

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

RECEIVED

AUG 10 2017

S.C. SUPREME COURT

BURTON FIRE DISTRICT..... Respondent,

vs.

CITY OF BEAUFORT..... Appellant.

And

BURTON FIRE DISTRICT..... Respondent,

vs.

TOWN OF PORT ROYAL..... Appellant.

APPENDIX

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* Respondents Final Brief was never filed

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

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Burton Fire District, Respondent,

v.

City of Beaufort, Appellant.

And

Burton Fire District, Respondent,

v.

Town of Port Royal, Appellant.

Appellate Case No. 2017-000620

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Unpublished Opinion No. 2020-UP-005
Submitted November 1, 2019 – Filed January 8, 2020

AFFIRMED

Mary Bass Lohr, of Howell Gibson & Hughes, PA, of
Beaufort, for Appellants.

H. Fred Kuhn, Jr., of Moss Kuhn & Fleming, PA, of
Beaufort, for Respondent.

PER CURIAM: This appeal arises from a dispute regarding a September 2, 2010 Settlement Agreement between the Burton Fire District (Burton) and Appellants City of Beaufort (Beaufort) and the Town of Port Royal (Port Royal). The Settlement Agreement was executed after years of litigation between the parties regarding Appellants' annexation of properties within Burton's service area.

In the Settlement Agreement, Burton acknowledged Appellants' right to annex properties in its service area, and Appellants acknowledged Burton's right to be compensated for the loss of the tax base of the properties and for continuing to provide services to the area. Under the heading "Payment for Service," the Settlement Agreement set forth formulas for calculating the annual payments Appellants were to pay to Burton under the Agreement on or before March 1 of each applicable year. The formula for Port Royal was "Burton Total Millage X Assessed Value of Port Royal Annexed Properties X 25%." The formula for Beaufort was identical, except that the final multiplier was nineteen, instead of twenty-five, percent. A footnote attached to the phrase "assessed value" in the formula provided it was 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." Attached to the Settlement Agreement were lists of the subject properties and beside the identifying PIN number for each property were three columns, labeled "appraised," "assessed," and "taxable va."

Sometime in 2011 or 2012, Burton suspected a shortage in Appellants' annual payments, which Burton attributed (correctly, it turns out) to Appellants' use of the "taxable values," rather than "assessed values," in the formulas for calculating their payments. For many of the properties, the assessed value and taxable value are the same, but when a property is owned by the federal government or otherwise tax-exempt, the taxable value may be as low as zero, resulting in the discrepancy in the payments. Ultimately, Burton brought this suit, alleging Appellants breached the Settlement Agreement by failing to make the required payments.

At trial, the parties presented conflicting testimony regarding the meaning of "assessed value." The Beaufort County Assessor testified "assessed value" had a specific and well-known meaning for property tax purposes in Beaufort County and that meaning was distinct from "taxable value." Several Burton employees testified

about the protracted negotiations leading up to the execution of the Settlement Agreement, the intentional nature of the use of "assessed value," and their understanding that Appellants were to compensate Burton not only for lost tax revenues but also for continuing to provide fire services to the annexed properties. Port Royal's former attorney, who drafted the Settlement Agreement, testified her understanding was the parties were to utilize the numbers from the "taxable va" column to calculate their annual payments to Burton. She testified she was unaware there was a difference in meaning between "assessed value" and "taxable value." Appellants presented testimony from several other employees who asserted that throughout the negotiations, the parties understood Appellants were to pay Burton based on the "taxable values" of the properties because otherwise they would be paying Burton for properties from which they were unable to collect property taxes.

The master awarded judgment in favor of Burton in the amount of \$178,618.20, concluding the Settlement Agreement unambiguously provided the annual payments were to be calculated using the "assessed value" of the annexed properties. Beaufort and Port Royal now appeal, arguing the master erred by (1) failing to properly consider the language in the parties' Settlement Agreement defining "assessed value" by reference to the "assessed values" set forth in the October 16, 2010 tax bills; (2) failing to consider and address Appellants' affirmative defenses of estoppel, waiver, laches, ultra vires, and reformation; and (3) finding the positions taken by the parties during their summary judgment motions bore any relevance to this matter.

"Our scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). "An action for breach of contract is an action at law." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Id.* "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.*; see also *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) ("In an action at law, 'we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them.'" (quoting *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 781 (Ct. App. 2001))).

We find evidence supports the master's interpretation of "assessed value." Appellants argue the master should have considered the meaning of "assessed value" as set forth in the tax bills referenced by footnote three of the Settlement Agreement. We disagree because the Settlement Agreement was unambiguous on its face and,

therefore, extrinsic evidence of the parties' intent was irrelevant. *See Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 427 S.C. 613, 622, 832 S.E.2d 312, 317 (Ct. App. 2019) (stating whether a contract is ambiguous is a question of law we review de novo); *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("The parties' intention must, in the first instance, be derived from the language of the contract."). The Settlement Agreement clearly stated that in consideration for providing fire and emergency response services to all Port Royal and Beaufort annexed properties throughout the term of the agreement, Appellants shall pay to Burton annual payments equivalent to the Burton millage, multiplied by the "[a]ssessed [v]alue" of the properties, multiplied by twenty-five percent (for Port Royal) or nineteen percent (for Beaufort). The reference to tax bills in footnote three of the Settlement Agreement appears to have been included only to clarify the timing of the payments, as property tax bills are paid in arrears and annexed properties are not transferred to the municipalities until the year following the annexation. No tax bills were attached to the Settlement Agreement, whereas the lists of properties containing distinct values for "assessed" and "taxable" were attached. Moreover, the explicit purpose of the Settlement Agreement was to compensate Burton "both for the loss of properties to annexation and for providing services to Beaufort and Port Royal as set forth herein"; as the master found, this purpose is consistent with Burton's interpretation, as the use of the pre-exemption "assessed values" would result in Burton being reimbursed beyond just a percentage of the tax revenues Appellants would actually be able to collect on the post-exemption values of the properties.

Next, Appellants argue the master's failure to fully address their defenses in either his order granting judgment or order on Appellant's motion for reconsideration was in contravention of Rule 52, SCRCP. In his order on Appellants' motion for reconsideration, the master stated, "The court rejects the Defenses of waiver, estoppel and laches under the facts presented. Further, the Court rejects the 'Ultra Vires' defense." Rule 52(a) provides, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon" While we believe Rule 52(a) requires a court to specifically separate its conclusions of law, we believe the master's failure to more fully flesh out the reasons for its rejection of Appellants' defenses is not reversible error. *See Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 279, 372 S.E.2d 99, 101-02 (Ct. App. 1988) (holding Rule 52(a)'s requirement that a court in an action tried without a jury "find the facts specially and state separately

its conclusions of law thereon" was "merely directory and provide[d] no basis for invalidating a judgment"); *see also In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) ("We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below." (citation omitted)). Appellants' arguments at trial centered only on issue one, above, so the bulk of the master's order was devoted to addressing that issue. We therefore affirm the master as to this issue.

The master initially found the parties stipulated the Settlement Agreement was unambiguous, citing the parties' cross-motions for summary judgment arguing the agreement was unambiguous. In their motion for reconsideration, Appellants argued this finding was in error because there was no such stipulation. In his order on Appellants' motion for reconsideration, the master amended the order, recognizing the parties did not technically stipulate to the unambiguity of the agreement, but finding the parties' positions at summary judgment were "relevant." Appellants now argue this finding was error. We find this issue was abandoned on appeal, as Appellants failed to cite to any legal authority in their final brief to support it. *See* Rule 208(b)(1)(E), SCACR (providing appellate briefs shall include, "[a]t the head of each part, the particular issue to be addressed . . . set forth in distinctive type, followed by discussion and *citations of authority*" (emphasis added)); *see also Bass v. Gopal, Inc.*, 384 S.C. 238, 250 n.7, 680 S.E.2d 917, 923 n.7 (Ct. App. 2009) (concluding the appellant abandoned issue on appeal where he failed to cite any authority in his brief to support his argument).

AFFIRMED.¹

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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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

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JAN 27 2020
SC Court of Appeals

BURTON FIRE DISTRICT.....Respondent,

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And

BURTON FIRE DISTRICT.....Respondent,

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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, Twigg 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

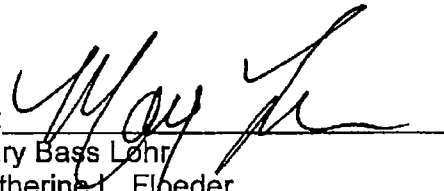
assertion of no ambiguity at summary judgment, as it ignores completely assertion of an alternative argument by the municipal parties.

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.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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January 23, 2020



The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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January 24, 2020

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Burton Fire District v. City of Beaufort (Port Royal)
Lower Court Case No. 2013CP0701463
Appellate Case No. 2017-000620

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Mary Bass Lohr, Esquire
H. Fred Kuhn, Jr., Esquire

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At trial, the parties presented conflicting testimony regarding the meaning of "assessed value." The Beaufort County Assessor testified "assessed value" had a specific and well-known meaning for property tax purposes in Beaufort County and that meaning was distinct from "taxable value." Several Burton employees

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We find evidence supports the master's interpretation of "assessed value." Appellants argue the master should have considered the meaning of "assessed value" as set forth in the tax bills referenced by footnote three of the Settlement Agreement. We disagree because the Settlement Agreement was unambiguous on its face and, therefore, extrinsic evidence of the parties' intent was irrelevant. *See Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 427 S.C. 613, 622, 832 S.E.2d 312, 317 (Ct. App. 2019) (stating whether a contract is ambiguous is a question of law we review de novo); *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("The parties' intention must, in the first instance, be derived from the language of the contract."). The Settlement Agreement clearly stated that in consideration for providing fire and emergency response services to all Port Royal and Beaufort annexed properties throughout the term of the agreement, Appellants shall pay to Burton annual payments equivalent to the Burton millage, multiplied by the "[a]ssessed [v]alue" of the properties, multiplied by twenty-five percent (for Port Royal) or nineteen percent (for Beaufort). The reference to tax bills in footnote three of the Settlement Agreement appears to have been included only to clarify the timing of the payments, as property tax bills are paid in arrears and annexed properties are not transferred to the municipalities until the year following the annexation. No tax bills were attached to the Settlement Agreement, whereas the lists of properties containing distinct values for "assessed" and "taxable" were attached. Moreover, the explicit purpose of the Settlement Agreement was to compensate Burton "both for the loss of properties to annexation and for providing services to Beaufort and Port Royal as set forth herein"; as the master found, this purpose is consistent with Burton's interpretation, as the use of the pre-exemption "assessed values" would result in Burton being reimbursed beyond just a percentage of the tax revenues Appellants would actually be able to collect on the post-exemption values of the properties.

Next, Appellants argue the master's failure to fully address their defenses in either his order granting judgment or order on Appellant's motion for reconsideration was in contravention of Rule 52, SCRCP. In his order on Appellants' motion for reconsideration, the master stated, "The court rejects the Defenses of waiver, estoppel and laches under the facts presented. Further, the Court rejects the 'Ultra Vires' defense." Rule 52(a) provides, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon" While we believe Rule 52(a)

requires a court to specifically separate its conclusions of law, we believe the master's failure to more fully flesh out the reasons for its rejection of Appellants' defenses is not reversible error. *See Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 279, 372 S.E.2d 99, 101-02 (Ct. App. 1988) (holding Rule 52(a)'s requirement that a court in an action tried without a jury "find the facts specially and state separately its conclusions of law thereon" was "merely directory and provide[d] no basis for invalidating a judgment"); *see also In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) ("We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below." (citation omitted)). Appellants' arguments at trial centered only on issue one, above, so the bulk of the master's order was devoted to addressing that issue. We therefore affirm the master as to this issue.

The master initially found the parties stipulated the Settlement Agreement was unambiguous, citing the parties' cross-motions for summary judgment arguing the agreement was unambiguous. In their motion for reconsideration, Appellants argued this finding was in error because there was no such stipulation. In his order on Appellants' motion for reconsideration, the master amended the order, recognizing the parties did not technically stipulate to the unambiguity of the agreement, but finding the parties' positions at summary judgment were "relevant." Appellants now argue this finding was error. We find this issue was abandoned on appeal, as Appellants failed to cite to any legal authority in their final brief to support it. *See* Rule 208(b)(1)(E), SCACR (providing appellate briefs shall include, "[a]t the head of each part, the particular issue to be addressed . . . set forth in distinctive type, followed by discussion and *citations of authority*" (emphasis added)); *see also Bass v. Gopal, Inc.*, 384 S.C. 238, 250 n.7, 680 S.E.2d 917, 923 n.7 (Ct. App. 2009) (concluding the appellant abandoned issue on appeal where he failed to cite any authority in his brief to support his argument).

AFFIRMED.¹

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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

RECEIVED
JAN 28 2020
SC Court of Appeals

BURTON FIRE DISTRICT.....Respondent,

vs.

CITY OF BEAUFORT.....Appellant.

And

BURTON FIRE DISTRICT.....Respondent,

vs.

TOWN OF PORT ROYAL.....Appellant.

CONSENT MOTION TO RECALL REMITTITUR
AND ACCEPT PETITION FOR REHEARING

Please take notice that the Appellants, City of Beaufort and Town of Port Royal, through their undersigned attorneys, hereby move before the South Carolina Court of Appeals for an order recalling the Remittitur in this case and to accept the Appellant's Petition for Rehearing. The Petition was mailed, but was not received prior to Remittitur being issued.

It is respectfully requested that the South Carolina Court of Appeals recall the Remittitur and accept for filing and consideration the Appellant's Petition for Rehearing.

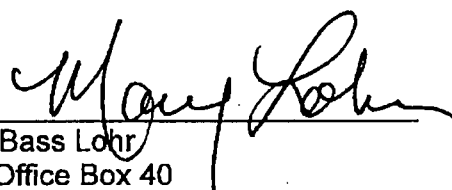
Undersigned counsel has consulted with opposing counsel and received consent to this motion as noted below.

WE MOVE:

WE CONSENT:

HOWELL, GIBSON & HUGHES, P.A.

MOSS, KUHN & FLEMING, P.A.

By: 

Mary Bass Lohr
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Beaufort, South Carolina

January 27, 2020

The South Carolina Court of Appeals

Burton Fire District, Respondent,

v.

City of Beaufort, Appellant.

And

Burton Fire District, Respondent,

v.

Town of Port Royal, Appellant.

Appellate Case No. 2017-000620

ORDER

The opinion in this case was filed on January 8, 2020. No petition for rehearing was received by the Court of Appeals within fifteen days of that filing. *See* Rule 221(a), SCACR ("Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (emphasis added)). A remittitur cannot be recalled except upon "a very strong showing . . . that remittitur was sent down through some mistake or inadvertence on the part of this Court or its officer". *See State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893). Appellants failed to make such a showing. Because the court did not actually receive the petition for rehearing within fifteen days after the filing of the opinion, remittitur was properly sent, and this Court no longer has jurisdiction over the case. *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter."). Appellant's motion to recall remittitur is therefore denied.

D. Han Li

FOR THE COURT

Columbia, South Carolina

cc:

Mary Bass Lohr, Esquire
H. Fred Kuhn, Jr., Esquire
Jerri Ann Roseneau

FILED

March 24, 2020

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

This petition is filed pursuant to Rule 240(i) and (j), SCRAP. The Appellants Town of Port Royal and City of Beaufort respectfully request rehearing on the Order of the Court dated March 24, 2020. The subject Order denying the Appellants' Motion to Recall Remittitur and accept the Petition for Rehearing was filed by a single judge, and the Appellants in this matter hereby request review Judge Hill's March 24, 2020 by a full panel of judges.

Procedural History

The Order of the Court of Appeals affirming the Circuit Court was issued on January 8, 2020. As the result of a calendaring error in counsel for the Appellant's office, the Petition for Rehearing was put in the mail on the day it was due at the Court, Thursday, January 23, 2020. The court issued remittitur on the very next day, January 24, 2020 and these two documents crossed in the mail. Notice of remittitur was received in the mail on Monday, January 27, 2020. Realizing that the petition was mistakenly put in the mail on the day it was due based on the erroneous calendar entry, counsel for the City and Town immediately contacted Fred Kuhn, counsel for the Respondent Burton Fire District, and explained the situation. Counsel for the Respondent graciously consented to and signed the motion to recall remittitur, which was filed on Monday, January 27, 2020. Judge Hill issued an order for the Court nearly two months later on March 24, 2020 denying the motion to recall remittitur.

Argument

The Appellant municipalities urge the Court to recall remittitur in this matter so as to not punish the people of the Town of Port Royal and the City of Beaufort for the calendaring error of counsel for the municipalities. The petition for rehearing in this matter was calendared as if it was to be mailed and post-marked (like other filing deadlines in the rules) on the date it was due as opposed to being filed at the court by the due date. This was a simple procedural error. In Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) our Supreme Court held that civil procedure and appellate rules should not be written

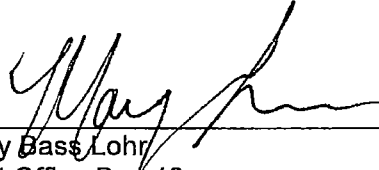
or interpreted to create a trap for the unwary lawyer or party. See also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "long-standing error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review ... Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." (quotation marks and citations omitted)); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary lawyer).

This is particularly true in light of the consent of the Respondent to have jurisdiction returned to the appellate court, as evidenced by their Counsel's signed consent on the motion to recall, and considering that the Petition for rehearing was in fact postmarked on the due date. It is important to note as well that parties filing motions for reconsideration are at a distinct disadvantage when they are located remotely from Columbia as the mail can take as much as five

days to reach places like Beaufort from Columbia, and five more days back again.

Based on the foregoing, it is respectfully submitted that a full panel should review this order pursuant to Rule 240(i) and (j), and reverse the order dated March 24, 2020, given the fact the Appellant's petition for rehearing was placed in the mail by the date it was due, coupled with the fact that the opposing party consented to the recall of remittitur, this court should not allow simple procedural error to result in the ability of the Town of Port Royal and City of Beaufort to have its petition for rehearing heard and thereby ending the rights appellate rights of the municipalities. It is respectfully submitted that this Court should recall remittitur and accept the filing of the Appellant's petition for rehearing.

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By: 

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March 30, 2020

The South Carolina Court of Appeals

Burton Fire District, Respondent,

v.

City of Beaufort, Appellant.

And

Burton Fire District, Respondent,

v.

Town of Port Royal, Appellant.

Appellate Case No. 2017-000620

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded by the court in its order denying the motion to recall remittitur, and hence, there is no basis for granting a rehearing. We, unfortunately, cannot review Appellants' petition for rehearing, which was filed after remittitur had been sent, even though Appellants and Respondent consented to recall the remittitur because this court (1) lost jurisdiction over the case when remittitur was filed, and (2) cannot recall remitter unless there is a strong showing this court sent the remittitur by mistake, and no such showing was made here. *See* Rule 221(a), SCACR ("Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (emphasis added)); *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter."); *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893) (providing a remittitur

cannot be recalled except upon "a very strong showing . . . that remittitur was sent down through some mistake or inadvertence on the part of this Court or its officer"). Accordingly, the petition for rehearing is denied.

James E. Lockery C.J.

U. Ke J.

D. Martin J.

Columbia, South Carolina

cc: Mary Bass Lohr, Esquire
H. Fred Kuhn, Jr., Esquire
Jerri Ann Roseneau

FILED
Jul 08 2020

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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Attorneys for the Respondent

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COUNTER STATEMENT OF ISSUES ON APPEAL

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."

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 Sirrine & 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 Sirrine & 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.

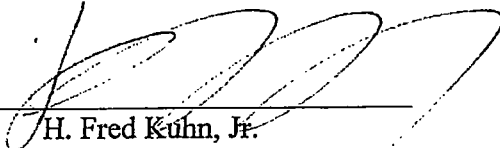
The Master in Equity did not err as a matter of law in refusing to reform the contract and in concluding that he was not at liberty to re-write the contract, especially with respect to such a significant and fundamental term, based solely upon a party's secret, subjective intentions.

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,

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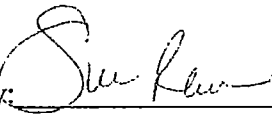
CERTIFICATE OF SERVICE

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
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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

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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court fail 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?
- II. Did the lower court 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 the City of Beaufort?
- III. Did the lower court err in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter?

STATEMENT OF THE CASE

These consolidated breach of contract cases were commenced by the filing of Summonses and Complaints in the Beaufort County Court of Common Pleas on June 4, 2013. In its Complaints, the Burton Fire District ("Burton") alleges that the Defendant City of Beaufort ("Beaufort") and the Defendant Town of Port Royal ("Port Royal") breached a Settlement Agreement entered into between the parties on September 2, 2010 by failing to pay to Burton the full amount of the annual payments Burton asserts are mandated by the Agreement. On October 2, 2015 these consolidated cases were referred to the Beaufort County Master-In-Equity in accordance with Section 14-11-85 of the South Carolina Code of Laws. These consolidated cases were tried before the Beaufort County Master-In-Equity on December 1 and 2, 2015. The Court took the matter under advisement and issued an order on October 24, 2016 finding on behalf of Burton. Beaufort and Port Royal timely filed a Motion for Reconsideration with the Court. The Court denied that Motion by Order filed March 8, 2017. This appeal follows.

Burton is a public service district that provides fire protection, firefighting, and first response emergency medical services to the properties located within its district. It was established in 1973 with a grant of authority to act from the legislature that was codified at Act No. 566, 1973 S.C. Acts. 1004-1006. Beaufort and Port Royal are municipalities that are adjacent to and border Burton's district.

Over the years, both Port Royal and Beaufort have annexed into their respective municipalities properties that were located in Burton's district. The

Settlement Agreement that is the subject of this lawsuit recites that Burton is indebted to the federal government by virtue of 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 this federal loan remains outstanding. The Settlement Agreement further recites that Sections 5-3-310 through 5-3-313 of the South Carolina Code of Laws, which went into effect on May 1, 2000, provides that upon annexation of a portion of a special purpose district, the annexing municipality and the effected 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. In 1996, Burton instituted an action in the Court of Common Pleas in Beaufort County, Burton Fire District v. City of Beaufort and Town of Port Royal, Case Number 2006-CP-07-0551, seeking a declaration of its rights under the aforementioned federal statute. This litigation resulted in a settlement by way of consent orders that governed the relationship between the parties through July 16, 2010.

In anticipation of the pending expiration of the foregoing consent orders, Burton instituted an action in 2009 in the Beaufort County Court of Common Pleas, Burton Fire District v. City of Beaufort and Town of Port Royal, Case Number 2009-CP-07-3020 (hereinafter "Burton Litigation"). In this action, Burton sought a declaration of its rights under both the aforementioned federal statute

and state statutes. Shortly thereafter, Port Royal and Beaufort filed their own action in the Beaufort County Court of Common Pleas, City of Beaufort and Town of Port Royal v. Burton Fire District, Case Number 2009-CP-07-4008. In this suit, Beaufort and Port Royal sought 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 Burton Litigation.

Once again, the parties were able to resolve their differences and on September 2, 2010 memorialized the terms of their agreement in the Settlement Agreement that is the subject of these lawsuits. In connection with the negotiation, drafting and execution of the Settlement Agreement, each of the parties was independently represented by experienced and competent counsel: Bill Harvey for the City of Beaufort; Francis Cantwell for the Town of Port Royal; and Fred Kuhn for the Burton Fire District.

In the Settlement Agreement **[R. p. 392]**, Burton acknowledges the right of Port Royal and Beaufort to annex property out of Burton's service area. In turn, Port Royal and Beaufort acknowledge the claim of Burton to be compensated both for the loss of tax revenue as a result of annexation and for providing services to Beaufort and Port Royal as set forth in the Agreement.

Attached to the Settlement Agreement, as an exhibit thereto, is a list of all the properties subject to the Settlement Agreement that had been annexed by Port Royal out of Burton's district ("Port Royal Annexed Properties"). **[R. p. 398]** A similar 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"). **[R. p. 407]** On these exhibits each annexed property is separately listed and identified by its PIN or Property Identification Number. For each annexed property three columns, labeled "Appraised" "Assessed" and "Taxable VA," show the appraised, assessed, and taxable values for each annexed property.

Ordinarily, once a municipality annexes property into its jurisdiction, that municipality assumes responsibility for providing municipal services, such as fire protection, to the annexed property. Pursuant to the terms of the parties' Settlement Agreement, however, Burton is required to provide first response fire 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.

The Settlement Agreement mandates that Port Royal will pay Burton for providing first response fire and emergency medical services to the Port Royal Annexed Properties. The payment is an annual, lump sum payment that is due on March 1st of each year during the term of the Settlement Agreement. The Settlement Agreement mandates that the following formula will be used to calculate the amount of each annual payment by Port Royal:

Burton Total Millage X Assessed Value of Port Royal Annexed
Properties X 25%

[R. p. 394]

There is a footnote (hereinafter Footnote 3) following the phrase "Assessed Value" above which provides as follows:

“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.

[R. p. 394]

The Settlement Agreement contains similar provisions regarding Beaufort's payment to Burton for the first response fire and emergency medical services provided by Burton to the Beaufort Annexed Properties, i.e., an annual lump sum payment due March 1st of each year. The Settlement Agreement mandates that the following formula will be used to calculate the amount of each annual payment by Beaufort:

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

[R. p. 395]

Additionally paragraph 7 of the Settlement Agreement references the property tax assessed values with specific relation to the values set forth on the 2010 tax bills. That section provides:

This Agreement shall be deemed to have commenced on July 1, 2010. The first payment will be due on or before March 1, 2011 and will be calculated using those properties listed on Exhibits B and C, as well as the property tax assessed values for those properties and millage from the tax bills that are scheduled to be sent out on October 16, 2010.

[R. p. 396]

As can be seen, the formulas for calculating the annual payment to Burton by Beaufort and Port Royal, except for the final percentage multiplier, are identical.

Pursuant to the terms of the Settlement Agreement, Burton provided first response fire and emergency medical services to all of the Beaufort and Port Royal Annexed Properties, and has continued to satisfactorily fulfill its obligations under the Settlement Agreement through the date of the trial.

The initial payment by Beaufort and Port Royal to Burton was due no later than March 1, 2011. At that time, Beaufort paid \$195,456.39 to Burton, while Port Royal paid \$154,493.34. The checks were cashed and no issue was raised regarding the underpayment for that year at that time.

Beaufort was late making its payment in 2012 because of a change of finance department staff. In trying to reconcile the amount owed because of the late payment, Burton's counsel Kuhn eventually raised the issue to Beaufort and Port Royal in June 2012 that the respective payments were short based on Burton's understanding of the Settlement Agreement. Beaufort and Port Royal were calculating their annual payment by utilizing the taxable assessed values (or post-exemption values) of the Annexed Properties. The taxable assessed values corresponded to the "assessed values" as they existed on the 2010 tax bill. **[R. p. 254]**. A review of the 2010 tax bill indicates that the assessed values on those tax bills were post-exemption values. At some point subsequent to the 2010 tax bills being issued, the assessed value changed on the Beaufort County tax bill to reflect pre-exemption value.

In 2012, when the discrepancy was first brought to light **[R. p. 549]**, the parties realized that while the municipalities were using the post-exemption value as reflected on the 2010 tax bill as "assessed value", Burton was calculating the

annual payment based upon pre-exemption values which were reflected as the assessed value on the Beaufort County tax bills at that time (and to the present). This amount was the pre-exemption value of the Annexed Properties. These properties were properties that were subject to statutory and other exemptions such as the homestead exemptions, religious exemptions and local government exemptions, and property belonging to the US Government including the Marine Corps Air Station and Parris Island, to name a few. For instance on the October 16, 2010 tax bill, the Marine Corps Air Station has an pre-exemption value shown on that bill as "taxable value" of \$25,728,030. However, it has an "assessed value" of \$0. **[R. p. 553]** This is because local government cannot tax the Federal Government; however tax bills are issued because of relevant stormwater fees.

Each of the parties re-involved their respective attorneys in an attempt to resolve the dispute. Neither party would concede to the interpretation being set forth by the other party(ies). Approximately a year later, Burton filed this lawsuit in June of 2013. **[R. p. 33]**

Through the March 1, 2015 payment, the City of Beaufort has paid the following amount towards each annual payment:

Amount Paid	Due Date
\$195,456.39	March 1, 2011
\$187,850.44	March 1, 2012
\$197,831.98	March 1, 2013
\$188,561.11	March 1, 2014

\$189,904.15

March 1, 2015

Each of the forgoing payments by the City of Beaufort was calculated by Beaufort utilizing post-exemption values of the Beaufort Annexed Properties, as opposed to the pre-exemption values. **[R. p. 431]**

If the payments by Beaufort to Burton for each of the foregoing years had been calculated utilizing the pre-exemption values of the Beaufort Annexed Properties, then the payments for 2011, 2012 and 2013 would have been \$13,477.90 higher each year, and the payments for 2014 and 2015 would have been \$14,905.18 higher each year, resulting in a total shortfall of \$70,244.06 through March 1, 2015 (Beaufort County underwent a reassessment between tax years 2013 and 2014).

Through the March 1, 2015 payment, the Town of Port Royal has paid the following amount towards each annual payment:

Amount Paid	Due Date
\$154,493.34	March 1, 2011
\$167,346.21	March 1, 2012
\$170,752.14	March 1, 2013
\$186,765.37	March 1, 2014
\$199,007.20	March 1, 2015

[R. p. 431] Each of the foregoing payments by the Town of Port Royal, like those paid by the City of Beaufort, was calculated by Port Royal utilizing the post-exemption values of the Port Royal Annexed Properties, as opposed to pre-exemption values.

If the payments by Port Royal to Burton had been calculated utilizing the pre-exemption values of the Port Royal Annexed Properties, then the annual payments for 2011, 2012 and 2013 would have been \$25,117.37 higher each year, and the payments for 2014 and 2015 would have been \$31,361.43 higher each year, resulting in a total shortfall of \$138,194.97 through March 1, 2015.

The dispute between these parties centers on the construction of the Settlement Agreement's formulas for calculating the annual payment. Burton contends the annual payment is calculated utilizing the pre-exemption values of the Annexed Properties, while Beaufort and Port Royal contend that the annual payment is calculated utilizing the post-exemption values the Annexed Properties. Although the formulas expressly recite that the "Assessed Value" is to be used, Footnote 3 goes on to define that term. Beaufort and Port Royal contend that, as used in the Settlement Agreement and defined at Footnote 3, this phrase is intended to mean post-exemption values as "assessed value" was reflected on the 2010 tax bill, as opposed to pre-exemption value as "assessed value" is currently reflected on the Beaufort County tax bill.

ARGUMENTS

- I. 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.**

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. This 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.” The “assessed value” on the 2010 tax bills are the assessed values for the properties after deductions are made for tax exemptions, or the post-exemption values.

Footnote Three of the Settlement Agreement specifically defines “assessed value” for the purpose of the Settlement Agreement. It is notated at the word “assessed value” used in the formula for calculating the payments owed and reads as follows:

“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.

[R. p. 394]

Importantly when read as a whole, the footnote makes specific reference to the assessed value established for the tax bills sent out in October 2010.

Additionally, the court failed to consider the express language of the settlement agreement contained in paragraph 7 of the contract referencing tax assessed values. That section provides:

This Agreement shall be deemed to have commenced on July 1, 2010. The first payment will be due on or before March 1, 2011 and ***will be calculated using*** those properties listed on Exhibits B and C, ***as well as the property tax assessed values for those properties and millage from the tax bills that are scheduled to be sent out on October 16, 2010.*** (emphasis added.)

This section, like Footnote 3, clearly explains that the payments *will be calculated* using the tax assessed values...from the tax bills that are scheduled to be sent out on October 16, 2010.

The Beaufort County tax bills sent out in October 2010 were submitted into evidence at trial and a review of those bills clearly demonstrates that the term “assessed value”, as testified to by Gary James as and as it currently exists on the Beaufort County tax bill, does not have the same meaning as it did on the October 16, 2010 Beaufort County tax bills referenced by the Settlement Agreement. **[R. pp. 552, 553]** Kathy Todd, CFO for the City of Beaufort, explained that she reviewed the October 16, 2010 tax bills and the values referenced as “assessed value” on those bills were the assessed value after any relevant tax exemptions were applied (or post-exemption values). Furthermore, she testified that the “assessed values” contained on the October 16, 2010 tax bills were not the same as the “assessed values” contained in the spreadsheets designated as Exhibits B and C to the Settlement Agreement. **[R. pp. 398 and 407]** In fact, the “assessed value” on the October 16, 2010 tax bills was the “Taxable VA” as contained on the spreadsheet. **[R. pp. 253-260]**

The court in this matter declined to consider the 2010 tax bills finding them to be inappropriate extrinsic evidence given its position that the contract language was clear in favor of Burton’s position. However, this finding is erroneous. 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). The parties’ intent is determined by the language of an agreement. Cullen v. McNeal,

390 S.C. 470, 483, 702 S.E.2d 378, 385 (Ct. App. 2014). There is no specific language one must state to incorporate another writing into a written agreement; however, a contract “must explicitly or at least precisely, identify the written material being incorporated and must clearly communicate that purpose of the reference is to incorporate the referenced material into the contract[.]” Stevens Aviation, Inc. v. Dyncorp Int’l LLC, 394 S.C. 300, 308, 715 S.E.2d 655, 659 (Ct. App. 2011), *rev in part on other grounds by* Stevens Aviation, Inc. v. Dyncorp Int’l LLC, 407 S.C. 407, 756 S.E.2d 148 (2014) (*citing* Northop Grumman Info. Tech, Inc. v. United States, 525 F.3d 1339 (Fed. Cir. 2008) (internal quotations omitted)).

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.

Where the terms of a contract are clear and unambiguous, the construction of the contract is a matter of law, but where the terms of a contract are ambiguous, the intention of the parties becomes a question of fact. Holcombe v. Orkin Exterminating Co., Inc., 282 S.C. 104, 317 S.E.2d 458 (Ct.App.1984). Extrinsic evidence relating to the conditions surrounding the parties, the circumstances under which the contract was executed and the negotiation between the parties leading to the execution thereof is admissible to aid the jury in determining the intent of the parties if the contract is ambiguous. Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962); see Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct.App.1989).

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 when the parties were negotiating and confirming their agreement.

The emails between the parties during the negotiation of the agreement with specific reference to the values contained on the Property List Exhibits to the Settlement Agreement clearly show that both parties understood they were dealing with the post-exemption tax assessed values. Bill Harvey, Beaufort's attorney explains these emails that were submitted as evidence in this matter, in the context of the negotiation at the time. **[R. pp. 310-322, 328-329] [R. pp. 539-541, 551]** In summary, these emails show that the parties set out to agree, prior to the mediation, which properties were part of the agreement and the total value of those properties that were the subject of the agreement. The term taxable value is found throughout these documents. Specifically, the parties agreed

through these email conversations and subsequent telephone conversations that the “universe” of properties had a total taxable value of \$17,055,504 for Beaufort and \$10,064,713 for Port Royal. This was the agreed upon value basis to be utilized by both parties for the properties before heading to mediation. Additionally, there are emails between the parties during the drafting of the Settlement Agreement by Francis Cantwell, attorney for Port Royal, that clearly show all parties understood that they were dealing with the taxable assessed (post-exemption) values and a specific effort was made with regard to Paragraph 7 to make sure the word “tax assessed value” was utilized. **[R. p. 329-332]** Lastly, there is evidence that Burton Fire District never anticipated the amounts they claim were owed to them by Port Royal and Beaufort because, the amounts budgeted by Burton in its yearly budgets submitted to Beaufort County show amounts anticipated as income from Port Royal and Beaufort much more closely reflected the amounts Port Royal and Beaufort contend were to be paid. **[R. p. 503]**

Based on the foregoing, 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 lower court failed to consider and address the affirmative defenses of the Town of Port Royal and 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 for reformation of the contract at trial, which was granted by the court. The order of 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, SCRPC. A motion was made pursuant to this section advising the court of the lack of ruling on the affirmative defenses. The court only "rejected" those affirmative defenses, still making no finding of fact or conclusion of law.

a. Ultra vires activity of Burton

Burton is a public service district that provides fire protection, firefighting, and first response emergency medical services to the properties located within its district. It was established in 1973 with a grant of authority to act from the

legislature that was codified at Act No. 566, 1973 S.C. Acts. 1004-1006. In Section One, Act 556 provides that "[t]here is hereby created the Burton Fire District in Beaufort County, which shall include all of Beaufort Township *except the area within the corporate municipalities of Beaufort and Port Royal.*" (emphasis added) Act No. 566, 1973 S.C. Acts. 1004. The Act goes on to enumerate the powers and duties granted to the district from the legislature. These powers range from buying equipment, procuring property for and construction of a fire station, procuring and providing for training, maintenance and repair of equipment, set forth policies and rules, and borrowing money. It allows for a tax levy, not to exceed five mills (which is presently over ten times that amount), for the appointment of a fire chief and board. Nowhere in this Act does it allow for the ability to contract with other municipalities to perform fire services in those municipal limits, and it specifically provides that fire services will not be performed by Burton in the municipal limits of Beaufort and Port Royal. The Settlement Agreement in this matter is in direct contravention to that mandate and is outside the specific authority granted to the Burton Fire District by the Legislature.

During the trial, Counsel for the municipalities questioned the Burton Fire Commissioner as to where the authority existed for the District to enter into a contract to provide fire services with the municipalities of Port Royal and Beaufort.

Lohr: Where in [Act 566] does the legislature give you all authority to provide fire services for outside the

boundaries as well as to contract with other governmental agencies?

Bright: I'm not sure this document does that.

Lohr: Okay. And is there a document that you believe does allow you to do that?

Bright: If there is, I haven't seen it.

[R. p. 121]

Burton Fire District is a creation of the legislature by state charter, akin to a municipal corporation. There is no authority in its enabling legislation to provide services outside of its district, and inside the municipal limits of Port Royal and Beaufort are specifically excluded. Furthermore, there is no authority to contract with other government agencies or municipalities to provide services.

In Barringer v. City Council of Florence, 41 S.C. 501, 19 S.E. 745, 747 (1894), the Supreme Court held that "[i]t is well settled that a municipal corporation has no powers except such as are conferred by its charter, it follows necessarily that any attempt on the part of the city council to act outside of the authority of its charter would be ultra vires and void. Additionally, "[t]hat which is illegal or ultra vires renders the proceedings void. State v. Norton, 69 S.C. 454, 48 S.E. 464, 465 (1904).

In a dissenting opinion in Newman v. Richland Cty. Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72, 76 (1997), Justice Toal expounded on this principal of *ultra vires* conduct as it relates to a public service commission. She noted that

the relevant public service commission, the Richland Historical Public Service Commission

was created by Act No. 69, 1963 S.C. Acts 63. This Act enumerates the powers of the Commission, declaring that the Commission has the power to "acquire, own, hold in trust, preserve, restore, maintain, suitably mark, develop, advertise, and operate buildings and structures of historic significance, and the land upon which the same may be situate, in Richland County, and to receive funds, grants, donations and appropriations for the accomplishment of these purposes." 1963 S.C. Acts at 64, § 4(5). Moreover, "The Commission shall have power and authority to borrow money and to mortgage or pledge its real and personal property...." 1963 S.C. Acts at 65, § 8.1. Conspicuously absent from the above list of powers is the power to convey property. When a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). The statute specifically sets forth the powers of the Commission; the power to convey property may not be implied from the statute. This would be consistent with the role of the Commission as a "Historic Preservation Commission."

Toal determined Actions of the commission in conveying property should be void as there was no authority to do those acts in the enabling legislation.

Clearly, the same would apply here. The enabling legislation limits the geographical boundaries of the Burton Fire District, specifically excluding the municipal areas of Port Royal and Beaufort. It then goes on to explicitly enumerate the powers it is granting to the District. Byrd, as cited by Justice Toal above is clear, that if there powers are specifically set forth, other powers may not be implied. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). Thus, Burton was never authorized to enter into the subject contract with Port Royal and Beaufort or to provide services in Port Royal and Beaufort, and its actions in doing so were *ultra vires* and, therefore the contract is *void ab initio*.

b. Estoppel, Waiver and Laches

First, as to the defenses of Estoppel, Waiver and Laches, the claims of Burton should be barred, particularly as to the payments made in 2011 to 2013. Burton accepted the payments of Beaufort and Port Royal made in 2011 based on the post-exemption values and there is no evidence that they took issue with these payments until fifteen months later. By that time, budgets had been established for these entities for the fiscal years 2012 and 2013. By failing to address the allegedly insufficient payments in 2011, they caused the Appellants to believe the payment was acceptable and the payment to be made in 2012 and 2013 would have already been budgeted based upon the accepted payment in 2011.

The elements of equitable estoppel as related to the party being estopped are:

- (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- (2) the intention that such conduct shall be acted upon by the other party; and
- (3) actual or constructive knowledge of the real facts.

The party asserting estoppel must show:

- (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question;
- (2) reliance upon the conduct of the party estopped; and
- (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

“Equitable estoppel is based on affirmative conduct between the parties.”

Strickland v. Strickland, 375 S.C. 76, 84-85, 650 S.E.2d 465, 470 (2007).

In order to show a waiver the waiver must have been

1) voluntary; 2) intentional; 3) an abandonment or Relinquishment of a known right; and 4) with actual or constructive knowledge of his rights or all material facts upon which they depended. “Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins.” Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) *quoting* Am.Jur.2d, Estoppel And Waiver, § 154, 158 (1966).

The elements of laches are:

- 1) Complaining party unreasonably delayed its assertion of a right;
- 2) With knowledge of the facts upon which he bases his claim or refusal to embrace opportunity to ascertain facts; and
- 3) Resulting material prejudice to the defendant.

Laches has been defined as “[n]eglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). To prove laches the defendant “must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. Strickland v. Strickland, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) *citing* Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App.2006). “Importantly, delay in the assertion of a right does not, in and of

itself, constitute laches; rather, "[s]o long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches." Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423-24 (1996) *citing* Archambault v. Sprouse, 218 S.C. 500, 63 S.E.2d 459 (1951).

Burton Fire District had the information available to it to know exactly how much money they should have been receiving and had the obligation to the public to budget accordingly, as a public service district. It should have known exactly how much money it would have been receiving in March 2011 under the Settlement Agreement. Burton's employees contend they thought the payment was too little but the only evidence is they accepted 2011 with no complaint, only brought it to the municipalities attention with 2012 payment when new calculations were required, and demanded the difference and interest in 2013 when this lawsuit was filed. They did this knowing that Beaufort and Port Royal likewise had to prepare budgets to anticipate how much tax money from the public would be required when approving their 2012 and 2013 budgets.

Based on the foregoing, the claims of Burton should be barred, particularly as to the payments made in 2011 to 2013. Burton accepted the payments of Beaufort and Port Royal made in 2011 based on the post-exemption values and there is no evidence that they took issue with these payments until fifteen months later. By that time, budgets had been established for these entities for the fiscal years 2012 and 2013. By failing to address the allegedly insufficient payments in 2011, they caused the Appellants to believe the payment was acceptable and the

payment to be made in 2012 and 2013 would have already been budgeted based upon the accepted payment in 2011. Burton has waived the right to claim a deficit on the 2011 payment or should be estopped from doing so. The defense of laches should bar the collection of 2012 and 2013 payments as Port Royal and Beaufort relied on the acceptance of the 2011 payment and the ensuing silence prior to June 2012 to establish a budget for fiscal year 2011-12 and 2012-13. Also, they should be barred from claiming pre-judgment interest penalties on these tax years.

Additionally, Burton should be estopped from claiming that the post-exemption taxable assessed value is not the intended "assessed value" to be utilized in the formula for payment in the Settlement agreement. By agreeing to the "universe of properties" and the amount represented by those properties in the pre-settlement agreement emails and during the drafting process of the settlement agreement and then contending that those agreed upon values are, in fact, not the values to be used in the formula, Burton's conduct (1) amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intended such conduct be acted upon by the municipalities; and (3) had actual or constructive knowledge of the real facts. Thus, the first three requirements of equitable estoppel are met. Clearly the municipalities relied on the representation to their detriment.

c. Reformation

Lastly, Port Royal and Beaufort moved for reformation of the contract at trial, which was granted by the court. [R. pp. 380, 381] The court failed to address the affirmative defense of reformation in either its original order or its order on the motion for reconsideration which specifically raised the issue to the court.

A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. Id. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981). Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence. Id. The essential question becomes the parties' intent, and "[p]arol evidence is admissible to show mistake." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 176 (2013) "A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.'...'Existence of mutual mistake must be shown by clear and convincing evidence'" Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013) citing Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct.App.1987).

Although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different

considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply. "A contract may be clear and unambiguous as far as it goes and yet may not express the agreement of the parties, by reason of mutual mistake." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 176 (2013). "[A]mbiguity or uncertainty has nothing to do with the reformation of a written instrument, but rather reformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." Id. "Both the parol evidence rule and the doctrine of merger are rules governing the construction of written documents." Id. at 308, 350 S.E.2d at 197

"[E]ach suit for reformation stands on its own peculiar facts." Belin v. Stikeleather, 232 S.C. 116, 123, 101 S.E.2d 185, 188 (1957) (citation omitted). "Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties." Crosby, 293 S.C. at 206, 359 S.E.2d at 300.

As set forth above, there were multiple emails between counsel for the parties settling on the "Universe of Properties" and addressing the corresponding values to be used of \$17,055.504 for the City and \$10,064,713 for the Town from which the final agreement was drafted (numbers in Exhibits B and C) to contract. It is clear the parties had agreed to use the Taxable Value on Exhibits B and C. The Appellants clearly established that these values corresponded to the Assessed value on the October 16, 2010 tax bills.

Along with these emails was the testimony of Bill Harvey in the same regard. He testified that prior to the mediation he confirmed the agreement of the

parties to use those properties and values with Kuhn via telephone. He and Francis Cantwell further confirmed that all discussions of value during negotiations and in drafting the agreement between the parties dealt with what the taxable assessed value on exhibits B and C. **[R. pp. 310-322, 328-332 and R. pp. 190-195, 204-205, 215-224, 229-230]** Again this taxable assessed value was post exemption amount, but was indicated only as "Assessed Value" set forth on the tax bills referenced in the Settlement Agreement.

It is clear that both parties at the time of negotiation and the drafting of the agreement understood assessed value as referenced in the agreement to be the post-exemption value or the "taxable assessed value." There are no exhibits presented by Burton from that time period that dispute that contention.

III. The lower court erred in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter.

Initially the 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:

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 unambiguity. While not a stipulation, and not the deciding factor in the Final Order, I find the parties' positions in that matter to be relevant.

A review of the transcript of the trial of this matter clearly demonstrates no such stipulation. The transcript reflects that Port Royal and Beaufort, while arguing the settlement agreement was unambiguous pursuant to the meaning of assessed value as defined Footnote 3 with reference to the 2010 tax bill, alternatively argued that if the court did not find that Footnote 3 was clear, it at least created an ambiguity in the Settlement Agreement requiring review of extrinsic material. **[R. pp. 378-381]** Additionally, the municipalities asserted reformation as an affirmative defense and argued that there was a clear understanding that all parties were using the taxable assesses post-exemption values. The court specifically acknowledges this in its ruling as to the amendment to add reformation of the contract as a defense and to allow in parole evidence. **[R. p. 381]**

Additionally Footnote 3 to the Court's Order references the cross motions for summary judgment and summary judgment and its relevance are referenced by the lower court in its order on the motion for reconsideration. There was no stipulation of unambiguity at trial and none in the Motions for Summary Judgment, or in the affidavits that were filed in support thereof. There is no record of the summary judgment hearing, so there is no recorded stipulation. Importantly, the cross summary judgment motions were denied. A denial of a summary judgment motion does not create any substantive ruling—or if anything is an indication that the court did NOT believe that the agreement was unambiguous as both parties moved. 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. It is clear error for the court to rely on the assertion of no ambiguity at summary judgment, as it bears no relevance on the assertion of an alternative argument by the municipal parties.

CONCLUSION

Based on the foregoing, it is respectfully submitted that 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. Additionally, the lower court failed to consider and address the affirmative defenses of the Appellants. Lastly, the lower court erred in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter.

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November 20, 2017

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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.

APPELLANTS CITY OF BEAUFORT AND TOWN OF PORT ROYAL'S
CERTIFICATION OF COMPLIANCE WITH RULE 211(B)

I, the undersigned, as counsel for the Appellants, City of Beaufort and Town of Port Royal, certify that the within Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing *FINAL BRIEF OF APPELLANTS* upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 20th day of November, 2017 addressed to the following:

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FINAL REPLY BRIEF OF APPELLANTS CITY OF BEAUFORT AND
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- I. **There is an ambiguity in the meaning of the term assessed values as utilized on the tax bills at that time and extrinsic evidence shows that the meaning as set forth by the City and Town is the meaning understood by all parties when the contract was made.**

Burton attempts to misdirect the court for the clear issues in this matter. Initially, Burton claims that the tax bills introduced by the municipalities to show an ambiguity in the settlement agreement should not be considered because they are not 2010 tax bills, but are instead 2011 tax bills.

Paragraph 7 of the Settlement Agreement references the property tax assessed values with specific relation to the values set forth on Beaufort County tax bills. That section provides:

This Agreement shall be deemed to have commenced on July 1, 2010. The first payment will be due on or before March 1, 2011 and will be calculated using those properties listed on Exhibits B and C, as well as the property tax assessed values for those properties and millage from the tax bills that are scheduled to be sent out on October 16, 2010.

[Page 5 of Settlement Agreement]

Tax Bills were introduced as evidence in this matter as during the testimony of Kathy Todd. During that testimony she explained how she first realized that "assessed value" on the tax bills did not equate to "assessed value" on the spreadsheet she was utilizing. The relevant 2011 payment had been made by the City to Burton but when she took over the Finances for the City the payments were already due. Burton had raised no issue with the amounts paid in 2011 at that point to the Town or the City. She testified that the numbers were not adding up when she was trying to calculate the amount to be paid based on the 2010-11 values from the County. She called the Finance Director for Beaufort County, David

Starkey, and asked for a copy of a tax bill to match up with the 2010-2011 data file she had from the county in order to determine which set of data she should be using. Using the tax bill sent to her by Starkey she determined that the tax bill referred to "assessed value" in a manor inconsistent with the data files she had. The data files, which were utilized to create Exhibits A-D, reflected "taxable value" as the same number reflected on the tax bill as "assessed value" provided by Starkey. Todd could only reconcile the numbers when she realized that the "assessed value" on the tax bills were the same as the "taxable values" on the data files and spreadsheets attached to the agreement and utilizing the 2010 numbers. This is how Todd came to the conclusion that the tax bills (whether it be for 2010 or 2011) indicated a different value as the "assessed value" from the relevant spreadsheets. The payments then for 2011 were made based on the "assessed value" number that was indicated on the tax bill. This was, furthermore, consistent with the numbers agreed upon in various emails by the parties when entering into the agreements as testified to by Harvey and Cantwell.

Whether it is a 2010 tax bill or a 2011 tax bill, it is clear that during this time period there was an ambiguity between what "assessed value" meant on the bill and what it meant on the spreadsheets made exhibits to the contract. Such an ambiguity, needs to be resolved by looking at extrinsic evidence as to the intent at the time of the parties. The emails between the parties indicating the value of the "universe of properties" is clear evidence of the intent of the parties. It is clear when these emails are reviewed, that the contract should be reformed to reflect that understanding that was obviously that of all the parties at the time the contract

was entered as displayed by the emails between those parties. This is further supported by the fact that Burton made no objection to the payments it received in 2011 and did not budget for the greatly increased payments but rather their budgets reflected amounts much closer to those amounts paid by the municipalities.

II. Burton's actions in Contracting with the Town and City were Ultra vires and are not allowed by any relevant statutory authority.

Burton contends it is authorized pursuant to S.C. Code Ann. §6-11-100 to contract with municipalities. However, Chapter 11 of Title 6 specifically addresses public service districts created prior to March 7, 1973, such as Burton, in a specific manner separate from the manner in which it treats post-Home Rule service districts. S.C. Code Ann. §6-11-100 authorizes particular actions to be taken by the post-March 7, 1973 districts. These districts are those established through the authority of Title 6, Chapter 11. In specific sections, however, Chapter 11 addresses with specificity, additional provisions granting authority contrary to the original enabling legislation of the pre-Home Rule public service districts such as Burton. S.C. Code §6-11-271 through 276 provides specifically a for differing rules established for public service district or authority that was created prior to March 7, 1973 or by the General Assembly through a local act. Specifically it recognizes limitations placed on these districts by their enabling legislation which are not an issue for those post-Home Rule districts established under authority of Title 6, Chapter 11, and authorized to act through its commission at §6-11-100. There is a clear distinction in the authority granted a pre-home rule district and one

established under Title 6, Chapter 11. Thus, it is clear that the powers granted to Commissions of Public Service Districts relied upon by Burton and set forth at §6-11-100 do not apply to Burton as it was created prior to March 7, 1973.

Burton next contends that it is specifically authorized under S.C. Code Ann. §5-3-312 to contract with municipalities. However, as set forth above, the statutes set forth by the legislature throughout Title 5 and 6 address public service districts created prior to home rule such as Burton and post-home rule special purpose districts differently. All the districts referred to by S.C. Code Ann. §5-3-311 and 312 are post-Home rule districts which would have the ability pursuant to their own statutory schemes to contract with municipalities for service. These districts differ from the pre-Home rule public service districts which do not have authority to contract except as set forth in their chartering legislation. The laws of this state consistently treat those public service districts such as Burton in a manner separate from post-Home rule special purpose districts except where they are explicitly set forth to be treated the same in a specific article. See S.C. Code Ann. §6-11-350, §6-11-410, §6-11-810. There is no such reference to these pre-1973 districts at S.C. Code Ann. §5-3-311. It is clear that if the legislature had intended to it could have added such inclusive language as it did in the sections set forth above. The exclusion is indicia of a specific intent to exclude. Thus, there is no authority to contract granted to Burton a pre-Home rule public service district set forth in S.C. Code Ann. §5-3-311 and 312.

CONCLUSION

Based on the foregoing, there is an ambiguity in the meaning of the term assessed values as utilized on the tax bills at that time and extrinsic evidence shows that the meaning as set forth by the City and Town is the meaning understood by all parties when the contract was made. Additionally, Burton's actions in Contracting with the Town and City were Ultra vires and are not allowed by any relevant statutory authority. Therefore, this court should reverse the order of the circuit court.

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APPELLANTS CITY OF BEAUFORT AND TOWN OF PORT ROYAL'S
CERTIFICATION OF COMPLIANCE WITH RULE 211(B)

I, the undersigned, as counsel for the Appellants, City of Beaufort and Town of Port Royal, certify that the within Final Reply Brief of the Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

SIGNATURE PAGE FOLLOWS

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November 20, 2017

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.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing *FINAL REPLY BRIEF OF APPELLANTS CITY OF BEAUFORT AND TOWN OF PORT ROYAL* upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 20th day of November, 2017 addressed to the following:

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