IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2015-000293

The Greens of Rock Hill, LLC and GRH 2011, LLC, ... Petitioners,

v.

Rizon Commercial Contracting, Inc. and Road Machinery and Supplies Co., ... Defendants.

Of whom Rizon Commercial Contracting, Inc. is the .....Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Did the Court of Appeals usurp the authority of the Legislature by judicially expanding the scope of the Mechanic's Lien Act?

2. Did the Court of Appeals err in finding that Rizon is entitled to a mechanic's lien as a "person who performs a component of the work involved in the development and construction project"?

Statement of the Case

The Petitioners, the Greens of Rock Hill, LLC and GRH 2011, LLC (hereinafter "Owners") are the owners and developers of a mixed use real estate development in Rock Hill, S.C. The Owner contracted with Celriver Services, Inc. (hereinafter "Celriver") for the demolition and removal of a large chemical plant on the property. (R. p. 191)

As a result of the demolition of the chemical plant, a large amount of scrap concrete was produced. Celriver contracted with Rizon Commercial Contracting, Inc. to crush the scrap concrete. (R. p. 191). The concrete was crushed to certain specifications so it could be used, if needed, as additive to road base on the Riverwalk project or other projects as Celriver might direct. (R. p. 192)

The scrap concrete was delivered to Rizon at the crushing site by Celriver. (R. p.192) Rizon crushed the material and the crushed concrete was removed from the crushing site by Celriver. (R. p. 192)

A dispute regarding the volume of concrete crushed and payment therefore arose between Celriver and Rizon. On March 30, 2012, Rizon filed a mechanic's lien on the entire development. (R. p. 121) As authorized by the case of Sea Pines Co. v. Kiawah

Island Co., 268 S.C. 153, 232 SE2d 501 (1977), the Owner filed a petition and motion to dismiss the mechanic's lien. (R. p.16)

A hearing was held before the Honorable S. Jackson Kimball, Master in Equity (?? Circuit Judge) on June 21, 2012. At Rizon's request, the hearing was continued to allow Rizon to present affidavits. (R. p. 146)

A second hearing was held before Judge Kimball on September 20, 2012 (R. p. 149). Following the second hearing, Judge Kimball issued an Order dismissing Rizon's mechanic's lien. (R. p. 1) This appeal followed.

On December 3, 2014, the Court of Appeals reversed the trial court's dismissal of the Rizon Mechanic's Lien. The decision was 2 to 1 with Judge Thomas dissenting.

Argument

Question 1. Did the Court of Appeals usurp the authority of the Legislature by judicially expanding the scope of the Mechanic's Lien Act?

The Mechanics Lien Statute in the general form in which we find it today was first passed in 1916. Lowndes Hill Realty v. Greenville Concrete Co., 229 S.C. 619 93 SE2d 855 (1956). The Statute has been amended many times to expand the services for which a mechanics lien can be filed. (See S.C. Code Ann. § 29-5-21 – Surveyors; S.C. Code Ann. § 29-5-22 - Rental value of equipment).

However, this Court has consistently applied the concept that expansion of coverage of the Mechanic's Lien Statute is for the Legislature. In Johnson v. Barnhill, the Court refused to allow a mechanic's lien for surveying work because there was no specific reference to surveying work, and the surveying work was not "work of making such real estate suitable as a site..." Johnson v. Barnhill, 279 S.C. 242, 306 SE2d 216 (S.C.1983). (See also Hardin Construction Group. V. Carlisle Construction Co. 300 S.C.

456, 388 SE2d 794 (S.C., 1990 – Subcontractor not allowed to claim mechanic's lien for rental equipment when lessor does not provide operator – modified by Act No. 374, §1 1990 S.C. Code §29-5-22).

The Court refused to extend the Statute to cover surveyor's services even though the Legislature had passed an amendment to the Statute giving surveyors the right to a mechanic's lien. Since the work was done before the amendment, the amendment was not applicable. But the amendment clearly stated the Legislature's intent. Yet the Court refrained from judicially expanding the scope of the Statute.

In every case in which the Statute has been expanded, the expansion has been accomplished by the Legislature. This Court has consistently refused to expand a statute's scope even in situations where the Court believed the wording of the statute was contrary to legislative intent.

> We are thus constrained to hold that, as defined by §16-25-10, Leopard's stepdaughter is within the statutorily defined class designed to be protected from domestic violence, and the Circuit Court erred in dismissing the charge. This result may be an unintended consequence of the statutory language. However, the plain language of the Statute cannot be contravened. Scholtec at 560, 490, SE2d at 607 "Despite this possibility of frustrating legislative intent however, we are confined to the statutory language". If it is a desirable public policy to limit the class to those physically residing in the household, that public policy must emanate from the Legislature. State v. Leopard, 349 SC 467, 563 SE2d 342 (Ct. App.) 2002

By reason of constitutional distribution of powers to three branches of government, Courts have no legislative powers.

> "Courts have no legislative powers, and in the interpretation and construction of statutes, their sole function is to determine, and within the constitutional limits of the legislative power, to give effect to the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered

from the Statute itself..." Laird v. Nationwide Insurance. 243 S.C. 388, 134 SE2d 206, 209 (1964).

> "...There is a marked distinction between liberal construction of statutes, by which courts, from the language used in the subject matter and the purposes of those framing them, find out their true meaning, and the act of a court in grafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized role of construction, while the latter is judicial legislation, forbidden by the constitutional provision distributing the powers of government amount three departments, the legislative, the executive and the judicial". Creech v. S.C. Public Service Authority, 200 S.C. 127, 20 SE2d 645 (1942)

The Court of Appeals found that Rizon was entitled to a mechanic's lien under Section 29-5-20. Section 29-5-20 provides that every laborer, mechanic, subcontractor or person furnishing material for the improvement of real estate has a lien on the real property so improved. The purpose of this provision is to protect a person who provides labor or material for the improvement of real property. To be entitled to a lien, the lien claimant must bring himself within the coverage of the language of the Statute. Clo-Car Trucking, Inc. v. Clifflure Estates of South Carolina, Inc., 282 S.C. 573, 320 SE2d 51 (Ct. App., 1984)

The opinion of the Court of Appeals significantly expands coverage of the Mechanic's Lien Statute. The Court found "the legislative intent that a person who performs a component of the work involved in development and construction of projects should be considered a "laborer" that performs work for the improvement of real estate".(Op. p. 5)

The Statute requires a lien claimant to show that he furnished labor or material for the improvement of real estate. The Court of Appeals concluded that a person should be deemed to be a laborer that performed work for the improvement of real estate if they

"performed a component of the work involved in development and construction projects". Petitioner submits that this standard is much broader than the statutory language. If the coverage of the Mechanic's Lien Statute is to be expanded, it should be accomplished by the Legislature, not by the Court of Appeals.

If the Legislature had intended for contractors who provide crushing service and nothing more, to a construction project, the Legislature could have done so. Having failed to include crushing services, it is not permissible for courts to expand the meaning of the terms of the statute. State v Green, 350 S.C. 580, 567 SE2d 505 (Ct. App) 2002 (See Laird v. Nationwide Insurance, 243 S.C. 388, 134 SE2d 206 1964 "...If such damages had been in contemplation of the Legislature, it could have easily provided therefor in said statutes...We cannot read into the Uninsured Motorist Statutes provisions which are not required thereby. If the statutes in question fail to accomplish the legislative purpose, the remedy lies with the Legislature and not with the courts").

Question 2. Did the Court of Appeals err in finding that Rizon is entitled to a mechanic's lien as a"person who performs a component of the work involved in the development and construction project?"

The Court of Appeals found that Rizon was entitled to a mechanic's lien based on the following factual findings:

> Celriver hired Rizon to accomplish two tasks: (1) rid the property of demolition debris so construction could continue and (2) convert concrete blocks into fragments that could be used in paving the roadways in the property. Rizon rented equipment and provided all the labor, fuel and supervision necessary to remove scrap concrete from the property – a component of the work necessary for the development project to continue – by crushing it into a materal that went directly back into the project..." Court of Appeals, Op. p. 4

The only evidence in this record establishes that Rizon was not hired and, in fact, did not "rid the property of the demolition debris". Rizon did not remove scrap concrete

from the property. The factual basis upon which the Court of Appeals relied in concluding that Rizon was entitled to a mechanic's lien is simply incorrect.

The sole task for which Rizon was hired was to crush scrap concrete. (R. p. 31) Rizon did not deliver the scrap concrete to the crushing site. (R. p. 191) Rizon did not remove the crushed concrete from the crushing site. (R. p. 191) It is undisputed in this record that when Rizon completed its task of crushing concrete, the property had not been improved to any degree. Not until Celriver removed the crushed concrete from the crushing site and delivered the crushed concrete to the building site, was the property improved. The property was improved by Celriver's delivery of the crushed concrete to the building site, not Rizon.

Again, Rizon's sole task was to crush concrete. Rizon's brief does not argue that Rizon's scope of work involved anything more than crushing concrete.

As the dissent in the Court of Appeals stated, there is nothing in this record to support the Court's finding that Rizon had any responsibility for removing demolition debris from the project "so the work could continue." In fact, this statement is contrary to the undisputed record.

The scope of work in Rizon's contract clearly states that Rizon's only task was to crush scrap concrete:

> The work to be performed by the Subcontractor [Rizon] includes mobilization of all labor, equipment, materials and other items required to crush and screen 30,000 tons of concrete stockpiled on the property. The concrete material is to be crushed and screened, as required to meet the South Carolina Department of Transportation specifications for Graded Aggregate Base. (R. p. 31)

No other work is required. Rizon does not argue that any additional work was required or performed by Rizon. There is simply no factual support in this record for the

Court of Appeals statement that Rizon was hired to "rid the property of the demolition debris so construction could continue".

Since the Seminal case of Lowndes Hill Realty Co. v. Greenvillle Concrete Co. 2299.1.619, 93 SE2d 855 (1956), the courts have recognized a two-fold purpose of what is now S.C. Code Ann. § 29-5-20 (1976):

> "The manifest two-fold purpose of Sections 45-252 and 45-254 is:
>
> > (1) The protection of one, not a party to a contract with the owner, who furnishes labor or material in the improvement of the owner's property by giving him a lien for such labor or material and (2) the protection of the property owner limiting his liability and that of his property in respect of all such liens to the amount due by the owner on the contract price.... Id., p. 860".

As Lowndes Hill recognized, the Statute requires a subcontractor to provide labor or materials for the improvement of real property. Rizon did not provide labor or materials to the project. Rizon provided labor to prepare materials for Celriver to provide the materials to the project.

Here, it is undisputed that Rizon did not provide material for the improvement of the owner's property. The concrete belonged to Celriver before it was crushed and it belong to Celriver after it was crushed.

Rizon did provide labor for the benefit of Celriver. If Rizon is owed money for this labor, Rizon has a contract claim against Celriver. However, Rizon's labor did nothing to improve the owner's property.

The property was not worth more or in any other way improved after the concrete was crushed than it was before the concrete was crushed. If Celriver had elected to use the crushed concrete elsewhere, as it was entitled to do, Rizon would not be making this

claim. The act of making material suitable for use on a project is not the same thing as providing the materials.

This Court has consistently held that the right to a mechanic's lien is purely statutory and that the requirements of the statute must be strictly followed.

"A mechanic's lien exists only by virtue of statute, therefore one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it." Clo-Car Trucking, Inc. v. Clifflure Estates of South Carolina, Inc., 282 S.C. 573, 320 SE2d 51 (Ct. App., 1984)

Here, there is no specific reference to crushing services in the Mechanic's Lien Statute. The language of § 29-5-20 is not broad enough to cover a subcontractor who only provided crushing services. The Petitioner submits that the expansion of the Statute by the Court of Appeals was improper.

Conclusion

Appellate Rule 242 states that the general character of reasons to be considered by this Court in granting a Writ of Certiorari include:

> "...2. Where there is a dissent in the decision of the Court of Appeals;
>
> 3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
>
> 4. Where substantial constitutional issues are directly involved;"

Petitioner submits that elements of each of the stated reasons for review are

present here. Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

February 24, 2015

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4851-1838-0834, v. 1

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

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v.

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Of whom Rizon Commercial Contracting, Inc. is the .....Respondent.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Respondent's Amended Petition for Writ of Certiorari was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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February 24, 2015

L. Melia Sweatt

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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AMENDED CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 14, 2015.

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February 24, 2015

The Honorable Daniel E. Shearhouse
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RE: *The Greens of Rock Hill, LLC, GRH, LLC v. Rizon Commercial Contracting, Inc., Road Machinery and Supplies Co.*
Appellate Case No.: 2015-000293

Dear Mr. Shearhouse:

I have enclosed the original and seven (7) copies of Respondents' *Amended* Petition for Writ of Certiorari in the above-named matter. Please file the original and return one clocked copy to me in the envelope I have provided. I have also enclosed two copies of the *Amended* Appendix as required by Rule 242. These documents have been amended with a correction to the case caption.

By copy of this letter to the Clerk for the S. C. Court of Appeals, I am enclosing a copy of Respondents' Amended Petition for Writ of Certiorari. Also by copy of this letter to opposing counsel, I am serving the Respondents' Amended Petition as evidenced by the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

L. Melia Sweatt
Paralegal

/lms
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cc: Daniel D. D'Agostino
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4845-1021-1874, v. 1

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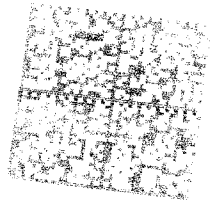

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