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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

[Unpublished] Opinion No. 2015-UP-351 (S.C. Ct.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

# PETITION FOR A WRIT OF CERTIORARI

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## INDEX

Certificate of Counsel .................................................................................... 1

Questions Presented .................................................................................... 1

Statement of the Case.................................................................................... 1

Argument .................................................................................... 4

THE COURT OF APPEALS SHOULD HAVE HELD THAT THE CONTRACT BETWEEN THE PARTIES WAS AMBIGUOUS AS TO STALL SIZE.

Conclusion.................................................................................... 8

## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was filed on July 29, 2015 and ruled on by the Court of Appeals on September 17, 2015.

## QUESTION PRESENTED

Did the Court of Appeals err in affirming the Special Referee's holding that the contract for the construction of a pole barn was unambiguous as a matter of law on the issue of the size of the individual horse stalls in this pole barn?

## 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 Petitioner, Doris E. Tummillo (hereafter, "Tummillo"). Tummillo intended to use the barn for boarding

horses (R. p. 149, lines 2-11). Most of the provisions of the parties' agreement were set forth in a written document dated July 16, 2008 (R. pp. 183-187). There were additional provisions agreed to by the parties that were not set forth in the written agreement. The parties, for example, reduced the number of horse stalls from 45 to 40 and correspondingly agreed to a proportional reduction in the contract price based upon this reduction (R. 101,124,132). The parties also agreed that the size of each horse stall would be "12′ x 12′." (R.110, line 24). The parties had a fundamental disagreement as to how to measure this "12′ x 12′." Tummillo contends that the parties agreed that the "12′ x 12′" was to be measured by the interior walls of the stalls. (R. p. 150, lines 12-21). Mr. Key with Elite contends that the measurement was center post to center post ( R. 110, line 17-24, R. p.112, line 2-24).

After a disagreement arose between Tummillo and Elite over the payments Elite claimed 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 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). The 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 (R. p.60). This lien is not affected by this appeal.

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 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. 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 Special Referee to afford Tummillo some relief on her counterclaim for consequential damages, and requesting that the claim for attorney's fees for Elite be denied. (R. pp. 61-64).

On June 24, 2013, the Special Referee issued an order denying Tummillo's motion to alter and/or amend (R. pp. 12-16). The Special Referee 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.

After an oral argument on June 2, 2015, the Court of Appeals issued its order filed on July 15, 2015, affirming the decision of the Special Referee (R. p. 321). On July 29, 2015, Tummillo filed a motion for Rehearing, which was denied by the Court of Appeals on September 17, 2015 (R. pp. 324 and 334).

## ARGUMENT

THE COURT OF APPEALS SHOULD HAVE HELD THAT THE CONTRACT BETWEEN THE PARTIES WAS AMBIGUOUS AS TO STALL SIZE.

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 thus concluded, as a matter of law, that the contract was not ambiguous, and that there was no issue of fact for him to determine as to stall size. The Special Referee concluded, in his interpretation of the contract, that stall size was to be 12 feet by 12 feet, measured center post to center post. The decision of the Court of Appeals to uphold the Special Master's finding seems to be based, at least in part, upon the Special Master making "factual findings" as to all the critical issues. The rule for reviewing factual findings, as cited by the Court of Appeals, 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 decision of the Special Referee, he did not make a factual finding on the issue of an ambiguity in the contract, 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.

This case presents a novel question of law for this Court. That issue concerns whether a contract spelling out dimensions of a room, stall, or other structure, should be construed as ambiguous because the contract fails to spell out the method of measuring these dimensions. The law seems clear that it is an appellate court's responsibility to recognize an ambiguity in a contract when determining whether the trial court appropriately relied on the contract language. This Court addressed a similar issue in the case of ***Langston v. Niles***, 265 S.C. 445, 219 S.E.2d 829 (1975). That case involved an interpretation of an assignment of three leases to real property upon which an automobile dealership was located. The leases and assignment were complicated by the fact that the lease included payments to be made to amortize a bank loan taken out by the landlord. One of the issues concerned whether the Plaintiff, the assignee of the lease, could reduce

his monthly payment when the principal sum of the loan had been paid. In affirming the trial court's finding an ambiguity in the contract, the Court stated:

> We unhesitatingly hold that the assignment is ambiguous on two points:
> 1. It does not spell out whether the rent to the landlord and the payment to the Savings and Loan were to be made by the plaintiff or the defendant.
>
> 2. It does not spell out or definitely indicate whether the $2,100.00 monthly payments were to continue until principal only, or principal and interest were paid on the Georgia bank loan. 265 S.C. at 454, 259 S.E. 2d at 832.

The Court further stated:

> As indicated hereinabove, the assignment contract is ambiguous on the question of who should pay the interest. Where a contract is ambiguous and the trial judge is sitting as the trier of the fact, he must determine the true intention of the parties in the light of the subject matter, the relations of the parties to each other, and the circumstances surrounding the parties when they entered into the agreement (*Cite omitted)*. 265 S.C. at 455, 456; 219 S.E. 2d at 833.

It is a question of law for the court to determine 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 this Court in the ***Langston*** case.

The requirement to ascertain the meaning intended by the parties is a fundamental and universal rule of contract law. Courts from around the country have not hesitated to reverse a trial court finding that a contract is unambiguous, when the language of the contract requires the admission of extrinsic evidence to ascertain the true intention of the parties. ***BKCAP, LLC v. Captec Franchise Trust 2000-1***, 572 F.3d 353 (7th Cir 2009); ***Bress v. Keep-Safe Industries, Inc.***, 155 Ga. App. 544, 271 S.E.2d 867 (1980); ***Mobile***

***Acres, Inc. v. Kurata***, 211 Kan. 833, 508 P.2d 889 (1973). As stated by the Kansas Court in the ***Mobile Acres***, case,

> [W]here the language in which the parties have expressed themselves leaves their intention doubtful or unclear either because of the terms which are used or the manner of their arrangement, the instrument must be said to be ambiguous, in which case the facts and circumstances surrounding its execution become competent as to which one of two or more meanings was intended *(cites omitted)* 211 Kan. at 838, 839, 508 P.2d at 894.

There is no dispute that the parties agreed that the forty (40) stalls to be constructed in the pole barn 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 roughly 1½ times the length of a horse (R. p. 146, lines 19–p. 147, line 12). Tummillo testified that she clearly agreed that the stalls would be measured by interior space (R. p. 150, lines 12-21). Elite, on the other hand, contends the measurement should be center post to center post (R. p. 110, line 17–p. 111, line 12). When adding the thickness of the post and interior boards, the ultimate stall dimensions for such size would be less than 12′ x 12′ (R. p. 112, lines 2-18). Elite estimated that this difference would be 3″ to 9″ on each side (R. p. 119, lines 9-19). The evidence revealed that for a number of stalls the difference was greater than a foot (R. 119, 207). While this

amount of reduction might not seem significant, Tummillo believes it is with horses. A one foot reduction in stall size amounts to a twenty-five (25%) percent reduction in available space for an eight (8) foot horse (R. p. 147, lines 7-12).

Tummillo contends that the contract is far from clear. No stall size is given. While the Special Referee extrapolated 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 barn 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. The Court of Appeals erred in not correcting this error of law.

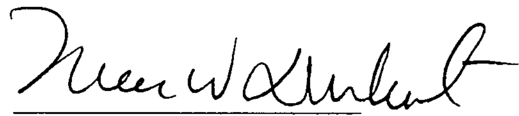
## CONCLUSION

This case presents a novel issue for the Court. The parties clearly agreed to a size of horse stalls in a pole barn. The agreement left out (and is therefore subject to interpretation) how to measure these dimensions. This is a classic case of an ambiguous contract whose meaning should be determined from extrinsic evidence, not from a construction by a matter of law by the Trial Court.

[SIGNATURE ONLY ON FOLLOWING PAGE]

Respectfully submitted,

October 15, 2015



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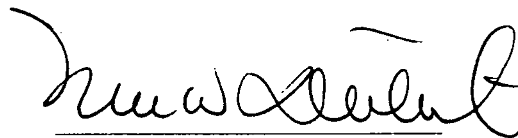
Georgia Bank and Trust Company of Augusta is a Respondent.

Appellate Case No. 2013-001624

# PROOF OF SERVICE

I certify that I have served the ***Petition for Writ of Certiorari*** and ***Index to the Appendix*** on Elite Construction, Inc., and Georgia Bank and Trust Company of Augusta, by delivery by the U. S. Mail with sufficient postage thereon, on October 15, 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.



October 15, 2015

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October 15, 2015

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S.C. Supreme Court

BY FEDERAL EXPRESS, TRACKING NO. 7747 4620 8822
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

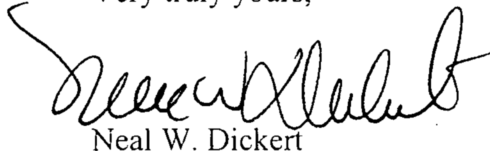
RE: ***Elite Construction, Inc., Respondent***
***vs. Doris E. Tummillo and Georgia Bank and Trust Company of Augusta, Defendants; Of Whom Doris E. Tummillo is the Appellant***
Appellate Case No. 2013-001624

Dear Ms. Kitchings:

In accordance with Rule 242 of the Appellate Rules, I am enclosing a copy of a Petition for Writ of Certiorari regarding the above-captioned matter, the original and six copies of which is being filed contemporaneously with the Clerk of the South Carolina Supreme Court. Also enclosed is a copy of the Proof of Service confirming service upon opposing counsel in this matter.

I would appreciate your being kind enough to acknowledge receipt of this filing on the enclosed additional copy of this letter and returning it to me in the enclosed self-addressed, postage-paid envelope. Thank you for your assistance. Please give me a call if you have any questions.

Very truly yours,



Neal W. Dickert

NWD:db
cc: Clerk, Supreme Court
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Mr. James S. ("Jeb") Murray, Attorney for Georgia Bank & Trust Company of Augusta