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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.

PETITION FOR REHEARING

Pursuant to Rule 220 of the Rules of Appellate Procedure, Appellants City of Beaufort and Town of Port Royal respectfully submit unto this Court their petition for rehearing of this Court's opinion filed January 8, 2020.

I. The Court erred in failing to incorporate by reference the definition of "assessed values" set forth in the October 16, 2010 tax bills.

Port Royal and Beaufort contend that the court erred in finding that the term "assessed value" as set forth in the Settlement Agreement means the assessed value before any relevant tax exemptions are applied. The Court's definition of assessed value is in direct contravention to the definition of assessed value found in the Settlement Agreement. The Settlement Agreement specifically defines "assessed value" as "the assessed value established for the October 16, 2010 Beaufort County property tax bills." In South Carolina, a contract can incorporate another document by reference, Twiggs v. Williams, 98 S.C. 431, 456, 82 S.E. 676, 679 (1914), which is exactly what the parties did here. Thus, even if the Settlement Agreement was unambiguous, the definition of "assessed value" as used in the October 16, 2010 Beaufort County property tax bills was incorporated by reference and the Court should have considered this evidence.

Instead, this Court concluded that "[t]he reference to tax bills in footnote three of the Settlement Agreement appears to have been included only to clarify the timing of the payments . . ." This was not a finding of the trial court – rather, it was the exact argument that the Respondent made to justify the footnote's

inclusion, and it is an argument that was made for the first time on appeal.[1] As such, the Court should have rejected this argument. Additionally, in thus justifying Footnote Three, the Court has opined on the **intent** of the parties in including this language. From the face of the document, however, no such explanation about the temporality of the payments is required. The purpose of footnote three is exactly what it says – footnote three defines "assessed value," and it does so by reference to the 2010 tax bills.

These October 16, 2010 tax bills and the "assessed value" contained thereon are explicitly referenced by both Footnote Three and Paragraph 7 of the Settlement Agreement and incorporated by that reference into the Settlement Agreement. The assessed value on these tax bills was the value after any relevant tax exemptions were applied. Thus, it is clear that in the formula in the Settlement Agreement, the parties intended "assessed value" to mean the assessed value after exemptions are taken for that tax year.

Alternatively, while Port Royal and Beaufort believe this definition to be clear on the face of the contract given the incorporation by reference of the 2010 tax bills, at the very least the use of the term "assessed value" on the 2010 tax bill and the purported common use of the term as defined by Gary James in his testimony and set forth in Exhibits B and C, gives rise to an ambiguity.

There was a plethora of evidence submitted in this case that it was the intent of all parties to utilize the taxable assessed value or post-exemption value

[1] The Clerk of Court, in a letter to counsel for the appellants dated February 13, 2018, advised that because the respondent failed to file and serve a final brief, "the Court will only consider the record on appeal and the appellants' final brief." Thus, it was error for the Court to adopt an argument found only in the respondent's initial brief.

when the parties were negotiating and confirming their agreement. Based on that evidence, which has already been fully briefed for the Court, it is respectfully submitted that the language in the contract clearly incorporates the assessed values as shown on the October 16, 2010 tax bill as the values upon which the formulas for payment in the settlement were based. The assessed values on the October 16, 2010 tax bills are actually taxable assessed or post-exemption values. Even if the court were to find this language created an ambiguity, all the extrinsic evidence in this matter supports the finding that the parties intended to utilize the post-exemption or taxable assessed values.

II. The Court erroneously failed to consider and address the affirmative defenses of the Town of Port Royal and City of Beaufort.

Port Royal and Beaufort asserted several affirmative defenses in their respective answers to the complaint. Specifically, the municipalities asserted that the actions of the Burton Fire District in entering the contract were ultra vires, as Burton's agreement to provide fire services in the municipalities was outside the authority of the fire district's enabling legislation, and, therefore, the Settlement Agreement, which is the subject of this litigation, is void ab initio. Additionally, the municipalities asserted the defenses of Estoppel, Waiver and Laches. Lastly, the Port Royal and Beaufort moved to plead reformation of the contract at trial, which was granted by the court. The order of lower the court fails to address any of these defenses in the original order and only states in the Order on the motion for reconsideration that the court rejects these defenses, with no application of law or fact.

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. Rule 52, SCRCP. A motion was made pursuant to this section advising the court of the lack of ruling on the affirmative defenses. The court requested proposed orders on the issue of the municipalities' affirmative defenses, and counsel for the defendants addressed the affirmative defense in depth in their proposed orders. Nevertheless, the lower court merely "rejected" those affirmative defenses, still making no finding of fact or conclusion of law.

The lower court's failure to making such findings of fact or conclusions of law has left this Court without any grounds on which to affirm the lower court's conclusion. It is impossible for this Court to know exactly what it is affirming, or why the affirmation is justified. As this Court noted in its opinion, "the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below." Burton Fire District v. City of Beaufort, Burton Fire District v. Town of Port Royal, Case No. 2017-000620 at 5 (January 8, 2020). The lower court's findings – or lack thereof – regarding the defendants' affirmative defenses were **not** sufficient to give this Court any indication of whether or not the law had been faithfully executed. And contrary to this Court's assertion that the "arguments at trial centered only on issue one [the definition of 'assessed value']," the parties addressed the affirmative defense in depth in their proposed orders as requested by the lower court. Appellant thus respectfully requests that the Court modify its opinion to require the lower Court to fully

consider the affirmative defenses and make appropriate findings of fact and conclusions of law consistent therewith.

III. The Court erred in concluding that because there is no available case law on point, the Appellants had abandoned their argument regarding the lower court's error in finding their position on summary judgment relevant to the final order.

Initially the lower court held in its order that the parties stipulated that there was no ambiguity in the contract. The municipalities raised this as a ground for error in their motion for reconsideration. In response, in its order on reconsideration the lower court ruled that while no technical "stipulation" occurred, at Summary Judgment both parties argued that the Agreement, as a matter of law, should be interpreted in a manner consistent with unambiguity. The judge found the parties' positions in that matter to be "relevant."

There was no stipulation of unambiguity at trial and none in the Motions for Summary Judgment. At summary judgment, Port Royal and Beaufort asserted alternative grounds, one being the language is clear given the language in the October 16, 2010 tax bills, and alternatively that if there was an ambiguity or mistake the parole and extrinsic evidence in this matter supports the municipalities' positions. A party is allowed to argue in the alternative at summary judgment without being bound to only one of its arguments at trial – such dual arguments give the court flexibility should it decide to *grant* summary judgment, while simultaneously preserving the issues for appeal. Here, the lower court denied summary judgment. It is clear error for the court to rely on the

assertion of no ambiguity at summary judgment, as it ignores completely assertion of an alternative argument by the municipal parties.

This Court's opinion found that the appellants had abandoned this issue on appeal because they "failed to cite to any legal authority" supporting it. While appellants were – and are – unable to find any South Carolina cases on point addressing this issue, the lack of existing appellate case law does not preclude this Court from addressing this issue nor requires that appellants be penalized for the novelty of the lower court's ruling in this case.

CONCLUSION

Because this Court has misinterpreted the purpose of the reference to the 2010 tax bills, because the Court ruled on an issue for which there is no foundation in the record, and because the Court misinterpreted a lack of case law citations for an abandonment of Appellants' argument, Appellants City of Beaufort and Town of Port Royal respectfully request rehearing on these issues.

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January 23, 2020

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Honorable Marvin H. Dukes, III

Appellate Case No.: 2017-000620

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PROOF OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Petition for Rehearing upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 23rd day of January, 2020 addressed to the following:

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January 23, 2020

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

Re: Burton Fire District vs. Town of Port Royal and City of Beaufort
Civil Action No.: Appellate Case No.: 2017-000620
Our File No: 11279 MBL

Dear Ms. Kitchings:

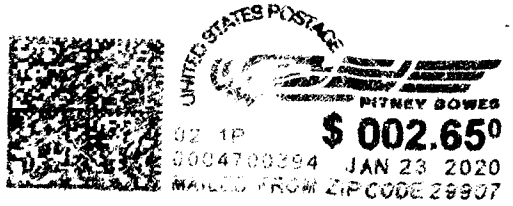
Please find enclosed herewith for filing an original and six (6) copies of the Petition for Rehearing and Proof of Service with regard to the above referenced matter. Also enclosed is the firm's check in the amount of $50.00 representing the appropriate filing fee. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Mary Bass Lohr
MBL/ad
Enclosure
cc: H. Fred Kuhn, Jr.



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