THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Special Referee

Case No. 2010-CP-40-8621

C.R. Meyer and Sons Company, ... Plaintiff,

v.

Custom Mechanical CSRA, LLC..... Defendant.

and

Custom Mechanical CSRA, LLC is.....Respondent,

v.

Plumbers & Steam Fitters Local #150 Health and Welfare Fund; Plumbers & Steam Fitters Local #150 Pension Fund; Plumbers & Steam Fitters Local #150 Annuity Fund, and Jackie K. Nordeen, Jr. and Patrick H.F. Smith, IV, as Trustees of these Funds; Plumbers & Steam Fitters Local #150 Vacation Fund and Patrick H. F. Smith, IV and Joseph L. Dozier, as Trustees of this Fund; Augusta Joint Apprenticeship and Journeymen Training Committee, and Patrick H.F. Smith, IV and Charles I. Hardigree, as Trustees of this Fund; Trustees of Southern Iron Workers Pension Fund; Trustees of Southeastern Iron Workers Healthcare Plan; Trustees of Southeastern Iron Workers #709 Joint Apprenticeship and Training committee and Local #709, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers; Southeastern Carpenters and Millwrights Health Trust, Southeastern Carpenters and Millwrights Pension Trust, Larry Phillips and J. Kirk Malone, as Trustees of these Funds; Ferguson Enterprises, Inc.; Presidential Financial Corporation; Norton Welding Supply, Inc.; United Rentals (North America), Inc.; Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade

Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; Bruce Pollock, Jr.; and, Security Federal Bank, ... Third Party Defendants,

Of Whom
Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; and Bruce Pollock, Jr. are ..... Appellants

And Presidential Financial and Security
Federal Bank, ...are also Respondents.

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Appellants take issue with numerous factual statements Respondents have made throughout their brief. In cases applying the preponderance of the evidence burden of proof, summary judgment is inappropriate if the non-moving party submits a mere scintilla of evidence in support of the non-movant's case. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012). This is true even where there are cross-motions for summary judgment. *See Springob v. University of South Carolina*, Op. No. 27363 (S.C. Sup. Ct. filed March 12, 2014) (Shearouse Adv. Sh. No. 10 at 28) (Supreme Court applied scintilla rule where parties filed cross-motions for summary judgment). Appellants therefore file this Reply Brief to address some of those factual misstatements.

It is important for this Court to understand that Custom Industrial and Custom Mechanical did not manufacture anything. These companies were compensated solely for the services (*i.e.*, labor) on the contracts, and the labor was provided solely by the Appellants – the Custom Employees were the *only* labor on the contract. The "CRMV Custom Award Spreadsheet" that the arbitrators prepared demonstrates that the arbitration award to C.R. Meyer was based in large part upon *labor* that was provided by the Appellants. (Custom Employee Memo. in Support of Summary Judgment, 1/24/13, Ex. (1)(A)). The balance due for the *labor* that the Custom entities provided through the Custom Employees (the Appellants) was $1,776,648.00, and to that amount was added $200,000.00 for "attorney's fees and legal expenses." (*Id.*) Without the Custom Employees, there is *no* arbitration award, and there is *no* pot of money against which

these banks assert a superior interest. (Cf. Order of 10/31/11 confirming Arbitration Award, p. 21).

Respondents minimize the Custom Employees' role in this project. (Brief of Respondent, p. 8). They note Custom Mechanical provided union-labor services for the Project, but this involved *all* of Custom's staffing for the project.

Importantly, Respondents concede that Appellants were "laborers" on the project for purposes of Section 29-7-10. (Resp. Br. p. 25, part (2)). They point to the fact that they did not appeal the Special Referee's finding of such, but the truth is that no finding to the contrary could have honestly been made.

Regarding particular factual assertions, Respondents mention that "twenty-six of the current twenty-nine Appellants" brought suit against the Custom entities. (Resp. Br. pp. 10-11). Respondents omit that the complaint was later amended in November 2008 to include all twenty-nine Appellants. (Third Amended Complaint filed 11/30/08).

Respondents characterize the withholding contracts for the vacation/holiday funds as "contracts with their union...." (Resp. Br. p. 2). Respondents also assert "the union gave them the opportunity to participate in a voluntary payroll deduction plan." (Resp. Br. p. 10). They also assert a lack of "privity of contract for vacation funds between Appellants and Custom Industrial, much less between Appellants and Custom Mechanical." (Resp. Br. p. 33). The contracts, however, covering Custom Employees Matt Lever, George Lever, Tony Hall, Nicholas Stewart and William McFerrin all say "Custom Mechanical" at the top. (Employment Sheets). Other contracts say "Custom Industrial" on them. (Employment Sheets). None of the agreements regarding the

vacation/holiday funds are written to suggest that the agreements are with the Union; rather, all of them are on forms created by the employers, Custom Industrial or Custom Mechanical, and all describe the Custom Employees as "Employees" of either Custom Mechanical or Custom Industrial. And it was not the union doing the withholding; rather, the Custom entities withheld these funds. Thus, while Custom Employees participated in the voluntary payroll deduction plan through the union, that plan was offered according to paperwork that Custom Mechanical and Custom Industrial provided.

Respondents mention that the settlement proceeds of $1.8 million were paid "into Custom Mechanical's attorney's escrow account for the benefit of Custom Mechanical's creditors." (Resp. Br. p. 3). Appellants are among those creditors, and they are the only non-bank creditors remaining. Custom Mechanical itself filed a third-party complaint to implead the Appellants as named creditors. (Answer and Third-Party Complaint, ¶¶ 11, 13).

Respondents also characterize the order as directing "C.R. Meyer to pay the sum of [$2 million] into the escrow account of Richardson Plowden & Robinson, P.A...." (Resp. Br. p. 14; see also p. 26, 27). The order actually states, however, "C.R. Meyer will pay the sum of $2,000,000.00 *to Custom* within ten (10) days of the date of this order. The funds will be transferred by electronic fund transfer into the escrow account of Richardson Plowden & Robinson, P.A." (Order of 3/5/12, p. 1, ¶ (1); Presidential and Security Federal Answer, Counterclaim and Crossclaim of 7/19/12, Ex. D) (emphasis added). So the funds were actually being paid *to Custom*, not the lawyers – the lawyers were merely holding the funds as agents in escrow to ensure their availability to pay

creditors, including Appellants. The concern arose because at least one of the principals – Danny Key -- had criminal charges pending related to management of Custom and another one of the principals – Bo Herrington – had filed bankruptcy. (Proofs of Claim in *In Re: Herrington*, Case No. 08-10912-SDB (U.S.B.C. So. Dist. Ga.) (9/18/00). *Cf.* Resp. Br. p. 28 ("all parties agreed that Custom Mechanical should not receive the funds due to its precarious financial situation.").

In a footnote, Respondents note the law firm, "Richardson Plowden & Robinson, PA, represented Custom Mechanical in the arbitration and resulting litigation, including the filing of the Third-Party Complaint in the present litigation." (Brief of Respondent, p. 14, n. 5). Respondent omits, however, the fact that this law firm, Richardson Plowden & Robinson, PA, also defended Custom Mechanical and Custom Industrial in the underlying lawsuit brought by the Custom Employees.

The Respondents erroneously contend the case "concerns Appellants' alleged priority under S.C. Code Ann. Section 29-7-10 to a first lien on approximately Fifty Thousand Dollars ($50,000) if successful." (Resp. Br. p. 8). They also describe the claim as one for $275,000 "as well as pre-judgment interest." (Resp. Br. p. 6). Respondents add that it "was not disputed...that Appellants assert priority to only $275,000 of the $1,800,000...." (Resp. Br. p. 16). None of these assertions is entirely correct. The dispute in fact involves *at least* $275,000.00, which is the amount of the confession of judgment entered on February 14, 2011, against Custom Industrial, Custom Mechanical and their sister company in favor of the Custom Employees for the wrongfully withheld and unpaid wages. It *also* involves claims for interest, treble damages, costs, and attorney's fees that

are recoverable under the Payment of Wages Act. The total amount sought will therefore exceed $275,000.00.

Respondents also contend "the sole purpose of the current litigation is to determine who has priority to the remaining amounts deposited in escrow for Custom Mechanical's, not Custom Industrial's, creditors." (Brief of Respondent, p. 8). Again, this is not correct. The purpose of this litigation was to determine priority in the entire $1.8 million dollars paid to Custom's lawyers as its agent. (Joint Reply of 8/1/12, p. 7). Further, Respondents concede Custom Mechanical is the only owner of Custom Industrial. (Resp. Br. p. 2; describing Custom Industrial as "a wholly-owned subsidiary" of Custom Mechanical).

Respondents contend "the parties agreed to raise the amount remaining in escrow from $275,00 to $325,000...." (Resp. Br. p. 16). There was, however, no such agreement. Instead, on November 7, 2012, over the Appellants' objection (Mem. Custom Empls. In Opp. to Banks' Jt. Mot. for Disbursement of Funds of 11/7/12), Judge Williams ordered this amount ($325,000) withheld. (Order of 11/7/12, pp. 3-4).

Respondents also contend that because $1,475,000 has already been received by Presidential and Security Federal, this matter is limited to the remaining funds in the Arbitration Award. (Resp. Br. p. 16). They also assert that the "appeal concerns the narrow issue of whether Appellants are entitled to a lien under Section 29-7-10 for a portion of the remaining $325,000 in Arbitration Award funds currently being held in escrow pending a court order on the determination of priority and distribution of funds." (Resp. Br. p. 19). Again, these statements mischaracterize the claims as well as the circuit

court's order. The November 2012 order specifically stated, "[t]his amount is set aside without prejudice to either party as to any possible recovery. Accordingly, I find that the Custom Employees will suffer no prejudice by the disbursement of [$1,475,000] to Presidential and Security Federal, to be shared equally." (Order of 11/7/12, p. 4 [emphasis added]). And as noted above, the claims include the $275,000 confessed judgment together with interest, costs and attorney's fees permitted by law.

In discussing the lines of credit to Custom Mechanical (Resp. Br., pp. 2, 9), Respondents omit that these lines of credit were also guaranteed by Custom Industrial and Presidential and Security Federal each loaned money to Custom Mechanical, but on the "Consent of Members of a Limited Liability Company Authorizing a Guaranty of Payment," Custom Industrial Services, LLC, guaranteed the $1.25 million that Presidential loaned to Custom Mechanical on May 1, 2007. (Compl., Ex. C and Pl. Presidential Fin. Corp. "Statement of Material Facts as to Which There is no Dispute" dated 3/10/08 in *Presidential Fin. Corp. V. Custom Mechanical CSRA, LLC, Custom Industrial Services, LLC, Dean Durand, George Herrington, and Danny Key*, C/A No.: 07-CV-10839-3 (Dekalb Cnty, GA)) (p. 2, ¶ 2). In fact, when Custom Mechanical and Custom Industrial did not pay the Banks, the Banks sued them both, and included allegations of "alter ego" liability. (See e.g., Complaint in *Security Fed. Bank v. Custom Mechanical CSRA, LLC, Custom Mechanical CSRA, Inc., Custom Industrial Services, LLC, et al.*, C/A No.: 2009-CP-02-02812 (Beaufort Cnty.) (see also p. 8, ¶ 19(c); pp. 8-10, ¶¶ 21-22) and Complaint in *Presidential Fin. Corp. v. Custom Mechanical CSRA, LLC, Custom Industrial Services, LLC, Dean Durand, George Herrington, and Danny*

Key, C/A No.: 07-CV-10839-3 (Dekalb Cnty, GA) (p. 4, ¶ 14 and Exh. C). This indicates that even these banks thought there was an amalgamation of interests between these two entities.

Respondents note "Appellants' Joint Reply contains no allegation or claim relating to the Wage Payment Act or any theory of piercing the corporate veil, alter ego, or an amalgamation of interests." (Resp. Br. p. 15). Of course, these claims would not be relevant as between these parties, who are third parties vying for priority to a pool of money. This was a declaratory judgment matter brought by the banks, so the reply would not logically contain any allegations aimed at the Custom entities.

Furthermore, on February 11, 2011, the Aiken County Court issued a Warrant of Attachment (Money), commanding law enforcement to seize so much of the arbitration award proceeds to secure so much of the proceeds of the $1,976,548.00 Arbitration Award as was needed to secure the Custom Employees' judgment of $275,000.00. (Custom Employee Memo. in Support of Summary Judgment, 1/24/13, Ex. (3)). At the same time, Custom Mechanical, Custom Industrial and all of their then-members assigned their interests in the arbitration award to the Custom Employees as collateral for the confession of judgment. (Custom Employees Memo in Support of Summary Judgment, Ex. 2 ; Custom Employees' Resp. to Pres. Fin. Corp.'s 1st Req. to Admit, Interrogatories, and Requests for Prod. of Docs at Ex. 48.)

Respondents contend that "Appellants cannot maintain an action as a creditor of Custom Mechanical under Section 29-7-10." (Resp. Br. p. 34). This contention, however, ignores that Custom Mechanical sued the Custom Employees and impleaded them as

potential creditors. (Answer and Third-Party Complaint, ¶¶ 11, 13). And as noted above, Custom Mechanical also gave the Custom Employees a confession of judgment and assignment of claims to the arbitration award. (Custom Employees Memo in Support of Summary Judgment, Ex. 2).

Union Recovery versus Custom Employees Remedies

In describing the action brought by the Union, Respondents mischaracterize the litigation. (Resp. Br. Pp. 15-16). The Union was pursuing its own rights to payment from Custom Industrial and Custom Mechanical by disgorgement of collected union dues, healthcare premiums, and pension contributions.

Custom Industrial and Custom Mechanical withheld the wages from the Custom Employees for participation in the voluntary payroll deduction for vacation/holiday savings funds, and these funds were to be paid to the appropriate union so that the union could write checks to the Custom Employees and their co-workers during the summer and Christmas holidays. (Second Am. Friedman Compl., ¶¶ 47, 48; Friedman Case Answer ¶¶ 21, 22). Custom Industrial and Custom Mechanical withheld these wages but never paid them to the Union. Because the Union never received the wages the Union could not pay them out to the Custom Employees. (Aff. Jeff Rice of 1/6/11.) Only the Custom Employees, whose wages had been wrongfully withheld, could assert their statutory right to recover wrongfully withheld wages, treble damages and attorney's fees under the South Carolina Payment of Wages Act. The Union could not and did not sue for recover under that Act.

The Union accepted $10,000.00 to settle all of its claims. None of that money was

ever paid to the Custom Employees. In other words, the Custom Employees have never been paid certain wages owed to them for their labor. But those claims were not the same claims as the claims the Custom Employees had against Custom Industrial and Custom Mechanical.

Also, Respondents contend the Appellants' "claims were barred" "to the extent Appellants were seeking the same monies" as the unions. (Resp. Br. pp. 15-16). However, the parties were not the same, nor were the parties seeking the same remedies. Neither *res judicata* nor collateral estoppel would apply.

Argument Regarding Amalgamation is Preserved

Respondents assert that any argument regarding amalgamation was not preserved because it was not raised in the Rule 59 motion the Custom Employees filed. (Resp. Br. Pp. 20-21). Appellants dispute this assertion.

In the Motion, Appellants asserted that "Custom Industrial and Custom Mechanical withheld said wages and never paid them to the union." (Motion, p. 7, ¶ 8). Appellants also pointed out that both Custom Industrial and Custom Mechanical were defendants in the suit involving the Payment of Wages claims, and that both admitted they had wrongfully withheld the wages. (*Id.*). Both entities confessed the judgment to the Appellants. (Motion, pp. 7-8, ¶ 8). These assertions sufficiently raise the point that there was an amalgamation between the two entities.

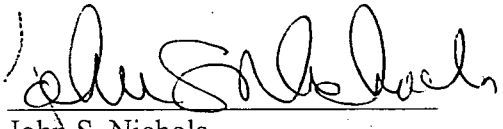
CONCLUSION

Respondents note "it is undisputed that if a lien does not attach under Section 29-7-10, Presidential and Security Federal have priority over Appellants to the remaining proceeds of the Arbitration Award." (Resp. Br. p. 3). Of course, the contrary would also be true – if the lien under Section 29-7-10 applies, then Appellants have priority to those funds.

Once again this matter comes to this Court under a grant of summary judgment for the Respondents. If there is a scintilla of evidence supporting Appellants' view of the evidence, then this Court must reverse.

For the reasons stated the Court should reverse the Special Referee's judgment and should remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted,



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SC Court of Appeals

Honorable Jenny Kitchings
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RE: C.R. Meyer and Sons Company v. Custom Mechanical CSRA, LLC v. Presidential Financial and Security Federal Bank v. Daniel R. Friedmann, et. al.
Case Tracking No.: 2013-001839

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply Brief of Appellants and Additional Designation of Matter to be Included in the Record on Appeal in reference to this matter. I have also enclosed a Proof of Service upon counsel for the Respondents. Please return the additional filed copies to me via the enclosed prepaid envelope.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures

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