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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

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Appellate Case No.: 2023-000649  
Civil Action No.: 2023-CP-10-00665

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Frank Holtham, as Trustee of the Holtham  
SC Realty Trust, dated April 12, 2022, ..... Appellant,

v.

Glenn F. Keyes and Glenn Keyes Architects LLC, ..... Respondents.

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**REPLY TO APPELLANT’S RETURN TO RESPONDENTS’  
MOTION TO DISMISS APPEAL**

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In opposition to the Motion to Dismiss filed by Respondents Glenn F. Keyes and Glenn Keyes Architects LLC (“Respondents”), Appellant Frank Holtham, as Trustee of the Holtham SC Realty Trust, dated April 12, 2022 (“Appellant”) argues that the orders below are immediately appealable under S.C. Code Ann. Section 14-3-330 because they “involve the merits” and affect a “substantial right.” However, the cases cited by the Appellant do not support either claim so the appeal should be dismissed.

**BACKGROUND**

Respondents refer to the case background as stated in their Motion to Dismiss and incorporate that information here by reference. Additionally, the exhibits attached to the

Appellant's memorandum and incorporated herein to the extent that they are referenced in this reply.

### ARGUMENT

First, Appellant incorrectly describes the proceedings below as “a contract interpretation case.” The case on which the Appellant relied as the basis for the petition for a rule to show cause was decided in 1977, several years prior to the enactment of the South Carolina Rules of Civil Procedure (SCRPC). Since the adoption of the SCRPC, specifically Rule 2, there is only one form of action to be known as a “civil action.” Furthermore, under SCRPC 3 a civil action is commenced by the filing of a summons and a complaint; neither of which were filed by Appellant in the matter which forms the basis of this appeal. Instead, Appellant filed a Petition for Rule to Show Cause asking for dismissal of a mechanic's lien filed by Respondents.

As cited in Respondents' prior memorandum, “[t]he authority to vacate a mechanic's lien may be somewhat likened to the judge's authority to grant a summary judgment if there is no genuine issue of material fact to be determined, or his authority to direct a verdict when the evidence is susceptible of only one reasonable inference. However, the judge to whom the application for relief is made may not try disputed facts. These are reserved, under Code § 45-273, for the jury.” Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 157, 232 S.E.2d 501, 502 (1977).<sup>1</sup> Therefore, Judge Scarborough correctly considered and ruled upon the Petition for Rule to Show Cause under the same standard as applied to a motion for summary judgment.

The law is clear that an order denying summary judgment is “never appealable.” Kinard v. Richardson, 407 S.C. 247, 263, 754 S.E.2d 888, 897 (Ct. App. 2014). A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides whether the

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<sup>1</sup> Code § 45-273 is the predecessor to current Code § 29-5-230.

case should proceed to trial. Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994) (citing Parker Oil Co. v. Smith, 34 N.C. App. 324, 237 S.E.2d 882 (1977)). “In short, the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable.” Ballenger, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (see also Good v. Hartford Accident & Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (an order which has not resulted in any binding adjudication of the rights of the parties is not appealable).

None of the cases cited in Appellant’s opposition support the argument that the orders below are subject to immediate appeal. Appellant’s reliance on the cases of Ecclesiastes Prod Ministries v. Outparcel Associates, LLC and HK New Plan Exch. Prop Owner I, LLC v. Coker is misplaced because neither involved an appeal from an order denying summary judgment. In Ecclesiastes Prod Ministries, the appeal followed a directed verdict. Ecclesiastes Prod Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 488, 649 S.E.2d 494, 496 (Ct. App. 2007). Similarly, in the HK New Plan case, that appeal followed the trial court’s decision to grant summary judgment. HK New Plan Exch. Prop Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E. 2d 181, 183 (Ct. App. 2007).

Likewise, the cases cited regarding the law of the case and collateral estoppel doctrines are not dispositive. Although it was decided in the context of a divorce action, the case of Weil v. Weil is most instructive. In that case, the Court of Appeals determined that the judge deciding the case on the merits was not bound by the decision of another judge denying summary judgment. Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989). Instead of parsing out the language of the summary judgment order as Appellant asks this Court to do here, the Court in Weil looked

at the substance of that order and concluded that “[t]he only real issue before Judge Rivers in the mother’s motion for summary judgment was the question of whether there were material facts which precluded the granting of summary judgment.” Weil v. Weil, 299 S.C. 84, 89 382 S.E. 2d 471, 473.

As demonstrated by the documents attached to the Appellant’s opposing memorandum, the Petition for Rule to Show Cause requested that Respondents be required to appear before the Court and show cause why the lien should not be ruled invalid. In support of that Petition, the Appellant submitted over one hundred pages of documentation. The Rule to Show Cause attached to Appellant’s memorandum as Exhibit 2 directed Respondents to appear before Judge Scarborough and show cause why the mechanic’s lien should not be dismissed and the cash bond returned. Respondents submitted a return and over one hundred pages of documents for that purpose, which were also attached to the Appellant’s memorandum. Judge Scarborough addressed the issue before him and concluded, correctly in Respondents’ view, that Respondents had met their burden under the Rule to Show Cause. As is clear from the case law pertaining to such petitions, that amounted to a prima facie showing supporting the filing of the lien and essentially denied Appellant’s request for summary judgment on the issues raised in its petition. Appellant’s attempt to turn Judge Scarborough’s ruling into something more in an effort to advance this appeal places form over substance and so the appeal should be dismissed.

### **CONCLUSION**

For the forgoing reasons and those reasons articulated in the Respondents’ Motion to Dismiss, the undersigned respectfully requests that this Court deny the appeal as premature.

This motion is further supported by all pleadings filed with this Court, South Carolina law, argument of counsel at a hearing on this matter, and any other matters the Court may permit to be

presented at the hearing on this motion.

June 2, 2023

s/John A. Massalon

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*Attorneys for Respondents*

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**PROOF OF SERVICE**

I certify that Respondents' Reply to Appellant's Return to Motion to Dismiss Appeal was served upon Appellant via e-mail to counsel of record listed below on June 2, 2023. A copy of the service e-mail is attached hereto as Exhibit A.

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EXHIBIT A

**Charline Barrasso**

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**From:** Charline Barrasso  
**Sent:** Friday, June 2, 2023 6:08 PM  
**To:** Benjamin C. Bruner, Esquire (bbruner@BrunerPowell.com)  
**Cc:** John A. Massalon; Bridget Steele  
**Subject:** 2023-000649; Holtham v. Keyes  
**Attachments:** 20230602 Reply in Supprt of Motion to Dismiss Appeal.pdf

Mr. Bruner,

Attached for service, please find Respondents' Reply to Appellant's Return to Motion to Dismiss Appeal. If you have any questions, please do not hesitate to contact us.

Thanks,

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