED

9-13-11
C. H. H. H.
850



Costs 40 stall barn

Labor 18763.00

Grill 4456.20

Insurance 240.25

Materials 32143.98

Stall gates 4548.00

Money paid 64,699.43

Shed 778.1 Square feet
Cost 43,263.44.

9-13-12
10:00 AM
Clara Jones
Deputy Clerk



Honey Do Home Repair, Inc.

1075 Outaways Road
Aiken, SC 29803
803-649-2676
803-215-6700 cell

Invoice

Date	Invoice #
4/16/2009	341

Bill To
Doris Tumillo 4201 Shiloh Church Rd. Aiken, S.C. 29801

P.O. No.	Terms	Project
Barn #4		

Item	Quantity	Description	Amount
Electrical		Construct mounting frame and install new SCE&G 400 amp meter can, install entrance cable to 2 200 amp panels. Install new circuit and make connection to water heater in wash area, install 4 lights in tack rooms.	1,920.00
Plumbing		Install water lines for water heater and 2 frost proof hose bibs in wash area. Insulate water lines and construct frame for mounting hose bibs.	652.00
misc.		Install end cap on barn ends and J-channel around door openings	580.00
Plumbing		Repair broken water line 3/5	63.00
Total			\$3,215.00
Payments/Credits			\$0.00
Balance Due			\$3,215.00

Phone #

DORISE TUMMILLO
TUMERKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN SC 29801

233

2/18/69

2-20-1/120

FFS 00

*Given to Dorise Tummillo
for her account*



005

DORIS E TUMMILLO
TUMMEKKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

291

3-14-07
376.30
Amount of \$376.30
that was hundred and 30/100



DORIS E TUMMILLO
TUMERKKA ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

281

2-26-09

61-17620

*Approved by
three board members*

31000/10



028

DORIS E. TUMMILLO
TUMMEKKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

282

2-27-09

61-17620

ANTONIO ALFARO
Dipter - Antenna 1/10

1500 ⁸⁰/₁₀



0282

DORISE TUMMILHO
TUMMEKKA ACCOUNT
2201 SHILOH CHURCH ROAD
SAIKEN SC 29801

283

ANDINO ALKANO
and ... 1/50

1000

DORIS E TUMMILLO
TUMMEKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

275

Feb 6, 2009

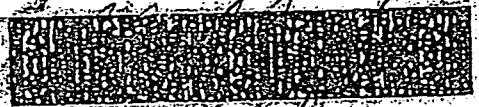
61-11620

Armour Companies
Four thousand four hundred

4456.20

and 20/100

to Stella and Brooks



U.O.L.

275

DORISE TUMMILLO
TUMMEKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

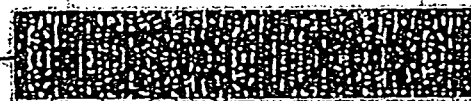
472

61-1/620

11/21/81

550.00

for bank



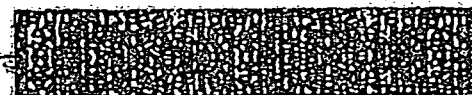
DORIS E TUMMILLO
TUMMEKKA ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

424

63-1/520

7/25/73

Don't forget to call me 5/1/73



5-24

DORIS E TUMMILLO
TUMMEKKE ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

276

51-1/620

Monter-huel

1/11/66



DORIS E. TUMMILLO
TUMMEKKA ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

284

3-2-09

61-1/620

EDITH EDWARDS
four hundred thirty 60/100

1,430 60/100



DORIS E. TUMMILLO
TUMMEKKE ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

287

3-10-97

61-17610

MAILED
for the - Mr. & Mrs. [unclear]

1429-26



[Redacted line]

FB

DORISE TUMMILLO
TUMMEKKA ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN SC 29801

288

3-21-09
DANE INSULATION
with Sept. 2008 bill
3830%

110

DORIS E TUMMILLO
TUMMILLO ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

299

4-3-09

1-1/620

M. J. TUMMILLO - 10/16/04 1/949
Walter - 10/16/04 1/949

HOE

258

DORISE TUMMILLO
TUMMEKKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN SC 29801

3/30/09 5/1/520

43666

06/06/09

1065

DORIS E TUMMILLO
TUMMEKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29301

244

gla/c

64-1/820

Pro Bank
the money for bill after 3/1

8545-35



TELL

DORISE TUMMILLO
TUMMKI ACCOUNT
4201 SHILOH CHURCH ROAD
AIKEN, SC 29301

347

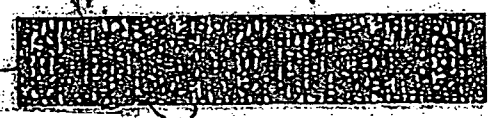
61-11620

6/8/61

Handwritten: Home of the Holy Spirit
The Holy Spirit is the one who
gives us life and love.

301500

#341 15.00





INVOICE

LOADED BY	CHECKED BY	DELIVERED BY

25 GORDON HWY
UGUSTA, GA 30904
706) 733-2217 FAX (706) 737-0119

2855890

INVOICE

810

02/12/09 14:50 011

DESIGN/CUSTOM BUILDERS, INC.
7906 SAN JOAN ROAD
RICHMOND, VIRGINIA 23229

SHIP 4201 SHILOH CHURCH
TO:

LB5892 S 58
CB5815 P3035
DB5892 A5807
TK5880 W5805
PR1101 C 2

MISC: TODAY 2/12
CUST-PO: NAILS

CUST#: 587712.0000 DEL DATE: 02/12/09
18042857712

TERMS: NET 10TH

FROM: 0 4825823

LN	QTY	DESCRIPTION	CAT#	UNIT	PRICE	AMOUNT
1	2	NAIL PO HOB PLUS 3X128 650385	650385	O	2	68.00 EA 136.00
2	1	PHLODE 2-3/8X113 FIB RH 650237	650237	O	1	91.00 EA 91.00
3	1	PHLODE 2-3/8X113 RS HOB 650283	650283	A	1	59.55 EA 59.55
4		4211 SHILOH CHURCH RD				

DATE: 02/12/09

SUBTOTAL 286.55
ATKEN CNTY, SC 20.06
TOTAL 306.61

BUILT WITH PRO-BUILD SOUTH, LLC! (111)

NOTE: ON THIS ACCOUNT IS A 1% IN FULL ON THE TOTAL
THE MONTH FOLLOWING PURCHASE. FINANCE
AGES AT THE MAXIMUM RATE IN THE STATE
RE THE GOODS ARE PURCHASED WILL BE CHARGED
ALL DELINQUENT AMOUNTS.

1. Check Your Used-For-Adjustment Made If Not Collected On Return To Store at Delivery.
2. A Restocking Charge Will Be Made On All Merchandise Returned For Credit.
3. All Returns Must Be Accompanied By Your Sales Invoice.
4. Special Orders Cannot Be Returned For Credit.
MERCHANDISE RECEIVED COMPLETE AND IN GOOD CONDITION

BY (SIGNATURE)

Thank You!

WE APPRECIATE YOUR BUSINESS

PROBuild

INVOICE

LOADED BY:	CHECKED BY:	DELIVERED BY:

5 GORDON HWY
 AUGUSTA, GA 30904
 (706) 733-2207 FAX (706) 737-0119

2855891

INVOICE

02/12/09 14:50 011

610

DESIGN CUSTOM BUILDERS, INC.
 7906 SAN JUAN ROAD
 RICHMOND, VIRGINIA 23229

SHIP 4201 SHILOH CHURCH R LB5892 S 58
 TO: CB5815 P3035
 DB5892 A5807
 TK5880 W5805
 PR1101 C 3

WT: 1440.00

CUST#: 587712.0000 DEL DATE: 02/12/09
 18042857712

TERMS: NET 10TH

FROM: 0 4835842

LG	QTY	DESCRIPTION	CATALOG	UNITS	PRICE	AMOUNT
						
1	10	616-16 #2 TREATED SYP	6616T2	0	10	28.52 EA
2	10	QUIKRETE CONCRETE MIX 80LB BAG	QDNQMIX00	0	10	4.90 BG
						285.20
						49.00

[Handwritten Signature]

DATE: 02/10/09

SUBTOTAL 335.20
 D Aiken CNTY, SC 23.47
 TOTAL 358.67

WILD WITH PRO-BUILD BATH LLC

MENT ON THIS ACCOUNT OR USE IN FULL ON THE 10TH
 THIS MONTH FOLLOWING PURCHASE. FINANCE
 CHARGES AT THE MAXIMUM LEGAL RATE IN THE STATE
 WHERE THE GOODS ARE PURCHASED WILL BE CHARGED
 ALL DELINQUENT AMOUNTS.

1. Check Your Order: No Adjustments Made If Not Called To Our Attention At Time Of Delivery
 2. A Handling Charge Will Be Made On All Shipment Returned For Credit
 3. All Returns Must Be Accompanied By Your Store Ticket
 4. Return Order Cannot Be Returned For Credit
 MERCHANDISE RECEIVED COMPLETE AND IN GOOD CONDITION
 BY:

Thank You!
 WE APPRECIATE YOUR BUSINESS

2

APROBuild

INVOICE

LOADED BY	CHECKED BY	DELIVERED BY

825 GORDON HWY
AUSTIN, GA 30904
706) 733-2207 FAX (706) 737-0119

2835893

INVOICE

02/12/09 14:50 011

DESIGN CUSTOM BUILDERS, INC.
7906 SAN JUAN ROAD
RICHMOND, VIRGINIA 23229

SHIP 4201 SHILOH CHURCH
TO:

LB5892 B 58
CB5815 P3035
DB5892 A5807
TK5880 W5805
PR1101 C 3

MISC: THURS 2/12
CUST PO: TEXT HARDI
OUR PO: 5808762

CUST#: 5877:2.0000 DEL DATE: 02/12/09
18042857712

TERMS: NET 10TH

FROM: 0 4835777

LN	QTY	DESCRIPTION	CATALOG	UNITS	PRICE	AMOUNT
1	12	5/16" X 8" TEXTURED HARDIE PANEL	WEMSO	E	12	29.35
2		3/4" PUT MATERIAL TO RT SIDE BY				
3		RACE TRACK AREA				
						352.20

Memo

DATE: 03/18/09

SUBTOTAL 352.20
D Aiken CNTY, SC 24.66
TOTAL 376.86

BUILT WITH PRO-BUILD SOUTH LLC

BUY ON THE ACCOUNT IS 15% IN FULL ON THE 15TH
THE MONTH FOLLOWING PURCHASE. FINANCE
USES AT THE MAXIMUM LEGAL RATE IN THE STATE
IF THE GOODS ARE PURCHASED WILL BE CHARGED
1 DELINQUENT AMOUNT.

1. Check Your Load - No Additional Charge If Not Called To Our Attention At Time of Delivery.
2. A Rescheduling Charge Will Be Made On All Merchandise Returned For C.A.B.
3. All Returns Must Be Accompanied By Your Sales Invoice.
4. Special Orders Cannot Be Returned For Credit.
MERCHANDISE RECEIVED COMPLETE AND IN GOOD CONDITION

Thank You!

WE APPRECIATE YOUR BUSINESS

PROBuild

INVOICE

LOADED BY	CHECKED BY	DELIVERED BY

25 GORDON HWY
AUGUSTA, GA 30904
(706) 733-2207 FAX (706) 737-0119

2855894

INVOICE

S10

02/12/09 14:51 011

DESIGN CUSTOM BUILDERS, INC.
7906 SAN JUAN ROAD
RICHMOND, VIRGINIA 23229

SHIP 4201 SHILOH CHURCH
TO:

LB5892 S 58
CB5815 P3035
DB5892 A5807
TK5880 W5805
PR1101 C 3

MISC: THURS 2/12 ON ARR
CUST PO: 2X6X16' VGR00
QUR. PO: 5808757

CUST#: 587712.0000 DEL DATE: 02/12/09
18042857712

TERMS: NET 10TH

FROM: P 4835770

LA	QTY	DESCRIPTION	CAT#	OB	UNIT	PRICE	AMOUNT
1	960	2X6 T&B (25'P V-GROOVE	WBMSD	E	960	.64	614.40
2		END 68-16' PCS					
3		INPUT MATERIAL TO LEFT BY BIG					
4		13814					

E-DATE: 03/19/09

SUBTOTAL 614.40
Aiken Cnty, SC 43.81
TOTAL 657.41

PAID WITH PRO-BUILD SOUTH LLC

ANY DEBT ON THIS ACCOUNT IS DUE IN FULL ON THE 10TH
OF THE MONTH FOLLOWING THE PURCHASE. FINANCE
CHARGES AT THE MAXIMUM LEGAL RATE IN THE STATE
WHERE THE GOODS ARE PURCHASED WILL BE CHARGED
ON ALL DELINQUENT ACCOUNTS.

Check Your Load and Acknowledgment Mark if Not Called to Our Attention at Time of Delivery.
A Resending Charge Will be Made On All Merchandise Returned For Credit.
All Returns Must be Accompanied by Your Sales Invoice.
Special Orders Cannot be Returned For Credit.
MERCHANDISE RECEIVED COMPLETE AND IN GOOD CONDITION
BY:

Thank You!

WE APPRECIATE YOUR BUSINESS

Goldman's True Value
2615 Columbia Hwy North
Aiken, SC. 29805
803-649-4908 Fax: 803-649-1732

STATEMENT

For the period: 3/25/2009 to 04/24/2009

Terms: NET THE 5TH

Account #: 9737

DORIS TUMMILLO
4201 SHILOH CHURCH ROAD
AIKEN, SC 29805

Date	Reference	PO/REF	Due Date	Credit	Debit
3/25/2009	Previous Balance				\$4,559.04
03/26/2009	Payment Received			(\$4,559.04)	
04/03/2009	B46020		05/05/2009		\$165.99
04/04/2009	B46170		05/05/2009		\$121.98
04/13/2009	A48000		05/05/2009		\$94.78
04/14/2009	A48068		05/05/2009		\$60.99
04/15/2009	A48118		05/05/2009		\$30.95
04/17/2009	B47056		05/05/2009		\$114.99
04/18/2009	B47099		05/05/2009		\$51.49
04/18/2009	A48358		05/05/2009		\$17.81
04/18/2009	B47168		05/05/2009		\$7.35
04/23/2009	B47437		05/05/2009		\$1,225.90

Totals: (\$4,559.04) \$1,882.31
Current Activity: (\$2,676.73)

Account Summary
Previous Balance: \$4,559.04
Payments, Credits: (\$4,559.04)
Purchases, Charges: \$1,882.31
New Balance: \$1,882.31

Aging Report by Due Date
PAST DUE: \$0.00
Current: \$1,882.31
1 to 30 Days: \$0.00
31 to 60 Days: \$0.00
61 to 90 Days: \$0.00
Over 90 Days: \$0.00

New Balance:

\$1,882.31

BIG D WEB & VET SUPPLY
9998 STATE ROUTE 43
STREETSBORO, OH 44241
1-800-321-2142

PH: 1-330-626-5000 FAX: 1-330-626-5011
www.bigdweb.com sales@bigdweb.com

Page	Date	Invoice No.
1	02/13/09	802732*

SUMMARY COPY

Mike Tumnillo
4201 Shilo Church Rd
Aiken, SC 29801

S
H
I
P
P
I
N
G

Customer No.	Ship To	Product	Media Code	Terms
345139	JJ /JJ	/SALE	XXXXXXXXX6428	DISCOVER MOM
Credit Card Number	Type	Cardholder Name	Exp. Date	Zone
		(804) 614-8214	39960.0	41 T

Message:

GO TO OUR WEBSITE TO SEE MORE GREAT SPECIALS
ORDER ONLINE 24 HOURS A DAY!
WWW.BIGDWEB.COM

Qty	Box	Ships	Item / Price	Description	Unit Price	Qty	Ext
40	0	40 873	CHR	STALL GATE LARGE WITH YOKE COUNTRY ESTATE 52X62 WITH MOUNTING BRACKETS	99.9500	--	3998.00
1	0	1 FREIGHT		THIS ITEM SHIPS FREIGHT TRUCK WE WILL EMAIL YOU WITH EXACT CHARGES FOR YOU APPROVAL	0.0000	--	0.00
MERCHANDISE INVOICE TOTAL \$							3998.00
SHIPPING & HANDLING \$							550.00
INVOICE TOTAL \$							4548.00
CR. CARD: D2, APPR: 012259 \$							-4548.00
BALANCE FOR THIS ORDER \$							0.00

Progress Paint Manufacturing

201 E. Market Street
Louisville, KY 40202

Phone: (502)587-8685 Fax: (502)587-2440

Invoice

Invoice #: 2009-22297-00

Bill to PO:

BILL TO:

DORIS TUMMILLO FARMS INC
4201 SHILOH CHURCH ROAD
AIKEN SC 29801

SHIP TO:

DORRIS TUMMILLO FARM INC
4201 SHILOH CHURCH ROAD
AIKEN, SC 29801

Ordered	Shipped	Invoiced	Terms	Payment Due	Shipped Via	B/I #
02/19/2009	02/27/2009	02/27/2009	Net 30 Days	03/29/2009	Common Carrier	

Part Number/Description	Unit	Ordered	Shipped	Price	Extension
88207	5GL	24	25	\$97.40	\$2,435.00
SGL - POLY VARNISH GLOSS					

AMOUNT DUE: \$2,435.00

A Service Charge of 1.5% will be applied to past due balances

Handwritten signatures and initials:
Ply
Wen
3/6/09



Original

FLXATT

Goldman's True Value
 2615 Columbia Hwy North
 Aiken, SC 29805
 803-649-4908 Fax: 803-649-1732

STATEMENT

For the period: 5/25/2009 to 06/24/2009

Terms: NET THE 5TH

Account #: 9737

DORIS TUMMILLO
 4201 SHILOH CHURCH ROAD
 AIKEN, SC 29805

Date	Reference	POI/REF	Due Date	Credit	Debit
5/25/2009	Previous Balance				\$599.01
06/06/2009	Payment Received			(\$599.01)	
06/10/2009	B50784		07/05/2009		\$46.85
06/16/2009	A52058		07/05/2009		\$3,322.40
06/24/2009	A52601		07/05/2009		\$21.39
Totals:				(\$599.01)	\$3,390.44
Current Activity:					\$2,791.43

Account Summary

Previous Balance: \$599.01
 Payments, Credits (\$599.01)
 Purchases, Charges \$3,390.44
 New Balance: \$3,390.44

Aging Report by Due Date

PAST DUE: \$0.00
 Current: \$3,390.44
 1 to 30 Days: \$0.00
 31 to 60 Days: \$0.00
 61 to 90 Days: \$0.00
 Over 90 Days: \$0.00

New Balance:

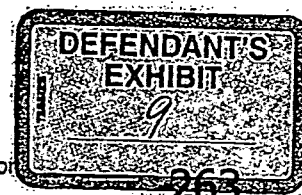
\$3,390.44

Handwritten signature



ELITE CONSTRUCTION, INC.

PURCHASE CONTRACT



Name Doris Tummilla Date 7-18-08
 Address Shiloh Church Road State, Zip S.C.
 Directions to Site _____

Building Use Barn Building Size W 64' L 204' H 10'
 Wall Color _____ Gable _____ Roof _____ Trim _____ Doors _____
 Power on site? X Yes No

Miscellaneous Building has three 72' long by 24' wide extensions with five stalls centered in each. Building permitted will be provided by Elite Construction. Electrical, plumbing, and two coats of polyurethane will be included in the price.

Building permit - Grading - Fill furnishing by owner unless specified.
 We shall furnish all labor and material as described above and in accordance with the specifications and conditions shown on reverse side of this contract unless otherwise specified.

Total Contract \$358,379.00

Financing by _____
 Terms _____

50% of total cost of project due upon signing.
 30% of total cost of project due after roof completion.
 30% of total cost of project due after exterior walls completed.
 10% of total cost will be due when job is completed, and be paid within 10 days of completion.
 If amount due is not paid within 10 days of completion, there will be a 5% late charge added to the total.
 Any change orders shall be in writing and approved by the builder.

Amount due at signing \$107,513.70 30%
 Amount due after roof completion \$107,513.70 30%
 Amount due at completion of exterior walls \$107,513.70 30%
 Amount due at completion of job \$35,837.90 10%

Buyer

Elite Construction Representative

Tummilla
 Printed Name

Chris Key
 Printed Name

[Signature]
 Signed Name

Chris Key
 Signed Name

GENERAL SPECIFICATIONS CUSTOM POLE BUILDINGS

1. Foundation columns and other lumber which comes in contact with the ground will be pressure treated to resist rot, decay and insect damage.
2. Standard spacing of side wall columns is 10' on center.
3. Truss lumber will be stress rated 1600 F.
4. Each building will have pressure treated splash boards at the bottom of the wall.
5. Truss designs are by licensed professional engineers and are certified as to load capacity. Standard spacing is 10' on center.
6. All trusses to be bolted as well as spiked into wall columns.
7. Hardware items such as door track, hinges, bolts, connector plates, door handles, hooks, etc., will be plated with zinc or equal.
8. Minor changes, which would not adversely affect the strength or appearance, may be made without notification.
9. Walls of this building are not designed to withstand the lateral loads imposed by the contact storage of bulk goods, such as fertilizer, grain, chopped or baled hay, or any loads that tend to settle or spread in storage.
10. All untreated lumber on the building exterior will be covered with pre-formed moldings.
11. Guarantee on pressure treated wood, workmanship and material becomes effective upon full payment of invoice. Craftsmanship and all other materials not covered under any other warranties will be covered for six months after completion date of the job.

TERMS OF SALE

1. Building will be Custom Structure and will be erected according to the above specifications. Builder will furnish all materials, labor and supervision for the building, but will not perform, furnish or install any electrical wiring, plumbing, heating, painting, glazing, concrete work, grading or filling, unless otherwise specified.
2. A service charge of 5% per month shall accrue to all accounts more than 30 days past invoice date. Should it be necessary to force collection of any monies due under this agreement, buyer shall be liable for service charges and reasonable attorney fees.
3. Buyer agrees to insure building for the amount of the contract price with the following coverage: fire, lightning, windstorm and hail. Such coverage is to be put into effect on date material is delivered to site and will remain in effect until contract price has been paid in full. The risk of any such casualty is assumed by the owner. In the event of loss, payment will be made to the owner and/or builder as their interests may appear.
4. Builder will carry adequate insurance to protect owner against any negligence by builder or his workmen.
5. Builder will carry workers' compensation on all workmen he employs on the job.
6. Builder is responsible for obtaining any required building permits prior to erection.
7. If possible, buyer will be at the building site at the start and finish of construction.
8. Buyer is responsible for and agrees to clear and level building site prior to scheduled date of erection. Leveling shall be performed so the site will not vary more than 8 inches from high to low points.
9. Buyer and builder assume that the building site is free from underground obstructions. Where rock, stumps, concrete or other unforeseen obstruction hinder digging holes for foundation columns, a charge will be made in accordance with additional time required. The builder reserves the right to decline jobs where underground obstructions are too severe, unless buyer can have site prepared.
10. Builder is not responsible for damage to underground utilities, such as tile, water lines, electric lines, etc.
11. Certain construction items such as ventilators, roof hatches, eave troughs, doors, windows, etc., are to be installed in a workmanlike manner in proper adjustment. However, such items are not sold with the understanding that they will never leak or need adjustment. This future maintenance and adjustment is the responsibility of the buyer.
12. If buyer or his agent requests change from specifications, any extra costs for such changes will be added to the purchase price.
13. This agreement is subject to verification by office of the builder.
14. This quotation is automatically withdrawn and is void after 30 days.
15. Occupancy or use of the building by purchase before completion will constitute acceptance of the building and payment in full is required at that time.

Building Specifications

Size

1. Length 204'
2. Width 64'
3. Overhang N/A
4. Other (3) 24' x 72' wings

Concrete and Insulation

1. Aisle way 14'
2. Aprons N/A
3. Bags N/A
4. Insulation Roof
5. Other _____

Color and Material

1. Roof 40 yr. Ag panel
2. Exterior Walls 40 yr. Ag panel (where applicable)
3. Stalls T&G
4. Bars (will be included in change order)
5. Doors Double Dutch 4' x 4' wood with cross bucks
6. Windows Dutch 4' x 4' wood with cross bucks
7. Interior Walls T&G
8. Other _____

INITIALS

Exterior

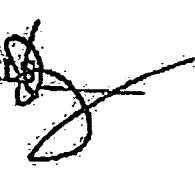
1. Cupolas N/A
2. Windows N/A
3. Doors N/A
4. Sky Lights 24" ridges
5. Front Posts N/A
6. Hydrants N/A
7. Other _____

Interior

1. Hydrants 9 frost freeze
2. Water Heaters N/A
3. Washer/Dryer N/A
4. Other _____

Stalls

1. Automatic Water Dispensers N/A
2. Feeder N/A
3. Mats N/A
4. Fans 45
5. Cribbing Metal Yes
6. Doors 4' x 4' Wooden Dutch with cross bucks
7. Divider Grill Work (will be included in change order)
8. Aisle Way Grill Work (will be included in change order)
9. Other _____

INITIALS 



JAN 12 APPROX 1PM

CHRIS - HOW CAN WE GET THINGS BACK ON TRACK
YOU HAVE BEEN SOME TOO LONG

~~WE ARE NOT GOING TO COME~~

WE NEED THIS BARN DONE ASAP AND WE NEED YOU
TO FINISH IT. WE ARE LOSING MENTAL INCOME PER
EVERY DAY IT IS UNFINISHED

WE NEED THE BARN DONE IN A WEEK AND A HALF
CHRIS SAID HE CANT DO IT WITHOUT PAYING HIS PEOPLE
OVERTIME - IT WILL COST YOU MORE MONEY.

I HAVE BILLS TO PAY AND I WANT ~~BE~~ RE AND DRAW NOW

CHRIS: JUST COME BACK WITH YOUR FULL CREW TOMORROW
AND STAY UNTIL THE BARN IS FINISHED AND I WILL HAVE
A CHECK TOMORROW EVENING - CALL ME TONIGHT AND
LET ME KNOW

JAN - 13

(HE NEVER CALLED ME)

7:00 AM TO DONIS

LET ME CALL CHRIS THIS AFTERNOON AND TRY TO
NEGOTIATE WITH HIM AGAIN

9:30 AM CHRIS WAS AT THE SITE REMOVING
MATERIALS AND ~~TOOLS~~ EQUIPMENT

HE SAID HE IS LEAVING AND GOING TO ANOTHER JOB
WHERE HE CAN MAKE MONEY.

I SAID CHRIS - WHAT DID WE TALK ABOUT YESTERDAY

I NEED YOU TO LEAVE THAT OTHER JOB AND YOU JUST

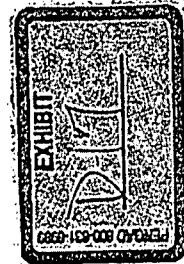
STAND BY AND ^{BE ON} ~~FINISH~~ THIS ^{JOB} WITH A FULL CREW AND YOU

WOULD HAVE GOTTEN YOUR MONEY THIS EVENING

CHRIS SAID IT COST HIM TOO MUCH MONEY TO MAKE HIS CREW
FROM THAT JOB.

TUN-O-BEEZ FARM ACCOUNT
 1000
 9/12/08
 \$108,897.07
 SOUTHERN BANK & TRUST
 1000
 9/12/08

Check 1005 Amount: \$108,897.07 Date 9/12/2008



9/12/08
 9/12/08
 9/12/08
 9/12/08

CENTER TO CENTER WIDTH

GALL

GALL

1	11 - 10 1/4"	21	11 - 7 7/8"
2	11 - 11 1/8"	22	11 - 9 1/8"
3	11 - 9"	23	11 - 1 1/2"
4	11 - 8 5/8"	24	11 - 9 3/8"
5	12 - 1"	25	11 - 8 1/8"
6	11 - 8 1/2"	26	11 - 11 1/8"
7	11 - 9"	27	11 - 9 3/4"
8	12 - 1 1/4"	28	11 - 9 1/4"
9	11 - 9"	29	11 - 11 1/8"
10	11 - 8 1/2"	30	11 - 9 1/2"
11	11 - 11 1/8"	31	11 - 6 1/2"
12	11 - 9 3/4"	32	11 - 6 1/2"
13	11 - 9 1/4"	33	11 - 6 1/4"
14	11 - 11 1/8"	34	11 - 6 1/4"
15	11 - 9 1/2"	35	11 - 6 1/4"
16	11 - 9 1/2"	36	11 - 5 1/8"
17	11 - 11 1/8"	37	11 - 6"
18	11 - 9 1/8"	38	11 - 6"
19	11 - 8 1/2"	39	11 - 6 1/4"
20	12 - 2 1/8"	40	11 - 6 1/8"

913
 10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40
 11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40
 11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40



**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 Record on Appeal contains all material proposed to be included by any of the parties and not any other material in accordance with Rule 201(g), SCACR.

March 19, 2014



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Paul K. Simons
Hull Barrett, PC
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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

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Elite Construction, Inc., Respondent

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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 BRIEF OF APPELLANT

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Paul K. Simons
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Trust Company of Augusta

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STATUTES

S.C. Code Ann. § 29-5-10(a) (1976)	
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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?

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' x 12'. (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). Tumnillo 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, Tumnillo 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).

Tumnillo 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 be 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 Tummillio 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. Abstract 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

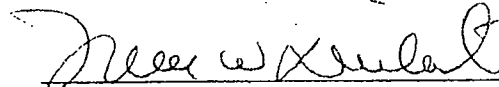
The trial court erred in not considering the testimony of the parties to determine the true intention of the parties relating to stall size. If the trial court did not err in its conclusion that the contract was clear on its face, the decision to "overlook" the deficiency in stall size as mere "nominal"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

Case No. 2009-CP-02-000958

Elite Construction, Inc., Respondent

v.

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Defendants,

Of Whom Doris E. Tummillo is the Appellant,

And

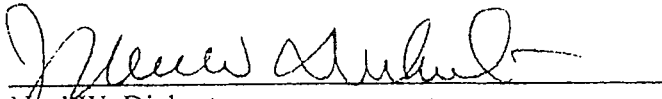
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

CERTIFICATE OF COUNSEL

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

March 21, 2014


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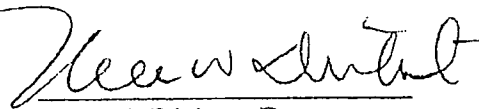
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PROOF OF SERVICE

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.

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STATEMENT OF ISSUES ON APPEAL

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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 Tummillio, 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.

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 Tummillio, 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.

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 RESPONDENT 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

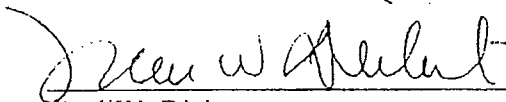
and 10/100's (\$80,204.10) Dollars, or a difference of a few dollars shy of Forty-Six Thousand (\$46,000) Dollars of the amount requested. With any consideration at all of even a nominal loss because of the delay, or the deficiency in the stall size produced under Elite's version of the facts, the question 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 21, 2014

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, 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

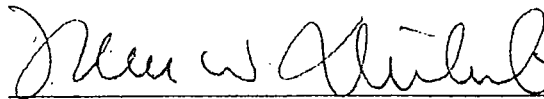
Georgia Bank and Trust Company of Augusta is a Respondent.

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



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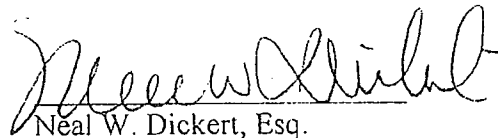
Georgia Bank and Trust Company of Augusta is a Respondent.

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



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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

Donis E. Timmillo and Georgia Bank and Trust
Company of Augusta, Defendants

Of Whom Donis E. Timmillo is the Appellant

And

Georgia Bank and Trust Company of Augusta is the
Respondent

FINAL BRIEF OF RESPONDENT
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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. (R. pp. 37 - 50). 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. (R. pp. 33 - 50).

Dr. Tummillo answered Elite Construction's Complaint and filed a counterclaim also alleging breach of contract. (R. pp. 51 - 56). Elite Construction replied to Dr. Tummillo's Counterclaim and denied her allegations. (R. pp. 57 - 59).

Georgia Bank and Trust Company of Augusta is also named as a Defendant in this matter. (R. pp. 37 - 50). 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. (R. pp. 28 - 32). 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. (R. pp. 17 - 27). 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. (Id.). 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. (Id.). The Special Referee reserved a decision as to the amount of such fees, costs and expenses pending submission of additional information by Elite Construction. (Id.).

A Motion to Amend Judgment was subsequently filed by Dr. Tumillo. (R. pp. 61 - 64). 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. (R. pp. 65 - 98).

The Special Referee's Order on Motion to Amend was filed in this matter on June 24, 2013. (R. pp. 12 - 16). 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. (Id.).

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. (R. pp. 1 - 16). 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. (R. pp. 37 - 50). 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. (R. p. 103, line 19 - p. 104, line 9; p. 123, line 22 - p. 125, line 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. (R. pp. 51 - 56). 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. (R. p. 99, line 14 - p. 100, line 17; p. 135, line 9 - p. 139, line 1). Photographs of the barn involved here were introduced into evidence at the trial of this case. (R. pp. 201 - 204).

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. (R. pp. 183 -196). 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. (R. pp. 1 - 27).

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. (R. p. 108, line 25 - p. 121, line 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. (R. p. 144, line 14 - p. 145, line 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. Tummlillo, 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. (R. p. 140, line 8 - p. 145, line 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. (R. p. 116, line 10 - p. 118, line 25).

Since the contract between Dr. Tummlillo 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. Tummlillo discussed "12 by 12" stalls. (R. p. 133, lines 14 - 16). He testified that he never promised Dr. Tummlillo that the interior of the stalls would measure exactly twelve feet by twelve feet.(R. p. 121, lines 2 - 9).

Dr. Tummlillo is a practicing physician and is also skilled in the area of boarding thoroughbred horses. (R. p. 161, line 10 - p. 171, line 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.; R. p. 155, line 14 - p. 156, line 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?". (R. p. 169, line 10 - p. 171, line 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. (R. p. 114, line 20 - p. 115, line 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. (R. p. 141, line 14 - p. 144, line 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. (R. p. 179, line 12 - p. 181, line 1; p. 206 and p. 268). Dr. Tummillo reviewed both of these lists. (R. p. 182, lines 2 - 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. (R. p. 134, lines 2 -19). Such additions have further decreased the size of the stalls.

As noted, Dr. Tummillo operates Palmetto Thoroughbred Training Center as an ongoing business. (R. p. 161, line 10 - p. 163, line 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. (R. pp. 183 - 187). 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. (*Id.*). The agreement provides, however, that Dr. Tummillo is responsible for "grading" and "fill". (*Id.*). The parties agree that these responsibilities include preparation of a concrete pad for the barn. (R. p. 106, line 13 - p. 107, line 11). The agreement does not set forth a date by which the pad should have been completed. (R. pp. 183 - 187).

The concrete pad was completed approximately the first part of September 2008. (R. p. 174, line 11 - p. 176, line 13). Mr. Key was involved in another project that month and only became aware that the pad was completed later that month. (R. p. 128, line 16 - p. 129, line 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. (R. pp. 17 - 27).

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.

(R. p. 159, line 23 - p. 160, line 3).

Upon cross-examination Dr. Tummillo admitted that she has no documents or records establishing the existence of such damages. (R. p. 172, line 6 - p. 173, line 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 Blite Construction prayed for judgment in the amount of \$126,160.37. (R. pp. 37 - 50). 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. (R. pp. 51 - 56). 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.

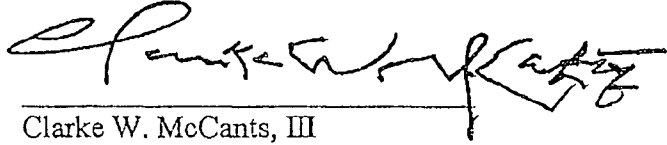
Dr. Tummillo's reliance upon Brazington Tile Co. v. Wooley, 327 S.C. 280, 491 S.E. 2d 244 (1997) is misplaced. Using that decision she argues that she should be given credit for the value of her Counterclaim in the amount of \$36,000.00. She then argues that \$36,000.00 is closer to the Special Referee's 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,

A handwritten signature in black ink, appearing to read "Clarke W. McCants, III", written over a horizontal line.

Clarke W. McCants, III
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(803) 649-6200 Ext. 21
Attorney for the Respondent
Elite Construction, Inc.

April 4, 2014

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2013-001624

Appeal From Aiken County
James Martin Harvey, Jr., Special Referee

Unpublished Opinion No. 2015-UP-351
Heard June 2, 2015 – Filed July 15, 2015

AFFIRMED

Neal W. Dickert and Paul K. Simons, both of Hull
Barrett, PC, of Augusta, Georgia; and T. Paul

Timmerman, of Braithwaite Law Firm, of Aiken, for Appellant Doris E. Tummillo.

Clarke W. McCants, III, of Nance, McCants & Massey, of Aiken, for Respondent Elite Construction, Inc.; and James S. Murray, of Warlick Stebbins Murray & Chew, LLP, of Augusta, Georgia, for Respondent Georgia Bank and Trust Company of Augusta.

PER CURIAM: In this action for breach of contract and foreclosure of a mechanic's lien, Doris Tummillo argues the special referee erred in awarding judgment to Elite Construction. Specifically, Tummillo contends the special referee erred in: (1) finding the parties' contract was unambiguous; (2) refusing to reduce Elite's recovery; (3) finding time was not of the essence in the contract; and (4) awarding Elite attorney's fees. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the special referee erred in (1) finding the parties' contract was unambiguous; (2) refusing to reduce Elite's recovery; and (3) finding time was not of the essence in the contract: *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 127, 631 S.E.2d 252, 255 (2006) (holding the foreclosure of a mechanics' lien is an action at law); *id.* at 127, 631 S.E.2d at 255-56 (holding in an action at law, tried without a jury, an appellate court will not disturb the trial court's findings of fact unless they are wholly unsupported by the evidence or unless it clearly appears the findings are controlled by an error of law); *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989) (holding questions regarding credibility and the weight of the evidence are exclusively for the trial court).

2. As to whether the special referee erred in awarding Elite attorney's fees: S.C. Code Ann. § 29-5-10(a) (2007) ("The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party."); S.C. Code Ann. § 29-5-10(b) (2007) ("For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and

attorney's fees. If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement. If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement.").

AFFIRMED.

SHORT, LOCKEMY, and McDONALD, JJ., concur.

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

MOTION FOR REHEARING OF APPELLANT

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Attorney for Respondent, Georgia Bank and
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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.

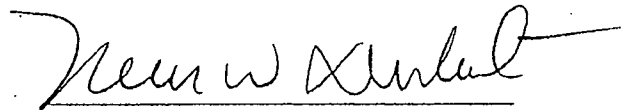
The parties agreed that the horse stalls were to be twelve (12) feet by twelve (12) feet (R- p. 110, line 17; R-p. 111, line 1; R-p. 112, lines 14-20; R-p.114, lines 20-22; R-p. 126; lines 19-21; R-p. 127, lines 2-4; R-p. 133, lines 1-20; R-p. 150, lines 18-21). The Special Referee determined that this 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,



Neal W. Dickert

Paul K. Simons

HULL BARRETT, PC

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(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, 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

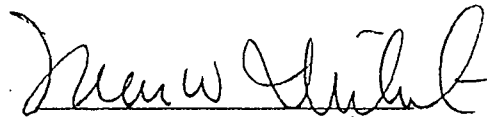
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

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



Neal W. Dickert, Esq.

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Attorneys for Appellant

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 August is the Respondent

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

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".

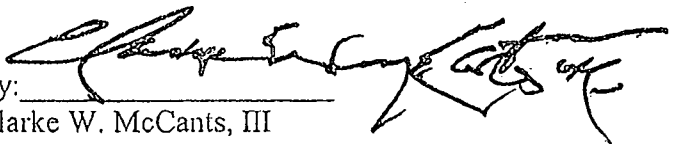
Both lay and expert evidence was offered to the Special Referee to assist him with understanding this concept. . Columbia East Associations v. Bi-Lo, 299 S.C. 515, 386 S.E. 2d 259

(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: 

Clarke W. McCants, III
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Attorney for the Respondent
Elite Construction, Inc.

August 10, 2015

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,

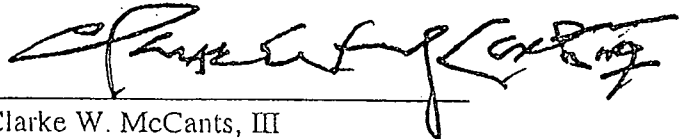
Of Whom Doris E. Tummillo is the Appellant,

And

Georgia Bank and Trust Company of Augusta is the Respondent

PROOF OF SERVICE

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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August 10, 2015

The South Carolina Court of Appeals

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.

Appellate Case No. 2013-001624

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

James E. Leary J.
Stephane P. Agnold J.

FILED

September 17, 2015 334

Columbia, South Carolina

cc:

Neal W. Dickert, Esquire

Paul Knapp Simons, Jr., Esquire

Clarke W. McCants, III, Esquire

James Samuel Murray, Esquire

Terence Paul Timmerman, Esquire