STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO.: 2009-CP-15-0595

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

v.

GENE R. SLIVKA, ... Petitioner.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE FACTS

In his brief, Respondent ("Spriggs") cites several facts which are either inaccurate or are taken out of context. Some further clarification of those facts is in order.

First, in numerous places in his brief, Spriggs represents that the work done from 2006 through 2008, which was reflected in the February 9, 2009 Invoice (defined in Petitioner's first brief), was done by Spriggs because of changes in conditions with respect to his assignment. Spriggs contends that additional work was work he did not contemplate in the original Fee Agreement (also previously defined. R. pp. 346-353) (R. p. 346). Disregarding the fact that he alone decided what work was included in the Fee Agreement and what was not (R. p. 204, lines 3-17; R. p. 298, lines 15-20), it is undisputed that at no time in 2006, 2007, 2008, *or ever*, did Spriggs tell Petitioner ("Slivka") that he was incurring charges outside of and beyond the Fee Agreement. Thus Slivka's surprise upon receipt of the February 9, 2009 Invoice, which he disputed.

Next, Spriggs repeatedly references the fact that Slivka admitted that he owed Spriggs sums for certain services that Spriggs had performed. As Spriggs correctly noted, at one point, after receiving the February 9, 2009 Invoice, Slivka agreed to pay Respondent the agreed upon contract balance (approx. $75,000.00) upon receipt of a corrected invoice (R. p. 110). This is undisputed. However, these facts, for the purpose of Spriggs' argument, have been taken out of context. After Slivka agreed to pay the original contract balance upon receipt of a corrected invoice, Spriggs filed his Mechanic's Lien on April 13, 2009, (R. p. 376) the viability of which is still highly disputed. The filing of the Mechanic's Lien caused Slivka to incur attorney fees and to deposit the sum of Two Hundred Sixty-Five Thousand One Hundred Twelve and 71/100 Dollars ($265,112.71) into the Court to clear the title to his property caused by the defective lien (R. pp. 387-391). From the point the Mechanic's Lien was filed, and Slivka incurred damages,

the amount in controversy, and even who owes who money, has been in dispute. The filing of the Mechanics Lien caused Petitioner Slivka significant injury and, throughout the underlying litigation and even today, there is great doubt which party owes the other and in what amount.

Spriggs discusses the invoices sent to Slivka for work ostensibly done for Slivka, but the content of and order of receipt of those invoices is critical. The February 9, 2009 Invoice totaling One Hundred Ninety-Eight Thousand Eight Hundred Thirty-Four and 53/100 Dollars ($198,834.53) (R. pp. 376-386), reflected work that was which was ostensibly done by the Spriggs in 2006, 2007 and 2008. None of that work was done within 90 days of filing the mechanic's lien. Subsequently, in May, 2009, another invoice was submitted for work associated with an appraisal ostensibly done in May of 2009. That work *postdated* Spriggs' mechanic's lien. It was not until November 2009, eight (8) months after filing the Lien, that Slivka was given an invoice reflecting work ostensibly done by Spriggs in January, 2009. Up until that date, which was after Slivka had deposited the $265,112.31 into the Court and had challenged the timelines of the lien, Slivka had no idea that Spriggs claimed to have done work in January, 2009 (R. p. 365).

Finally, with regard to the work in May, 2009, done after Spriggs filed his lien, the testimony was crystal clear that the Slivka had no idea that an appraiser had contacted Spriggs and Spriggs admitted that the Slivka never authorized the work ostensibly done in May.

> Q: In May of 2009, did you authorize an appraiser to contact Mr. Spriggs to talk to him about the house or anything in connection with an appraisal?
>
> A: No. And I want the jury to understand – and you saw my shock when I saw that the appraisal guy come in. It wasn't that I cared about what was in it, but the banks must order these appraisals themselves. And they do it and you have no control of it. They want this distance.

> So Enterprise Bank ordered that confidential appraisal from the appraiser. I had never seen it. And so, you know, the relationship is completely with them. I was really floored that it ended up here.
>
> But at any rate, the point is that I had nothing to do with that. They did send the appraiser out to the house. I let the appraiser into the house but beyond that I have no relationship with the appraiser. I didn't pay her. It was paid through the bank.

(R. p. 300 lines 1-17) (R. p. 273, lines 1-25).

Spriggs contends that at no time did Slivka tell him not to perform services in January or in May of 2009. Recall that the January, 2009, work was unknown to Slivka until November, 2009, after the lawsuit was well underway. The May work was performed by Spriggs after he had already filed a lien. The temerity of that billing, and its use to support the lien, is breathtaking. It is disingenuous to suggest that Slivka should have cut off services which he did not know were being performed and which were incurred while the parties were already in litigation.

ARGUMENT I

Respondent's Contract Administration Services
Are Not "Labor" As Defined By The Mechanic's Lien Statute

In its brief, Spriggs makes a number of points about the Mechanic's Lien Statute and Mechanic's Lien claims that are fundamentally incorrect.

Spriggs cites *Clo-Car Trucking Co., Inc. v. Clifflure Estates of S.C.* 282 S.C. 573, 320 S.E. 2d51 (Ct. App. 1984), for the proposition that the Mechanic's Lien Statute is to be given the liberal construction to create a lien where one is intended by the legislature. Spriggs' argument is then premised on the notion that since contract administration services is both "instrumental" and "supports the erection of a building" (p. 15) and that contract administration services "supports the erection of a building even more so that the preparation of plans, specifications and

design drawings related to the project." (P. 15 of Respondent's brief) Not allowing his rights for these services will be "contrary to legislature's intent, illegal and without merit" (p. 17 of Respondent's Brief)

The difficulty is that Spriggs reads the Mechanic's Lien Statute as he wants it to read and disregards how it actually reads. Section 29-5-10 (the "Mechanic's Lien Statute"), cited extensively by Spriggs, does not use the words "supports" or "are instrumental in" to describe the labor and materials that are covered by the Mechanic's Lien Statute. Rather, it says that labor and materials, "furnished or actually used in the erection, alteration or repair of a building or structure..." are subject to lien rights.

A reading of *Clo-Car* makes it clear that the Mechanic's Lien Statute far from being the elastic, open-ended statute, as Spriggs would have it be. While the Court in *Clo-Car* did say that the Mechanic's Lien Statute is to be given liberal construction, it also says, expressly, "Still, we must take each mechanic's lien statute as we find it [citation omitted] for we are not at liberty to depart from the plain meaning of its language." Id at 52. The Court of Appeals went on to note that, "Statutory liens, then, will not be extended by us to permit a claim not specified by the statute. [citation omitted] As our Supreme Court stated in *Williamson v. Hotel Melrose,* 110 SC 1, 34, 96 SE 407(1918), 'He who sets up a lien must bring himself fairly within the expressed intention of the lawmakers.' Id.

In *Clo-Car*, the contractor who filed the lien did site work related to streets and roads at a planned subdivision. The Court carefully analyzed whether or not the work done by the contractor for street and roads constituted either a "building or structure" within the meaning of the Mechanic's Lien Statute. In performing its analysis, the Court of Appeals noted that the Supreme Court had made it plain that in order to establish a mechanic's lien it is necessary that

the labor performed should have gone into something that became connected to and part of the land. The Court of Appeals denied the contractor's claim on the basis that "...a mechanic's lien cannot be attached to land or an owner's interest to the land where the work done is unconnected with and forms an integral part of the erection, alteration or repair of either a building or a structure of some description. [citation omitted] For us to hold otherwise would amount to a usurpation of the functions of the General Assembly. If the scope of the statute discussed here is to be expanded, the legislature, not this Court, should undertake to do it." Id at 57

In illustrating how unreasonable Slivka's view of the language of the Mechanic's Lien Statute is, Spriggs argues that, "Under Petitioner's analysis, any work performed, including services making the real estate suitable as a site for the building or structure,[1] would necessarily require further explicit description to be deemed labor and therefore lienable under §29-5-10(a)."(Respondent's Brief p. 11) That of course is exactly right. To illustrate how that works, the *Clo-Car* court referenced a prior Supreme Court case, *George AZ Johnson V. Barnhill,* 279 SC 242, 306 SE2, 216, 218 (1983), where the Supreme Court held that a surveyors work was not "labor" or "materials" under the Mechanics Lien Statute. The Mechanic's Lien Statute was subsequently changed, by the legislature, to include the services of a surveyor (see §29-5-21, which also includes protection for a real estate licensee). The Mechanic's Lien Statute was subsequently amended, by the legislature, to include Mechanic's Statute coverage for the rental value for tools, appliances, machinery and equipment (§29-5-22). The services provided by a

[1] Curiously, Spriggs urges the Court to view his labor and materials in the context of "the work of making the real estate suitable as a site for the building or structure." (P.11 of the Respondent's brief) That section, by its language, relates to site work, not an architect conversing from his office in Savannah with a plumber. The evidence is uncontroverted that as of January, 2009, the project was well underway though it had been several months or even years since Spriggs visited the site. Again, it is erroneous to include that phrase from the Mechanic's Lien Statute as some sort of catch-all provision for any activity which "supports" or is "instrumental in" the erection of a project.

private security guard services was brought within the purview of the Mechanic's Lien Statute with the addition of §29-5-25 and landscapers were brought within the purview of the Mechanic's Lien Statute with the addition of §29-5-26. Construction and demolition and debris disposal services were also brought within the purview of the statute pursuant to §29-5-27. None of those additional statutory sections would have been necessary had the Mechanic's Lien Statute been applied as expansively as Spriggs seeks to apply it and every material or labor that "supports" or which is "instrumental in" delivering a project is already included within the Mechanic's Lien Statute.

From Spriggs' perspective, "the lienable services is expressly neither exclusive nor exhaustive" (p. 11), thus, under Spriggs' view there are an infinite number of services which either "support" or are "instrumental in" projects that are protected by the Mechanic's Lien Statute. Spriggs would have the Mechanic's Lien Statute read as follows, "As used in this section, labor performed or furnished in the erection, alteration or repair of any building or structure upon real estate includes *but is not limited to* the preparation of plans, specification and design drawings...". However, contrary to Spriggs' view, the legislature elected not to include the words "*but not limited to*" within the statute, which is in fact, exclusive and the list of labor and materials which is included in its protection is exhaustive.

As noted in Slivka's initial brief, there are an infinite number of services that an architect can provide that cannot be said to be "actually used in the erection, alteration or repair of a building or structure". For example, an architect could bill time while taking a shower or eating dinner and simply thinking about a project, similarly, an architect could bill time for going to a project and simply taking photos of the status of construction. According to Spriggs, such "labor" will be protected by the Mechanic's Lien Statute. Under Spriggs' view of the

Mechanic's Lien Statute, an architect could resurrect long dead lien rights by simply picking up the phone and calling a contractor or subcontractor - or even answering the call of an appraiser with whom the owner has no relationship.

This last point is of critical importance. Consistent with his expansive and all inclusive view of the Mechanic's Lien Statute, Spriggs argues that the work done in May of 2009 supports the Mechanic's Lien filed in April of 2009. First, this is contrary to the established view of the Mechanic's Lien Statute which was articulated by the Court of Appeals in *Preferred Savings and Loan Association Inc., v. Royal Garden Resort, Inc.* 295 S.C. 268, 368 S.E.2d 78 (S.C.App. 1988) in which the Court of Appeals held that "when a party files a notice of lien under [the Mechanic's Lien Statute] he is asserting that at a time within ninety (90) days before the notice, he has performed the work for which he is entitled to assert a lien." 295 S.C. at 272, 368 SE 2d at 81. In affirming the Court of Appeals language, the Supreme Court further noted,

> The statute requires that the Certificate include a statement "of the amount *due* him", and that it be filed "within ninety (90) days *after* he ceases to labor." The clear meaning of this language is that the labor contemplated in the filed statement has already been performed "within ninety (90) days prior to the filing.

Preferred Savings and Loan Association., Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 389 S.E. 2d 853, at 854 (1990).

More to the point, however, there is nothing to suggest that answering the questions of an appraiser is work that would, in any circumstances, can be said to have been "actually used in the erection, alteration or repair of a building or structure". Only by applying the statute elastically to any work that "supports" or is "instrumental in" the erection of a project, could answering the questions of an appraiser conceivably come within the purview of the Mechanic's Lien Statute.

Spriggs' reliance on the May 2009 "work" to supplement the lien illustrates just how untethered to the actual language of the Mechanic's Lien Statute his claim is.

In conclusion, contract administration services performed by an architect are not covered by the Mechanic's Lien Statute if the language of that statute is applied as it was written by the Legislature. If the Legislature wants to amend the statute to include any form of contract administration services, to include answering questions from a real estate appraiser who is unknown to the owner, then the legislature can do that. The trial court and Court of Appeals should not have and should be reversed.

ARGUMENT II

The Facts Of The Case Render §27-1-5 Inapplicable
As A Matter Of Law

With respect to Spriggs' arguments relative to §27-1-15, Slivka has three (3) arguments in reply. First, there is no authority for the applicability or inapplicability of §27-1-15 to parties who are engaged in a lawsuit involving counterclaims and the time the demand is made. Whether or not under these facts a fair and reasonable investigation took place, demand is not a question of fact for a jury. It is an issue that should have been determined by the court as a matter of law. Second, where Spriggs invoked the applicability of the Mechanic's Lien Statute, thereby obligating Slivka to deposit one and a third times (1 1/3) Spriggs' entire claim into the court to remove the cloud from his title, as a matter of law, Slivka should have no obligation to pay additional sums under §27-1-15 even if there were sums that could be said to have been "valid" when the demand was received and the parties were engaged in litigation. Finally, given the current status of the case, neither Spriggs or anyone else can say what amount was deemed to

have been "valid" at the time of the §27-1-15 demand was made, meaning that claim should have been deemed as a matter of law.

First, the absence of authority relative to Slivka's position should not be a basis to deny his defense. Slivka has asked, since the trial of this case, for the Court to dismiss the §27-1-15 under the facts and circumstances of this case. The applicability of that statute is a legal issue, not a factual issue.

That there is no precedent or applicable authority illustrates that there are no cases where §27-1-15 has been utilized while the parties were actually in litigation involving colorable claims against one another. §27-1-15 was clearly intended by the legislature to be a tool to avoid the filing of litigation. Spriggs elected to file litigation first, only sending the §27-1-15 demand many months later, after the assertion of counterclaims by Slivka. At that time, the parties were engaged in active discovery and neither party was entitled to judgment as a matter of law on their legal defenses or on their claims for damages. Thus, as a matter of law, §27-1-15 was inapplicable as the parties were engaged, by the definition of discovery, in a fair and reasonable investigation and there was no sum that could be said to have been "valid" at the time the demand was received.

Contrary to the ruling of the trial court, whether a fair and reasonable investigation has taken place was not a question of fact in this case given the manner in which Spriggs attempted to utilize §27-1-15. That was an issue of law for the Court which should have ruled that §27-10-15 was inapplicable.

Second, as stated in his original brief, Slivka believes that depositing one and a third (1 1/3) of the total amount of Spriggs' claim in the Court, pursuant to the requirements of the Mechanic's Lien Statute, constitutes payment of any sum that could have been deemed "valid" at

the time the demand was received. In his brief, Spriggs says, "Under Petitioner's interpretation, §27-1-15 is rendered meaningless." (P. 26 of Respondent's Brief) In fact, that is precisely what Slivka is saying: Spriggs rendered §27-1-15 meaningless when Spriggs elected to file his Mechanic's Lien, thereby invoking the application of the Mechanic's Lien Statute, in full, almost a year before he sent his §27-1-15 demand. It was Spriggs, not Slivka, who rendered §27-1-15 meaningless in the context of this dispute.

Finally, even in his brief, more than four (4) years after sending the §27-1-15 demand, Spriggs cannot articulate what sum was deemed "valid", and therefore and should have been paid by Slivka, when he received the §27-1-15 demand. Then question of which of these parties owes the other and in what amount, is still disputed, highly contested, and legitimately at issue, as evidenced by this Court's acceptance of Certiorari. The only sum Spriggs insinuates should have been paid, was the amount Slivka was willing to pay *before* Spriggs significantly changed the circumstances by commencing this action and Slivka incurred attorney's fees and other damages.

CONCLUSION

For the forgoing reasons the decision of the trial court, which was affirmed by the court of appeals, should be reversed and the matter remanded to the trial for a new trial on the issue of Petitioner's damages as a result of the defective mechanics lien, an assessment of attorneys fees in favor of petitioner, and Respondent's claim for breach of contract.

[Signature page to follow]

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petitioner's Reply Brief in Response to Respondent's Brief for Writ of Certiorari on The Spriggs Group, P.C. by depositing a copy of it in the United States Mail, First Class postage prepaid, on September 23, 2014, addressed to their attorney of record, James A. Bruorton, IV, Esquire, Rosen, Rosen, & Hagood, LLC 151 Meeting Street, Suite 400, Charleston, South Carolina 29401.

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