

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Special Referee

Case No. 2010-CP-40-8621

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JUL 07 2014

SC Court of Appeals

C.R. Meyer and Sons Company, ... Plaintiff,

v.

Custom Mechanical CSRA, LLC Defendant.

And

Custom Mechanical CSRA, LLC is Respondent,

v.

Plumbers & Steam Fitters Local #150 Health and Welfare Fund;
Plumbers & Steam Fitters Local #150 Pension Fund; Plumbers &
Steam Fitters Local #150 Annuity Fund, and Jackie K. Nordeen, Jr.
and Patrick H.F. Smith, IV, as Trustees of these Funds; Plumbers
& Steam Fitters Local #150 Vacation Fund and Patrick H. F. Smith, IV
and Joseph L. Dozier, as Trustees of this Fund; Augusta Joint
Apprenticeship and Journeymen Training Committee, and Patrick
H.F. Smith, IV and Charles I. Hardigree, as Trustees of this Fund;
Trustees of Southern Iron Workers Pension Fund; Trustees of
Southeastern Iron Workers Healthcare Plan; Trustees of
Southeastern Iron Workers #709 Joint Apprenticeship and
Training committee and Local #709, International Association
of Bridge, Structural, Ornamental and Reinforcing Iron Workers;
Southeastern Carpenters and Millwrights Health Trust,
Southeastern Carpenters and Millwrights Pension Trust, Larry
Phillips and J. Kirk Malone, as Trustees of these Funds;
Ferguson Enterprises, Inc.; Presidential Financial Corporation;
Norton Welding Supply, Inc.; United Rentals (North America), Inc.;
Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D.
Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade
Cliett; Christopher Cullipher; David W. Cullipher; Joseph A.
Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.;

Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; Bruce Pollock, Jr.; and, Security Federal Bank, ... Third Party Defendants,

Of Whom

Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; and Bruce Pollock, Jr. are Appellants,

And Presidential Financial and Security Federal Bank, ... are also Respondents.

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TABLE OF AUTHORITIES

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STATUTES

S.C. Code Ann. § 29-7-10 (Supp. 2012)	2, 4, 5, 7, 10
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ARGUMENT

Appellants take issue with numerous factual statements Respondents have made throughout their brief. In cases applying the preponderance of the evidence burden of proof, summary judgment is inappropriate if the non-moving party submits a mere scintilla of evidence in support of the non-movant's case. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012). This is true even where there are cross-motions for summary judgment. *See Springob v. University of South Carolina*, Op. No. 27363 (S.C. Sup. Ct. filed March 12, 2014) (Shearouse Adv. Sh. No. 10 at 28) (Supreme Court applied scintilla rule where parties filed cross-motions for summary judgment). Appellants therefore file this Reply Brief to address some of those factual misstatements.

It is important for this Court to understand that Custom Industrial and Custom Mechanical did not manufacture anything. These companies were compensated solely for the services (*i.e.*, labor) on the contracts, and the labor was provided solely by the Appellants – the Custom Employees were the *only* labor on the contract. The “CRMV Custom Award Spreadsheet” that the arbitrators prepared demonstrates that the arbitration award to C.R. Meyer was based in large part upon *labor* that was provided by the Appellants. (R. pp.474-483). The balance due for the *labor* that the Custom entities provided through the Custom Employees (the Appellants) was \$1,776,648.00, and to that amount was added \$200,000.00 for “attorney’s fees and legal expenses.” (R. pp.474-483) Without the Custom Employees, there is *no* arbitration award, and there is *no* pot of money against which these banks assert a superior interest. (R. p.21).

Respondents minimize the Custom Employees’ role in this project. (Brief of

Respondent, p. 8). They note Custom Mechanical provided union-labor services for the Project, but this involved *all* of Custom's staffing for the project.

Importantly, Respondents concede that Appellants were "laborers" on the project for purposes of Section 29-7-10. (Resp. Br. p. 25, part (2)). They point to the fact that they did not appeal the Special Referee's finding of such, but the truth is that no finding to the contrary could have honestly been made.

Regarding particular factual assertions, Respondents mention that "twenty-six of the current twenty-nine Appellants" brought suit against the Custom entities. (Resp. Br. pp. 10-11). Respondents omit that the complaint was later amended in November 2009 to include all twenty-nine Appellants. (R. p.211).

Respondents characterize the withholding contracts for the vacation/holiday funds as "contracts with their union...." (Resp. Br. p. 2). Respondents also assert "the union gave them the opportunity to participate in a voluntary payroll deduction plan." (Resp. Br. p. 10). They also assert a lack of "privity of contract for vacation funds between Appellants and Custom Industrial, much less between Appellants and Custom Mechanical." (Resp. Br. p. 33).

The contracts, however, covering Custom Employees Matt Lever, George Lever, Tony Hall, Nicholas Stewart and William McFerrin all say "Custom Mechanical" at the top. (R. pp.813-837). Other contracts say "Custom Industrial" on them. (R. pp.813-837). None of the agreements regarding the vacation/holiday funds are written to suggest that the agreements are with the Union; rather, all of them are on forms created by Custom Industrial or Custom Mechanical, and all describe the Custom Employees as

“Employees” of either Custom Mechanical or Custom Industrial. And it was not the union doing the withholding; rather, the Custom entities withheld these funds. Thus, while Custom Employees participated in the voluntary payroll deduction plan through the union, that plan was offered according to paperwork that Custom Mechanical and Custom Industrial provided.

Respondents mention that the settlement proceeds of \$1.8 million were paid “into Custom Mechanical’s attorney’s escrow account for the benefit of Custom Mechanical’s creditors.” (Resp. Br. p. 3). Appellants are among those creditors, and they are the only non-bank creditors remaining. Custom Mechanical itself filed a third-party complaint to implead the Appellants as named creditors. (R. p.250, ¶¶ 11, 13).

Respondents also characterize the order as directing “C.R. Meyer to pay the sum of [\$2,000,000.00] into the escrow account of Richardson Plowden & Robinson, P.A....” (Resp. Br. p. 14; see also p. 26, 27). The order actually states, however, “C.R. Meyer will pay the sum of \$2,000,000.00 to *Custom* within ten (10) days of the date of this order. The funds will be transferred by electronic fund transfer into the escrow account of Richardson Plowden & Robinson, P.A.” (R. p.24, ¶ 1); (emphasis added). So the funds were actually being paid to *Custom*, not the lawyers – the lawyers were merely holding the funds as agents in escrow to ensure their availability to pay creditors, including Appellants. The concern arose because of the financial situation of the principals. *Cf.* Resp. Br. p. 28 (“all parties agreed that Custom Mechanical should not receive the funds due to its precarious financial situation.”).

In a footnote, Respondents note the law firm, “Richardson Plowden & Robinson,

PA, represented Custom Mechanical in the arbitration and resulting litigation, including the filing of the Third-Party Complaint in the present litigation.” (Brief of Respondent, p. 14, n. 5). Respondent omits, however, the fact that this law firm, Richardson Plowden & Robinson, PA, also defended Custom Mechanical and Custom Industrial in the underlying lawsuit brought by the Custom Employees.

The Respondents erroneously contend the case “concerns Appellants’ alleged priority under S.C. Code Ann. Section 29-7-10 to a first lien on approximately Fifty Thousand Dollars (\$50,000) if successful.” (Resp. Br. p. 8). They also describe the claim as one for \$275,000 “as well as pre-judgment interest.” (Resp. Br. p. 6). Respondents add that it “was not disputed...that Appellants assert priority to only \$275,000 of the \$1,800,000....” (Resp. Br. p. 16). None of these assertions is entirely correct. The dispute in fact involves *at least* \$275,000.00, which is the amount of the confession of judgment entered on February 14, 2011, against Custom Industrial, Custom Mechanical and their sister company in favor of the Custom Employees for the wrongfully withheld and unpaid wages. It *also* involves claims for interest, costs, and attorney’s fees that are recoverable under the Payment of Wages Act. The total amount sought will therefore exceed \$275,000.00.

Respondents also contend “the sole purpose of the current litigation is to determine who has priority to the remaining amounts deposited in escrow for Custom Mechanical’s, not Custom Industrial’s, creditors.” (Brief of Respondent, p. 8). Again, this is not correct. The purpose of this litigation was to determine priority in the entire \$1.8 million dollars paid to Custom’s lawyers as its agent. (R. p.288). Further, Respondents

concede Custom Mechanical is the only owner of Custom Industrial. (Resp. Br. p. 2; describing Custom Industrial as “a wholly-owned subsidiary” of Custom Mechanical).

Respondents contend “the parties agreed to raise the amount remaining in escrow from \$275,00 to \$325,000....” (Resp. Br. p. 16). There was, however, no such agreement. Instead, on November 7, 2012, over the Appellants’ objection, Judge Williams ordered this amount (\$325,000) withheld. (R. pp.40-41).

Respondents also contend that because \$1,475,000 has already been received by Presidential and Security Federal, this matter is limited to the remaining funds in the Arbitration Award. (Resp. Br. p. 16). They also assert that the “appeal concerns the narrow issue of whether Appellants are entitled to a lien under Section 29-7-10 for a portion of the remaining \$325,000 in Arbitration Award funds currently being held in escrow pending a court order on the determination of priority and distribution of funds.” (Resp. Br. p. 19). Again, these statements mischaracterize the claims as well as the circuit court’s order. The November 2012 order specifically stated, “[t]his amount is set aside without prejudice to either party as to any possible recovery. Accordingly, I find that the Custom Employees will suffer no prejudice by the disbursement of [\$1,475,000] to Presidential and Security Federal, to be shared equally.” (R. p.41). And as noted above, the claims include the \$275,000 confessed judgment together with interest, costs and attorney’s fees permitted by law.

Respondents note “Appellants’ Joint Reply contains no allegation or claim relating to the Wage Payment Act or any theory of piercing the corporate veil, alter ego, or an amalgamation of interests.” (Resp. Br. p. 15). Of course, these claims would not be

relevant as between these parties, who are third parties vying for priority to a pool of money. This was a declaratory judgment matter brought by the banks, so the reply would not logically contain any allegations aimed at the Custom entities.

Furthermore, on February 11, 2011, the Aiken County Court issued a Warrant of Attachment (Money), commanding law enforcement to seize so much of the arbitration award proceeds to secure so much of the proceeds of the \$1,976,548.00 Arbitration Award as was needed to secure the Custom Employees' judgment of \$275,000.00. (R. p.489). At the same time, Custom Mechanical, Custom Industrial and all of their then-members assigned their interests in the arbitration award to the Custom Employees as collateral for the confession of judgment. (R. p.484).

Respondents contend that "Appellants cannot maintain an action as a creditor of Custom Mechanical under Section 29-7-10." (Resp. Br. p. 34). This contention, however, ignores that Custom Mechanical sued the Custom Employees and impleaded them as potential creditors. (R. p.250, ¶ 11; R. p.251, ¶ 13). And as noted above, Custom Mechanical also gave the Custom Employees a confession of judgment and assignment of claims to the arbitration award.

Union Recovery versus Custom Employees Remedies

In describing the action brought by the Union, Respondents mischaracterize the litigation. (Resp. Br. Pp. 15-16). The Union was pursuing its own rights to payment from Custom Industrial and Custom Mechanical by disgorgement of collected union dues, healthcare premiums, and pension contributions.

Custom Industrial and Custom Mechanical withheld the wages from the Custom Employees for participation in the voluntary payroll deduction for vacation/holiday savings funds, and these funds were to be paid to the appropriate union so that the union could write checks to the Custom Employees and their co-workers during the summer and Christmas holidays. (R. p.196, ¶¶ 47, 48; R. p.277, ¶¶ 21, 22). Custom Industrial and Custom Mechanical withheld these wages but never paid them to the Union. Because the Union never received the wages the Union could not pay them out to the Custom Employees. Only the Custom Employees, whose wages had been wrongfully withheld, could assert their statutory right to recover wrongfully withheld wages, treble damages and attorney's fees under the South Carolina Payment of Wages Act. The Union could not and did not sue for recover under that Act.

The Union accepted \$10,000.00 to settle all of its claims. None of that money was ever paid to the Custom Employees. In other words, the Custom Employees have never been paid certain wages owed to them for their labor. But those claims were not the same claims as the claims the Custom Employees had against Custom Industrial and Custom Mechanical.

Also, Respondents contend the Appellants' "claims were barred" "to the extent

Appellants were seeking the same monies” as the unions. (Resp. Br. pp. 15-16). However, the parties were not the same, nor were the parties seeking the same remedies. Neither *res judicata* nor collateral estoppel would apply.

Argument Regarding Amalgamation is Preserved

Respondents assert that any argument regarding amalgamation was not preserved because it was not raised in the Rule 59 motion the Custom Employees filed. (Resp. Br. Pp. 20-21). Appellants dispute this assertion.

In the Motion, Appellants asserted that “Custom Industrial and Custom Mechanical withheld said wages and never paid them to the union.” (R. p.417, ¶ 8). Appellants also pointed out that both Custom Industrial and Custom Mechanical were defendants in the suit involving the Payment of Wages claims, and that both admitted they had wrongfully withheld the wages. (*Id.*). Both entities confessed the judgment to the Appellants. (R. pp.417-418, ¶ 8). These assertions sufficiently raise the point that there was an amalgamation between the two entities.

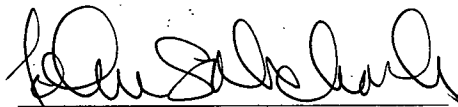
CONCLUSION

Respondents note "it is undisputed that if a lien does not attach under Section 29-7-10, Presidential and Security Federal have priority over Appellants to the remaining proceeds of the Arbitration Award." (Resp. Br. p. 3). Of course, the contrary would also be true – if the lien under Section 29-7-10 applies, then Appellants have priority to those funds.

Once again this matter comes to this Court under a grant of summary judgment for the Respondents. If there is a scintilla of evidence supporting Appellants' view of the evidence, then this Court must reverse.

For the reasons stated the Court should reverse the Special Referee's judgment and should remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted,



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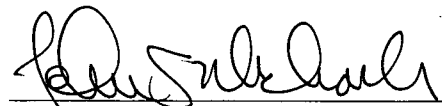
Of Whom

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And Presidential Financial and Security Federal Bank, ... are also Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants and Reply Brief* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.



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