THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge
The Honorable Alexander S. Macaulay, Circuit Court Judge and Trial Judge

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Case No.: 2005-CP-37-00788
Appellate Case No.: 2011-202946

Tri-County Development, Inc. and Melinda Holbrooks ..... Respondents,

v.

Christopher A. Pierce .....Appellant.

Christopher A. Pierce ..... Third Party Plaintiff,

v.

Jeff Gray ..... Third Party Defendant,
AND
Tri-County Development, Inc. and Melinda Holbrooks ..... Respondents,

v.

Christopher A. Pierce ..... Appellant.

INITIAL AMENDED BRIEF OF RESPONDENTS

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5. **THE CIRCUIT COURT CORRECTLY DETERMINED THAT RESPONDENTS WERE THE PREVAILING PARTY AND CORRECTLY ISSUED AN AWARD OF ATTORNEYS' FEES AND COSTS.**

STATEMENT OF THE CASE

Respondents Tri-County Development, Inc. ("Tri-County") and Melinda Holbrooks ("Holbrooks") filed a Mechanic's Lien on the home it had been contracted to construct for Appellant Christopher A. Pierce ("Appellant") on September 26, 2005 after a dispute arose very close to the end of construction. The Mechanic's Lien was signed by Jeff Gray, a principal of Tri-County. Tri-County and Holbrooks also filed a lawsuit on September 26, 2005 to enforce the Mechanic's Lien. Appellant subsequently filed a Third-Party Complaint against the owner of Tri-County, Jeff Gray ("Gray"). It is undisputed that neither Tri-County nor Gray was a

licensed builder at the time the Mechanic's Lien and lawsuit were filed. It is undisputed that Holbrooks, who signed the contract as the "contractor", was at all times a licensed residential builder, pulled the building permit, performed some of the work herself and oversaw the balance of construction on Appellant's house.

Gray was properly served with a Third-Party Complaint filed by Appellant, but Gray's lawyer at that time failed to timely answer, and an Order for Judgment by Default was signed by the Honorable Alexander Macaulay and filed on September 26, 2006. Gray moved to substitute counsel and present counsel made a motion to set aside the Order of Default. This motion was denied by the Honorable J. Cordell Maddox, Jr.

Later, Appellant's attorney was forced to withdraw from the case for reasons unrelated to the case and Appellant remained unrepresented from that point forward. Appellant never filed for a hearing on damages against Gray.

A hearing was held April 6, 2009, before the Honorable Alexander S. Macaulay on Tri-County's and Holbrooks' motion to compel discovery responses, among other motions from both parties. Tri-County and Holbrooks were asking the court for an order compelling Appellant to produce evidence to support his claims of damage for the offset and counterclaim he was claiming. These were the same damages that Appellant would have presented at a damages hearing for his default judgment against Gray. Appellant had argued at that hearing that he did not have to produce evidence of damages because he had won by default. Judge Macaulay, in his Order filed May 5, 2009, as amended, granted the motion to compel and vacated the order of default against Jeff Gray, *sua sponte*, as a sanction against Appellant for discovery abuse. The Court noted that he had been the one who signed the Order of Default

against Gray. The Court determined that since no damage hearing had ever been set, revoking the default solved the issue of whether Appellant had to produce his "damages". Appellant filed an appeal to the Court of Appeals on this ruling and it was rejected as interlocutory in an Order dated July 8, 2009 (Order of Court of Appeals, dated July 8, 2009).

On November 1, 2010, the Honorable R. Lawton McIntosh heard Appellant's motions to dissolve the mechanic's lien and for summary judgment, along with Tri-County's and Holbrooks' motions for summary judgment. Tri-County and Holbrooks moved that it was undisputed that Appellant had breached the contract and had produced no evidence that his damages exceeded the contract balance. Tri-County and Holbrooks argued that Appellant's counterclaim be dismissed, but that his defense of offset remains in place. Judge McIntosh denied Appellant's motion to dissolve the mechanic's lien and summary judgment motions. Judge McIntosh did, however, find in Tri-County's and Holbrooks' favor for breach of contract as to liability only and acknowledged the Appellant had a right to present evidence of offset damages at trial.

The case was tried before a jury on November 28 and 29, 2011. At trial, Judge Macaulay permitted the case to go forward on the question of damages, allowing Appellant to present evidence of offset. Appellant had the opportunity to prove offset damages, but did not. The jury returned a verdict of $23,591.07 in favor of the Respondents, Tri-County and Holbrooks. Respondents then filed a petition for an award of attorneys' fees and costs, which was granted by Judge Macaulay in an Order dated March 26, 2013. Appellant filed a Motion for Reconsideration which was denied by the lower court. Appellant then retained attorney T. Jeff Goodwyn, Jr. of the Goodwyn Law Firm, LLC and this appeal followed.

STATEMENT OF FACTS

Respondent Tri-County is a corporation owned and operated by Respondent Gray that, until contracting to build Appellant's home, acted exclusively as a property developer. Tri-County is not a licensed homebuilder and Gray, its principal, holds no such license. Tri-County's business model involved purchasing property and then contracting with Holbrooks, a licensed South Carolina home builder, to construct "spec" homes on the property and then sell them. (Trial Transcript November 28, 2011, p. 50, l. 14 thru p. 51, l. 12). Holbrooks is not an owner, officer, or employee of any type of Tri-County. Holbrooks owns and operated her own construction company with her then husband Nathan Holbrooks, also a licensed residential builder, called Holbrooks Construction. In their business dealings to that point, Gray through Tri-County would "put up the money and they (Holbrooks) would perform the work." (Trial Transcript November 28, 2011, p. 52, ll. 3-12).

In mid-2004, Appellant owned a vacant lot and was in the market to have a home constructed on the lot. He admired the homes he would see in Tri-County developments and decided to contact Tri-County about building a home on his lot. At Appellant's request, Appellant's father, a retired lawyer, met with Gray to negotiate the construction of a home on Appellant's lot.

Building a home for someone other than for speculation was something that Gray and Tri-County had never done before. (Trial Transcript November 28, 2011, p. 69, ll. 2-11).

Appellant's father, a retired lawyer, drafted the contract wherein Tri-County and Holbrooks would construct a home on Appellant's lot on July 24, 2004 (the "Contract"). (Trial Transcript November 28, 2011, p. 52, ll. 21-23). Gray signed the contract for Tri-County as

"Developer" and Holbrooks signed the contact as "Contractor" under such designated lines drafted by Appellant's father. (November 28, 2011 Trial Exhibit 1).

Holbrooks was at the time, and continues to be, a licensed residential builder. (November 28, 2011 Trial Exhibits 8 and 10). Holbrooks pulled the building permit for Appellant's house, personally performed work on the house and oversaw construction. (November 28, 2011 Trial Exhibit 2). The house passed final inspection on September 13, 2005. (November 28, 2011 Trial Exhibit 9).

When the house was close to completion, Appellant took issue with some of the work and refused to pay the final two installments totaling $34,000.00 until the house was complete. This was contrary to the terms of the contract. Shortly thereafter, Appellant locked Tri-County and Holbrooks out of the Property. The last two installment payments Appellant refused to pay are the basis for the mechanic's lien and lawsuit. Appellant took issue with proof of allowances in the contract and claimed he suffered damages.

ARGUMENT

1. THE TRIAL JUDGE AND THE PRESIDING JUDGE AT SUMMARY JUDGMENT WERE CORRECT AS A MATTER OF LAW IN RULING S.C. CODE § 40-59-30 DID NOT PROHIBIT TRI-COUNTY FROM ENFORCING THE CONTRACT AND FROM FILING THE MECHANIC'S LIEN EVEN THOUGH IT WAS NOT A "RESIDENTIAL BUILDER" AS DEFINED BY S.C. CODE § 40-59-30 BECAUSE A LICENSED BUILDER WAS A PARTY TO THE CONTRACT, PULLED THE BUILDING PERMIT, PERFORMED WORK, OVERSAW CONSTRUCTION AND WAS A NAMED PARTY IN THE MECHANIC'S LIEN AND THE LAWSUIT.

As a preliminary matter, this argument of Appellant was not properly preserved for appeal pursuant to Rule 50(a) SCRCP. Appellant did raise Tri-County's lack of license at the close of Tri-County's and Holbrooks' case, but failed to renew his Directed Verdict Motion at

the close of his case (Trial Transcript November 29, 2011, p. 132) and further made no JNOV argument after the jury's verdict (Trial Transcript November 29, 2011, p. 172). For these reasons, this argument is not properly before this court.[1] Stephens ex rel. Lillian C. v. CSX Transp., 2012 WL 3025097 (Ct. App. 2012); Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). See also Connolly v. People's Life Ins., 299 S.C. 248, 384 S.E.2d 738 (1989).

As to the underlying argument, Appellant's argument still fails. As was presented at trial, Tri-County and Holbrooks, prior to meeting Appellant, had always only built homes for speculation with Tri-County being the developer and providing the money, and Holbrooks pulling the building permit, performing the work and overseeing the work; a perfectly legal arrangement. (Trial Transcript November 28, 2011, p. 50, l. 14 thru p. 51, l. 12). The evidence shows Tri-County and Holbrooks operated exactly the same with Appellant except instead of having to seek a buyer after the work was completed, Appellant already owned the property. The licensing laws are in place to ensure only licensed builders pull permits, oversee construction and if there is a problem, the Department of Labor, Licensing and Regulations ("LLR") has the ability to sanction a license holder. S.C. Code § 40-59-10, et seq. The licensing laws require applicants to have experience, pass an exam and provide a bond. S.C. Code § 40-59-220 and S.C. Code § 40-59-280. Additionally, a homeowner, if the LLR finds just cause, may recover from a licensed builder's required bond. S.C. Code § 40-59-220(c). It is undisputed that Holbrooks met all these requirements. Appellant's home was constructed by a licensed residential builder who pulled the permit, oversaw construction and, importantly,

[1] Appellant's father, a retired lawyer, was present with Appellant during the entire trial and sat at counsel's table with Appellant. The trial court even invited the elder Mr. Pierce to assist Appellant during Defendant's case in chief.

signed the construction contract as the Contractor and was listed as a party to the litigation. Appellant never contested that his home was not built by a licensed residential builder.

The only twist here is that both Tri-County and Holbrooks signed the contract together making them a defacto joint venture. There is no section of the residential builder statute that prohibits joint ventures. The trial court correctly noted that the statute raised by Appellant, S.C. Code § 40-11-330, is in the General Contractor's statutes, not the Residential Builder's statutes. (Trial Transcript November 29, 2011, p. 138, ll. 9-10). The Court noted there are marked differences in how the legislature chose to regulate commercial general contractors and residential builders. (Trial Transcript November 29, 2011, p. 138, ll. 10-14). Holbooks signed the contract as the Contractor and was listed on the Mechanic's Lien and named in the lawsuit with Tri-County. There was no attempt to change or hide the relationship. Holbrooks was a named Plaintiff in the pleadings and Appellant had the opportunity to allege construction defects and did not. The fact Appellant failed to put up any evidence of construction defects and only argued about the accounting shows that he did not have an issue with Holbrooks' work as the contractor. Appellant only raises the issue of Tri-County's lack of license but ignores the critical fact that Holbrooks was licensed, pulled the permit, and oversaw the work. (November 28, 2011 Trial Exhibit 2). Appellant failed to show any harm from this arrangement, real or perceived. In fact, the evidence established that the intent of the statute was properly satisfied.

Appellant claims Judge Macaulay's ruling denying Appellant's directed verdict argument on the issue of licensing was in direct contradiction of Judge McIntosh's prior ruling regarding licensing. Further, Appellant states Judge McIntosh's ruling was the "law of the case" because it was not appealed. This ruling by Judge McIntosh was not immediately appealable and

therefore, could not be the "law of the case" as Appellant suggests.

But what cannot be overlooked here is the nature of Appellant's argument. Appellant correctly states exactly what happened with Appellant's house with regards to the licensed builder Holbrooks, "[s]he was treated in this job the same way she had been treated in all of the other prior jobs she performed for Tri-County when Tri-County was the actual land owner and contracted with her to build the homes." (Appellant's Amended Initial Brief, p. 14; Trial Transcript November 28, 2011, p. 50, l. 18 thru p. 51, l. 12; p. 52, ll. 3-12).

By taking this position, Appellant must admit that Holbrooks' and Tri-County's arrangement for "spec" homes is perfectly legal. Appellant admits in his Amended Initial Brief, which is true, that Holbrooks and Tri-County operated the same way they always did regarding Appellant's house with Tri-County putting up the money and Holbrooks building the house. (Appellant's Amended Initial Brief, p. 18). There was no evidence of Appellant getting a construction loan. Appellant paid cash for the house. In fact, the contract required Appellant to pay $1,000.00 down and Tri-County and Holbrooks to get paid when the work was completed. This is where Tri-County performed its role as the financier. The sole dispute at trial was accounting related and had nothing to do with the actual construction of the house. (November 28, 2011 Trial Exhibit 1). But Appellant completely fails to address how this is a violation of the statute or legislative intent.

Clearly, when an unlicensed builder does work, the LLR cannot sanction someone without a license and has no bond in place to protect a homeowner. And most importantly, in cases of unlicensed builders, the homeowner has no comfort that the builder has met the requirements to become licensed or even has any knowledge of construction. Yet, none of

those reasons apply here. The reality is that Holbrooks and Tri-County operated the way they always did for spec houses and, in this instance, it was like a joint venture.

Our Supreme Court has intimated that it might consider a substantial compliance approach if the right facts were presented. Respondents assert the license laws were satisfied but if there is an issue with Tri-County being on the contract, these facts warrant consideration as substantial compliance with the licensing laws. Burry & Sons Homebuilders, Inc. v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). For the reasons stated, Appellant's licensing argument fails.

2. THE CIRCUIT COURT SETTING ASIDE THE DEFAULT OF JEFF GRAY *SUA SPONTE* WAS A HARMLESS ERROR AND VALIDATED BY THE LACK OF EVIDENCE AT TRIAL AGAINST JEFF GRAY.

Judge Macaulay's ruling setting aside the entry of default that he himself had previously entered was not an abuse of discretion and, if anything, was harmless error pursuant to Rule 61, SCRCP. The only affect Judge Macaulay's ruling had was that it required Appellant to actually prove his claims against Gray, who was not an individual party to any contract with Appellant, including, notably, the requisite element of damages. At trial, despite the opportunity, Appellant offered no testimony or evidence as to how he might have a claim against Gray individually or any damages caused by Gray. The Court granted Tri-County's and Holbrooks' motion for a Directed Verdict at the close of Appellant's case when no evidence was offered that implicated Gray individually, and no evidence of damages were ever produced as to Gray's alleged liability. (Trial Transcript November 29, 2011, p. 132, ll. 9-25). The fact that Appellant offered no evidence against Gray shows that Judge Macaulay did not abuse his discretion in revoking the entry of default. Even assuming Judge Macaulay did abuse his discretion, it was a harmless error. As such, Appellant's argument on this point should also fail.

3. THE CIRCUIT COURT CORRECTLY REFUSED TO GIVE A JURY CHARGE ON THE CONTRACTOR LICENSING REQUIREMENTS SET FORTH IN S.C. CODE § 40-59-30.

As a preliminary matter, this argument also was not properly preserved for appeal. Appellant made no objection as to the jury charges and so it is not properly preserved. (Trial Transcript November 29, 2011, p. 138); Rule 51 SCRCP; see also Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005).

The Court considered jury charges by Tri-County and Holbrooks and by Appellant. (Trial Transcript November 29, 2011, p. 135, l. 16 thru p. 139, l. 7). After the Trial Court charged the jury, the Judge asked if there were any exceptions or requests and Appellant responded "No". (Trial Transcript November 29, 2011, p. 157, ll. 19-23). The Trial Court asked again before the jury returned their verdict. (Trial Transcript November 29, 2011, p. 168, ll. 12-19). Again, Appellant raised no objection to the charges. Appellant also made no post-trial motions after the verdict was published. (Trial Transcript November 29, 2011, p. 169, ll. 10-25; p. 172, ll. 8-15).

For the reasons stated above in response to Argument 1 raised by Appellant in his Amended Initial Brief, the Trial Court correctly refused to charge the jury with S.C. Code § 40-59-30 as it was not relevant. Appellant's house was built by a licensed residential builder that was a party to Appellant's contract. (November 28, 2011 Trial Exhibits 1 and 10). Appellant's argument seeks to elevate form over substance. The intent of the legislation governing residential home construction was satisfied. Appellant's argument ignores this fact and tries to use a technical argument that ignores the compliance with the intent of the statute. Appellant has a house which was built by a licensed residential home builder who signed the

contract, pulled the building permit, performed the work, and oversaw the construction.

For the above stated reasons, Appellant's argument on this point should also be denied.

4. THE CIRCUIT COURT'S GRANTING OF SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY WAS CORRECT AND THE BEST PROOF OF THIS IS THE APPELLANT'S FAILURE TO PRESENT ANY DAMAGES FOR OFFSET AT TRIAL, MUCH LESS DAMAGES ABOVE THE ADMITTED CONTRACT BALANCE.

The crucial piece missing from Appellant's contention here is that summary judgment was granted based on Appellant's failure to prove damages in excess of the undisputed contract balance, less all allowances for purposes of the hearing. The point being that Appellant may very well have a claim for offset, but the evidence provided only showed a defense of offset and not a counterclaim. Counsel very clearly spelled out the basis of the motion for summary judgment. Appellant agreed he did not pay the last two payments of $34,000.00. For the purposes of the summary judgment hearing, counsel assumed Appellant proved nothing for the $18,000.00 in allowances included in the final two contract payments. (Hearing Transcript dated November 1, 2010, p. 6, ll. 5-10; p. 7, ll. 9-21).

The Circuit Court gave Appellant an opportunity to submit a memorandum in response[2]. (Hearing Transcript dated November 1, 2010, pp. 29-30). Later, in its Order dated August 16, 2011, the Circuit Court determined that despite being given the opportunity, Appellant "has not provided any evidence to prove that the cost to complete the Project exceeded the remaining undisputed contract balance." (Order dated August 16, 2011, p. 9). The Court went on to find

> "Pierce claims his damages are in excess of the contract balance of $34,000.00. However, Pierce has failed to produce documentation that would be admissible in

[2] As a side note, Appellant moved at the hearing to dismiss the Mechanic's Lien as being untimely. The Circuit Court determined both parties agreed the last date of work was the removal of a portable. (Order dated August 16, 2011, p. 5). Appellant did not raise the issue of the timeliness of the lien at trial. If Appellant considered that an issue, he abandoned it at trial and can offer no evidence about it.

> court to support his damages in excess of even the undisputed balance of $15,000.00. Defendant Pierce has had more than adequate time to do so and numerous court orders requiring Pierce to provide proof of his alleged damages.
>
> While Defendant Pierce has produced some documents, Plaintiff asserts the Defendant cannot produce admissible evidence establishing a material issue of fact that Defendant's damages exceed the contract balance, entitling him to a counterclaim. Based upon the record, Plaintiffs' memorandum, the response filed by Defendant, and the argument of counsel at the hearings the Court agrees. Since the cost to complete as shown by Pierce clearly does not exceed the contract balance, Pierce's counterclaims must be dismissed.
>
> Pierce has been given four years to produce admissible evidence that would support his damages. As our Courts have repeatedly held, '[a] party opposing a properly supported motion for summary judgment ... may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment.' *Bravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Ct. App. 1994)."

The Circuit Court further went on to find that no material issue of fact existed that Appellant had breached the contract. (Order dated August 16, 2011, p. 10). Respondents do not contest this, but if this was an error, it was harmless. It was Appellant's failure to produce admissible evidence of damages exceeding the undisputed contract balance that rendered the counterclaim baseless, not whether there was a material issue of fact or who breached the contract first. Appellant was still given the opportunity to assert the claim of offset and prove offset at trial, yet he did not do so. The fact that the jury did not reduce the contract balance by more than what Respondents stipulated at trial, which would be offsets due Appellant, clearly shows Appellant's claim of offset was no more than what Respondents agreed to prior to trial. The record reflects that at trial Appellant presented no evidence of offset in excess of the offset Respondents stipulated to at trial and the jury agreed. (Trial Transcript dated November 28, 2011, p. 127, l. 15 thru p. 128, l. 23). For these reasons, the Circuit Court was correct in

granting summary judgment and, even if it was wrong, which Respondents deny, it was harmless error because Appellant had the opportunity at trial to produce damages for offset and did not. Therefore, Appellant suffered no error for this Court to correct. As such, Appellant's argument that the Circuit Court erred in granting summary judgment must fail.

5. THE CIRCUIT COURT CORRECTLY DETERMINED THAT RESPONDENTS WERE THE PREVAILING PARTY AND CORRECTLY ISSUED AN AWARD OF ATTORNEYS' FEES AND COSTS.

Prior to the trial of this case in the lower court, Respondents filed an Offer of Settlement on March 30, 2010 for the sum of $0.00 (Offer of Settlement filed March 30, 2010). At the trial, Appellant had the opportunity to present evidence of back charges or offsets to Respondents' claims.

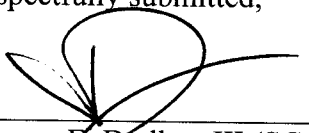
Appellant can point to no evidence where he presented any documentation to substantiate any claims for back charges or offsets to the contract balance. As such, the jury did not give Appellant any credits other than the ones Respondents agreed were due.

Based upon S.C. Code § 29-5-10, Respondents were the prevailing party and are entitled to an award of attorneys' fees and costs. Therefore, Appellants' argument must fail.

CONCLUSION

For all of the above reasons, this appeal, in its entirety, should be denied.

Respectfully submitted,



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June 17, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
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The Honorable R. Lawton McIntosh, Circuit Court Judge
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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondents' Initial Amended Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 17 day of June, 2014, addressed as follows:

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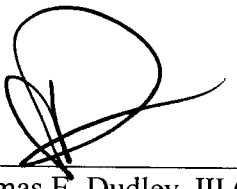

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June 17, 2014

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Re: Tri-County Dev. v. Pierce, Chris (2)
AND
Tri-County Development v. Christopher Pierce (4)
Appeal from Oconee County
Case No.: 2005-CP-37-00788
Appellate Case No.: 2011-202946

To Whom It May Concern:

Please find enclosed the original and one copy of Respondents' Initial Amended Brief and Designation of Matter with Proof of Service for both in the above referenced matter. By copy of this letter, we are serving same upon counsel for Appellant.

Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC

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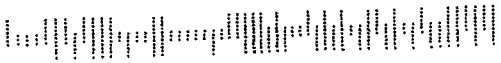

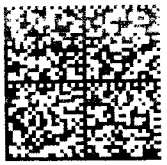

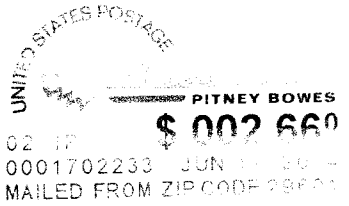

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