THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2016-CP-40-00164

Appellate Case No. 2017-001522

The Kitchen Planners, LLC, Appellant,

v.

Samuel E. Friedman and Jane Breyer Friedman and Branch Banking and Trust, Respondents.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

Appellant The Kitchen Planners, LLC, filed a mechanic's lien supported by a verified statement of account for $16,594.68 on November 12, 2015 with the Richland County Clerk of Court, seeking to collect the balance due on a contract between The Kitchen Planners, LLC and Respondents Sam and Jane Friedman to design their new kitchen and provide cabinets for it. The lien and verified account were served personally on Respondents Samuel E. Friedman and Jane Breyer Friedman November 17, 2015. Appellant filed a Complaint to foreclose the lien on January 13, 2016. Respondents answered, counterclaimed and filed a third-party claim against Crystal Cabinets, Inc. by amended pleading dated August 26, 2016. Appellant replied September 27, 2016.

Respondents Friedman filed a Motion to Dismiss Mechanic's Lien and Foreclosure on January 19, 2017, unsupported by affidavit.

Under cover of letter dated April 13, 2017 but postmarked April 14, 2017, Respondents served an affidavit of Samuel E. Friedman in connection with the upcoming hearing for the Motion to Dismiss scheduled for April 25, 2017. This was received by the attorney for Appellant April 17, 2017. Appellant served by mail April 18, 2017 her own affidavit as well as a Motion to Strike the Affidavit of Samuel E. Friedman.

At the hearing on the Motion to Dismiss, held April 25, 2017, the Honorable Robert E. Hood denied Appellant's Motion to Strike, converted the Motion to Dismiss to one for Summary Judgment, and issued his Order dated May 11, 2017 granting Respondents Summary Judgment. Judge Hood further issued an Order July 5, 2017 denying Appellant's motion to alter or amend.

A Notice of Appeal was timely served and filed on July 12, 2017.

FACTS

Patricia Comose, the sole member of Appellant The Kitchen Planners, LLC, entered into a written contract with Respondents Jane and Sam Friedman on March 16, 2015 to provide and install kitchen cabinetry pursuant to a design plan she would prepare. The total contract price was $52,779.04, payable in three equal installments of $16,594.68, due at the time of the order, shipment, and delivery. Respondent Jane Friedman approved the order March 16, 2015, and paid the initial installment. The second installment was paid May 14, 2015, when manufacturer Crystal Cabinets, Inc. shipped the order.

The cabinets were delivered by Kitchen Planners to the Friedman's June 20, 2016, and problems then arose between the parties. While the Respondents have repeatedly said that they wanted cabinets just like they had in their previous kitchen (which was destroyed by water damage from a broken pipe), in fact there were changes they made from the original design. (Deposition) There were instances also where Crystal Cabinets had ceased manufacturing the specific cabinet previously installed in the Respondents' original kitchen. (Deposition) In other instances Jane Friedman had showed Patricia Comose a photograph of what she wanted, and the photograph itself did not illustrate all the interior details which Jane Friedman also wished, but not articulate to Patricia Comose. (Deposition) There were apparent manufacturing errors where, even though Patricia Comose had ordered from Crystal Cabinets cabinets with extra deep drawer space, when delivered, the drawers themselves were not the extra depth, although the cabinets themselves were. (Deposition). Respondents were also dissatisfied with some aspects of the cabinets, even though the cabinets

were made according to specifications of their approved design. (Deposition)

The Friedman's got a representative of Crystal Cabinets involved in the re-ordering process, although subsequently the cabinets ordered by the manufacturer's representative turned out to be the incorrect color. (Deposition) In July and August of 2016 Patricia Comose continued contacting the manufacturer's representative and working with him in an effort to satisfy Respondents. The final work performed by Appellant on this project was September 29, 2015, when she re-ordered drawer boxes for the island cabinets, and sent Crystal Cabinets a check for $550.61. (Comose Deposition, Page 62; Exhibits 6 and 7, Affidavit of Comose).

Appellant filed November 12, 2016 a mechanic's lien for the third installment payment due her, $16,594.68, which lien and verified statement were personally served on Respondents November 17, 2016.

Appellant's Complaint to foreclose the lien was filed on January 13, 2016, and in their answer, counter-claim and cross-claim, as amended, Respondents generally denied the allegations of the complaint, and alleged, as affirmative defenses, accord and satisfaction, laches, mistake, payment, violation of S.C. Code Ann. §29-5-100 (1976) (asserting Appellant willfully and knowingly claimed more than due her, therefore invalidating the action), invalid lien, ("failing to adhere to the requirements of Title 29, Article 5 of the South Carolina Code of Laws"), and failure to state a cause of action, as well as counterclaiming against Appellant and cross-claiming against Third-Party Defendant Crystal Cabinets, Inc., asserting that Respondents had been without a kitchen for five months and had now paid $40,000 to another contractor to have new cabinets constructed and installed.

Respondents filed a Motion to Dismiss Mechanic's Lien and Foreclosure on January 19, 2017, unsupported by any affidavit.

The deposition of Patricia Comose was taken April 7, 2017. All through the deposition of Patricia Comose, Respondents' attorney repeatedly asked Mrs. Comose to agree that she had not returned to the Friedman residence since June 18, 2016, and she so agreed. (Deposition) However she testified on Page 62 about her re-order of box drawers for the Respondents' kitchen island on September 29, 2015. See also, Deposition Exhibits 6 & 7.

On April 17, 2017, a week before the hearing on Respondents' Motion to Dismiss was scheduled for April 25, 2017, Appellant's counsel received the Affidavit of Samuel E. Friedman, which had been mailed (postmarked) April 14, although the certificate of service stated April 13, 2017. (Record) She served and filed her Motion to Strike the Affidavit the next day, April 18, 2017. She also served the Affidavit of Patricia Comose in opposition.

At the April 25, 2017 Motion Hearing, the Honorable Robert E. Hood denied Appellant's Motion to Strike the Friedman Affidavit, and, over Appellant's objection, converted the Motion to Dismiss hearing into one for Summary Judgment, which was subsequently granted. (Order) Judge Hood also granted judgment against Appellant for $16,594.68 in attorneys' fees and costs. Appellant's Motion to Alter or Amend was denied. This appeal followed.

ARGUMENTS

I. Did the trial Judge err in granting Respondents Summary Judgment?

It is well settled that:

> [T]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder...When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party... Watson v. Underwood, 407 S.C. 443, 453, 756 S.E.2d 155, 160-161 (Ct.App. 2014) (citations omitted).

In the case at hand, there are ample material and genuine issues of fact, and the granting of summary judgment was clear error.

A. The mechanic's lien and verified statement of account were timely served and filed.

The mechanic's lien filed November 12, 2015 states that Appellant furnished materials and labor "beginning on or about March 11, 2015 through on or about August 18, 2015..." (Mechanic's Lien). Because the lien and statement of account were served on Respondents 91 days after August 18, 2015, it was their contention (with which the Judge ultimately agreed) that Appellant had failed to comply with S.C. Code Ann. §29-5-90 (1976), which requires that the lien be both served and filed within ninety days after the last work performed or materials supplied.

Discovery subsequently showed that Appellant was actually working on designing Respondents' kitchen beginning January 23, 2015 (Exhibit 1,

Deposition), and ending when writing the last check for a reorder of island drawers on September 29, 2015 (Deposition, Page 62; Exhibits 6 & 7); Comose Affidavit, Paragraph 4. The appealed Order ignores the September 29, 2015 work, documented by the check, erroneously:

> The Court also reviewed the submissions of the parties regarding the evidence of when the last date that Plaintiff provided materials or labor to the Friedman's home. It is clear to the Court that no credible evidence exists to show that Plaintiff provided any materials or labor to the Friedman's home after August 18, 2015. Plaintiff's sworn deposition testimony stated that the last date any material or labor was provided by KP was before June 18, 2015. Mrs. Comose, the only member/employee of KP, was deposed on April 7, 2017. In that deposition, Mrs. Comose stated that she furnished no materials or labor after June 18, 2015. Additionally, there is corroborating evidence in the form of e-mails and other documents that indicate KP was no longer providing services of material after that June 18, 2015 date. (Order, p. 4; italics added).

When Appellant, in support of her Motion to Alter or Amend, insisted that the Judge focus on the documentary evidence (in the form of the cancelled KP check) of her expending $550 of Kitchen Planners' money in support of performance of its contractual duties, on September 29, 2015, the Order denying Plaintiff's Motion to Alter or Amend stated,

> The Court found that the Affidavit [of Patricia Comose] was not creditable as it was a self-serving statement which was in complete contradiction to all of the other evidence including the dates on the Lien, the e-mails between the parties and Mrs. Comose's own sworn testimony that she provided no materials after June 18, 2015 and that Derrick Tackett had been fired from Friedman job by August 18, 2015 (the date given in the Lien). (Order, p 2; italics added).

It is not for the Judge here to make decisions concerning credibility. There is a clear genuine issue of fact on when the last labor and materials were furnished in the case, and documentary evidence supporting Appellant's contentions are in the Record. A jury needs to decide. The slight discrepancy in the date alleged in the lien, August 18, 2015, with the actual date of the last work, September 29, 2015, can be easily cured by amendment to conform to the proof, and the Order should be reversed.

Pleadings in mechanic's lien actions may be amended as in any other civil actions. S.C. Code Ann. §29-5-180 (1976). No inaccuracy in the Statement of Account invalidates the proceedings if the property can be reasonably recognized. S.C. Code Ann. §29-5-100 (1976). The error is plain and summary judgment should be reversed.

B. Appellant furnished labor and materials used in the improvement of Respondents' residence.

S.C. Code Ann. §29-5-10 (1976), requires that labor performed and materials furnished be actually used for improvements or repair of the residence.

The second basis for the granting of summary judgment is "that there is no question of material fact that the materials furnished by KP were never installed in the Friedman's home..." (Order, p. 4)

Again, there are genuine issues of material facts in the Record which prove Kitchen Planners' labor and materials were utilized and installed and improved Respondents residence. Attached as the final three pages to Patricia Comose's Affidavit is the estimate of Viggiano Remodeling, LLC, the contractor who ultimately finished Respondents' kitchen. This estimate provides "all usable hardware and drawers from the existing Crystal Cabinets

will be reflected as a credit in final price." "[H]ardware and drawers" from the cabinetry is an expansive category of the product sold by the Appellant to Respondents. Materials furnished by Appellant were in fact installed in Respondents' house.

As Appellant explained in her deposition, the entire cabinet order of Respondents was special ordered – these cabinets are unique to Respondents' kitchen, and cannot be utilized anywhere else, except in the exact floor plan of the Respondents' kitchen. (Deposition) The remainder of the cabinets not cannibalized by Viggiano are still with Respondents, who have apparently elected to install some, but not all, of the product. It was Respondents who refused to allow Appellant to install the cabinets (Deposition) and Respondents should be estopped to complain and attempt to raise this technicality they themselves created.

Also, all of the labor under the contract has been performed by Appellant and used in the design of the kitchen, so, again, the requirements of S.C. Code Ann. §29-5-10 (1976) are met. Appellant was questioned closely and repeatedly throughout her deposition about how the contract price had been set, which was the wholesale cost she paid to Crystal Cabinets plus an industry-wide standard markup of 33%. (Answers to Interrogatories; Deposition). Although Appellant initially charged Respondents a $500 design fee for her work, that design fee was allowed as a credit on the cabinet price (Exhibit 2, Deposition). However, Appellant literally spent hundreds of hours working with Respondents on their kitchen, without charging for her labor, which was in fact compensated by the 33% margin increase. (Deposition, Exhibit 5).

Appellant is an interior decorator with over 25 years' experience, and a member of the American Society of Interior Designers. Her hourly rate is

$125, but in contracts where the customer buys the cabinets from her, she applies the industry standard markup of 33%, and, in addition, performs all necessary labor, including design, problem solving, supervising installation, re-ordering as needed and doing whatever else needs doing. A typical project lasts six weeks. (Deposition)

Respondents have paid the first two of the three installments due Appellant under the written contract between the parties. As Respondents' attorney pointed out in questioning Mrs. Comose, she in fact has now recovered her actual wholesale cost of the cabinets. (Deposition) However, unquestionably, Appellant has expended many hours in labor in designing and implementing the remodeling of Respondents' kitchen, and the balance of the contract price is due her is because of the labor she has expended as well as the expense of the cabinets. This is a genuine issue of fact, and summary judgment should not have been granted. The Trial Judge in his Order Denying Plaintiff's Motion to Alter or Amend noted the "Court finds Ms. Comose's affidavit unpersuasive and fails to establish a question of fact." (Order) This is clear error.

C. The lien is claimed in the correct amount.

Respondents alleged in their sixth defense in their Answer a violation of S.C. Code Ann. §29-5-100 (1976), which provides in full:

> No inaccuracy in such statement relating to the property to be covered by the lien, if the property can be easily recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, unless it appears that the person filing the certificate has willfully and knowingly claimed more than is his due.

In this case, Respondents' attorney spent a good portion of his time for questioning Appellant at her deposition in establishing the wholesale price Appellant paid Crystal Cabinets, together with determining the other out of pocket expenses Appellant had incurred in the job, and in arguing that the two of the three installment payments Respondents have made constituted enough money to pay her. (Deposition).

The trial judge in granting summary judgment on this basis stated:

> In this case, Plaintiff testified that she already made a profit prior to filing the Lien. The terms of overhead and profit were not specified in the contract. The Lien is seeking solely overhead and profit. Ms. Comose understood this when she filed the Lien; therefore, she knowingly sought more than she was entitled. This action is in violation of S.C. Code Ann. Section 29-5-100. Therefore, the amount sought is not for materials used in the job, but for overhead and profit alone. The Court finds that there is no question of material fact that the Plaintiff willfully and knowingly claimed more than her due; therefore, the Lien should be dissolved, and the cause of action for foreclosure of the Lien dismissed with prejudice.

This statement by the Court in the Order granting summary judgment is palpably inaccurate. Uncontestably, there is a written contract between the parties which of course includes a profit margin for Appellant, and that contract has been fully performed on Appellant's end. (Contract)

The Order on Appeal cites the case of Zepsa Construction, Inc. v. Randazzo, 357 S.C. 32, 591 S.E. 2d 29 (Ct.App. 2003). In Zepsa, the parties entered into a written contract and the Plaintiff contractor commenced work, completing about $10,000 worth of work before the termination of the contract, which contract was originally for a $610,000 agreed price. The contractor was held entitled to a recovery of the value of his actual work, under the lien. In addition, he was allowed to retain the $21,000 the owner

previously paid contractor as part of a down payment, because the "deposit" was not associated with any labor performed. 357 S.C. 39, 591 S.E.2d 36.

The Court of Appeals recognized that this result was consistent with good contract law, citing decisions from prior jurisdictions:

> [A] claim for lost profits arising from a breach of contract based on wrongful termination of the contract before construction is completed cannot be asserted as a mechanic's lien...357 S.C. 39, 591 S.E.2d 36. (emphasis added)

However, the Court of Appeals in Zepsa also discussed the decision of the South Carolina Supreme Court in Sentry Engineering & Construction, Inc. v. Mariner's Cay Dev. Corporation, 287 S.C. 346, 338 S.E.2d 631 (1985).

Sentry affirmed summary judgment granted to allow the lien holder to foreclose its mechanic's lien based upon an arbitration award earlier entered, which included compensation for lost profits. The Court of Appeals in Zepsa recognized that:

> [T]he Supreme Court [in Sentry] expanded the items that are recoverable under the mechanic's lien statute to include overhead and profit. *However, this holding is only available in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied in a contract.* 357 S.C. 37-38, 291 S.E.2d 34. (emphasis added)

Here, the contract between the parties has been completely executed and Appellant has fully performed. (The additional installation charge of $2,995 specified in the contract is not included in the statement of account of the mechanic's lien, because Kitchen Planners did not actually install.) However, Appellant has fully performed all of her labor hours, and delivered to Respondents the unique product they purchased for their kitchen. This case is nothing more than a routine mechanic's lien foreclosure action to

collect the balance due on a written contract, and it was error to grant summary judgment on the basis of a supposed violation of S.C. Code Ann. §29-5-100 (1976).

D. The action to foreclose the lien was timely commenced.

For the same reasons set forth in Argument I.(A) above, the suit for foreclosure was timely commenced on January 13, 2016, which is less than six months after the last work Appellant performed on September 29, 2015. See S.C. Code Ann. §29-5-120 (1976).

II. Appellant's Motion to Strike should have been granted.

The Motion to Dismiss Mechanic's Lien and Foreclosure served by Respondents in January 2017 was unsupported by any affidavit, and so unspecific as to be unintelligible. Specifically, the entire body of the Motion to Dismiss reads:

> COMES NOW, Samuel E. Friedman and Jane Breyer Friedman by and through their undersigned attorney responding to the Notice and Certificate of Mechanic's Lien and subsequent Foreclosure action filed on January 13, 2016 by The Kitchen Planners, LLC and seeks its dismissal pursuant to SC Statute 29-5-100 and South Carolina Rules of Civil Procedure 56(a). Defendants would show that the lien filed by The Kitchen Planners, LLC, is invalid and that there is no issue of fact to support the Plaintiff's claims and that Defendants are entitled to a dismissal of the Lien and the dismissal of the Plaintiff's cause of action for Foreclosure of the Lien with prejudice.
>
> Wherefore Defendants would move this Court to dismiss the Lien and the Plaintiff's cause of action for Foreclosure with prejudice pursuant to SC Statute 29-5-10, 29-5-100 and South Carolina Rule of Civil Procedure 56(a). In addition Defendant would direct the Court to award Defendant all attorney's fees and costs for defending this claim Pursuant to SC Statute 29-5-20. Defendants may supplement with a memorandum of law to be filed prior to the hearing of this matter. (Record)

SCRCP Rule 6(d) requires that when, "a motion is to be supported by affidavit, the affidavit shall be served with the motion..."

Appellant's counsel received a two-page affidavit form Respondent Samuel Friedman on April 17, 2017, a week prior to the Motion hearing date of April 25, 2017.

The following day Appellant served via mail and email an opposing affidavit of Patricia Comose, as well as a Motion to Strike the affidavit of

Sam Friedman, objecting to the timeliness of service of the Friedman affidavit, and the introduction of any matters outside of the pleadings at the upcoming hearing for the Motion to Dismiss. Then, on April 20, 2017 Respondents counsel served by mail a memorandum which contained additional evidentiary exhibits. (Memorandum)

Counsel for Appellant at the hearing called to the Court's attention that she had filed a Motion to Strike the Affidavit of Friedman that she had received April 17, 2017. Counsel objected at the timeliness of service, and the attorney for Respondents confusingly asserted that, "I did file the affidavit for 10 days before this hearing. The understanding of Rule 6 being that this hearing is going to be set within ten days of your motion." (Transcript April 25, 2017, line 18, p. 3 through line 10, p. 5). The Court ruled, "I'm going to deny your Motion to Strike the Affidavit. You've had time to review it, had time to reply to it." (Lines 4 through 6, p. 5).

Appellant objects to the violation of basic rules of pleading committed by the last minute conversion of the nonspecific Motion to Dismiss into a motion for summary judgment. Appellant objects to every affidavit and evidentiary exhibit the Respondents utilized in support of their Motion to Dismiss being served and received by her counsel only during the week prior to the hearing. The Trial Judge should not have allowed conversion due to Respondents' tardiness.

III. The trial judge erred in awarding attorneys' fees.

A. The award of attorneys' fees should be reversed because the Order granting Summary Judgment should be reversed.

Obviously, if this Court correctly reverses the Order Granting Summary Judgment, then the fee award cannot stand, and should likewise be reversed. See, Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC, 2014 S.C. Lexis 255 (2014).

B. The attorneys' fee award should be reversed because the amount of fees was not properly proven.

Respondents attached a two and a half-page Affidavit of Attorneys' Fees as Exhibit E to their Memorandum filed with the Court April 20, 2017 and served by mail on the attorney for Appellant that same date.

Paragraph 9 on the second page of this Affidavit asserts that the attorney for Respondents had spent through April 19, 2017, 58.6 hours on the case, and that the "time was necessarily expended in the preparation of for this cause..." The attorney hours claimed are not itemized in the affidavit. (Affidavit) That amount of attorney time is a week and a half of solid, fulltime work.

In this case, there were no hearings prior to April 25, 2017. Defendant had served a one-page motion in January 2017, which he had four months later supported by a one and a half-page affidavit of one of his clients. He had taken the deposition of Patricia Comose, the member/owner of The Kitchen Planners, LLC on April 7, 2017, from 10:00 a.m. to 1:00 p.m. The attorney for Appellant had also taken the depositions of Respondents. Both sides had served and answered simple discovery. The attorney for Respondents had also amended his Answer and filed a third-party counterclaim against manufacturer Crystal Cabinets, Inc., and had reached

a separate settlement with that Defendant at mediation, although he had refused to reveal to Appellant the amount paid at settlement, claiming it was confidential. Respondents had filed April 17, 2017 a motion for protective order (Motion). This Motion was not scheduled to be heard April 25, although the Order denying Plaintiff's Motion to Alter or Amend gratuitously and improperly grants the Motion, in a backhand fashion, in connection with denial of Appellant's request that the attorneys' fee award be vacated. (Paragraph 15 of Order denying Plaintiff's Motion to Alter or Amend).

The Order granting Defendants' Motion for Summary Judgment recites the six factors to consider in determining the amount of attorneys' fees, but fails to discuss or make any specific findings about any of the six factors.

It is difficult to conceive how an attorney could expend almost 60 hours in this case to date. Perhaps some of the time was expended in developing the third-party claim against Crystal Cabinets, but given the improper un-itemized bill, this cannot be determined. See, e.g. Griffith v. Griffith, 332 S.C. 603, 506 S.E.2d (Ct.App. 1998); Johnson v. Johnson, 288 S.C. 270, 341 S.E.2d 811 (Ct. App. 1985).

Appellant is confident that the summary judgment will be reversed and the fee award vacated because there are clearly genuine issues of material fact. However, Appellant has appealed specifically the present issue to show the pervasive errors shot through this entire proceeding.

CONCLUSION

Appellant would request that the Orders granting Defendant's Motion for Summary Judgement, and the Order denying Plaintiff's Motion

to Alter or Amend be reversed *in toto* and the case remanded for trial by a jury.

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November 27, 2017

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter to be Included In Record On Appeal, on Counsel for Charles A. Krawczyk, Esquire, by depositing a copy in the United States Mail, postage prepaid, on November 27, 2017 addressed to Charles A. Krawczyk, Esquire, Finkel Law Firm, LLC, P O Box 1799, Columbia, SC 29201.

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November 27, 2017

The Honorable V. Claire Allen, Deputy Clerk
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Re: The Kitchen Planners LLC, Appellant v. Samuel E. Friedman and Jane Brown Friedman and Branch Banking and Trust, Respondent
Appellate Case No.: 2017-00-1522

Dear Clerk Allen:

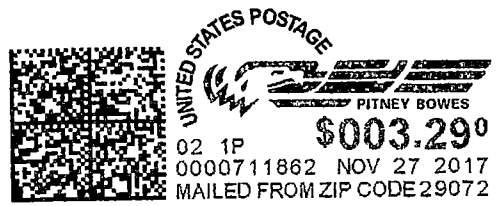
Enclosed please find the original and one copy of Appellant's Designation of Matter to be Included in Record on Appeal and Appellant's Initial Brief, together with a Proof of Service of each document upon opposing counsel, which I would request that you file. Please return to me the clocked-in copy of each in the self-addressed stamped envelope.

With kindest regards,

Jean P. Derrick
JPD/mh

Enclosures

cc: Charles Krawczyk, Esquire (w/enclosure)
Patricia C. Comose (w/enclosure)



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