THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master in Equity

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SC Court of Appeals

Appellate Case No. 2018-001971

RS Custom Homes, n/k/a RS General Contracting, LLC, Respondent

v.

Matthew David DeNapoli, Lindsay Ann DeNapoli, and Branch Banking & Trust, and Mortgage Electronic Registration Systems, Inc., Defendants.

Of whom Matthew David DeNapoli and Lindsay Ann DeNapoli are Appellants.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. The trial court's findings of fact that the owners waived strict adherence to change order requirements in the contract by directing scope changes and incurring costs in excess of allowance items were supported by evidence, and the Master's determination that the owners thereby breached the contract should be affirmed.

II. The trial court correctly held that pre-judgment interest was properly awardable on sums that were capable of being reduced to certainty when payment was demandable.

III. The trial court's enforcement of the builder's mechanic's lien must be affirmed because Appellants raised the issues of timeliness and the amount of the lien for the first time in their motion to reconsider, and the evidence at trial supports its validity and timeliness.

STATEMENT OF THE CASE[1]

This action was commenced by the Respondent Builder, which was then known as RS Custom Homes, on February 17, 2015 in the Court of Common Pleas for Charleston County. The Builder's complaint against the Appellant Owners asserted causes of action for breach of contract, *quantum meruit,* and foreclosure of a mechanic's lien that had previously been filed on February 9, 2015. On or about March 18, 2015, Owners filed and served an answer that denied in general terms the allegations of the Builder's complaint, asserted several affirmative defenses and counterclaimed for breach of contract, negligence, breach of warranty of habitability and fitness for a particular purpose, breach of warranty of workmanlike service and breach of express warranty. On April 17, 2015, Builder served a reply to the counterclaims by generally denying the allegations thereof and raising several affirmative defenses.

The circuit court issued an order on November 7, 2016 referring the case to the Master in Equity. The order stated that the Master in Equity was to issue a final order, with any appeal being made to the South Carolina Court of Appeals pursuant to S.C. Code Ann. §14-11-85 (1976). In accordance with the order of reference, the Master in Equity conducted a trial without a jury on January 30, 2018. The trial proceeded for three days concluding on February 1, 2018. The Master took the evidence under advisement and on May 30, 2018, he issued his detailed findings of fact and conclusions of law with an initial award in favor of the Builder in the amount of $412,952.90 with attorney's fees to be determined by the Court in a subsequent proceeding.

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[1] Rule 208(b)(1)(C), SCACR, mandates that the statement of the case shall be a concise history of the proceedings and shall not contained contested matters. Appellants' statement of the case does not comply with that Rule in that it is argumentative, makes assertions that are without evidentiary support, and lacks the information required by the Rule. Their statement of the case should accordingly be disregarded.

Builder served its petition for attorney's fees and costs as the prevailing party in a mechanic's lien action on June 25, 2018.

Owners filed a motion to alter and amend and/or reconsider the trial court's May 30, 2018 order on June 20, 2018. Builder filed and served a return to Owners' motion to alter and amend on August 13, 2018.

The Master conducted a hearing on both the Builder's motion for attorney's fees and costs and on the Owners' motion to alter and amend and/or reconsider. The Master issued an order dated September 24, 2018 denying the Owners' motion to reconsider as he found no basis to alter or amend the May 30, 2018 order. He granted the Builder's motion for attorney's fees and costs in the amount of $80,157.53, enrolling a judgment in favor of RS Custom Homes against the Defendants Matthew DeNapoli and Lindsay Ann DeNapoli in the amount of $493,110.43.

Subsequently, on October 12, 2018, Owners filed a second motion to alter and amend and/or reconsider. In their October 12 motion, filed some nine months after the case was tried, Owners asserted for the first time that the mechanic's lien was invalid and unenforceable because the Builder failed to offer evidence that it furnished labor and materials within 90 days of filing the mechanic's lien. Owners also contested the award of certain costs in that motion. Builder filed a return to the second motion to reconsider on November 30, 2018.

The Master conducted a hearing on the second motion to reconsider and issued an order denying the motion on December 18, 2018. As to the validity of the mechanic's lien, the trial court found that the mechanic's lien was properly and timely filed. However, the Master granted, in part, the motion to reconsider the award of costs in the amount of $776.07 and accordingly reduced the final judgment. Therefore, judgment was enrolled in favor of RS

Custom Homes a/k/a RS General Contracting, LLC[2] against Matthew DeNapoli and Lindsay Ann DeNapoli in the amount of $492,334.36.

Owners appealed from the Master's orders. Appellants' initial notice of appeal was dated November 1, 2018. That notice appealed from the final order and judgment dated May 30, 2018 and the Form 4 order dated September 24, 2018 that denied Owners' motion to reconsider and awarding attorney's fees and costs. On January 30, 2019, Appellants served a notice of appeal from the Form 4 order of December 27, 2018 that denied Appellants' successive motion to reconsider and motion challenging the validity of the subject mechanic's lien.

A motion to consolidate the appeals was filed on or about January 30, 2019, which motion was granted without opposition by order filed by this Court on March 15, 2019.

[2] The name of the Builder was changed during the pendency of the action.

STANDARD OF REVIEW

Actions to foreclose a mechanic's lien and for damages due to breach of contract are both deemed to be actions at law. In actions at law tried without a jury, the trial judge's findings of fact will not be disturbed on appeal unless found to be without evidence reasonably supporting them. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Karl Sitte Plumbing Co. v. Darby Dev. Co.*, 295 S.C. 70, 77, 367 S.E.2d 162, 166 (1988). In such cases, *Townes* requires that the appellate court review the evidence, "not to determine the preponderance thereof but to determine whether there is *any* evidence which reasonably supports the factual findings" of the trial judge. *Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 776 (emphasis added).

By contrast, questions of law such as the interpretation of contracts may be reviewed by an appellate court without deference to the conclusions of the trial court. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 685 S.E.2d 539 (Ct. App. 2008). Missing from the Appellants' discussion of the standard of review on appeal is any consideration to the Master's extensive and detailed 17 page findings of fact. Those findings of fact formed the basis for the Master's decision and are subject to a deferential review. They may not be reversed where there is any supporting evidence.

INTRODUCTION

At trial, the Builder proved that he was entitled to recover for unpaid scope changes and costs in excess of allowance items incurred in completing construction of the Owners' residence in Mount Pleasant. Owners wrongfully terminated the contract after the house was substantially complete and Owners had moved in, leaving a substantial unpaid balance due to the Builder. In his detailed findings of fact and conclusions of law, the Master in Equity correctly found as facts that the Owners committed acts in breach of the contract, wrongfully failed to pay the Builder for hundreds of thousands of dollars in scope changes and excess allowance items, unfairly misapplied and misconstrued contractual provisions regarding the construction budget and change orders, and waived strict enforcement of those provisions.

On appeal, Owners attempt to characterize the detailed findings of the master as "errors of law" in order to have this Court retry the case and reconsider the facts properly found by the Master. Those factual findings are entitled to deference and are not properly challenged on this appeal. The Master in Equity's findings of fact and conclusions of law and his resulting award of damages should be affirmed because the Appellants failed to demonstrate any basis upon which the Master's orders should be reversed. Moreover, Owners raise an unpreserved and untimely challenge to the mechanic's lien that has no factual basis, and they incorrectly argue that the trial court erred in awarding prejudgment interest. The Master's Orders are supported by the evidence and should be affirmed.

ARGUMENT

I. The trial court's findings of fact that the owners waived strict adherence to change order requirements in the contract by directing scope changes and incurring costs in excess of allowance items were supported by evidence, and the Master's determination that the owners thereby breached the contract should be affirmed.

The trial court made specific and detailed findings of fact and conclusions of law concerning the creation and performance of the contract between the Builder and the Owners. The court noted that the Owners themselves revised the contract form originally presented by the Builder as a standard form AIA Agreement. (Tr. p. ___, Finding of Fact 2) The trial court also noted that the agreement contained seven additional terms that were not included in the standard AIA form (Tr. p. ___, Finding of Fact 3), and an addendum to the agreement contained an additional provision regarding the Owners' review of final estimates prior to work. (Tr. p. ___, Finding of Fact 4) Contrary to the Owners' arguments, the trial court correctly construed the contract as a fixed price agreement (Tr. p. ___, Finding of Fact 5), but found that the record was "replete with examples where the Builder was asked to perform additional work and such additional work was completed, accepted and even paid for without the Builder obtaining the homeowners' written approval of the detailed final estimates called for in this section." (Tr. p. ___, Finding of Fact 4)

The trial court's findings of fact recite a litany of evidence supporting scope changes, the Owners' selection of materials on the Builder's account in excess of allowances, and waivers of contract provisions relating to contract time and changes. In their Brief, Owners refer to these scope changes and excess allowance items as "overruns," but that is a mischaracterization that is inconsistent with the evidence.

Specifically, the trial court determined that the Owners made and directed scope changes and exceeded allowances in, among others, the following instances:

- Cabinets (Finding of Fact 23);
- Removal of pool (Finding of Fact 26);
- Removal of tile medallion (Finding of Fact 13);
- Electrical fixtures not in budget (Finding of Fact 25);
- Correction of flooring defects from prior contractor (Finding of Fact 27);
- Repeated repairs and alterations to walls and ceiling finishes (Finding of Fact 29);
- Bathtubs changed (Findings of Fact 30, 31);
- Countertops (Finding of Fact 24);
- Tile (Finding of Fact 28);
- Doors (Finding of Fact 32);
- Carpet (Finding of Fact 17).

Under the Owners' theory of the case, the Builder would not be compensated for costs incurred at the instance of the Owners where the Owners specifically ordered materials on the Builder's account to be delivered to the project. They believe that the Builder would not be entitled to compensation for those sums unless the Builder submitted a written change order and a "detailed final estimate" for each item. That would result in an egregious result as the record has many instances where the Owners ordered material on the Builder's account and had the materials delivered to the job. The trial court's order cited examples. Cabinets were not included in the original construction budget. All of the cabinets were to be Owner supplied but some of the cabinets that were present at the time of contracting were damaged or incomplete. The Owners were unable to have the original cabinet maker supply the necessary materials and make repairs, so the Owners asked the Builder to find another cabinet maker, which he did. Some $52,000.00 in materials, ordered by the Owners, were delivered and were charged to the Builder. *See*, generally, Finding of Fact 23. The record contains other examples discussed in the Order.

The Owners' Brief fundamentally misapprehends the trial testimony elicited by their trial counsel from the Builder's expert. Owners mistakenly argue that Builder's expert, Catherine Stoddard, CPA, based her opinion on a theory that Builder was seeking to recover all of

Builder's costs for the work plus a 15% markup. Ms. Stoddard – the only expert to testify at trial – was asked on cross-examination by the Owners' trial counsel (Tr. __ , Trial transcript 256, l. 13-257, l. 6) about the calculations in her expert report (Trial Exhibit 29, Tr. ____). In a portion of her report, she calculated the Builder's total costs expended on the project. However, Ms. Stoddard's trial testimony was based on her calculation of scope changes and excess allowance items, and that formed the basis of the Court's award. The trial court awarded $220,805.00 of those costs, but only to the extent that they represented scope changes and excess allowance items. Order, para. 38, Tr. ____) The record does not support Owner's argument that the trial court improperly converted the fixed-price contract to a cost-plus agreement. Instead, the award specifically stated that the court took the revised construction budget—per change order 1, it is the revised contract amount[3]—and added the scope changes and excess allowance items to calculate a subtotal, from which credits were subtracted to reach the award amount.

Based on the evidence at trial and the trial court's findings, the Owners owed the Builder for the scope changes and excess allowance items. The Owners' failure to pay those items constituted a breach of the contract. In addition, the trial court found facts constituting other breaches of contract that were detailed in the Court's order. Specifically, the trial court found that the Owners admitted in discovery that the Builder was terminated and that the evidence indicated that the Owners expressly terminated the agreement or at least constructively terminated the Builder by withholding payment. (Order, para. 36, Tr. ____) Additionally, the Court found as a fact that the Owners breached the contract by refusing to pay invoices when due, restricting the Builder's ability to complete the work and failing to pay the Builder undisputed sums even after Builder complied with the Owners' request to deliver project cost

[3] Plaintiff's Trial Exhibit 5, Tr. ____.

documents to the Owners' counsel. (Order, para. 37, Tr. ____) Moreover, Owners failed to pay Builder for undisputed sums due. (Order, p. 18, Tr. __)

Owners also argue that the trial court committed an error by including a 15% markup on the additional costs. Again, Owners mischaracterize the award as an award of total costs plus a 15% markup. As previously noted, that position is inaccurate. The 15% markup is, however, authorized by the parties' contract. The specific terms of the first page of the agreement that was added to the contract form by the Owners provided at paragraph 5 that in the event of a change requested by the Owners, change orders will be billed at cost plus 15%. Having found that the Owners owed the Builder for those additional costs and having found the Owners in breach of contract, the Court properly awarded the 15% markup on those additional costs to the Builder, which was entirely consistent with the parties' agreement. South Carolina law allows the nonbreaching party to receive an award of those gains above the costs which would have been realized had the contract been performed. This principle is noted in Appellants' Brief at p. 12. *See, South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct. App. 1990). The Appellants erroneously argue, however, that the trial court misinterpreted this rule to find that "the proper measure of damages in a "fixed price" contract is the contractor's <u>total</u> costs plus a fee of 15%" (Brief of Appellant at 13) (emphasis added). Again, the Court did <u>not</u> award the contractor's total costs. The Court merely awarded the Builder the costs of executing scope changes and for the additional allowance items.

On this issue, the trial court's award is consistent with South Carolina law. There is nothing in *Bensch v. Davidson,* 354 S.C. 173, 177-78, 580 S.E. 2d 128, 130 (2003) which requires a different result. Again, Appellants seek to distinguish *Bensch* from this case misconstruing the Court's award as holding Builder entitled to recover all of its costs and

disregarded the fixed price nature of the agreement. Contrary to Appellants' arguments, nothing in the Court's award was inconsistent with the contract and accordingly there was no error of law. Once again, Appellants argue that "the trial court did nothing more than adopt the 'total cost' figures testified to by Stoddard, and added a fee of 15%." (Brief of Appellant at 14) To the contrary, the trial court's award took the amount contained in the revised construction budget – a contract document[4] – and added the scope changes and allowances in excess of the budget to arrive at the subtotal of $958,349.00 which was the basis for the award. The actual total costs calculated by Ms. Stoddard in her July 31, 2017 expert report was $976,189.00[5], a figure that has no relationship whatsoever to the award. Appellants simply misconstrue the evidence in arguing that the lower court awarded Builder its "total costs."

In attacking the lower court's finding that contractual requirements concerning change orders had been waived, Owners mischaracterize the changes for which compensation was awarded. The trial court specifically found multiple scope changes were made to the agreement and that in making these scope changes, the Owners did not require strict adherence to their contract. In advancing their argument, Appellants misconstrue the types of changes that were awarded. They characterize the changes as "overruns" and resulting from "price fluctuation." (Brief of Appellants at 14-15) The changes that had been found compensable by the lower court had nothing to do with either price changes or overruns. These are wholesale changes in the scope and the quality of materials.

The Owners want to characterize their conduct as innocent and unwary. They argue that they were left with no reason to suspect a change order was needed or to know that they needed

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[4] See, Plaintiff's Exhibit 4, Change Order worksheet and Plaintiff's Exhibit 5, Change Order 1, Tr. ___ and ___.

[5] Plaintiff's Exhibit 29, page 9 of report (Tr. ____).

to stop the work in order to avoid waiver. (Brief of Appellants at 16). Under the facts as found, the Owners were obviously aware of the changes when they directed them or when they selected the materials to be incorporated into their home. In cherry-picking one item – interior trim – to represent a "quintessential example of a cost overrun" (Appellants' Brief at 18), Appellants fail to note that evidence of interior trim as a scope change was presented at trial and was included in the trial court's Findings of Fact. Ms. Stoddard testified regarding this item and stated that the trim work was required because of the type of concrete walls that were present in the house before Builder began its work. She also explained that the Builder had to retrofit doors to fit the space which required additional trim. (Tr. p. ___; transcript of record 222-223) The trial court's finding on this point is not subject to attack because it is supported by evidence at trial.

Appellants also mischaracterized the Court's findings relating to door selection. Appellants acknowledge that no formal change order was prepared and that emails existed in which the Owners acknowledged cost increases due to doors. Appellants argue, however, that by agreeing to pay additional costs for doors, they did not intend to convert the "fixed price contract to a cost-plus for the entire project." The trial court certainly did not find that the changes to doors agreed by the Owners converted the entire agreement to a cost-plus arrangement. The doors are a good example of how the contract was administered and how waiver arose in the course of performance. Ms. Stoddard testified concerning the doors at some length. Due to Owners' decisions, the doors evolved from an MDF-type door throughout the house, to some doors being stain-grade as shown in the revised construction budget, to providing an allowance for a master bedroom door, to ultimately selecting stain grade knotty pine or knotty alder radius top doors at considerable additional cost. There were four additional doors of

similar type that were not accounted for in the original quantities shown on contract documents. (Tr. p. ____; trial transcript pp. 232-233; Plaintiff's Exhibit 25)

Under the Owners' approach to the case, when the Builder acquiesced to Owners' material selections and scope changes, his right of recovery would be limited to the door budget contained in the revised construction budget since there was no change order. (See generally Brief of Appellant at 20 and 10.) Somehow, Owners use this evidence of waiver and the Builder's clear entitlement to compensation for these additional and changed doors as evidence that the trial court erred in finding waiver under the contract. Rather than supporting an argument that the trial court made an error in awarding these additional costs, the issue of doors provides further support for the trial judge's decision. There was ample evidence in the record to support the Court's Finding of Fact that the Owners waived contractual provisions by their course of dealing and the course of performance of the contract.

II. The trial court correctly held that pre-judgment interest was properly awardable on sums that were capable of being reduced to certainty when payment was demandable.

The trial court properly determined that Builder's claim was subject to prejudgment interest. As the Court noted, an obligation to pay money is subject to prejudgment interest if the sum is certain or capable of being reduced to certainty. (Tr. p. ___, Order p. 22) In *Butler Contracting, Inc. v. Court Street, LLC,* 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006), the plaintiff subcontractor was entitled to prejudgment interest notwithstanding what the trial court determined was a "good faith dispute" and the general contractor's assertion of substantial offsets for delay damages. The Supreme Court held the trial court erred in refusing to award the subcontractor prejudgment interest, stating:

> The amount Contractor owed Subcontractor was a sum certain or capable or being reduced to a certainty based on contractual provisions regarding the amount of the

> original contract, the amount of change orders approved by Contractor, and payments made by Contractor. In this case the trial court should have awarded prejudgment interest to Subcontractor after determining the amount Contractor owed Subcontractor. Furthermore, Contractor's assertion of a counterclaim seeking an offset does not prevent an award of prejudgment interest because it is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.

369 S.C. 121, 134-35, 631 S.E.2d at 259 (emphasis added).

The decision of *Miller Construction Co., LLC v PC Construction of Greenwood, Inc.*, 418 S.C. 186, 791 S.E.2d 321 (Ct. App. 2016) further illuminates the issue. There, this Court noted that the right of a party to prejudgment interest is not affected by any right of discount or offset claimed by the opposing party. "It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable" (418 S.C. at 207, 791 S.E.2d at 333), quoting *Butler Contracting,* 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006). In *Miller,* the general contractor admitted that the contract balance owed to the subcontractor was a certain amount yet the general contractor attempted to prove that it was entitled to completely offset that amount by delay damages. The court held that prejudgment interest was awardable but remanded because there was an insufficient record to determine at what point a sum certain claim accrued. Id. at 208, 791 S.E. 2d at 333.

Owners argue that prejudgment interest is not available where the parties did not agree to a calculation of amounts due. They contend that *Southern Welding Works, Inc. v. K&S Construction Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985) stands for the proposition that prejudgment interest should be denied in the absence of a stated account or a means of calculating a liquidated sum. Owners read far too much into the *Southern Welding* holding. *Southern Welding* was tried on a claim for a stated account, yet the plaintiff in that case presented no evidence that there was an agreed price for the repairs that Southern Welding

undertook. The Court of Appeals held that the trial court correctly ruled that prejudgment interest was not allowed. *Southern Welding* is distinguishable because here there is a mechanism for valuing the work accomplished by the Builder. The contract provides for change orders to be priced at cost-plus 15%. The trial court properly decided that the Owners waived strict application of the change provisions and properly determined that Builder was entitled to recover for those changes. To the extent Owners argue that the contract documents fail to provide sufficient basis for valuing these changes at cost-plus 15%, they ignore the very language that they placed in the contract, at paragraph 5 on the first page of the contract which states change orders are to be priced accordingly. There was a sufficiently definite basis for valuing scope changes and allowance exceedances and the changes were properly valued on that basis.

Moreover, the evidence supports the interest accrual date. Ms. Stoddard testified that the last invoice dated August 29, 2014 served as an appropriate basis for the running of interest. In other words, at that point in time the claim was capable of being reduced to a sum certain, and appropriate credits could have been taken to calculate it. Appellants seem to also argue that $958,349.00 was the basis for the prejudgment interest calculation. (Appellants' Brief at 23) Their argument is mistaken. That amount is simply the subtotal of the revised construction budget amount plus scope changes and allowances in excess of budget as found by the trial court. The interest was calculated on the basis of the net amount owed by the Owners to the Builder, $313,453.90. (Order, p. 17, Tr. ___) This amount was net all payments made by the Owners, and net of several credits that were found by the trial court to be applied to reach the net award. The award of prejudgment interest should accordingly stand.

III. **The trial court's enforcement of the Builder's mechanic's lien must be affirmed because Appellants raised the issues of timeliness and the amount of the lien for the first time in their motion to reconsider, and the evidence at trial supports its validity and timeliness.**

The trial court correctly found that RS Custom Homes was entitled to recover under the mechanic's lien statute. For the very first time in their Rule 59 motion to reconsider, Owners raised the issue of whether the mechanic's lien was valid. Owners contended there was a lack of evidence in the record to show that the mechanic's lien was filed within 90 days of Builder's last work. In so doing, the Owners are attempting to use a Rule 59(e) motion to advance an issue that they could have raised in the trial court before judgment but failed to do so. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *Stevens and Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). Therefore, the issue is not preserved for appeal.

The purpose of a motion to reconsider a judgment is "to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Coward Hund Constr. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999); *See also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004); Rule 59(e), SCRCP. Under South Carolina law, a Rule 59(e) motion is appropriate when a party believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue and when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Elam* at 24; *Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017) (finding that issues were not preserved for appeal when first raised in a motion for reconsideration under Rule 59(e)).

To illustrate, in *Hickman*, the Court of Appeals held that the wife in a divorce proceeding could not raise the issue of apportioning her husband's civil service retirement fund for the first time within her Rule 59(e) motion for reconsideration. *Hickman* at 456. Similarly, in *Johnson*, the defendant in a workers compensation action argued for the first time in its Rule 59(e) motion that the circuit court did not have the authority to award interest and assess nonpayment penalties laid out within the Workers' Compensation Act. The court rejected the argument, holding that the issue was not properly preserved for appellate review because the issue was not raised until the defendant's Rule 59(e) motion. *Johnson* at 177.

Finally, in *Stevens and Wilkinson*, the plaintiff was a construction company that filed an action for breach of contract against the City of Columbia. Throughout litigation, the defendant argued *only* that there was no enforceable contract between the parties. *Id.* at 564. On motion for partial summary judgment, the only issue for determination was whether there was an enforceable contract between the parties. *Id.* at 567. The circuit court granted partial summary judgment in favor of the plaintiff, finding that the plaintiff's estimate constituted a valid offer and that the defendant accepted the same when it authorized payment on "seemingly modified terms." *Id.* Therefore, there was a valid contract. *Id.* Subsequently, the defendant filed a Rule 59(e) motion, arguing for the first time that the authorization was not an acceptance, but a counteroffer. *Id.* On appeal to the Supreme Court of South Carolina, the Court determined that the issue was limited to the existence of a contract and allowing the defendant to add new theories and issues post-judgment would be improper. *Id.* at 568

Like the defendant in *Stevens and Wilkinson* who failed to raise additional alternate theories regarding the payment authorization, Appellants are attempting to add new defenses through their Rule 59(e) motion. No issue of timeliness was raised at any time prior to the

judgment. Accordingly, this Court should not consider Appellants' timeliness argument and the issue was not preserved for appeal.

Nevertheless, on the merits of the argument, there was ample evidence in the record to establish that the work, labor and materials furnished by the Builder were in fact last furnished within 90 days of the filing of the mechanic's lien. This was found as a fact by the trial court in its December 18, 2018 Order: "[T]he Court finds [the mechanic's lien] was properly filed." Tr. at __) Builder filed and served its mechanic's lien on February 9, 2015. The verified notice and certificate of mechanic's lien and statement of account served on that date stated that the date of last furnishing of labor and materials for improvements on the Owners' property was November 15, 2014. There is substantial evidence in the record supporting a finding that the Builder's lien was timely, and the trial court so found in denying Appellants' Rule 59(e) motion. The Builder's job cost report demonstrates several items of work coming within the 90 day lien period (Tr. ___, Plaintiffs' exhibit 18), and emails concerning the Builder's punch list and railing work show work on November 17 and November 20, 2014. (Tr. ___, Plaintiffs' exhibit 17, Tr. ___, Defendant's exhibit 40) Also, Builder's employee testified at trial that he performed wrought iron railing and Juliet balcony work after a punch list was created on October 22. (Tr. ___ at ____, trial transcript pp. 294-295.) There was evidence in the record to support the trial court's findings on this issue.

Owners also argue that the trial court committed an error in awarding overhead and profit to the Builder. They contend that South Carolina law does not allow the recovery of overhead and profit on "unapproved changes." This is an attempt to relitigate the Builder's entitlement to recover the changes in scope and allowance items properly awarded in the trial court's order. South Carolina law is entirely consistent with the award of overhead and profit in this matter. As

noted, this is a fixed price contract where the overhead and profit components were built into the contract price.[6] To the extent change orders are made, they are priced according to the contract at cost plus 15%.[7] The trial court accordingly was correct in awarding overhead and profit as a part of the lien award.

The award is consistent with South Carolina law as stated in *Sentry Engineering and Construction, Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985) and *Zepsa Construction, Inc. v. Randazzo*, 357 S.C. 32, 591 S.E.2d 29 (2004). In *Sentry*, the agreement in issue was explicitly a side agreement that only dealt with the contractor's compensation for overhead and profit items as additional compensation. The Supreme Court held that overhead and profit were proper components of a lien claim when stated as part of the contract price or reflected in the reasonable value of the labor and materials furnished. The claim of the contractor was for balances due including change orders. "The parties by express contractual provisions fixed the compensation for full performance. Overhead and profit under the Side Agreement were components of the contract price." 287 S.C. at 352, 338 S.E.2d at 634 The *Sentry* court construed S.C. Code Ann. §29-5-10, the Mechanic's Lien statute to include overhead and profit as proper components of a mechanic's lien. *Id.*, 238 S.E.2d at 635. In so holding, the court noted:

> Since the statutes provide a lien for labor performed and materials furnished, the question arises, particularly where a contractor works under a cost – plus contract, whether items which are not direct labor or material costs, such as overhead and profit, are lienable. Such items as such and standing by themselves, are nonlienable, but they become lienable when they are included in a contract price or are reflected in the reasonable value of labor or materials furnished. Thus, the cost or value of labor for which a lien may be claimed is not necessarily confined to the actual wages paid by the employer to the employee actually performing the

[6] See Plaintiff's Exhibit 5, Change Order "includes contractor's 15% OH&P," Tr. ____.
[7] Plaintiff's Exhibit 3, Contract, page 1, paragraph 5, Tr. ____.

> labor. It may also include costs and expenses of operation, in addition to direct wages paid.

Id., 338 S.E.2d at 634-635, quoting 53 Am.Jur.2d *Mechanic's Liens* section 107 (1970).

Likewise, in *Zepsa* the court applied *Sentry* but limited it to situations where the overhead and profit are agreed upon by the parties and are subsequently embodied within a contract. 357 S.C. 38, 591 S.E.2d at 32. *Zepsa* is distinguishable on its facts. There, the general contractor had performed only approximately $11,000.00 of the work before being terminated. The general contractor then filed a mechanic's lien for the $11,000.00 of work performed plus the remaining balance of the initial deposit due upon contract execution, $40,000.00. The trial court awarded the entire claim as lost profits and as overhead, which was error. Here, however, the overhead and profit is contained in both the lump sum contract price and in the mechanism for valuing change orders as described above. Moreover, the contract in this case was almost fully performed at the time the Owners terminated it. Under *Sentry*, overhead and profit is awarded when stated as part of the contract price or "when they are included in the contract price or are reflected in the reasonable value of labor and material furnished." It is inconceivable that Owners can argue that the agreed cost - plus 15% overhead and profit provided in the contract is not a reasonable means of valuing the labor and materials furnished. Those amounts were properly awarded under the Mechanic's Lien statute.

The Owners generally denied the validity of the mechanic's lien in their answer to the Builder's complaint. The only defense asserted at trial to the mechanic's lien was the Builder had breached the contract and that the costs alleged in the mechanic's lien were not authorized under the parties' agreement. At no time, however, did the Owners ever take issue with the lien's timeliness, and they presented no evidence supporting such a defense. In essence, the mechanic's lien claim was tried by consent and there was no assertion made regarding its

untimeliness. Only after judgment did the Appellants raise this issue and accordingly it is not preserved for appeal. The issue is neither timely nor valid on the merits.

CONCLUSION

Based on the foregoing arguments, the Findings of Facts and Conclusions of Law of the trial court as well as the subsequent Orders should be affirmed. Because the initial notice of appeal was filed prior to entry of final judgment, the cause should be remanded to the circuit court for further proceedings including foreclosure remedies.

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Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2018-001971

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SC Court of Appeals

RS Custom Homes, n/k/a RS General Contracting, LLC, Respondent

v.

Matthew David DeNapoli, Lindsay Ann Denapolli, and Branch Banking & Trust, and Mortgage Electronic Registration Systems, Inc., Defendants.

Of whom Matthew David DeNapoli and Lindsay Ann DeNapoli are Appellants.

PROOF OF SERVICE

I, Kim Pedersoli, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Respondent, do hereby certify that I have served a copy of Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal in connection with the above-referenced case by mailing a copy of the same on July 11, 2019, by United States Mail, postage prepaid, to the following addresses:

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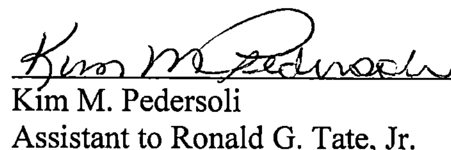

Kim M. Pedersoli
Assistant to Ronald G. Tate, Jr.

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July 11, 2019

Via Federal Express

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SC Court of Appeals

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1015 Sumter Street, Suite 5
Columbia, SC 29201

Re: RS Custom Homes v. Matthew David Denapoli, et al.
C.A. No.: 2018-001971

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the following:

1) Respondent's Initial Brief;
2) Respondent's Designation of Matter to be Included in the Record on Appeal; and
3) Proof of Service.

I would appreciate your returning a filed copy to my office in the return envelope provided.

Thank you for your attention to this matter. If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards,

Sincerely yours,

GALLIVAN, WHITE & BOYD, P.A.

Ronald G. Tate, Jr.

RGT/kmp
Enclosures
cc: All Counsel of Record

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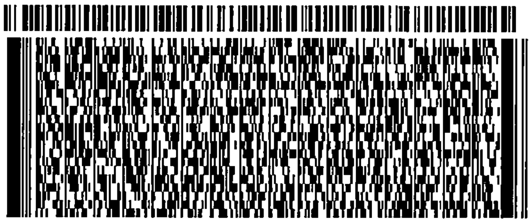

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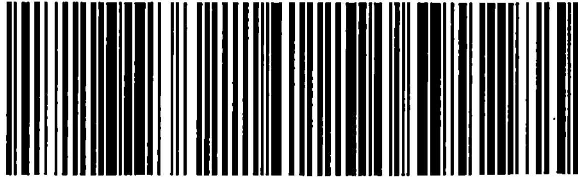

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