STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO.: 2009-CP-15-0595

THE SPRIGGS GROUP, P.C., ... Respondent,

v.

GENE R. SLIVKA, ... Petitioner.

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE COURT OF APPEALS HOLDING THAT THE WORK PERFORMED BY THE RESPONDENT CONSTITUTED "MAKING THE REAL ESTATE SUITABLE AS A SITE FOR THE BUILDING OR STRUCTURE," OR THAT IT FELL WITHIN ANY DEFINITION OF "LABOR" WITHIN THE STATUTE, IS INCORRECT AND THE EFFECT OF THE COURT OF APPEALS HOLDING IS TO INAPPROPRIATELY EXPAND THE DEFINITION OF LABOR AND TO RENDER OTHER PORTIONS OF THE MECHANICS LIEN STATUTE MEANINGLESS.

First, Spriggs incorrectly argues that "the list of lienable services is expressly neither exclusive or exhaustive." (*Respondent's Return,* p.14) In fact, the mechanics lien statute is exclusive and its definitions are not open-ended. *See, Clo-Car Trucking Co, Inc., v. Clifflure Estates of S.C.*, 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984) ("Because a mechanic's lien exists only by virtue of a statute, one's right to a mechanic's lien is wholly dependant on the language of the statute creating it...[W]e must take each mechanic's lien statute as we find it...for we are not at liberty to depart from the plain meaning of it's language." (Internal citation omitted.) *Id.* at page 576). Spriggs elected to pursue recovery pursuant to that statute and must strictly comply with its terms and requirements. *See. Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407, 408 (1918). "[H]e who sets up such a lien must bring himself fairly within the expressed intention of the lawmakers."

Second, rather than apply the portion of the statute that clearly is applicable to this case, the Court of Appeals misapplied the statute and case law to make the January, 2009 work of Spriggs fit within the statute, effectively expanding the definition of "labor." Applying *S.C. Code Ann.* § 29-5-10, the Court held:

> "While the statute provides labor includes the preparation of plans, specifications, and design drawings, it also states labor includes the work of

> making the real estate suitable as a site for the building structure. Here, [Respondent's] discussions with the plumber and engineer in January 2009 were part of its architectural services **overseeing** the proper construction of the property."

Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 501 (Ct. App. 2013), reh'g denied (March 22, 2013)(emphasis added).

Essentially acknowledging that the definition of "labor" relative to design professionals ("labor performed or furnished in the erection, alteration or repair of any building or structure upon any real estate includes the preparation of plans, specifications, and design drawings", *S.C. Code Ann.* § 29-5-10) would not include the work of Spriggs, the Court of Appeals relied on the inapplicable language which immediately followed, "and the work of making the real estate suitable as a site for the building or structure," to find support for Spriggs' claim. However, that clearly contemplates coverage for site work, which is made even more clear by the sentence that follows which exhaustively describes site work activities which typically make the "site" suitable for building (including grading, bulldozing, the creation of ditches, curbs, and the like). The portion of the statute relied upon by the Court of Appeals is simply inapplicable to this case and nowhere in the record is it even alleged or argued by Spriggs that anything he did was "work making the real estate suitable as site for the building or structure."

By using that portion as a "catch-all", applicable to Spriggs' services and anyone else, the Court of Appeals effectively rendered meaningless the requirement of the statute that labor or materials protected by the statute be "furnished in the erection, alteration or repair of any building or structure." Under the Court of Appeals holding, anything done by anyone associated with a project, as long as it is the "work of making the real estate suitable as a

site," would fit within the definition of "labor". *S.C. Code Ann.* § 29-5-10.

Perhaps realizing this, the Court of Appeals then held that the January work of Spriggs, talking on the telephone, was part of Spriggs "overseeing" the project. While "overseeing" is not used by the legislature in the definition of "labor" in the statute, or in relevant case law, there is case law referencing a design professionals' performance of services described as "superintending" construction. In *Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407, 408 (1918), the court found that the architect had lien rights where he had "superintended" construction. In *Sea Pines Co. v. Kiawah Island Co., Inc.*, 268 S.C. 153, 232 S.E.2d 501, (S.Ct. 1977), the Court did hold that the mechanics lien statute covered the **supervision** of the planning and development of the project by a design professional. (emphasis added). However, in that case, the design professional provided a staff to supervise construction at the project.

The South Carolina Supreme Court clearly delineated the difference between "construction administration" generally and on-site supervision was articulated in *George A.Z. Johnson, JR., Inc. v. Barnhill*, 279 S.C. 242, 306 S.E.2d 216 (S.Ct. 1983), where a surveyor's claim under the Mechanic's Lien Statute was rejected. In distinguishing the surveyor's claim from those where lien rights had been granted for design professionals, the court stated that the cases in which architects had been entitled to assert lien rights "deal with labor performed in the actual construction of the buildings **on the property**." *Id.* at 245. (emphasis added). Here, Spriggs admittedly did not go on-site and did not "supervise" anything with regard to construction in January, 2009.

Respondent also relies on a 1951 Pennsylvania case, *Lee v. Du-Rite Products, Co., Inc.*, 366 Pa. 548, 29 A.218 (Pa. S.Ct. 1951), which actually supports Petitioner's argument. In *Lee*, the Pennsylvania Court refused to expand its mechanic's lien statute and reversed a verdict on a mechanic's lien action which had been entered in favor of the Plaintiff, an architect. Pennsylvania law does allow an architect to assert a lien if he is employed to be **on site directing construction**, but not to draw plans alone. *Id.* at 219. (emphasis added). The court in *Lee* found that the architect had no lien claim, even though he made site visits, because during those visits he did not superintend or supervise construction.

Here, Spriggs admitted that he had not been on site for months in January, 2009 and the administration work done by him then was done at his office. Thus, there is no support for the inclusion of that January work within the language of the statute or in any cases in South Carolina.

Attempting to rationalize the Court of Appeals decision, Spriggs asks how could security guard services during construction be services for which a lien is created but not architectural services overseeing and supporting proper construction of a residence? *(Respondents Return,* p. 15) The answer is simple and fundamental to this appeal: The legislature specifically included within the definition of labor the services of a security guard. *S.C. Code Ann.* § 29-5-25. When considering the work of design professionals to be included, the legislature limited design services to the preparation of "plans, specifications and design drawings". It did not include Construction Administration services, done at the office, and it was error for the Court of Appeals to expand the definition of labor to include those services.

Because the argument of the Respondent and the holding of the Court of Appeals rely on a definition of "labor" that is not supported by either statute or case law, Petitioner must be granted certiorari as the holding of the Court of Appeals must be reversed. To allow the holding to stand opens a floodgate for mechanic's liens to be asserted by any individual who answers a phone call regarding a project months or even years after a project is completed and opens the door to claims that are clearly not contemplated under the clear meaning of the statute or applicable case law.

II. RESPONDENT DOES NOT ESTABLISH AN UNREASONABLE FAILURE TO PAY, OR EVEN WHAT SUM CAN BE SAID TO HAVE BEEN UNDISPUTED, OR OWED, BY DEFENDANT AT THE TIME OF THE DEMAND AND THEREFORE JUDGMENT UNDER *S.C. CODE ANN.* § 27-1-15 SHOULD BE REVERSED.

While Slivka does not contend that Spriggs does not understand § 27-1-15, it is clear that Spriggs is not being candid with the Court relative to the facts of the case. It is undisputed that in June 2009, Slivka agreed he owed Spriggs a sum of money, though the amount was disputed. However, Spriggs did not send his demand pursuant to § 27-1-15 at that time. Instead, Spriggs filed this action seeking the foreclosure of his untimely mechanics lien. By the time Spriggs sent the §27-1-15 demand, in March, 2010, the parties had been engaged in the litigation, with claims pending against each other, for nine months. For the reasons that follow, even in his brief, Spriggs cannot articulate what sum was "undisputed" or even "owed" by either party to the other at the time the §27-1-15 demand was sent, since it was not determined until the jury rendered it's verdict in July, 2011.

When Respondent's invalid lien foreclosure was filed, on July 8, 2009, Petitioner began to incur attorneys fees and damages, which continued to accrue and are still accruing.

Petitioner asserted cross-claims that survived all efforts by Respondent to have them dismissed. Thus, at the time this matter was submitted to the jury, a question existed about whether Petitioner owed Respondent anything and if so, how much. The Court or the jury could have ultimately concluded that Respondent's lien was untimely and that, in fact, Respondent owed Petitioner for Petitioner's damages. That these matters were in dispute, as a matter of law, is established by the fact that the trial court denied Respondent's motions for directed verdict (R. pp. 285-297, 314).

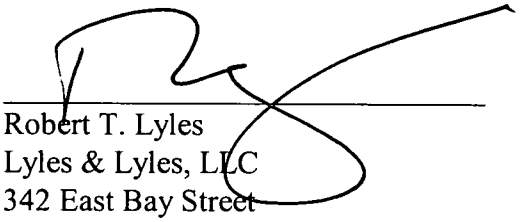
At the close of the case, Spriggs moved for directed verdict, and an award of damages, making the same argument he makes now: that Slivka had agreed, in June, 2009, that he owed Spriggs money. (R. pp. 287-288). The trial court correctly denied Respondent's motion. (R. p. 297). That denial establishes, as a matter of law, that there was not an undisputed or "valid" sum payable to Respondent at the time the case was submitted to the jury in July, 2011, much less when the demand was sent in March, 2010.

When the Respondent initiated a mechanic's lien, prior to sending his § 27-1-15 demand, it put into play a claim under which the Petitioner had the right to recovery attorney's fees in the event that Respondent's lien was invalid. When Respondent initiated litigation, he compelled Petitioner to assert his own cross-claims. In holding as a matter of law that months after this process has been initiated by the Respondent, that the Petitioner must pay pursuant to § 27-1-15, despite the fact that Petitioner has no right for immediate determination of the validity of his own claims, essentially takes away Petitioner's right to litigate his own claims. For this reason, certiorari must be granted and the Court of Appeals decision must be reversed.

CONCLUSION

Based on the foregoing, the Court's Opinion filed February 6, 2013, is in error and therefore, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,



June 5, 2013

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PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to the Respondent's Return to the Petition for Writ of Certiorari on The Spriggs Group, P.C. by depositing a copy of it in the United States Mail, First Class postage prepaid, on June 5, 2013, addressed to their attorneys of record, A. Bright Ariail, Esquire and James A. Bruorton, IV, Esquire, Rosen, Rosen, & Hagood, LLC 151 Meeting Street, Suite 400, Charleston, South Carolina 29401.

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