THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2016-CP-40-00164

RECEIVED
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SC Court of Appeals

Appellate Case No. 2017-001522

The Kitchen Planners, LLC, ...Appellant,

v.

Samuel E. Friedman and Jane Breyer Friedman and
Branch Banking and Trust, ...Respondents.

APPELLANT'S PETITION FOR REHEARING

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Appellant The Kitchen Planners, LLC petitions for rehearing of the attached Opinion No. 5738 pursuant to South Carolina Appellate Court Rule 221, upon the following grounds:

I.

The Court overlooked and misapprehended the error of the Circuit Judge in allowing conversion by Respondents of the Motion to Dismiss to a Summary Judgement Motion, because Respondents failed to serve Appellant with their affidavits ten days prior to the hearing.

As the Supreme Court of South Carolina held in Baird v. Charleston County, 333 S.C. 519, 511 S.E. 2d 69 (1999):

> Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. [citation omitted] The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to relief on any theory. [citation omitted] Rule 12(b) further provides:
>
> *If*, on a Motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such Motion by Rule 56.* Rule 12(b), SCRCP (emphasis added). We

> have interpreted this language as meaning the trial court may treat a 12(b)(6) motion as a motion for summary judgement and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6): Brown v. Leverette, 291 S.C. 364, 367, 353 S.E. 2d S.E. 2d 697,698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E. 2d 613 (1995).

The primary notice provision violated here was the requirement of SCRCP Rule 56 that the non-movant have copies of the supporting affidavits at least 10 days before the hearing. Higgins v. Medical University, 326 S.C. 592, 596, 486 S.E. 2d 269, 271 (Ct.App. 1997).

In this case, Respondents' counsel mailed Appellant's counsel an affidavit of Samuel Friedman (R. pp. 40-41) on April 14, 2017, for the hearing set April 25, 2017 (even though the affidavit of service says April 13, 2017, the envelope is postmarked April 14, 2017) (R. p. 42). Counsel for Respondents mailed April 20, 2017 a Memorandum of Law with attached affidavit (R. pp. 93-95) of attorney's fees, which Appellant's counsel recalls receiving April 23, 2017, two days before the motion hearing.

When Appellant's counsel received the affidavit of Samuel Friedman on April 17, 2017, she subsequently filed a Motion to Strike, objecting to the introduction of any matters outside of the pleadings in connection with the Motion to Dismiss (R. pp. 45-46). The Motion to Strike also objects because the "affidavit fails to support the only raised affirmative defense in the Answer and Counterclaim of Defendants which is relevant to their Motion to Dismiss, the Sixth Defense for violation of §29-5-100...", Proceedings not invalidated by inaccuracy of statement of account. (R. p. 46)

At the motion hearing on April 25, 2017 counsel for Appellant again objected to untimely service.

> Ms. Derrick: Yes, sir. And for the record, Your Honor, I've made a motion to strike an affidavit that he sent me last week in connection with this motion to dismiss.
> The Court: What – okay. And what's your basis for that?
> Ms. Derrick: Well, let me hand up my filed copy. A number of reasons. ***He didn't timely serve the affidavit in connection with the motion which is supposed to be under Rule 6***.
> The Court: What about that, Mr. Krawczyk?
> Mr. Krawczyk: Well, Your Honor, I did file the affidavit for ten days before this hearing. The understanding of Rule 6 being that this hearing is going to be set within ten days of your motion.
> The motion was actually filed well back in January, and information became available afterwards, and now it's being produced in time for Mrs. – for Ms. Derrick to also put a counter affidavit which I think is also the purpose of that particular rule that –" (R. p. 55, line 18 – p. 56, line 12). (emphasis added)

This Court, in its Opinion filed July 1, 2020 specifically held, in Section II. Motion to Strike "First, we find unpreserved Kitchen Planners' argument the circuit court improperly treated the motion to dismiss as a motion for summary judgement because it advances this argument for the first time on appeal."

Appellant respectfully submits that this Court has overlooked and misapprehended this point in the record. The conversion of the motion to dismiss to one for summary judgement because of the untimely service of affidavits was objected to both before and during the hearing, as well as afterwards, in Appellant's Motion to Alter or Amend (R. p. 49).

This Court in its Opinion implies repeatedly that because Appellant filed an affidavit in opposition, she had enough time, implying that the violation of the ten (10) day notice requirement of service of both a motion as well as supporting affidavits is harmless. This type of reasoning is incorrect and unjust. As a practical matter, Derrick

Tackett, the representative for Crystal Cabinets, was out of town the week of the motion hearing and Appellant could not obtain an affidavit from him which confirmed that he was working with her well into the Fall of 2015. Given the weighing of the evidence and findings of credibility made by the circuit judge as well as this Court on appeal, Appellant wishes she would have been able to obtain this affidavit.

However, Appellant has never waived the time limits and the procedural requirements of the South Carolina Civil Procedure Rules. She is entitled to ten (10) days notice of all affidavits, and she objected before, during and after trial to this breach. She submitted an affidavit, conditioned upon her prior objections to any submissions of affidavits by either party, to avoid the pit fall of automatic granting of summary judgment if no opposing affidavits are submitted. Appellant is entitled to have any affidavit intended to be submitted in support of a motion to be served concurrently with the motion. Appellant is entitled to have a motion specifically state the grounds. Again, Appellant did not waive these requirements, but objected to it clearly on the record, as well as in her Motion to Strike.

Ten days is ten days and Appellant is entitled to that time and was not granted this right afforded her under the South Carolina Rules of Civil Procedure, and this Court should not and can not take that right away from her.

This Court can and should reverse the Order of the Circuit Judge solely on the issue of the error of conversion of the motion to dismiss to a motion for summary judgement. That would be dispositive of this appeal.

II.

This Court has also overlooked and misapprehended that the grounds of Respondents' Motion to Dismiss were different than those argued in the Memorandum of Law received by Appellant two (2) days prior to the hearing. Again, conversion should have been disallowed.

Specifically, Respondents filed, *sans* any affidavit, on January 19, 2020 a Motion to Dismiss Mechanics Lien (R. p. 37). The grounds for dismissal vaguely mentioned in the motion were Section 29-5-10, which is a general statute which describes and defines a mechanics lien, and Section 29-5-100, captioned "Proceedings not invalidated by inaccuracy of statement of account." The Motion to Dismiss also twice cites SCRCP Rule 56(a), which is the basis of summary judgement for *claimant*. (Respondents are not claimants.) The Motion to Dismiss concludes with the sentence "Defendants may supplement with a memorandum of law to be filed prior to the hearing of this matter."

The ultimate basis of the circuit judge for granting summary judgement was that the mechanic's lien was not filed and served within 90 days of Plaintiff providing the labor or materials, which is Section 29-5-90, which statute was not cited in the Motion to Dismiss nor raised as an affirmative defense in Respondents' Answer and Counterclaim. Section 29-5-90 was first raised by Respondents in their Memorandum of Law, which was served by U.S. mail on Appellant April 20, 2017 and physically received by the attorney for Appellant April 23, 2017.

Appellant, noting the incongruity between the affidavit of Samuel Friedman she had received April 17, 2017 and any defenses raised in Respondents' Answer and Counterclaim or Motion to Dismiss, had moved to strike the affidavit, specifically citing this discrepancy (R. p. 46). Appellant's counsel also objected on the record to the discrepancy between the statutes cited in the Motion to Dismiss and the grounds that were argued at the time of the hearing (R. p. 63, line 9-p. 64, line 13). Appellant's objection was continued in her Motion to Alter or Amend. (R. p. 49)

This Court in Higgins v. Medical University, expressed concern about the:

> practical effect of the [12(b)(6)] conversion rule is to require non-movants to be vigilant and adequately prepare whenever a movant submits a 12(b)(6) **motion** coupled with **affidavits.** We hope that movants will not, as a strategic device, submit 12(b)(6) **motions** with **affidavits**, anticipating

> that the non-movant will appear at the hearing without having **served supporting affidavits** [citing authorities] It is a fundamental rule that 'if the plaintiff relies solely upon the pleadings, files no counter-**affidavits**, and makes no factual showing **in** opposition to a **motion** for **summary judgment**, the [trial] court is required under Rule 56, to grant **summary judgment...'** Higgins v. Medical University, 326 S.C. at 598, 486 S.E.2d at 272

Here, Respondents have taken an even more ambush like approach than envisioned by this Court in *Higgins*: A Motion to Dismiss not supported by any affidavits was filed in January 2017, prior to any discovery being taken. The depositions of the parties were taken earlier in the month of April, before the April 25th Motion hearing, and on April 14th and April 20th Respondents served by mail affidavits utilized by the trial court in the April 25th motion hearing. The statutes and court rules cited in the Motion to Dismiss were completely different than the statute argued in the memorandum of law mailed April 20th to counsel for Appellants.

A basic rule of pleading, set forth in SCRCP Rule 7(b)(1) is that "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought."

Appellant's Motion to Strike specifically objected to the Friedman affidavit because the "affidavit fails to support the only raised affirmative defense in the Answer and Counterclaim of Defendants which is relevant to their Motion to Dismiss..." (R. p.46)

Also, at argument during the motion hearing, counsel for Appellant again objected to the discrepancy in the grounds of the Motion to Dismiss and §29-5-90, which had been raised only two days before, in Respondents' memorandum of law:

> So her affidavit shows that she worked well within the ambit of the 90 days allowed on the lien, and it was timely served and filed. ***I also object to this ground because it's not raised in their –their answer and counterclaim in this case, too.***

> You know, Mr. Krawczyk – I guess because he is doing the best he can, is real close to the best of me about whatever he is objecting to in this motion to dismiss because I can't tell reading on its face what error of law or fact they are asserting is incorrect.
> There is nothing specifying about the lien wasn't served timely. It just says it just fails to comply with the mechanic's lien statute. So this is the first time I've heard him say that, but I'm not worried about that.
> That's a transparently incorrect fact because our affidavit, as well as what I submitted to you today, as well as my client's deposition establishes facts work well within the mechanic's lien statute.
> The dates are disputed at the very – at the very least under the summary judgement if we're proceeding under Rule 56. There's plenty of disputes of fact contained in the two affidavits in front of you, Dr. Friedman and Ms. Comose's.
> In addition, he claims that the lien doesn't apply because the cabinets weren't installed in the kitchen. That is incorrect. At least a portion of the cabinets that my client has paid Crystal cabinets for, but she has not in turn been paid by her customer the Friedmans for, were installed, the cabinet, by the follow-up contractor, a fellow individual Vigiano..." (R. p. 63, line 9 - p. 64, line 13) (emphasis added)

Because there is no overlap in the grounds stated in the Motion to Dismiss and the grounds argued by Respondents at the motion hearing, there is nothing to convert.

Again, this Court can and should reverse the order of the circuit court solely on the issue of the error of conversion of a motion to dismiss to a motion for summary judgment. That would dispositive of this appeal.

III.

The Court misconstrued and misapprehended in its Opinion the proper procedure and notice requirements of SCRCP Rule 56.

This Court held that the circuit judge did not abuse his discretion by refusing to strike the untimely affidavits, reasoning that:

> However, Rule 56, SCRCP, governs motions for summary judgement and does not require that the moving party support its motion with affidavits. *See* Rule 56(b), SCRCP ("A party against whom a claim, counterclaim or cross-claim is asserted....may, *at any time*, move *with or without supporting affidavits* for a summary judgement in his favor as to all or any part thereof." (emphasis added). Pursuant to Rule 56(c), the party moving for summary judgment must serve the motion at least ten days before the hearing Rule 56(c) SCRCP. Here, the motion for summary judgement was filed January 17, 2017. The hearing on the Friedmans' motion was held April 25, 2017. Although they filed their memorandum and exhibits on April 20, 2017, the Friedman's served Kitchen Planners with Mr. Friedman's Affidavit on April 13, 2017. Further, Kitchen Planners had an opportunity to – and did submit – an opposing affidavit, which the circuit court accepted. Therefore, we find the circuit court did not abuse its discretion by refusing to exclude the affidavit.

SCRCP Rule 6(d) very simply and clearly states in part "When a motion is to be supported by affidavit, the affidavit *shall* be served with the motion..." (Emphasis added)

The present language of this Opinion gives any litigant free rein to file a motion without any supporting affidavits, and then, subsequently serve affidavits at any time prior to the hearing. This Court has misapprehended and overlooked the requirement that a litigant receive an affidavit at least ten days prior to a summary judgement motion hearing. Higgins vs Medical University, 326 S.C. 592, 486 S.E.2d 296 (Ct.App. 1997) (SCRCP Rule 56 requires non-moving party to have copies of supporting affidavits at least 10 days before the hearing).

The Court has overlooked and misapprehended and failed to address and prohibit the bad faith tactic employed here of deliberately filing a vague, almost nonsensical Motion to Dismiss and then converting to a motion for summary judgment on completely different grounds and without adhering to notice requirements of Rule 56. This Opinion, if it stands, will certainly encourage cunning litigants to not file affidavits with a motion, and then submit affidavits at or immediately prior to a hearing.

To put it differently, the emphasis in this Opinion on the language of SCRCP Rule 56 which allows a summary judgement motion to be filed without an affidavit infers that it is proper to file a summary judgement motion without an affidavit, even if the affidavits are intended to be later offered. This contradicts the mandatory "shall" language of Rule 6, which requires affidavits to accompany motions. The true meaning of this SCRCP Rule 56 language is that in lieu of affidavits, the parties are instead allowed to rely upon deposition transcripts and other evidentiary items in support of the summary judgement motion, and are not confined just to affidavits. The procedure employed by Respondents here is a poor practice, which should not be encouraged, as this Opinion nevertheless does.

This Court has overlooked and misconstrued the notice and pleading requirements of SCRCP Rules 6, 7 and 56. If a movant intends to submit an affidavit, it shall be served with the motion, which should state with particularity the grounds therefore. A moving party must serve affidavits ten (10) days in advance of a summary judgement hearing. This Opinion encourages practices violative of both the spirit and the letter of the South Carolina Rules of Civil Procedure.

This entire Opinion should be withdrawn and not published.

IV.

This Court overlooked and misapprehended the provisions of Section 29-05-180, Amendments of Pleadings, South Carolina Code of Laws, Annotated, as well as SCRCP Rule 15 in holding that "Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien."

Section 29-5-180 provides *in toto* "The court may at any time allow either party to amend his pleadings as in other civil actions." SCRCP Rule 15(c), Relation Back of Amendments, provides in part that "Whenever the claim or defense asserted in the

amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

Here, discovery had been ongoing through the month of April 2017, when all the parties were deposed. A copy of the September 29, 2015 check written by the Appellant to pay for cabinets had been recently produced in discovery. Derrick Tackett, the Crystal Cabinets representative with whom Appellant continued to work to finish the job, has not as yet been deposed. Two days before the motion hearing, on April 23, 2017 Appellant's counsel had received the memorandum of law from Respondents', in which was raised, for the very first time, the issue of whether or not the lien had been timely filed pursuant to Section 29-5-90.

This Court, in its Opinion, under **I. Timeliness**, stated:

> Although Kitchen Planners argues it was entitled to amend its complaint to change the date it last provided materials, it never requested leave of the circuit court to amend its pleadings; rather, it raises this argument for the first time on appeal. Thus, we find this argument is unpreserved.

It is ironically insult to injury for this Court, given the flagrant violations by Respondents of notice and specificity of grounds, to hold that Appellant should have formally moved to amend her complaint and statement of lien in the two days prior to the hearing.

Appellant can easily move, with or without the consent of Respondents, to amend her lien and Complaint to allege September 29, or some November date in 2015 as the last date labor and materials were furnished, when she wrote a check and continued to coordinate on the project with the Crystal Cabinets representative.

However, a formal amendment of pleadings should not be necessary in the context of deciding a motion for summary judgement. Here, evidence adduced in ongoing discovery via depositions as well as production of documents established that Appellant continue to work and communicate with Derrick Tackett, the manufacturer's

representative for Crystal Cabinets through mid-November 10, 2015, as well as earlier writing a check September 29, 2015 for $550.60 when she reordered drawers for the island in the kitchen. (R. p. 96; R. p.110, lines 2 – p.111, line 7; R. p.164, lines 6 -22) These were evidentiary facts in the record at the motion hearing, and tried by consent of the parties. Respondents did not object to any of these evidentiary facts. The pleadings themselves are amended pursuant to SCRCP Rule 15(b) to conform to the evidence. These facts, whether contested or uncontested, are in the record and militate the denial of summary judgement, even assuming conversion was proper.

Appellant respectfully submits this Court has overlooked and misapprehended the pettiness of holding inflexibly that "Kitchen Planners is bound by the dates assert in its pleadings and on the face of the lien". It is well established that amendments are granted freely and liberally to serve the interest of justice. This Opinion incorrectly stops short with the pleadings when it should proceed to look at the evidence subsequent discovery has revealed in the case. SCRCP Rule 15 instructs this Court to decide this case on the facts, and not the pleadings.

V.

This Court overlooked the repeated improper findings concerning the weight of evidence and credibility in the Orders of the Circuit Judge, and failed to reverse the Orders on that basis and instead itself incorrectly making additional findings of the weight of evidence and credibility.

It is well settled that, as this Court acknowledges in the Opinion here, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgement." Hancock v. Mid-S. Mgmt. Co, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony..." Nevertheless, the

Orders on appeal of the circuit court below make numerous factual findings and determinations of credibility. This court has also made its own numerous factual findings and determination of credibility in the Opinion for which rehearing is sought.

The statements in the Orders on appeal are patently erroneous – "It is clear to the Court that no credible evidence exists to show that Plaintiff provided any materials or labor to the Friedman's home after August 18, 2015. "(R. p.4); "The Court found that the affidavit [of Appellant] was not credible as it was self-serving statement which was in complete contradiction to all of the other evidence including the dates on the Lien, the e-mails between the parties and Ms. Comose's own sworn testimony that she provided no materials after June 18, 2015..." (R. p. 9) "Even if Ms. Comose's affidavit were creditable...." (R. p. 9) "[T]he Court finds Ms. Comose's affidavit unpersuasive..." (R. p. 9)

This Court, in footnote two of its Opinion, stated "Though we note witness credibility is not a proper consideration in deciding a motion for summary judgement, given our standard of review on appeal, we need not consider this argument," [that the Order should be reversed because of the trial judge's findings of credibility]. This Court has misconstrued and misapprehended the whole point of the appeal. Clearly this Court admits the error of the lower court. The trial judge improperly weighed evidence and made findings of credibility in granting summary judgement. Respectfully, the Court should directly address and reverse this clear error, instead of affirming it.

A simple review of the short affidavit of Appellant reveals a credible, straight forward affidavit which is totally consistent with the deposition testimony of Appellant. (R. pp. 96-104) This affidavit clearly constitutes at least a scintilla of evidence and can not be overlooked. There was never any claim by Respondents that this is a sham affidavit. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 411 (Ct.App. 2014).

This Court has overlooked and misapprehended and misapplied the standard of review of the Orders upon appeal; indeed, this Court has committed the same error on

appellate review as the trial judge did below, in weighing the evidence and judging credibility.

This Court in its Opinion gives lip service to the appropriate standard of review, that "the non-moving party is only require to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.", citing Hancock v. Mid-S Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, this Court in its Opinion still states "[W]e find the evidence was not sufficient to contest the Friedmans' assertion that August 18, 2015, was the last date labor or materials were furnished." This Court then follows with a detailed factual discussion, weighing the evidence, questioning why Appellant never testified she was specifically requested or directed to reorder drawers, and noting that Appellant offered no testimony to show that the drawers were ever delivered, could not offer an explanation as to why she wrote the check in September, and did not prove that these additional items were delivered.

In fact, the record shows that Appellant in her deposition clearly was motivated / instructed / told to reorder these drawers by Respondent Jane Friedman (R. p.164, lines 6- 22). The record shows that at some point after the reorder, the boxes were delivered to her, and Derrick had someone pick them up and take them to the house (R. p. 212, line 21 – p. 213, line 7).

In short, this Court on appeal has still erred in weighing the preponderance of the evidence. It has utilized the incorrect standard of review. Instead, all Appellant needs to show is a mere scintilla.

All Appellant needs to do to avoid entry of summary judgement is show inferences which create genuine issues of material fact, and the check September 29, 2015 (R. p. 249) and the Viggiano estimate (R. pp. 102-104) both do that, as well as Appellant's affidavit stating she continued work until mid-November with the Crystal Cabinet representative on the project. (R. p. 96).

The labor in writing the check is labor furnished toward completion of the job. The funds paid by Appellant are value added by Appellant in completion of the contract. The date of the check September 29, 2015 shows that Appellant continued to labor on the project, even though she did not return to the home of Respondents after June 18, 2015. The Viggiano estimate clearly intends to cannibalize the Crystal Cabinets to finish the job Appellant started. Further discovery will show whether that was actually done.

Opposing counsel in argument to the circuit court below certainly recognized that Appellant's affidavit and the check created disputed issues of fact. He stated on the record in argument "And so those were undisputed dates of ... as of ... until this affidavit was filed, those were undisputed dates." (R. p. 59, lines 10-12).

Counsel continued:

> And now we get an affidavit saying she did something. Your Honor, direct -- directly against her testimony in here. So I think even under their dates -- in this September date of, obviously, looking at what she said -- all she said that she did, for example, 'I reordered drawer boxes for the island in the kitchen and paid $550 after.' Your Honor, nobody was on the job after that. Everybody was fired. She, obviously, couldn't order things from my client after that point. (R. p. 67, lines 7-15)

Counsel for Respondents in argument himself articulated disputed issues of fact in this case. Summary Judgement was improperly granted and this should be reversed by this Court.

This Court also overlooked and misapprehended the genuine issue of material fact created by the Viggiano estimate, when it instead affirmed the Order of the lower Court granting summary judgment on the alternate ground that materials were not actually installed in Respondents' residence.

Specifically, in its Opinion, this Court held;

> Further, the Viggiano estimate does not create a genuine issue of material fact because the statement '[a]ll usuable hardware and drawers from the

> existing Crystal cabinets will be reflected as a credit in final price' is not probative of whether any such items were actually installed. Based on the foregoing, we find the only reasonable inference that can be drawn from the pleadings and evidence is that the materials were never installed in the Friedman's home.

This statement certainly does not give Appellant every benefit of the doubt, as this Court nevertheless should.

Actually, it is the opposite inference which is drawn from the Viggiano estimate – a licensed contractor hired to do the work states in his estimate that credit will be given for materials installed. He knows the materials furnished by Appellant are useful and he intends to use them. That is a genuine issue of material fact.

This Court sits in this case to recognize disputed facts, not decide them. The Viggiano estimate makes a clear, favorable inference that the Crystal cabinets were cannibalized and parts installed in the residence by Viggiano, a contractor who has now completed the cabinet job for the Respondents.

Clearly further discovery is needed on this disputed point.

Ultimately, at trial, if Respondents seek to void the lien regarding whether or not the cabinets were installed and utilized by them, Appellant will also be free to argue to the jury the legal defense of estoppel. Given the posture of the pleadings, Appellant has not needed to file a Reply raising this legal defense. Clearly on the facts of the skeleton record before this Court, there is an inference of fact that a jury would need to decide, as to whether or not the Respondents, who are in possession of $50,000 worth of Crystal custom cabinets, which are unfit to be utilized by anyone other than Respondents in their own kitchen, can void a mechanic's lien by merely electing not to install them.

VI.

This Court overlooked and misapprehended its duty as an appellate court when it failed to reverse as a matter of law the circuit court's erroneous finding that Kitchen Planners claimed entitlement to more than what was due under the lien, in violation of Section 29-5-100, South Carolina Code of Laws Ann.

In the Orders on Appeal, the Circuit Judge below erroneously found that the "Plaintiff willfully and knowingly claimed more than her due....", and that the "Lien is seeking solely overhead and profit." (R. p. 5).

Here, the written contract between the parties is an Exhibit attached to Appellant's Affidavit (R. pp. 98-101). The amount of the lien, the third of three agreed upon instalments of $16,594.68, is the amount owing on a written contract negotiated and entered into by the parties. Unquestionably, under the South Carolina Supreme Court's decision in Sentry Engineering & Construction, Inc. v. Mariner's Cay Dev. Corp, 287 S.C. 346, 338 S.E.2d 631 (1985), "overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien."

This is a clear cut, established principal of law in South Carolina. This Court has overlooked and misapprehended its obligation in failing to address this issue in the Opinion for which rehearing is sought. The holding of the lower court on this point is plain error and this Court should reverse. The present Opinion affirms this error.

VII.

This Court has overlooked and misapprehended applicable law, in affirming the award of attorney's fees.

This Court has overlooked and misapprehended the nature of the proceeding below, when it states in its Opinion "Although, Kitchen Planners challenges the amount and reasonableness of the fee, it raised this argument for the first time in its Rule 59, SCRCP, Motion. Because Kitchen Planners could have raised this argument at or before the hearing, we find it unpreserved for our review." Respectfully, this is a nonsensical statement. The first time Kitchen Planners could protest the reasonableness and the amount of any fees awarded was by post hearing Motion to Alter and Amend, and Appellant has clearly done so. (R. p. 50)

It is outrageous to claim, as Respondent's attorney nevertheless has, that Respondents have incurred over $20,000 in fees and costs in connection with this lien. In this case, there were no hearings prior to April 25, 2017. Defendant had served a one-page motion in January 2017, which he had four months later supported by a one and a half-page affidavit of one of his clients. He had taken the deposition of Patricia Comose, the member/owner of The Kitchen Planners, LLC on April 7, 2017, from 10:00 a.m. to 1:00 p.m. The attorney for Appellant had also taken the depositions of Respondents. Both sides had served and answered simple discovery. The attorney for Respondents had also amended his Answer and filed a third-party counterclaim against manufacturer Crystal Cabinets, Inc., and had reached a separate settlement with Crystal Cabinets at mediation, although he had refused to reveal to Appellant the amount paid at settlement, claiming it was confidential. Respondents had filed April 17, 2017 a motion for protective order. [R. pp. 43-44]. This Motion was not scheduled to be heard April 25, although the Order denying Plaintiff's Motion to Alter or Amend gratuitously and improperly grants the Motion, in a backhand fashion, in connection with denial of Appellant's request that the attorneys' fee award be vacated. [R. p. 11].

Appellant believes that likely that at least some of the legal time and expenses claimed by Respondents were instead incurred in the litigation against Crystal Cabinets.

The lack of an itemized bill prevents such scrutiny however.

While the order appealed from recites the six factors necessary to consider in determining both the award and amount of award of attorney's fees, the order on appeal fails to discuss or make any specific findings of any of these six factors.

In Griffith v. Griffith 332 S.C. 630, 506 S.E.2d 526 (Ct.App.1998), the "wife's attorney's fees affidavit consist of two paragraphs which provide in summary form that the wife's attorney expended 57.5 hours on the case at the rate of $175 an hour, for a total attorney's fee of $10,062.50." *Id.*, 332 S.C. at 644, 506 S.E.2d at 533.

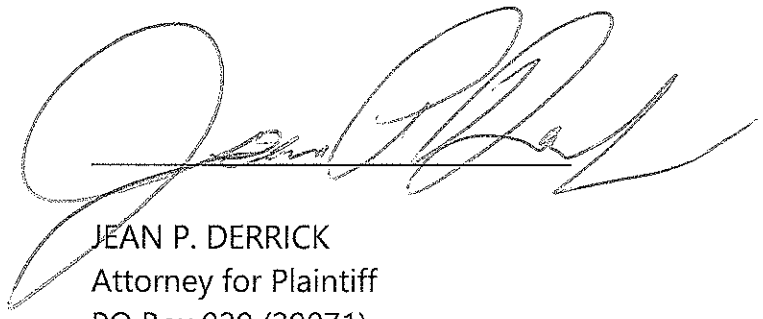
This Court reversed the fee award to the wife:

> However, the order of awarding the fee does not set forth specific findings of fact on each of the six required factors to be considered in determining the amount of the fee pursuant to Glasscock. The conclusory information of total time expended and hourly rate charged which was set forth in the affidavit is insufficient to provide the evidentiary basis necessary to support the award, even with the wife's testimony confirming the amounts actually paid. See Johnson v. Johnson, 288 S.C. 270, 341 S.E.2d 811 (Ct.App. 1986) (one-half page statement of estimated time devoted a case, totaling 90 hours, coupled with vague testimony of attorney as time and labor, found insufficient to support award of attorney's fees). 332 S.C.630, 646; 506 S.E.2d 526, 534.

This Court in affirming the award of attorney's fees overlooked and misapprehended the insufficiency of the fee affidavit which of course was also served out of time. The fee award should fall not only because summary judgment was improperly granted, but also because of the insufficiency of Respondents' fee affidavit.

CONCLUSION

For the above reasons Appellant would respectfully request that this Court grant rehearing and reverse the orders on appeal, withdrawing the present published Opinion.



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August 13, 2020

Lexington, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Kitchen Planners, LLC, Appellant,

v.

Samuel E. Friedman and Jane Breyer Friedman and Branch Banking and Trust, Respondents.

Appellate Case No. 2017-001522

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5738
Heard December 10, 2019 – Filed July 1, 2020

AFFIRMED

Jean Perrin Derrick, of Jean Perrin Derrick, LLC, of Lexington, for Appellant.

Charles A. Krawczyk, of Finkel Law Firm, LLC, of Columbia, for Respondents.

LOCKEMY, C.J.: The Kitchen Planners, LLC (Kitchen Planners) appeals the circuit court's order granting summary judgment in favor of Samuel E. and Jane Breyer Friedman (collectively, the Friedmans) as to Kitchen Planners' action for a mechanic's lien and foreclosure. Kitchen Planners argues the circuit court erred by (1) finding there was no genuine issue of material fact as to its claim for a mechanic's lien, (2) denying its motion to strike Mr. Friedman's affidavit, and (3) awarding attorney's fees to the Friedmans. We affirm.

FACTS

In 2015, the Friedmans and Kitchen Planners entered into a contract, pursuant to which Kitchen Planners was to provide and install kitchen cabinets in the Friedmans' home in exchange for $49,784.04, plus $2,995 for delivery and installation. The parties agreed the Friedmans would pay the contract price in three installments consisting of one-third at the time of ordering, one-third at the time of shipment, and the final third at the time of delivery. The Friedmans paid two-thirds of the contract price prior to delivery of the cabinets. However, when the cabinets arrived at their home on May 21, 2015, they were dissatisfied with the product and never paid the final one-third of the contract price.

Kitchen Planners filed a mechanic's lien and statement of account on November 12, 2015, pursuant to sections 29-5-10 to -440 of the South Carolina Code (2007 & Supp. 2019). It served the Friedmans on November 17, 2015, and filed its complaint and a lis pendens on January 13, 2015. Kitchen Planners alleged in its complaint that it "furnished materials, supplies, and labor beginning in or around March 16, 2015 and continuing through August 18, 2015." In their answer, the Friedmans asserted several defenses, including failure to properly file a mechanic's lien and violation of section 29-5-100. The Friedmans also asserted counterclaims against Kitchen Planners, including breach of contract, negligent supervision, and negligent misrepresentation. They alleged Kitchen Planners' measurements were incorrect and the cabinets had remained in their garage and were never installed in their home.

Subsequently, on January 19, 2017, the Friedmans filed a motion titled "motion to dismiss mechanic's lien and foreclosure," requesting "dismissal pursuant to [sections] 29-5-10[and] 29-5-100 and South Carolina Rule[] of Civil Procedure 56(a) [sic]." They sought dismissal of the lien and of Kitchen Planners' causes of action with prejudice, arguing the lien was invalid and "there [wa]s no issue of fact to support" Kitchen Planners' claims.

The Friedmans deposed Patricia Comose, the sole member of Kitchen Planners, on April 7, 2017. Comose testified she held a degree in interior design and a retail license that allowed her to purchase items at wholesale and sell them for retail value. She explained the Friedmans contacted her because they wished to purchase cabinets manufactured by Crystal Cabinets and she was the only dealer for Crystal Cabinets in the Columbia area. Comose stated the Friedmans had incurred water damage in their kitchen and "wanted the kitchen designed" to enable them to

replace the cabinets. She recalled some of the elements of the design were the same as the existing designs. Comose stated she visited the Friedmans' home on January 23, 2015, and they signed a "design retainer agreement" and paid a $500 retainer for the planning of the kitchen. The agreement provided that if the Friedmans decided to purchase the cabinets through Kitchen Planners, the $500 fee would be deducted from the purchase price. She stated they discussed the design several times between January 23 and March 16, 2015, and on March 16, Kitchen Planners and the Friedmans entered an agreement "for the ordering of the cabinets." Comose stated she purchased the cabinets for $28,953.58 and her profit margin was thirty-three percent. She acknowledged that prior to delivery of the cabinets, Kitchen Planners had already realized a profit of $4,175 and made additional profit from other items, such as the sink and the cabinet pulls. Comose explained that rather than charging by the hour, she earned profits by purchasing items at wholesale and selling them at retail and did not charge for her time "basically at all."

Comose confirmed that when the cabinets were delivered to the Friedmans' home on May 20, 2015, they had some concerns with the product. Comose stated that when the installer arrived the next day to install the cabinets, Mr. Friedman told her he wanted the cabinets removed from the home and a refund. She recalled she and the installer spent several hours at the home that day, unboxing the cabinets and setting them in place so the Friedmans could see how they would look. Comose stated she offered to reorder any portions of the cabinets they were dissatisfied with. She testified she spent the next two or three days preparing a list of items to reorder. Comose stated that when she began reordering items, the Friedmans removed her from the project. She explained the Friedmans contacted Crystal Cabinets directly and Derrick Tackett, a sales representative, took over the reorder process. Comose stated the Friedmans arranged with Tackett to pay dealer cost for the reorder. Comose stated she did not "have anything more to do with the project" after June 18 when Tackett informed her the Friedmans did not want her to be involved. Comose agreed that on August 18, 2015, she received an email from Tackett informing her the Friedmans had taken him off the job as well. Comose admitted, "I understand that we were not allowed to install [the cabinets]." When asked about a check for $550.61 paid on September 29, 2015, for "a re-order of boxes" for the kitchen island, she explained she reordered drawer boxes after Mrs. Friedman complained the boxes they received "could have been deeper." However, Comose did not know why she wrote this check in September as opposed to an earlier date, and she commented, "And I have those, by the way."

On April 13, 2017, the Friedmans served a copy of Mr. Friedman's affidavit upon Kitchen Planners by mail. The Friedmans then filed a memorandum titled "memorandum in support of defendant's motion for summary judgment" on April 20, 2017. On April 24, 2017, Kitchen Planners filed a motion to strike the affidavit, arguing it was improper because (1) the Friedmans filed a motion to dismiss and motions to dismiss must be determined by the pleadings only and (2) the affidavit should have been served concurrently with the Friedmans' motion pursuant to Rule 6, SCRCP. It also served and filed Comose's affidavit in opposition, in which she stated she continued to work with Tackett "through November 2015." Comose stated, "For example, on September 29, 2015, I reordered drawer boxes for the island in the kitchen, and paid $550.61." Additionally, she attested another contractor, Viggiano Remodeling, finished the project and "utilized some of the cabinets [she] furnished." In support of this, she attached the contractor's estimate, which stated, "All useable hardware and drawers from the existing Crystal cabinets will be reflected as a credit in final price."

The circuit court heard the Friedmans' motion on April 25, 2017. At the outset of the hearing, Kitchen Planners moved to strike Mr. Friedman's affidavit, relying on its written motion to strike and arguing the document was outside of the pleadings and untimely. The Friedmans argued they timely served the affidavit and their motion was a Rule 56, SCRCP, motion for summary judgment rather than a Rule 12(b)(6), SCRCP, motion to dismiss. The court denied the motion to strike, noting Kitchen Planners had sufficient time to review and submit a response to the affidavit. The court then proceeded with the hearing as a hearing on a motion for summary judgment, and Kitchen Planners did not object.

The circuit court granted the Friedmans' motion, finding there was no question of material fact that Kitchen Planners failed to timely file and serve the lien according to section 29-5-90. *See* § 29-5-90 (providing that "within ninety days after he ceases to labor on or furnish labor or materials for such building," a person seeking to enforce a mechanic's lien must "serve[] upon the owner . . . a statement of a just and true account of the amount due him"). It reasoned the face of the lien stated Kitchen Planners furnished materials and labor from "on or about March 11, 2015 through on or about August 18, 2015," and it served the lien on November 17, 2015—which was a difference of ninety-one days. The court noted "no credible evidence exist[ed] to show [Kitchen Planners] provided any materials or labor" after August 18. Additionally, it concluded the materials furnished were not actually used in the erection, alteration, or repair of a building and that Kitchen Planners knowingly claimed more than it was due in violation of section 29-5-100 and failed to commence the foreclosure action within six months. Kitchen

Planners filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by granting the Friedmans' motion for summary judgment?

2. Did the circuit court err by denying Kitchen Planners' motion to strike?

3. Did the circuit court err by awarding attorney's fees to the Friedmans?

STANDARD OF REVIEW

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 36, 637 S.E.2d 560, 561-62 (2006). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354-55, 650 S.E.2d 68, 70 (2007) (quoting Rule 56(c), SCRCP). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 516, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *M&M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008)). "When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

LAW/ANALYSIS

I. Summary Judgment

Kitchen Planners argues the circuit court erred by granting summary judgment in favor of the Friedmans. We disagree.

A. Mechanic's Lien

"A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006); *see also Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) ("[M]echanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them.").

Sections 29-5-10 to -440 of the South Carolina Code (2007 & Supp. 2019) set forth the requirements for establishing and enforcing a mechanic's lien. "The statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014). "For . . . [the] lien to become valid, the lien must be perfected and enforced in compliance with South Carolina's mechanic's lien statutes." *Id.* at 342, 762 S.E.2d at 566. Section 29-5-10(a) provides,

> A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building . . . by virtue of an agreement with, or by consent of, the owner of the building . . . shall have a lien upon the building or structure and upon the interest of the owner of the building . . . to secure the payment of the debt due to him. . . . As used in this section, 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 . . . . As used in this section, materials furnished and actually used include tools, appliances, machinery, or equipment supplied for use on the building or structure to the extent of their reasonable rental value

> during their actual use. . . . For purposes of this section, the term "materials" includes flooring, floor coverings, and wall coverings.

"[W]hen the labor is performed or material is furnished, the right exists but *the lien has not been perfected*." *Ferguson Fire*, 409 S.C. at 341, 762 S.E.2d at 566 (quoting *Butler Contracting*, 369 S.C. at 128, 631 S.E.2d at 256)). "Any material supplied for improving real estate by the erection of a building or structure ordinarily gives rise to a mechanics' lien. Materials must, of course, be incorporated into the structure or become fixtures." 22 S.C. Jur. *Mechanics' Liens* § 14 (2020) (footnotes omitted).

Section 29-5-90 provides that "within ninety days after he ceases to labor on or furnish labor or materials for such building," a person seeking to enforce a mechanics lien must "serve[] upon the owner . . . a statement of a just and true account of the amount due him." Otherwise, the "lien shall be dissolved." *Id.*; *see also Butler Contracting*, 369 S.C. at 131, 631 S.E.2d at 257 ("The deadline to serve . . . a mechanic's lien begins running from the date the last material was furnished . . . ."). The court in *Butler* explained,

> [W]he[n] a claimant, after a contract is substantially completed, . . . furnishes additional material [that] is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, the period for filing the lien will run from the . . . furnishing of such materials, irrespective of the value thereof.

Butler Contracting, 369 S.C. at 130-31, 631 S.E.2d at 257 (first alteration in original) (quoting *Wood v. Hardy*, 235 S.C. 131, 140, 110 S.E.2d 157, 161 (1959)). Thus, as we stated in *Shelley Construction*,

> [T]o perfect and enforce the lien against the property, the person claiming it must: (1) *serve* and record a certificate of lien *within ninety days after he ceases to furnish labor or materials* . . . ; (2) bring suit to foreclose the lien within six months after he ceases to furnish labor or materials . . . ; and (3) file notice of pendency of the

> action within six months after he ceases to furnish labor or materials . . . .

287 S.C. at 27, 336 S.E.2d at 490 (emphases added). If the person claiming the lien "fails to take any one of these steps, the lien against the property is dissolved." *Id.*[1]

Section 29-5-100 provides "[n]o inaccuracy in [the] statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, unless it appear that the person filing the certificate has wil[l]fully and knowingly claimed more than is his due." *See also Zepsa Constr. Inc. v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 31-32 (Ct. App. 2004) (holding overhead and profit are recoverable under the mechanic's lien statute only "in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract").

"Minor imperfections and mistakes in the complaint or petition to foreclose a lien do not affect its validity." 22 S.C. Jur. *Mechanics' Liens* § 19 (2020). "The court may at any time allow either party to amend his pleadings as in other civil actions." § 29-5-180; *see also* 22 S.C. Jur. *Mechanics' Liens* § 19 ("Allegations in a complaint to foreclose a mechanics' lien may be amended."). However, "[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)); *see also Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Postal*, 308 S.C. at 387, 418 S.E.2d at 323 ("The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.").

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[1] We also noted dissolution of the lien would not preclude a claimant from maintaining an action on the debt. *See id.*; § 29-5-420 ("Nothing in this chapter shall be construed to prevent a creditor in such contract from maintaining an action thereon in like manner as if he had no such lien for the security of his debt.").

1. Timeliness

Kitchen Planners contends it timely served and filed its mechanic's lien pursuant to section 29-5-90, an amendment pursuant to section 29-5-180 could easily cure the "slight discrepancy" between the date alleged in the lien and the actual date of the last work, and any inaccuracy in the statement of account would not invalidate the proceedings pursuant to section 29-5-100. Kitchen Planners argues that although its lien stated it last furnished materials or labor "on or about August 18, 2015," evidence showed its work did not conclude until September 29, 2015, when it reordered drawer boxes and issued a check to Crystal Cabinets for $550.61. It argues it served and filed its lien within ninety days of September 29, 2015. Kitchen Planners asserts that it also timely commenced the suit for foreclosure on January 13, 2016, which was less than six months after the last work it performed. We disagree.

First, we find Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien. A claimant seeking to enforce a mechanic's lien must strictly follow the requirements of the statute. *See Butler Contracting*, 369 S.C. at 130, 631 S.E.2d at 257. To perfect a mechanic's lien, a claimant must "*serve* and record a certificate of lien *within ninety days after he ceases to furnish labor or materials*." *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490 (emphases added); *see also* § 29-5-90. Here, on the face of the lien, Kitchen Planners asserted its lien was for materials and labor furnished "beginning on or about March 11, 2015 through on or about August 18, 2015." In its complaint, Kitchen Planners asserted its lien was for labor and materials furnished beginning "in or around March 16, 2015 and continuing through August 18, 2015." Thus, we find Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien. *See Johnson*, 413 S.C. at 202, 775 S.E.2d at 700; *see also Postal*, 308 S.C. at 387, 418 S.E.2d at 323. Although Kitchen Planners argues it was entitled to amend its complaint to change the date it last provided materials, it never requested leave of the circuit court to amend its pleadings; rather, it raises this argument for the first time on appeal. Thus, we find this argument is unpreserved. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (citation omitted) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

Second, we find the evidence was not sufficient to contest the Friedmans' assertion that August 18, 2015, was the last date labor or materials were furnished. Neither

Comose's testimony nor her statement in her affidavit that she paid for a reorder of drawer boxes on September 29, 2015, created a genuine issue of material fact as to when Kitchen Planners last furnished materials. *See Gecy*, 422 S.C. at 516, 812 S.E.2d at 754 ("[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." (quoting *M&M Grp.*, 379 S.C. at 473, 666 S.E.2d at 264)). Here, Comose testified she provided no materials to the Friedmans after June 18, 2015, and did not know why she did not pay for the drawer boxes until September 29. Although she explained she reordered the drawer boxes because Mrs. Friedman pointed out they could have been deeper, she never stated the Friedmans specifically requested or directed her to reorder them. Comose offered no testimony or other evidence to show these drawer boxes were ever delivered to the Friedmans, and when she testified about this reorder, she stated, "And I have those, by the way." Viewing the evidence in the light most favorable to Kitchen Planners, we find the only inference to be gleaned from this testimony is that these additional items were never delivered to the Friedmans or installed in their home. *See* § 29-5-10 (providing materials must be "*furnished and actually used* in the erection, alteration, or repair of a building" to give rise to a lien (emphasis added)); 22 S.C. Jur. *Mechanics' Liens* § 14 (noting the materials furnished must ordinarily "be incorporated into the structure or become fixtures"); *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490 ("[T]o perfect and enforce the lien against the property, the person claiming it must . . . serve and record a certificate of lien within ninety days after he ceases to furnish labor or materials . . . ."); *Butler Contracting*, 369 S.C. at 130-31, 631 S.E.2d at 257 ("[W]he[n] a claimant, after a contract is substantially completed, . . . furnishes additional material [that] is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, the period for filing the lien will run from the . . . furnishing of such materials, irrespective of the value thereof." (first alteration in original) (quoting *Wood*, 235 S.C. at 140, 110 S.E.2d at 161)). Accordingly, we find the evidence and the pleadings show there was no genuine issue of material fact as to the date—August 18, 2015—that Kitchen Planners last furnished materials to the Friedmans. Ninety days from August 18, 2015, would have been November 16, 2015; Kitchen Planners served the Friedmans on November 17, 2015, which was ninety-one days after Kitchen Planners last furnished materials to the Friedmans. Therefore, we find the circuit court did not err by concluding Kitchen Planners failed to timely serve the lien. Further, because Kitchen Planners failed to serve the lien within ninety days, it must be dissolved, regardless of whether the foreclosure action was filed within six

months.[2] *See Shelby Constr.*, 287 S.C. at 27, 336 S.E.2d at 490 (stating if a person claiming a lien fails to take any one of the three steps required to perfect and enforce the lien, the lien against the property is dissolved). Based on the foregoing, we find the circuit court did not err by granting the Friedmans' motion for summary judgment.

2. Actual Use

Next, Kitchen Planners argues there is a genuine issue of material fact as to whether its labor or materials were installed in the Friedmans' home. It contends Viggiano's estimate demonstrated some of the materials it furnished were installed and argues it satisfied section 29-5-10 because it performed all of the labor required under the contract, which was used in the design of the kitchen. Kitchen Planners concedes it recovered the actual wholesale cost of the cabinets but argues it spent "hundreds of hours" designing and implementing the remodeling of the kitchen and was entitled to the balance of the contract price for its labor and the expense of the cabinets.[3] We disagree.

Viewing the evidence in the light most favorable to Kitchen Planners, we find it failed to show the materials were actually used in the Friedmans' home. *See* § 29-5-10 ("A person to whom a debt is due for . . . materials *furnished and actually used* in the erection, alteration, or repair of a building . . . shall have a lien upon the building . . . to secure the payment of the debt due to him." (emphasis

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[2] We note Kitchen Planners argues the circuit court should not have made decisions concerning credibility when, in denying her motion to reconsider, the court stated Comose's affidavit "was not credible as it was a self-serving statement" and contradicted all other evidence, including Comose's deposition. Though we note witness credibility is not a proper consideration in deciding a motion for summary judgment, given our standard of review on appeal, we need not consider this argument. *See David*, 367 S.C. at 247, 626 S.E.2d at 3 ("When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court."); *Gecy*, 422 S.C. at 516, 812 S.E.2d at 754 ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . . ." (quoting *M&M Grp., Inc.*, 379 S.C. at 473, 666 S.E.2d at 264)).

[3] Kitchen Planners asserts Comose's hourly rate was $125 per hour. However, this figure does not appear in the record. Further, the record contains no evidence as to the number of hours Kitchen Planners spent on the project.

added)); 22 S.C. Jur. *Mechanics' Liens* § 14 (noting the materials furnished must "be incorporated into the structure or become fixtures"). In their answer, the Friedmans asserted the cabinets were never installed. In its responsive pleading, Kitchen Planners admitted those allegations, and Comose acknowledged the cabinets were not installed. Although Kitchen Planners asserts that because the Friedmans refused to allow the cabinets to be installed they should be estopped from avoiding the lien on this basis, it raises this argument for the first time on appeal. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)). Further, the Viggiano estimate does not create a genuine issue of material fact because the statement "[a]ll useable hardware and drawers from the existing Crystal cabinets will be reflected as a credit in final price" is not probative of whether any such items were actually installed. Based on the foregoing, we find the only reasonable inference that can be drawn from the pleadings and evidence is that the materials were never installed in the Friedmans' home. *See Hansson*, 374 S.C. at 354-55, 650 S.E.2d at 70 ("Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP)). Accordingly, we find there was no genuine issue of material fact as to whether the materials were installed in the Friedmans' home.

3. Overhead and Profit

Kitchen Planners contends the circuit court erred by concluding it claimed more than it was entitled to under the lien in violation of section 29-5-100. *See* § 29-5-100 (providing an "inaccuracy . . . in stating the amount due for labor or materials shall invalidate the proceedings[if] it appear[s] that the person filing the certificate has wil[l]fully and knowingly claimed more than is his due"); *see also Zepsa Constr. Inc.*, 357 S.C. 32, 591 S.E.2d 29 (holding overhead and profit are recoverable only "in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract"). Because we have concluded Kitchen Planners failed to satisfy the statutory requirements to establish the existence of a valid lien, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its determination of a prior issue is dispositive).

For the foregoing reasons, we find there was no genuine issue of material fact as to Kitchen Planners' claim for a mechanic's lien and foreclosure. Thus, we find the circuit court did not err by granting summary judgment in favor of the Friedmans.

II. Motion to Strike

Kitchen Planners argues the Friedmans failed to serve Mr. Friedman's affidavit with their motion to dismiss and therefore the circuit court erred by denying its motion to strike the affidavit as untimely pursuant to Rule 6(d), SCRCP. Additionally, it contends the circuit court erred by allowing the Friedmans to convert a motion to dismiss into a motion for summary judgment. We disagree.

First, we find unpreserved Kitchen Planners' argument the circuit court improperly treated the motion to dismiss as a motion for summary judgment because it advances this argument for the first time on appeal. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)).

Regardless, even assuming the argument is preserved, we find the circuit court did not err by treating the motion as one for summary judgment. Rule 12(b), SCRCP, provides:

> If, on a motion . . . to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the [c]ourt, *the motion shall be treated as one for summary judgment* and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(emphasis added). When the court treats a motion to dismiss as a motion for summary judgment, the "parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See* Rule 12(b), SCRCP. Here, although the Friedman's motion was titled "motion to dismiss," the body of the motion referenced only Rule 56 and did not reference Rule 12(b)(6). Therefore, we find the reference to Rule 56 in the body of motion was sufficient to place Kitchen Planners on notice that the Friedmans intended to proceed with a motion for summary judgment. Kitchen Planners did not argue it had an insufficient opportunity to present evidence in opposition to the Friedmans' motion,

and in fact it did present evidence in opposition. Accordingly, even assuming the issue is preserved, we find the circuit court did not err by treating the motion as a motion for summary judgment.

Finally, we find the circuit court did not abuse its discretion by refusing to strike Mr. Friedman's affidavit. *See Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal."). Rule 6(d), SCRCP, provides, "A written motion . . . shall be served not later than ten days before the time specified for the hearing . . . . When a motion is to be supported by affidavit, the affidavit shall be served with the motion . . . ." However, Rule 56, SCRCP, governs motions for summary judgment and does not require that the moving party support its motion with affidavits. *See* Rule 56(b), SCRCP ("A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, *at any time*, move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof." (emphases added)). Pursuant to Rule 56(c), the party moving for summary judgment must serve the motion at least ten days before the hearing. Rule 56(c), SCRCP. Here, the motion for summary judgment was filed on January 17, 2017. The hearing on the Friedmans' motion was held April 25, 2017. Although they filed their memorandum and exhibits on April 20, 2017, the Friedmans served Kitchen Planners with Mr. Friedman's affidavit on April 13, 2017. Further, Kitchen Planners had an opportunity to—and did submit—an opposing affidavit, which the circuit court accepted. Therefore, we find the circuit court did not abuse its discretion by refusing to exclude the affidavit.

III. Attorney's Fees

Kitchen Planners argues the circuit court erred by awarding attorney's fees because the Friedmans did not properly prove they were entitled to such fees. We disagree.

A party defending against a mechanic's lien may recover a reasonable attorney's fee in defending against the lien. *See* § 29-5-20(a) ("If the party defending against the lien prevails, the defending party must be awarded . . . a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien."). Because we concluded the Friedmans were entitled to summary judgment, we find the circuit court did not err by concluding they were entitled to reasonable attorney's fees as the prevailing party. *See* §§ 29-5-10, -20. When determining a reasonable attorney's fee, courts should consider the six

factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Here, the Friedmans set forth their request for $16,594.68 in attorney's fees in the memorandum supporting their motion for summary judgment and an accompanying affidavit, which they filed several days before the hearing. The circuit court granted the request, finding the fees set forth in the affidavit met "the factors necessary to determine reasonable attorney's fees as set out in Rule 407, [SCACR], and *Jackson v. Speed*" but did not specify or analyze these factors. Although Kitchen Planners challenges the amount and reasonableness of the fee, it raised this argument for the first time in its Rule 59, SCRCP, motion. Because Kitchen Planners could have raised this argument at or before the hearing, we find it unpreserved for our review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). Accordingly, we find the circuit court did not err by awarding $16,594.68 in attorney's fees.

CONCLUSION

We find Kitchen Planners failed to serve and file its mechanic's lien within ninety days of the last date it supplied materials or labor and no evidence showed the materials were actually used in the home. Therefore, we affirm the circuit court's order granting summary judgment in favor of the Friedmans pursuant to sections 29-5-10 and -90. Further, we find the circuit court did not err by treating the motion as a motion for summary judgment or by refusing to strike Mr. Friedman's affidavit. Finally, we find the circuit court did not err by awarding attorney's fees to the Friedmans. For the foregoing reasons, the ruling of the circuit court is

AFFIRMED.

KONDUROS and HILL, JJ., concur.