

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III

Appellate Case No.: 2017-000620

BURTON FIRE DISTRICT

Respondent,

vs.

CITY OF BEAUFORT

Appellant.

And

BURTON FIRE DISTRICT

Respondent,

vs.

TOWN OF PORT ROYAL

Appellant.

RESPONDENT'S INITIAL BRIEF

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COUNTER STATEMENT OF ISSUES ON APPEAL

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II. THE MASTER IN EQUITY DID NOT FAIL TO CONSIDER AND ADDRESS THE AFFIRMATIVE DEFENSES OF ESTOPPEL, WAIVER, LACHES, ULTRA VIRES, AND REFORMATION AS ASSERTED BY THE TOWN OF PORT ROYAL AND CITY OF BEAUFORT.

III. THE MASTER IN EQUITY DID NOT COMMIT REVERSABLE ERROR IN NOTING THAT BOTH PARTIES, IN THEIR CROSS MOTIONS FOR SUMMARY JUDGMENTS, HAD ARGUED THAT THE CONTRACT SHOULD BE INTERPRETED IN A MANNER CONSISTENT WITH UNAMBIGUITY.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal involves two (2) breach of contract cases which were consolidated prior to trial. The Respondent Burton Fire District (“Burton”) alleged that the Appellant City of Beaufort (“Beaufort”) and the Appellant Town of Port Royal (“Port Royal”) breached a Settlement Agreement entered into between the parties on September 2, 2010 by failing and refusing to pay to Burton the full amount of the annual payments mandated by the Settlement Agreement. Burton alleged that the annual payments should have been calculated based upon the “assessed values” of the parcels of real estate covered by the Settlement Agreement, and that Beaufort and Burton had made their annual payments based upon the “taxable values” of the properties, which resulted in a lower payment. The Beaufort County Master in Equity ruled in favor of Burton, finding and concluding that the annual payments should be calculated based upon the assessed values of the subject properties.

B. PROCEDURAL HISTORY

On June 4, 2013 Civil Action Number 2013-CP-07-1463 was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas against the Defendant City of Beaufort, and Civil Action Number 2013-CP-07-1464 was commenced by the filing of a Summons and Complaint against the Defendant Town of Port Royal in the Beaufort County Court of Common Pleas. Beaufort duly served and filed its Answer on July 9, 2013, and Port Royal duly served and filed its Answer on July 11, 2013.

On January 23, 2014, at the request of the Defendant Port Royal and with the consent of all parties, these two (2) cases were consolidated under Case Number 2013-CP-07-1463.

On October 2, 2015 these consolidated cases were referred to the Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County in accordance with §14-11-85 of the South Carolina Code of Laws.

The trial of these cases took place on December 1 and 2, 2015 in the Beaufort County Court of Common Pleas.

On October 24, 2016 the Honorable Marvin H. Dukes, III issued his Final Order, entering judgment in favor of Burton against the City of Beaufort in the amount of \$91,458.07, and in favor of Burton against Port Royal in the amount of \$178,618.20.

On November 7, 2016 Beaufort and Port Royal filed a Motion to Reconsider, which was denied by an Order filed on March 8, 2017.

On March 10, 2017 Beaufort and Port Royal filed their Notice of Intent to Appeal to the South Carolina Court of Appeals.

C. FACTUAL BACKGROUND

Burton is a public service district that provides fire protection, firefighting and first response emergency medical services in Beaufort County. Beaufort and Port Royal are municipalities that are adjacent to and border Burton's territory.

Over the years, both Port Royal and Beaufort have annexed property out of Burton's district and into their respective municipalities.

In 1996 Burton filed a suit in the Beaufort County Court of Common Pleas against Beaufort and Port Royal challenging the right of Beaufort and Port Royal to annex Burton's properties without compensation. This lawsuit was based on the fact that Burton was (and is) indebted to the federal government by virtue of a loan awarded to it in 1993 by the Farmers Home Administration, now the Rural Development Authority. A federal statute, 7 U.S.C.

§1926(b), provides certain protections to the service area of a federal debtor from certain aspects of municipal annexation while a federal loan remains outstanding. In its 1996 lawsuit, Burton sought a declaration of its rights under this federal statute.

This 1996 litigation resulted in a settlement by way of two (2) Consent Orders (one with each municipality) that governed the relationship between the parties through July 16, 2010. Under these Consent Orders, Burton continued to provide services to the annexed territories, and Beaufort and Port Royal made annual payments to Burton. See Plaintiff's Exhibits 6 and 7.

In 2009, anticipating the upcoming expiration of the foregoing Consent Orders, Burton again filed suit against Beaufort and Port Royal in the Beaufort County Court of Common Pleas. Once again, Burton sought a declaration of its rights under the aforementioned federal statute. Additionally, Burton sought a declaration of its rights under a series of state statutes, §5-3-310 – 5-3-313 of the South Carolina Code of Laws, which had gone into effect on May 1, 2000. These state statutes provide that upon annexation of a portion of a special purpose district, the annexing municipality and the affected special purpose district must devise a plan to provide for the continuation and/or transfer of services, which plan must balance the equities between the municipality and the special purpose district so that each can efficiently and effectively serve their respective constituents.

Shortly thereafter Port Royal and Beaufort filed their own actions in the Beaufort County Court of Common Pleas seeking to maintain the status quo with respect to the provision of fire service and emergency medical service by and among Port Royal, Beaufort and Burton, pending the disposition of the recently filed suit by Burton.

Once again, the parties were able to resolve their differences and settled these cases. On September 2, 2010 the parties memorialized the terms of their agreement in a written Settlement

Agreement. This Settlement Agreement is the contract that is the subject of this appeal. See Plaintiff's Exhibit 1.

An exhibit attached to and referenced in the Settlement Agreement lists all of the properties subject to the Settlement Agreement that had been annexed by Port Royal out of Burton's district ("Port Royal Annexed Properties"). Another exhibit lists all of the properties subject to the Settlement Agreement that had been annexed by Beaufort out of Burton's district ("Beaufort Annexed Properties"). On these exhibits each annexed property is separately listed and identified by its PIN or Property Identification Number. Following the Property Identification Number for each annexed property are three (3) columns, labeled "Appraised," "Assessed," and "Taxable VA," showing the appraised, assessed, and taxable values for each annexed property.

Ordinarily, when a municipality annexes property into its jurisdiction, the municipality assumes responsibility for providing fire protection services to the annexed property. Pursuant to the terms of the parties' Settlement Agreement, however, Burton is required to continue to provide firefighting and emergency medical services to all of the Port Royal Annexed Properties and to all of the Beaufort Annexed Properties throughout the term of the Agreement. In the Settlement Agreement, Burton acknowledges the right of Port Royal and Beaufort to annex property out of Burton's district and, in turn, Port Royal and Beaufort acknowledge the right of Burton to be compensated both for the loss of tax revenue as a result of annexation **and** for continuing to provide firefighting and emergency medical services to Beaufort and Port Royal's annexed properties. The Settlement Agreement requires that this compensation be paid in an annual, lump sum payment that is due on March 1 of each year during the term of the Settlement

Agreement. The Settlement Agreement contains a relatively simple formula to be used in calculating the amount of each annual payment. For Port Royal the formula is as follows:

Burton Total Millage X **Assessed Value** of Port Royal Annexed
Property X 25%.

With respect to the annual payment to be paid by Beaufort to Burton, the formula is almost identical, as follows:

Burton Total Millage X **Assessed Value** of Beaufort Annexed
Properties X 19%.

Plaintiff's Exhibit 1, pp. 3 and 4 (emphasis added). As can be seen, the formulas for calculating the annual payment to Burton by Beaufort and Port Royal, except for the involved properties and the final percentage multiplier, are identical. Most significantly for the purposes of this appeal, both formulas are based upon the "Assessed Value" of each municipalities' annexed properties.

In accordance with the terms of the Settlement Agreement, Burton continued to provide firefighting and emergency medical services to all of the Beaufort and Port Royal annexed properties, and continued to satisfactorily fulfill all of its obligations under the Settlement Agreement through the date of the trial.

Beaufort and Port Royal began making their annual payments to Burton, beginning with the first annual payment that was due on March 1, 2011. A disagreement between the parties thereafter arose as to the accuracy of the payments made by Beaufort and Port Royal. The process involved in calculating the amount due is somewhat complex, involving a large number of annexed properties. The parties initially communicated directly with each other without involving their respective attorneys in an attempt to ascertain the source of the discrepancy in their calculations. Burton eventually realized that Beaufort and Port Royal were calculating their

annual payment by utilizing the taxable values of the annexed properties, as opposed to the assessed values of the annexed properties. Each of the parties re-involved their respective attorneys in an attempt to resolve the dispute. These negotiations were unsuccessful and eventually culminated in the filing of the lawsuit leading to this appeal.

Through the time of the trial in December 2015, Beaufort and Port Royal had each made five (5) annual payments to Burton, in the following amounts:

<u>DUE DATE</u>	<u>AMOUNT PAID BY BEAUFORT</u>	<u>AMOUNT PAID BY PORT ROYAL</u>
March 1, 2011	\$195,456.39	\$154,493.34
March 1, 2012	\$187,850.44	\$167,346.21
March 1, 2013	\$197,831.98	\$177,052.14
March 1, 2014	\$188,561.11	\$186,765.37
March 1, 2015	\$189,904.15	\$199,007.20

Each of the foregoing payments by Beaufort and Port Royal were calculated by the municipalities utilizing the taxable values of their respective annexed properties, as opposed to the assessed values. As a result, there was a total cumulative shortfall through March 1, 2015 of \$70,244.06 in the payments made by Beaufort and \$138,194.97 in the payments made by Port Royal. The addition of pre-judgment interest resulted in the judgment against Beaufort in the amount of \$91,458.07 and the judgment against Port Royal in the amount of \$178,618.20.

I. THE MASTER IN EQUITY PROPERLY CONCLUDED THAT THE TERM “ASSESSED VALUE” AS SET FORTH IN THE ANNUAL PAYMENT CALCULATION REQUIRED BY THE CONTRACT OF THE PARTIES MEANT “ASSESSED VALUE.”

A. STANDARD OF REVIEW

This is a breach of contract action which was tried non-jury before the Beaufort County Master in Equity.

“An action to construe a contract is an action at law reviewable under an “any evidence” standard.” *Pruitt v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). “In an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law.” *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). “The Court will not disturb the trial Court’s findings unless they are found to be without evidence that reasonably supports those findings.” *Id.*, 381 S.C. at 600, 675 S.E.2d at 415. “The Judge’s findings are equivalent to a jury’s findings in an action at law.” *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). See also, *Miller Construction Company, LLC v. PC Construction of Greenwood, Inc.*, 418 S.C. 186, 196, 791 S.E.2d 321, 326 (Ct.App. 2016).

B. LEGAL AUTHORITY

“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Whitlock v. Stewart Title Guarantee Company*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Id.*, 399 S.C. at 615, 732 S.E.2d at 628. “A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.” *Jordan v. Sec. Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

“It is a question of law for the Court whether the language of a contract is ambiguous.” *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). “In determining as a matter of law whether a contract is ambiguous, the Court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways.” *Silver v. AAbstract Pools and Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct.App. 2008). “One may not, by pointing out a single sentence or clause, create an ambiguity.” *Yarborough v. Phoenix Mutual Life Insurance Company*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract.” *Farr v. Duke Power Company*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

An ambiguity cannot be created by referring to extrinsic evidence. The ambiguity must exist within the “four corners” of the contract. “In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed.” *McPherson v. JE Serrine & Company*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). “Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.” *Id.*, 206 S.C. at 205, 33 S.E.2d at 509-10.

C. DISCUSSION

The Appellants spend the bulk of their brief attempting to explain why the parties utilized the term “assessed” in the formula to calculate the annual payment to Burton, but didn’t really mean it.

The Appellants' explanation as to why the word "assessed" secretly meant "taxable" is incongruous and incomprehensible. The Appellants argument that the phrase "assessed value" should not be given its universally recognized and long well established meaning is as follows:

"The lower court failed to properly consider the language in the contract defining "assessed value" that incorporated by reference the "assessed values" set forth in the October 16, 2010 tax bills."

Appellants' Initial Brief, pg. 9. Aside from the fact that this argument makes no sense, it is fatally defective inasmuch as it totally lacks any evidentiary support. Not a single October 16, 2010 tax bill was introduced into evidence. The only tax bills placed into evidence are from the following year, 2011. Defendant's Exhibits 24, 25, and 26.

Even if it were assumed for the sake of argument that there was some evidentiary support for the Appellants' argument, the Master in Equity properly rejected it. Appellants' argument is based upon footnote 3 of the Settlement Agreement. Footnote 3 follows the phrase "assessed value" in the annual payment formula for Port Royal, and it states, *in toto*:

Defined as the **assessed value** of each subject property for the applicable service year. For example, the March 1, 2011 payment for services in, and cumulative annexations through, calendar year 2009 will use the **assessed value** established for the October 16, 2010 Beaufort County property tax bills.

Plaintiff's Exhibit 1, pg. 3 (emphasis added). Rather than redefining "assessed value" to be synonymous with "taxable value" as Appellants argue, this footnote redundantly twice re-emphasizes that "assessed value" means "assessed value."

The first sentence of footnote 3, which Appellants tend to ignore, point blank and clearly recites that "assessed value" is "defined" as the "assessed value."

The second sentence of footnote 3, which is the focus of Appellants' argument, is clearly not an attempt to redefine "assessed value" to give it completely different meaning which it has

never held, but is simply, as it states, an example explaining the temporal relationship between the time of annexation, the time tax bills are sent out, and the time when a payment is due. This temporal relationship is explained in detail in paragraph 3(d) of the Settlement Agreement, as follows:

The parties acknowledge that real property taxes are paid in arrears and further acknowledge that properties annexed by Port Royal and Beaufort are not transferred to the tax rolls of those municipalities until the year following annexation, to-wit: A property annexed in 2009 will not be transferred to the municipal tax rolls until January 2010. As real property taxes are paid in arrears, the tax bills generated in October 2010 will reflect the status of properties as of December 31, 2009. Thus, the first payment due for subparts (A) and (B) of this paragraph will be based on properties annexed in 2009 (as well as, of course, all properties annexed after 1995 as identified on Exhibits B and C). Properties annexed in 2010 will be included in the tax notices issued in 2011, and so on.

Plaintiff's Exhibit 1, pg. 4.

In other words, a piece of property may be annexed in Year One of the Settlement Agreement, at which time Burton would immediately commence to provide fire protection and emergency medical services to that property on behalf of the annexing municipality. That property would not appear on the tax rolls, however, until Year Two. Burton would not receive payment for that piece of property until March 1 of Year Three. The second sentence of footnote 3 simply explains this temporal relationship between annexation, property tax bills, and the annual payment. As it recites, it is simply stating that, "for example" the annexed status of a property annexed in 2009 will not appear on the property tax bills until the following year, 2010, and payment will not be due until the following year, 2011.

This interpretation of footnote 3 is reinforced by footnote 2, which follows the term "millage" in the same annual payment formula. Plaintiff's Exhibit 1, pg. 3. Footnote 2 repeats

almost verbatim the verbiage of footnote 3, simply substituting the word “millage” for the word “assessed.”

The simple truth as to why the annual payments to Burton were shorted is that Beaufort’s Finance Director, Kathy Todd, simply made a mistake. Ms. Todd was the individual with Beaufort who was charged with making the payments to Burton. She was a brand new employee who was not involved with the negotiation or execution of the Settlement Agreement, having started her job with the City after the Settlement Agreement was executed. Transcript, Volume II, pg. 6, lines 3 – 23. When she prepared the check to Burton she prepared the check utilizing the exhibits to the Agreement, but for some reason utilized the values in the column labeled “taxable” as opposed to the values in the column labeled “assessed.” *Id.*, pg. 27, lines 7 – 23. She initially attempted to justify her mistake by referencing three (3) 2011 property tax bills with explanations that, quite frankly, made no sense. *Id.*, pg. 11, line 7 to pg. 13, line 22, Defendants’ Exhibits 24, 25 and 26. On cross examination, she was forced to admit that these bills had nothing to do with her mistake, inasmuch as one of them she did not see until 2012 and the other two she saw for the first time “just the other day” prior to trial. *Id.*, pg. 31, lines 1 – 20.

It is respectfully submitted that the Master in Equity properly credited the testimony of Gary James, the Beaufort County Assessor, as to the meaning of the term “assessed.” Even the Appellants’ attorney admitted on the record that “I’m sure the Assessor knows what the assessed value would mean . . .” Transcript Volume I, pg. 18, lines 10 – 11. The Beaufort County Assessor testified as follows:

Q. The word assessed value, does that mean anything to you?

A. Yes, it does.

Q. Is that a term that has a clear definition?

A. To the best of my knowledge, yes.

Transcript Volume I, pg. 17, lines 8 – 13 (emphasis added). The Assessor gave a detailed explanation as to what assessed value for property tax purposes means in Beaufort County. *Id.*, pg. 21, line 11 – pg. 25, line 15, and pg. 27, lines 1 – 8. In summary, Mr. James testified that the first step is to establish the market value of the property, which is synonymous with its appraised value, which is determined by what a willing buyer would pay a willing seller free of any outside forces or factors. Mr. James paraphrased §12-37-930 of the South Carolina Code of Laws, which provides in pertinent part as follows:

“All property must be valued for taxation at its true value in money which in all cases is the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed of the uses and purposes for which it is adapted and for which it is capable of being used.”

S.C Code Ann. §12-37-930(2010). *Id.*, pg. 21, line 13 to pg. 22, line 7. Mr. James testified that the appraised value then forms the basis for determining the assessed value, which is simply a ratio or a percentage of the appraised value. *Id.*, pg. 22, lines 8 – 11. Mr. James explained that the most common assessment ratios in Beaufort County are either 4% or 6%, resulting in an assessed value that is either 4% or 6% of the market or appraised value. *Id.*, pg. 22, lines 8 – 18. See, S.C. Code Ann. §12-43-200(2016).

Finally, Mr. James explained that taxes are based upon the taxable value of a property and that in most cases the assessed value and the taxable value are the same, but if a property qualifies for certain exemptions, then its taxable value will be lower than its assessed value. Mr. James summarized the difference between appraised, assessed, and taxable values as follows:

“Q. So the piece of property for tax purposes - - for property tax purposes will have an appraised value - -

A. Correct.

Q. - - Which is the fair market value. And then it will have an assessed value which is derived from the appraised value; is that correct?

A. That's correct.

Q. And then if that property, depending on its use, qualifies for certain exemptions, it may have a taxable value that is different from the assessed value?

A. That's correct.

Q. Okay. So if it was a 100% exempt, a government office building for example, it may be appraised at a million dollars, assessed at \$40,000 or whatever, \$60,000, but the taxable value may be zero because they don't have to pay taxes?

A. That's correct."

Id., pg. 24, line 22 – pg. 25, line 15. The Beaufort County Tax Assessor continued, testifying:

"Q. Are these well understood definitions in your field?

A. Yes sir.

Q. These are definitions that apply in Beaufort County?

A. Yes sir.

Id., pg. 25, lines 19 – 24.

The Master in Equity found that the Beaufort County Tax Assessor's testimony as to the definition of "assessed value" was not only credible, but was consistent with South Carolina's statutory and case law. Order, pg. 11. §12-43-220 of the South Carolina Code of Laws mandates that the ratio of assessment to value of property in each class shall be equal and uniform throughout the State and provides for various assessment ratios in order to determine the assessed value of property. For example, the assessed value of a primary residence is 4% of its fair market value. *Id.*, §12-43-220(c)(1), while the assessed value of real property not otherwise

specifically referenced in §12-43-220 has an assessed value equal to 6% of the property's fair market value. *Id.*, §12-43-220(e).

It is worth emphasizing that this Settlement Agreement was not something that was thrown together haphazardly, overnight, or by unsophisticated individuals. This Settlement Agreement resolved three (3) pending lawsuits. It was the result of extensive back and forth negotiations. All parties were represented by competent and experienced attorneys. The Settlement Agreement was the result of three (3) separate mediation sessions. These negotiations lasted for almost 2 years, both before and after the lawsuits were filed. Transcript Volume I, pg. 38, line 14 to pg. 40, line 1. The Appellants are municipal taxing authorities, intimately familiar with property taxes and the terms involved. The Appellants' attorneys were the ones tasked with drafting the settlement agreement. Transcript Volume I, pg. 126, lines 11 – 13. The Settlement Agreement went through several drafts and edits. *Id.*, pg. 128, lines 5 – 7. There were at least four different drafts of the Settlement Agreement and the Settlement Agreement that was finally signed by all parties was drafted by Port Royal's counsel. *Id.*, pg. 14, lines 17 – 25. Significantly, the term "assessed value," contained in the payment calculation formula was consistently present in every draft of the Settlement Agreement. The Appellant Port Royal's attorney testified as follows:

Q. Okay. And each of these drafts (of the Settlement Agreement) when it talks about the formula to be used, uses the term assessed value?

A. Correct.

Q. That remained consistent throughout every draft?

A. Correct.

Q. Okay. And that language was chosen by you?

A. Correct.

Id., pg. 143, lines 5-4.

The Appellant Port Royal's attorney further testified:

Q. . . . Okay. You see where assessed value has Footnote 3. And we are on Page 3 of 6 under Payment of Services. There is a footnote by the term assessed value. And can you read the footnote, the first sentence? Or I'll read it for you.

Defined as the assessed value of each subject property for the applicable service year: Is that correct?

A. Right.

Q. Who added that footnote?

A. I think I did.

Id., Transcript Volume I, pg. 144, lines 3 – 14.

The fact that the parties recognized that there was a difference between assessed values and taxable values is made clear by Exhibits B and C to the Settlement Agreement, which plainly and clearly recognize the difference between "assessed value" and "taxable value." Plaintiff's Exhibits 2, 3, 10, 11, 12, and 13. The parties to the Settlement Agreement obviously went to a lot of time and trouble documenting for each of hundreds of parcels their "assessed" and "taxable" values.

The final fatal flaw in Appellants' argument is that any individual tax bill is extrinsic evidence. Appellants are attempting to utilize the 2010 property tax bills (none of which are in evidence) to create an ambiguity that does not exist in the Settlement Agreement itself. As

previously noted, in order to allow extrinsic evidence, the ambiguity must be found within the “four corners” of the contract, *McPhearson v. JE Serrine & Company*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945), and an ambiguity cannot be created by pointing out a single sentence or clause, but rather, must be determined from the entire contract and not from isolated portions of the contract. *Yarborough v. Phoenix Mutual Life Insurance Company*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976) and *Farr v. Duke Power Company*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

“The Court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.” *Blakely v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). As the Master in Equity noted, he was not at liberty to re-write the contract, and it was his duty to enforce the contract as written and executed by the parties. The Appellants are sophisticated entities, with decades of experience in property taxation and its terminology. This Settlement Agreement was the result of extended and careful settlement negotiations in which all parties were represented by attorneys. The payment calculation formula expressly calls for “assessed value” to be used and the word “assessed” has a well-established meaning, as testified to by the unchallenged testimony of the Beaufort County Assessor and established by South Carolina’s statutory and case law. As the Master in Equity noted, if the parties had meant “taxable value,” it would be have been very easy to have so stated. The simple fact is that the phrase “taxable value” is not referenced or found anywhere within the four corners of the Settlement Agreement, much less within the formula for the annual payment. Order, pg. 13. In their Settlement Agreement, the parties agreed to a relatively simple formula for the annual payment which expressly references “assessed value.” It is respectfully

submitted that the Master in Equity properly enforced the contract of the parties as it was written and executed by the parties.

II. THE MASTER IN EQUITY DID NOT FAIL TO CONSIDER AND ADDRESS THE AFFIRMATIVE DEFENSES OF ESTOPPEL, WAIVER, LACHES, ULTRA VIRES, AND REFORMATION AS ASSERTED BY THE TOWN OF PORT ROYAL AND CITY OF BEAUFORT.

Appellants assert that the Master in Equity failed to consider and address the Respondent's affirmative defenses of estoppel, waiver, laches, ultra vires, and reformation. Appellants' Initial Brief, pg. 15. This is incorrect. The Master in Equity expressly considered, addressed, and rejected these affirmative defenses. In his Order filed March 8, 2017 the Master in Equity ruled as follows:

“This matter came before me on Defendants’ Motion for Reconsideration, filed November 7, 2016. After hearing from the parties and review of the file, I hereby deny the motion. Specifically, to the extent not addressed in the Final Order of the Court:

The Court rejects the defenses of waiver, estoppel and laches under the facts presented. Further, the Court rejects the “Ultra Vires” defense.

...

Any other relief not specifically granted is denied.”

Order filed March 8, 2017, pg. 1. The Court, accordingly, specifically considered and addressed the Appellants’ affirmative defenses.

Although the Appellants’ enumeration of alleged error is that the Court failed to consider and address their affirmative defenses, as opposed to alleging that the Court considered, addressed, and wrongfully decided against their affirmative defenses, out of an abundance of caution the Respondent will briefly address the merits of these defenses herein below.

A. ULTRA VIRES

The Appellants assert that Burton acted outside its authority by entering into the Settlement Agreement. Appellants' Initial Brief, pp. 16 – 19. In making this claim, the Appellants rely upon the Act that initially established Burton as a public service district in 1973. Act No. 566, 1973 S.C. Acts 1004-1006. The Appellants argue that this Act “specifically provides that fire services will not be performed by Burton in the municipal limits of Beaufort and Port Royal.” Appellants' Initial Brief, pg. 16. This is incorrect. Even a cursory reading of the Act reveals that there is no such prohibition. Defendants' Exhibit 2.

The Appellants rely almost exclusively upon a dissenting opinion by Justice Toal in *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1977). Aside from the fact that this is a dissenting opinion, the facts and issue in *Newman* are totally inapposite. In *Newman*, the issue is whether or not a member of a Historic Preservation Commission had standing to challenge a vote of the Commission in which she ended up on the losing side. *Id.*, 325 S.C. at 79, 480 S.E.2d at 74 – 75. Four justices confirmed she lacked standing to challenge her own Commission's decision. The point made by Justice Toal in her dissent was that normally a Commission member could not challenge the decision of her Commission, but an exception existed if the decision was “illegal, fraudulent, or a clear abuse of authority.” *Id.*, 325 S.C. at 79, 480 S.E.2d at 75 (paraphrased). Justice Toal noted that the decision of the Historic Preservation Commission in the case before her was to **sell** property, and that the statute expressly only gave the Commission the power to “acquire, own, hold in trust, preserve, restore, maintain, suitably market, develop, advertise, and operate buildings and structures of historic significance.” *Id.* Noting that “conspicuously absent” from this list of powers is the power to sell property, Justice Toal concluded that the Commission did not have

the power to sell property, noting that “when a statute expressly enumerates the requirements on which it is to operate, initial requirements are not to be implied.” *Id.* In short, because the Commission only was empowered to acquire and hold property, she felt it did not have the authority to sell property.

Such is not the case with the Burton Fire Commission. There is absolutely nothing in its enabling statute that would imply a limitation on its power to contract with neighboring municipalities. The Constitution in fact, gives rise to the opposite implication, as follows:

“The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties and responsibilities granted local government subdivisions by this constitution and by law shall include those fairly implied and not prohibited by this Constitution.”

S.C. Const. Art. VIII, Section 17.

More significantly, the powers of special purpose districts have been greatly expanded over the years through enactments and amendments to what is now Chapter 11 of Title VI of the South Carolina Code of Laws. More specifically, with respect to public service districts Section 6-11-100 of the South Carolina Code of Laws provides in pertinent part as follows:

“The boards of commissioners of these (special purpose) districts must be bodies politic and shall exercise and enjoy **all** the rights and privileges of such.” They may . . . contract for . . . fire protection . . . They may . . . contract with . . . municipalities for . . . fire protection . . .”

S.C. Code Ann. §6-11-100 (2012) (emphasis added). Accordingly, special purpose districts are expressly authorized by the General Assembly to contract with municipalities regarding fire protection services.

Additionally, the Settlement Agreement which is the focus of this appeal was created to resolve a lawsuit which was based in large part upon §5-3-310, et seq. of the South Carolina

Code of Laws. This statutory scheme expressly mandates what will take place as a result of the annexation of a special purpose district. These statutes expressly mandate that the special purpose district **must** be allowed to continue providing service within the district's annexed area until the municipality elects to displace the district's service. S.C. Code Ann. §5-3-310(2) (2000) (emphasis added). The Settlement Agreement entered into between these parties is simply the plan mandated by §5-3-312, which provides in pertinent part as follows:

“The plan may provide for certain service contracts to be entered into between the municipality and the district. The municipality has the right, in its sole discretion, to determine whether the municipality will provide service to the area annexed directly **or by contract with the district.**”

S.C. Code Ann. §5-3-312(1) (2000) (emphasis added).

In short, the Settlement Agreement is not ultra vires, but is expressly authorized by several statutes.

B. ESTOPPEL, WAIVER AND LACHES

The Appellants jumbled together their arguments regarding the defenses of estoppel, waiver and laches. Appellants' Initial Brief, pp. 19 – 22. These defenses are all based upon the allegation that Burton delayed too long in filing this lawsuit.

The initial annual payments required by the Settlement Agreement were due on March 1, 2011. The Appellant Beaufort made its payment on time, while the Appellant Port Royal made its payment twenty-two (22) days late. Transcript Volume I, pg. 61, lines 8 – 11. The following year, both Appellants were late in making their payments, each of them making their payment in April 2012, rather than prior to March 1, 2012. *Id.*, pg. 61, lines 12 – 16. The March 1, 2013 payments were made on time by each Appellant and this lawsuit was filed on June 4, 2013.¹

¹ Well within the applicable statute of limitations. S.C. Code Ann. §15-3-530(1).

Harry Rountree is the fire chief for Burton. He testified that as a result of the Settlement Agreement there was a substantial increase in the payments made by both Beaufort and Port Royal to Burton over what had previously been paid under the prior Consent Orders. Transcript Volume I, pg. 80, lines 22 – 25. When the first checks were received he asked his Assistant Chief, Tom Webb, to double check that the amounts were correct. In doing so, Chief Rountree did not have any reason to believe that the amounts tendered were incorrect, and he explained:

Q. Okay, and let me ask you this. Why did you ask him to double check that? Why didn't you just take it at face value?

A. Well, I was just making sure. It's a great deal of math and there was a great deal of properties that were involved. And I just wanted to make sure that the Burton Fire District was receiving all the funds that they were supposed to get.

Q. And I think this is fairly obvious, but is it a fairly complex process to go through all of those properties and figure out the values and apply the millage and add them all up and see if the amount was correct?

A. Yes, sir.

Q. It's not just you hit a button on a computer and its spits it out instantly?

A. No, sir. It takes quite a bit of time to put all of that math together.

Transcript Volume I, pg. 81, lines 7 – 25.

Assistant Chief Webb confirmed Chief Rountree's testimony, stating:

A. When I initially ran the numbers I realized that the checks -- the value did not add up to what I had calculated they should be. After doing it a few times and looking at it, trying to make sure it wasn't a mistake on my part, I realized that if you did it through the formula of taxable value the number came out correct, but if you did it through the formula of the contract is where the difference was.

Q. You said if you read the numbers according to the taxable value it came out correct. You mean you came up with the amount that was paid by the City and the Town?

A. That the City and the Town had paid, correct.

Q. But you discovered those figures were based upon taxable value as opposed to assessed value?

A. That is correct.

Q. Did this take a while to figure out?

A. Quite a few cups of coffee and a bottle of aspirin.

Id., Volume I, pg. 55, line 13 to pg. 56, line 9.

Assistant Chief Webb then reported the results of his calculations to Chief Rountree, who in turn reported it to Burton's Commissioners, who at that time met once a month. He believes that this would have been some time in 2011. The Commission instructed Chief Rountree to make contact with the Appellants' Fire Chief to see if the issue could be resolved at that level. As Chief Rountree explained, "the intent was to attempt to see if we could fix the problem without getting the lawyers involved, initially." Transcript Volume I, pg. 82, lines 1 – 24.

Chief Rountree recalled that discussions of the issue at the fire department level went on for "a fairly extended period of time" and that "things were moving very slowly initially." He recalled "That we were talking. That we were communicating. And, again, we were trying to keep the lawyers out of it at that point." Transcript Volume I, pg. 83, lines 2 – 17. When these discussions proved unfruitful and did not resolve the problem, Burton contacted its attorney, Fred Kuhn. Exactly when this took place is unknown, but it is inferable that it took place sometime between April 12, 2012 and May 8, 2012, inasmuch as correspondence from Attorney Kuhn to Attorney William B. Harvey, who represented Beaufort, on April 12, 2012 addresses the lateness of the March 1, 2012 payments, but does not reference a shortfall (Defendants' Exhibit

19), whereas a letter from Attorney Kuhn to Kathy Todd, the Finance Director for Appellant Beaufort, copied to Attorney Harvey, dated May 8, 2012 in addition to mentioning the lateness of the payment, states:

“Additionally, my figures do not match up with the figures set forth in your April 17 correspondence. Would it be agreeable if I met with you briefly at your office so that you can show me how these figures were calculated?”

Defendants’ Exhibit 20. On May 21, 2012 an email sent from Attorney Kuhn to Ms. Todd and Attorney Harvey references their meeting the previous week, requesting in electronic format copies of excels spreadsheets that had been provided during the meeting of annexed parcels which would “make it easier for my folks to compare your list to our list. Our totals are slightly different and would like to see if we can find the discrepancy.” This email further states:

“Also, the formula set forth in the agreement between the City and Burton expressly states that “assessed” values are to be used. I understand from reviewing the hard copies of the spreadsheets that you provided at our meeting that you used “taxable” values. Is my understanding correct? Do you agree that the assessed values are what we should be using?”

Defendants’ Exhibit 21.

On June 29, 2012 Attorney Kuhn wrote Attorney Harvey and Attorney Francis I. Cantrell, who was representing the Appellant Port Royal stating:

“Additionally, in attempting to reconcile the payments made with the property tax records, it appears that both the City of Beaufort and the Town of Port Royal have based payment on the “taxable” value of the subject properties, as opposed to the “assessed” value. The Settlement Agreement expressly provides for the payment to be based on the assessed value of the subject properties. In reviewing the figures provided to me by the City and the Town, it appears that both the City and Town based their payments on the taxable values instead of the assessed values, which are higher. There is accordingly an additional principal payment past due to the District from both the City and the Town.

Accordingly, demand is hereby made by the District for a payment from both the City of Beaufort and the Town of Port Royal for the shortage in principal owed, which should have been calculated utilizing the assessed values of the annexed properties instead of the taxable values . . .

Defendants' Exhibit 22.

It is accordingly clear that Burton never relinquished a known right, did not unjustifiably delay in asserting its rights, and made no representation to the Appellants that utilization of taxable values was acceptable despite the terms of the Settlement Agreement. The affirmative defenses of waiver, laches and estoppel simply do not apply to the facts of this case.²

The gist of the Appellants' argument in support of these affirmative defenses is that they budgeted based on taxable values. The Appellants cite no law in support of this proposition. The author of this brief has likewise been unable to find any law which would conceivably support the position that a debtor can avoid paying its just obligations simply because the debtor failed to budget or manage its finances properly.

It is accordingly respectfully submitted that the Master in Equity correctly concluded that the Appellants failed to carry their burden of proof with respect to these affirmative defenses.

C. REFORMATION

At the commencement of the case the Appellants moved to amend their Answers to conform to the evidence to allege "reformation of the contract." Respondent's counsel objected, noting, among other things, that since no witness had yet taken the stand there was "no evidence to conform the pleadings to at this point." At that time, the Master in Equity denied the motion, noting that the motion could be re-made at the conclusion of the testimony. Transcript Volume I, pg. 5, line 13 to pg. 6, line 8. During the trial, the Master in Equity subsequently granted the

² Even if proven, the defenses would apply only to the March 1, 2011 payments, not the payments that fell due in 2012, 2013, 2014 and 2015.

Appellants' motion to amend their Answers "to assert reformation of the contract." Transcript Volume II, pg. 135, line 1 to pg. 136, line 21.

Unfortunately for Appellants, they never amended their Answers. To date, amended Answers have never been filed on behalf of either Appellant.

In any event, the Master in Equity properly refused to reform the contract. As he properly noted, the secret, uncommunicated intentions of Beaufort and Port Royal are immaterial. The Courts "are not at liberty to consider the undisclosed or secret intentions of the parties but must be governed by their outward expressions." *Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950). "To ascertain the intention of an instrument, resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Words cannot be read into a contract which in part intent wholly unexpressed when the contract was executed." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).

There is simply no mutual mistake. The word "assessed" was deliberately and intentionally used. It remained constant throughout every draft of the Settlement Agreement. This is an Agreement which was carefully parsed by sophisticated entities represented by attorneys. Each party to this Agreement has extensive experience with property taxes and how those taxes are assessed, collected, and paid. The term assessed is repeatedly and consistently found throughout the Settlement Agreement. Nowhere within the four corners of the Settlement Agreement does the phrase "taxable value" appear. The only place where taxable value can be found is in the exhibits to the Settlement Agreement, where the phrase taxable value is used solely and exclusively for the purpose of **distinguishing** it from the phrase "assessed value."

Likewise, the terms appearing for the first time in the Appellants' Brief - - post exemption values and pre-exemption values - - are not found within the Settlement Agreement.

The Master in Equity properly concluded that the Appellants failed to carry their burden of proof regarding reformation of the contract.

III. THE MASTER IN EQUITY DID NOT COMMIT REVERSABLE ERROR IN NOTING THAT BOTH PARTIES, IN THEIR CROSS MOTIONS FOR SUMMARY JUDGMENTS, HAD ARGUED THAT THE CONTRACT SHOULD BE INTERPRETED IN A MANNER CONSISTENT WITH UNAMBIGUITY.

The Appellants argue that the Master in Equity's note that the parties' positions during previous summary judgment motions bear any relevance in this matter was error. The Appellants' argument takes the Master's comments completely out of context.

In his Final Order of Judgment, the Master in Equity stated:

“Additionally, any individual tax bill is extrinsic evidence, the footnote having referred generally to tax bills and not including or attaching any example. The parties have stipulated that the Settlement Agreement is unambiguous. Even in the absence of their stipulation, I find and conclude that the Settlement Agreement is unambiguous. When a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. The tax bills, accordingly, are inadmissible.

Final Order of Judgment, pp. 13 – 14 (citations omitted). There is a footnote following the second sentence of the above excerpt from the Final Order of Judgment, which states as follows:

“The parties previously filed cross motions for summary judgment arguing that the Agreement was unambiguous.”

Final Order of Judgment, pg. 13, footnote 3.

In their Motion to Reconsider, the Appellants challenged the Master's statement above that the parties stipulated that the Settlement Agreement was unambiguous. In their Motion to Reconsider, the Appellants admitted that they argued that the Settlement Agreement was unambiguous, but stated that this was an alternative argument, that is, that they argued both that the Settlement Agreement was unambiguous, or alternatively was ambiguous. Motion to Reconsider, pg. 3, ¶4(a). The Appellants also argued in their Motion to Reconsider that the

position taken by them in their previously denied Motion for Summary Judgment should not be binding upon them. *Id.*, ¶4(b).

In his Order denying the Appellants' Motion to Reconsider, the Master in Equity stated:

“Further, the Order is amended to modify that portion in which it is asserted that the parties “stipulated” to the unambiguity of the Settlement Agreement. While the motion correctly asserts that no technical “stipulation” occurred, in cross summary judgment motions (both denied) both parties argued that the Agreement, as a matter of law, should be interpreted in a manner consistent with ambiguity. While not a stipulation, and **not a deciding factor in the final Order**, I find the parties' positions in that matter to be relevant.”

Order, pg. 1 (emphasis added).

Accordingly, the Master in Equity expressly found that no stipulation as to unambiguity occurred, and expressly did not hold the Appellants to the position taken by them in their prior Motion for Summary Judgment.

More importantly, the Master made it clear in his Final Order of Judgment that his finding and conclusion that the Settlement Agreement was unambiguous was a conclusion that he reached independently of any stipulation (“Even in the absence of their stipulation, I find and conclude that the Settlement Agreement is unambiguous.” Final Order of Judgment, pg. 13). The Master reinforced this point in his Order denying the Appellants' Motion to Reconsider, expressly reciting that the alleged stipulation was “not the deciding factor in the Final Order.” Order filed March 8, 2017, pg. 1.

Reading his Final Order of Judgment as a whole, it is clear that the Master in Equity concluded that the Settlement Agreement was unambiguous because the word “assessed” has a clearly defined and well-established meaning as testified to by the Beaufort County Assessor and as established by long-standing South Carolina constitutional, statutory, and case law. In

reaching this conclusion, it is clear from the Master's Final Order of Judgment that he is not relying upon any alleged stipulation or the position taken by Appellants in their prior summary judgment motion, but rather, was relying upon a review of the four corners of the Settlement Agreement, and the fact that the Agreement was a carefully parsed and deliberately drafted document entered into as a result of prolonged negotiations between sophisticated entities who are intimately familiar with real property taxation terminology.

It is accordingly respectfully submitted that the Master in Equity did not commit reversible error in simply noting, correctly and almost in passing, that his conclusion that the Settlement Agreement is unambiguous is consistent with the position taken by both Appellants in their prior summary judgment motions.

CONCLUSION

The Settlement Agreement in this case is a carefully crafted and deliberately worded document that resolved three pending lawsuits. It was the result of extended negotiations over a prolonged period of time involving three mediation sessions. Each party is a sophisticated political entity, intimately familiar with property taxation and its terminology. The phrase “assessed value” has a well-defined and clear meaning, as verified by the Beaufort County Assessor and South Carolina’s statutory and case law. The annual payment calculation formulas are expressly based on “Assessed Value” and the Settlement Agreement repeatedly references assessed value. Nowhere in the body of the Settlement Agreement does the phrase “Taxable Value” even appear. Indeed, the Exhibits to the Settlement Agreement emphasize the difference and distinction between “Assessed” and “Taxable” values, as well as “Appraised” values. If the parties had intended for the annual payment to have been based on “Taxable Values” it would have been very easy to have so stated. The Master in Equity correctly concluded that “Assessed Value” in the annual payment calculation means “Assessed Value.”

The Master in Equity properly considered and rejected the Appellants’ affirmative defenses of laches, estoppel and waiver. More accurately, he did not commit an error of law in concluding that the Appellants failed to carry their burden of proving their alleged affirmative defenses. The Appellants’ deception was not readily apparent and, once discovered, the Respondent should not be punished for initially trying to resolve this dispute without involving the Courts.

The Settlement Agreement is not only not ultra vires, but is expressly authorized by several statutes.

The Master in Equity did not err as a matter of law in refusing to reform the contract and in concluding that he was not at liberty to re-write the contract, especially with respect to such a significant and fundamental term, based solely upon a party's secret, subjective intentions.

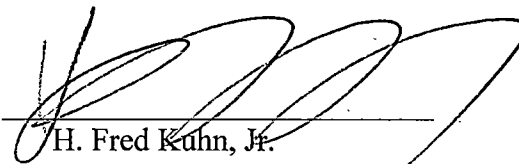
The Master in Equity reached his conclusion that the Settlement Agreement was unambiguous for reasons independent of the positions taken by the parties in their earlier Summary Judgment motions and in denying the Appellants' Motion for Reconsideration he was simply observing (correctly) that his conclusion was consistent with the position previously taken by Appellants.

It is accordingly respectfully requested that the Final Order of Judgment by the Beaufort County Master in Equity be affirmed.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By:



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Beaufort, South Carolina
August 23, 2017

Attorneys for the Respondent

CERTIFICATE OF SERVICE

Undersigned certifies that the Respondent's Initial Brief to which this certificate is affixed, was served upon the party (s) to this action by hand delivery, certified mail or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Mary Bass Lohr, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, South Carolina 29901

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on August 24, 2017.

MOSS, KUHN & FLEMING, P.A.

By: 
Sue Radford

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AUG 28 2017

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August 24, 2017

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Burton Fire District v. City of Beaufort and Town of Port Royal
Appellate Case No.: 2017-000620

Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal with regard to the above-referenced matter. I would appreciate your filing the same and returning a filed copy to me in the enclosed self-addressed stamped envelope.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.



H. Fred Kuhn, Jr.

HFKjr:sr

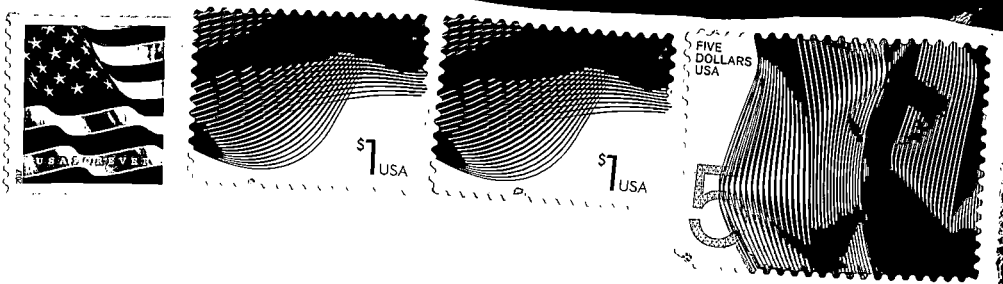
Enclosures

cc: Mary Bass Loehr, Esquire (w/enclosure)

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