

**RECEIVED**

NOV 25 2015

S.C. Supreme Court

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[Unpublished] Opinion No. 2015-UP-351 (S.C. Ct.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

---

**REPLY TO RETURN TO  
PETITIONER'S WRIT OF CERTIORARI**

---

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

**Other Counsel of Record:**

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

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

**INDEX**

Questions Presented ..... 1

Statement of the Case..... 1

Argument ..... 1

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

Conclusion..... 4

**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**

Petitioner restates her statement of the case set forth in her initial Petition for Certiorari.

**ARGUMENT**

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

The Respondent argues in its Return to the Petition for Certiorari that the trial court correctly concluded as a matter of fact and law that the contract between the parties was not ambiguous as to the question of stall size, and that the decision of the trial court

was supported by the facts and legal principles. The trial court concluded in its opinion, however, that the contract was not ambiguous and therefore not subject to testimony to explain the clear ambiguity on the issue of the stall size. As stated by the Court,

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 testimony is clear that the contract was silent as to stall size, and the parties agreed that it was to be 12 feet x 12 feet. While the Respondent takes issue with the reference to the statement in Petitioner's Statement of Facts that this was 12 feet x 12 feet, it is apparent from the testimony that the parties were talking about feet, not inches or other measurements. (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). The dispute arose over the manner to measure the 12 feet x 12 feet.

The Court never addressed the issue of this ambiguity and instead determined the stall size from the drawings attached to the contract. This barn has a U-shaped configuration (R. P. 110, line 4-11). Thirty stalls are located under one roof and ten stalls are attached as a separate wing (R. p. 201-204). For the trial court to conclude that the measurement of 204 feet x 136 feet (as contained in the drawing) necessarily represents the confines of the building, is not supported by the testimony and is purely speculative. There is absolutely nothing in the record or from the drawings from which the court could have concluded that the ten stalls on the two wings have any measurements at all

(R. p. 188-196). It is impossible mathematically to draw the conclusion that it did from the drawings submitted in evidence.

As stated by the Petitioner in her Petition for Certiorari, the case of *Langston v. Niles*, 265 S.C. 445, 219 S.E.2d 829 (1975), is instructive. That case involved the interpretation of the assignment of three leases, as part of the sale of an automobile dealership. One of the issues concerned whether the Plaintiff, the assignee of the lease, could reduce its monthly payments under the lease once the principal sum of a loan on the property had been paid. The court clearly found an ambiguity based upon the fact that the contract “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.” 265 S.C. at 454; 219 S.E.2d at 832. The Respondent seems to argue that unless there is an ambiguity within the four corners of the contract, there is no need for the court to consider extrinsic evidence to determine this ambiguity. Clearly, in the *Niles* case, the issue of the rent and how to treat the loan payments was not spelled out in the contract. In the present controversy, the issue of how to measure the stall size (whether center post to center post or interior space) was not spelled out in the contract. Consequently, the court should have determined from extrinsic evidence the true intension of the parties. The Court failed to take that evidence into consideration and concluded as a matter of law that the contract was not ambiguous and subject to interpretation.

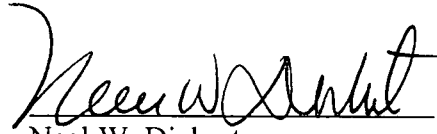
### CONCLUSION

This is an ambiguous contract. Petitioner’s evidence concerning the meaning of the stall size should have been considered, and the facts weighed by the Court in determining

the construction of the contract. Petitioner respectfully requests the Court review this case and correct this error by the Court of Appeals.

Respectfully submitted,

November 24, 2015

A handwritten signature in cursive script, appearing to read "Neal W. Dickert", written over a horizontal line.

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

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

RECEIVED

NOV 25 2015

S.C. Supreme Court

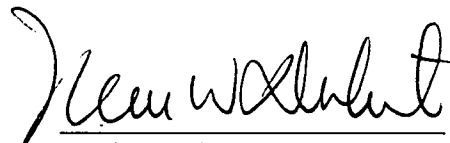
---

PROOF OF SERVICE

---

I certify that I have served the *Petitioner's Reply to Respondent's Return to Petition for Writ of Certiorari* 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.

November 24, 2015



Neal W. Dickert, Esq.

Paul K. Simons

HULL BARRETT, P.C.

P.O. Box 1564

Augusta, GA 30903

Phone: 706-722-4481

Facsimile: 706-722-9779

Attorneys for Petitioner