STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Case No. 2009-CP-15-0595
Appellate Case No. 2013-000800

The Spriggs Group, P. C. .....Respondent

v.

Gene R. Slivka .....Petitioner

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA CHAPTER OF THE AMERICAN INSTITUTE OF ARCHITECTS

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STATEMENT OF ISSUE ON APPEAL

The South Carolina Chapter of the American Institute of Architects (hereinafter "the AIASC") addresses only one issue: whether an architect's "construction administration" constitutes "labor" under South Carolina's mechanics' lien law, S.C. Code Ann. § 29-5-10. The AIASC supports the holding of the Court of Appeals on this issue and requests that the opinion of the Court of Appeals be affirmed.

STATEMENT OF THE FACTS

For purposes of the single issue addressed by the AIASC, the following facts are relevant:

1. By letter of November 27, 2006, the Spriggs Group ("Architect") provided an estimate of architectural services and construction costs to Mr. Gene Slivka ("Owner") for seven buildings, including a 13,056 SF main house (Plaintiff's Exhibit 7; R., pp. 346-351). The Architect's proposal identified four "construction administration" services that were to be performed after issuance of a building permit and the start of construction:

> 16) We will provide shop drawing review for mechanical systems, site visits for electrical inspection prior to cover up, and final plumbing, mechanical, and electrical punch list.
>
> 17) We will provide structural foundation inspections and one framing inspection for each building.
>
> 18) We will provide any requested construction phase services by the project architect or staff on an hourly basis.
>
> 19) Once we begin construction documents, any change in room layouts, sizes, window locations door locations and exterior elevation designs will be performed on an hourly basis.

(R., p. 350).

2. The Architect's proposal of November 27, 2006 was the only contract document agreed to by the parties.

3. After the delivery of the plans and specifications and the start of construction, the Owner's plumbing contractor requested the Architect to review and approve changes to the piping design for the Project (R., p. 198, line 23 – p. 200, line 11; pp. 398-399; pp. 403-436). The Architect complied with this request by coordinating drawing changes with the Project's mechanical engineer, and the revised plans and specifications for plumbing were used in the Project (R., p. 230, line 19 – p. 232, line 11); R., p. 232, line 12). The Architect invoiced the Owner for these construction administration services, but the Owner refused to pay. The Architect then filed a mechanic's lien within ninety days after its last performance of work on the Project. (Plaintiff's Exhibit 10; R., p. 376).

ARGUMENT

An architect's "construction administration" constitutes "labor" under South Carolina's mechanics' lien law, South Carolina Code § 29-5-10 *et seq.*

The right to practice architecture in South Carolina is governed by S.C. Code Ann. § 40-3-10- *et seq.* and the regulations of the South Carolina Board of Architectural Examiners adopted pursuant thereto, 23 S.C. Code Regs § 11-10. Under South Carolina Law, the "practice of architecture" means:

> [A] service or creative work requiring architectural education, training, and experience and the application of the principles of architecture and related technical disciplines to the professional services or creative work as consulting, evaluating, planning, designing, specifying, coordinating of consultants, **administration of contracts, and reviewing of construction for the purpose of assuring compliance with the specifications and design,** in connection with a building or site development.

S. C. Code Ann. § 40-3-20 (6) [emphasis added]. 23 S.C. Code Regs § 11-12 B(4) and (5) provides as follows:

> (4) On a project where a building permit has been issued and the sealing architect and the firm of record have not been engaged to perform at least minimum construction administration services, as

> defined in subsection (5) below, the sealing architect and firm must report to the permitting authority and the building owner that he and the firm have not been so engaged.
>
> (5) The minimum construction administration services expected of the sealing architect and firm deemed necessary to protect the health, safety, and welfare of the public shall be **periodic site observations of the construction progress and quality, review of contractor submittal data and drawings, and reporting to the building official and owner any violations of codes or substantial deviations from the contract documents which the architect observed.**

[Emphasis added].

Under South Carolina law, a licensed architect cannot provide plans, specifications and reports for purposes of applying for a building permit without also undertaking additional "construction administration" services, unless the architect informs the permitting authority that the owner has not contracted for such "construction administration" services. In this case, the Owner *did* contract for "construction administration services," as required by law.

The Owner's position in this case is that the Architect's "construction administration" services are not "labor" for purposes of the South Carolina mechanic's lien statute, S.C. Code Ann. § 29-5-10(a). The Court of Common Pleas and the Court of Appeals both rejected the Owner's argument. The Court of Common Pleas ruled that it was "implausible that construction administration services would be excluded from the description of labor performed or furnished in the erection, alteration, or repair of any building." 738 S.E. 2d at 500. In sustaining that conclusion, the Court of Appeals held that: "[Architect's] discussions with the plumber and engineer in January 2009 were part of its architectural services overseeing the proper construction of the property." *Spriggs Group, P.C. v. Slivka*, 402 S.C. 42, 52, 738 S. E. 2d 495, 501 (Ct. App. 2013).

The decisions of the Court of Common Pleas and the Court of Appeals correctly reflect South Carolina's licensing laws for architects and should be affirmed. Both courts correctly held that the architect's work is not complete at the delivery of design documents. By law, the architect cannot undertake any design responsibility without also assuming certain minimal "construction administration" duties, and, if the Owner refuses to employ the Architect for such minimal construction administration duties, the Architect must notify the agency issuing the building permits that the Architect will not be available to review the project for code compliance and other safety-related concerns during construction.

South Carolina's mechanic's lien law, S.C. Code Ann. § 29-5-10(a), identifies "the preparation of plans, specifications, and design drawings" as "labor" for which a lien can be filed:

> 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 or structure upon real estate or the boring and equipping of wells, by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner in procuring or furnishing the labor or materials shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated 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** and the work of making the real estate suitable as a site for the building or structure.

[Emphasis added].

By law, "plans, specifications and design drawings" necessarily entail "construction administration services" identified by 23 S.C. Code Regs § 11-12 B(4) and (5). The need to read S.C. Code Ann. § 29-5-10 and 23 S.C. Code Regs § 11-12 B consistently with each other arises

from this Court's previous decisions that architectural services are protected by the mechanics' lien laws. In *Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407 (1918) , the Supreme Court ruled that architects are protected by South Carolina's mechanic's lien law. The Petitioner in the present case attempts to distinguish the *Williamson* case on the ground that the Court in *Williamson* limited the architect's lien to "on-site supervision of the construction."

The Petitioner's argument fails for two reasons. First, the *Williamson* court did not limit the architect's lien to on-site construction supervision. *Id.*, 96 S-E at 416 ("One person may perform labor with his trowel; another may furnish labor with his mind."). Second, the Petitioner's argument attempts to confuse "construction supervision" with "direction of the work." The two are distinctly different. Pursuant to 23 S.C. Code Regs § 11-12, "construction supervision" by a design professional includes inspection for compliance with building codes and specification requirements and approval of any proposed changes to the design. "Direction" of the work means telling the contractors how to do their work. Architects do not "direct" the contractor as to "means and methods of the work." In fact, the AIA A201- 2007, General Conditions of the Contract for Construction , § 3.3.1 specifically states: "The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract." The 2007 version of the AIA A201 reflects long-standing industry practice and AIA policy. The testimony quoted on page 12 of the Petitioner's Brief is all related to control of means and methods of performance and is not related to "construction administration services" as defined in 23 S.C. Code Regs § 11-12(B)(5). Petitioner misreads the *Williamson* case and misrepresents evidence that the architect did not direct means and methods as evidence that the Architect did not perform "construction administration services."

As regulated by South Carolina, the Architect's design work (drawings, specifications and reports) cannot be separated from the Architect's "construction administration services."

CONCLUSION

The Court of Appeals correctly held that an architect's "construction administration services" constitute "labor" under the South Carolina mechanic's lien statue, S.C. Code Ann. § 29-5-10 *et seq.* The decision of the Court of Appeals is consistent with South Carolina's architectural licensing laws and the regulations adopted pursuant thereto, which require an architect to undertake certain "construction administration services" or to advise the permitting authority that the project owner refused to contract for such services. The Petitioner's position is inconsistent with S.C. Code Regs § 11-12 B(4) and (5) and with this Court's decision in *Williamson v. Hotel Melrose*, . For these reasons, the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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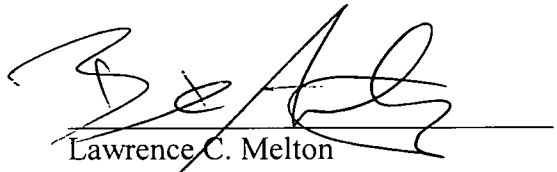
CERTIFICATE OF COUNSEL

The undersigned certifies that the Amicus Curiae Brief complies with Rule 211(b), SCAR.



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PROOF OF SERVICE

I certify that I served the **Amicus Curiae Brief of the South Carolina Chapter of the American Institute of Architects** on the Appellant and Respondent by depositing copies of it in the United States Mail, postage prepaid, on October 7, 2014 addressed to their attorneys of record as follows:

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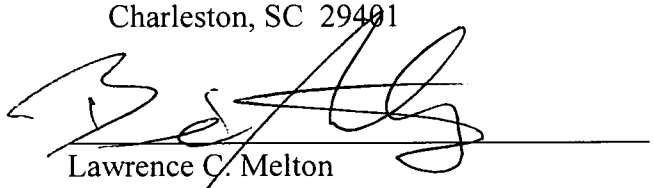

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