THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Trial Court Case No. 2015-CP-40-00164

Appellate Case No. 2017-001522
Opinion No. 5738
Heard December 10, 2019 – Filed July 1, 2020
Withdrawn, Substituted, and Refiled December 2, 2020

The Kitchen Planners, LLC, ...Appellant,

v.

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

APPELLANT'S PETITION FOR ISSUANCE OF WRIT OF CERTIORARI

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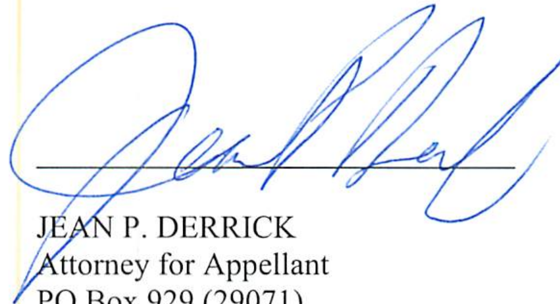
CERTIFICATION

Pursuant to South Carolina Appellate Court Rule 242(d)(1) I hereby certify that a Petition for Re-hearing was made to the South Carolina Court of Appeals and finally ruled upon by the South Carolina Court of Appeals pursuant to Order filed December 2, 2020.



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January 14, 2021

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in affirming conversion by Respondents of the Motion to Dismiss into a Summary Judgement Motion, because Respondents failed to serve Appellant with their affidavits ten (10) days prior to the hearing?

II. Did the Court of Appeals err in affirming conversion by Respondents of the Motion to Dismiss into a Summary Judgement Motion, because the grounds argued in the Memorandum of Law received by Appellant two (2) days prior to the hearing were different than those stated in Respondents' Motion to Dismiss?

III. Did the Court of Appeals err in holding that "Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien," because the provisions of Section 29-5-180, South Carolina Code of Laws Annotated allow amendments?

IV. Did the Court of Appeals err in failing to reverse the Trial Court because of the repeated improper findings concerning the weight of the evidence and credibility made by the Trial Court in the Order on appeal?

V. Did the Court of Appeals err when it failed to reverse as a matter of law the Trial Court's erroneous finding that Kitchen Planners in violation of Section 29-5-100, South Carolina Code of Laws Annotated, claimed entitlement to more than was due under the lien?

VI. Did the Court of Appeals err in affirming the award of attorney's fees?

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 mechanics lien alleged that "materials and labor were furnished beginning on or about March 11, 2015 through on or about August 18, 2015..." (R. pp.12-14) 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. Affirmative defenses were accord and satisfaction, laches, mistakes, payment, violation of Section 29-5-100, failure to properly file lien pursuant to Title 29, Article 5, and failure to state a cause of action. (R. pp.23-32) Appellant replied September 27, 2016.

Respondents Friedman filed a Motion to Dismiss Mechanic's Lien and Foreclosure on January 19, 2017, unsupported by affidavit. The specific statutes and rule stated in the Motion to Dismiss were Section 29-5-10, Section 29-5-100, and SCRCP Rule 56(a). The Motion sought fees pursuant to Section 29-5-20. (R. p.37)

Under cover of letter dated April 13, 2017 but postmarked April 14, 2017 (R.p.42), Respondents served by mail an affidavit of Samuel E. Friedman in connection with the upcoming hearing for the Motion to Dismiss scheduled for April 25, 2017. (R. pp.38-42) 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. The Motion to Strike objected to the Friedman Affidavit as untimely, as well its failure to support any affirmative defense raised either in the Answer and Counterclaim or in their Motion to Dismiss. (R. pp.45-46)

Respondents filed April 20, 2020 a Memorandum in support of Defendant's Motion for Summary Judgement arguing the lien was not timely filed pursuant to Section 29-5-90 and also that same date served it by mail on Appellant's counsel, who received it two (2) days prior to the

hearing. An unitemized Affidavit of Attorney's Fees was attached to the Memorandum. (R. pp.71-95)

Neither the Friedman affidavit or the Memorandum were served via fax or email. Each was only sent via U.S. mail.

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. Appellant's counsel objected several times on the record at the hearing to the admission of affidavits as untimely as well as the inconsistency between the grounds argued at the hearing and the statutes and rule stated in the Motion to Dismiss. (R. p.55 l 18 – p.56, l 12; R. p.63 ll 9-22) 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. By Opinion filed July 1, 2020 the Court of Appeals affirmed the Order of the Trial Court. The Court of Appeals granted Appellant's Petition for Re-Hearing by Order dated December 2, 2020, and on that same date withdrew the earlier Opinion number 5735, and substituted and refiled December 2, 2020 the Opinion, still affirming the Order of the Trial Court which granted summary judgement.

ARGUMENT

This case presents a blatant disregard of the minimum ten (10) day rule to serve affidavits when a Motion to Dismiss is converted into a Motion for Summary Judgement, as well as disregard at the both the trial and appellate level for the principle that summary judgment should be denied if there is even a scintilla of evidence of contested facts.

I.

Did the Court of Appeals err in affirming conversion by Respondents of the Motion to Dismiss into a Summary Judgement Motion, because Respondents failed to serve Appellant with their affidavits ten (10) days prior to the hearing?

As the Supreme Court of South Carolina held in Baird v. Charleston County, 333 S.C. 519, 511 S.E. 2d 69 (1999):

> Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. [citation omitted] The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to relief on any theory. [citation omitted] Rule 12(b) further provides:
>
> *If*, on a Motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such Motion by Rule 56.* Rule 12(b), SCRCP (emphasis added). We have interpreted this language as meaning the trial court may treat a 12(b)(6) motion as a motion for summary judgement and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6): Brown v. Leverette, 291 S.C. 364, 367, 353 S.E. 2d S.E. 2d 697,698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E. 2d 613 (1995).

The primary notice provision violated here was the requirement of SCRCP Rules 56 and 6 that the non-movant have copies of the supporting affidavits at least 10 days before the hearing. Higgins v. Medical University, 326 S.C. 592, 596, 486 S.E. 2d 269, 271 (Ct.App. 1997).

In this case, Respondents' counsel mailed Appellant's counsel an affidavit of Samuel Friedman (R. pp.40-41) on April 14, 2017, for the hearing set April 25, 2017. (Even though the affidavit of service says April 13, 2017, the envelope is postmarked April 14, 2017) (R. p.39,42). Counsel for Appellant actually received this affidavit April 17, 2017. Counsel for Respondents also mailed April 20, 2017 a Memorandum of Law with attached affidavit (R. pp.93-95) of attorney's fees, which Appellant's counsel recalls receiving April 23, 2017, two days before the motion hearing. Neither of these documents were faxed or emailed; they were simply "snail mailed".

When Appellant's counsel received the affidavit of Samuel Friedman on April 17, 2017, she subsequently filed a Motion to Strike, objecting to the introduction of any matters outside of the pleadings in connection with the Motion to Dismiss as well as the untimely service under SCRCP Rule 6(d). (R. pp.45-46). The Motion to Strike also objects because the "affidavit fails to support the only raised affirmative defense in the Answer and Counterclaim of Defendants which is relevant to their Motion to Dismiss, the Sixth Defense for violation of §29-5-100," Proceedings not invalidated by inaccuracy of statement of account. (R. p.46)

At the motion hearing on April 25, 2017 counsel for Appellant again objected to untimely service.

> Ms. Derrick: Yes, sir. And for the record, Your Honor, I've made a motion to strike an affidavit that he sent me last week in connection with this motion to dismiss.
> The Court: What – okay. And what's your basis for that?
> Ms. Derrick: Well, let me hand up my filed copy. A number of reasons. ***He didn't timely serve the affidavit in connection with the motion which is supposed to be under Rule 6.***
> The Court: What about that, Mr. Krawczyk?
> Mr. Krawczyk: Well, Your Honor, I did file the affidavit for ten days before this hearing. The understanding of Rule 6 being that this hearing is going to be set within ten days of your motion.

> The motion was actually filed well back in January, and information became available afterwards, and now it's being produced in time for Mrs. – for Ms. Derrick to also put a counter affidavit which I think is also the purpose of that particular rule that –" (R. p.55, line 18 – p.56, line 12). (emphasis added)

This Court of Appeals, in the Opinion refiled December 2, 2020 specifically held, in **Section II. Motion to Strike** "First, we find unpreserved Kitchen Planners' argument the circuit court improperly treated the motion to dismiss as a motion for summary judgement because it advances this argument for the first time on appeal."

Appellant respectfully submits that the Court of Appeals has overlooked and misapprehended this point in the record. The conversion of the motion to dismiss to one for summary judgement because of the untimely service of affidavits was objected to both before and during the hearing, as well as afterwards, in Appellant's Motion to Alter or Amend (R. p.49, R. p.55 l. 18- p.56 l. 12; R. p.63 ll. 9-22)

The Court of Appeals in its Opinion implies repeatedly that because Appellant filed an affidavit in opposition, she had enough time, implying that the violation of the ten (10) day notice requirement of service of both a motion as well as supporting affidavits is harmless. This type of reasoning is incorrect and unjust. As a practical matter, Derrick Tackett, the representative for Crystal Cabinets and an identified witness for Appellant, was out of town the week of the motion hearing and Appellant could not obtain an affidavit from him which confirmed that he was working with her on the Friedman job well into the Fall of 2015. Given the weighing of the evidence and findings of credibility made by the circuit judge as well as the Court of Appeals, Appellant wishes she would have been able to obtain this affidavit. In the refiled Opinion the Court of Appeals held:

> Here, the Friedmans filed their motion for summary judgement on January 17, 2017 and the court heard the motion on April 25, 2017. Although they filed their memorandum and exhibits on April 20, 2017 the Friedmans served Kitchen Planners with Mr. Friedman's affidavit on April 13, 2017 – more than ten days in advance of the hearing. *See* Rule 6(d), SCRCP (Opinion 5738, filed December 2, 2020, **II Motion to Strike**)

The Court of Appeals math skills are lacking.

The Friedman Affidavit dated April 13, 2020 was actually served by mail in an envelope with a Pitney Bowes metered stamp of April 14, 2017 [R. p.42], but with a Certificate of Service

by mail dated April 13, 2017 [R. p.39]. The Court of Appeals Opinion is silent on the provisions of SCRCP Rule 6(e), which adds an additional five days to the prescribed period of ten days, when, as here, service is by mail. Under any of the factual scenarios (mailed April 13th or April 14th or certainly April 20th), Appellant still was not accorded ten days notice. See Dedes v. Strickland, 307 S.C.152, 414 S.E.2d 132 (1992) (Appellant did not receive timely of hearing under SCRCP Rule 6, when served by mail May 3, 1989 for May 8, 1989 hearing)

Appellant has never waived the time limits and the procedural requirements of the South Carolina Civil Procedure Rules. She is entitled to ten (10) days notice of all affidavits, and she objected before, during and after trial to this breach. She submitted an affidavit, conditioned upon her prior objections to any submissions of affidavits by either party, to avoid the pit fall of automatic granting of summary judgment if no opposing affidavits are submitted. Appellant is entitled to have any affidavit intended to be submitted in support of a motion to be served concurrently with the motion. Appellant is entitled to have a motion specifically state the grounds. Again, Appellant did not waive these requirements, but objected to it clearly on the record, as well as in her Motion to Strike.

This Court can and should, issue a writ of certiorari and reverse the Order of the Court of Appeals solely on the issue of the error of conversion of the motion to dismiss to a motion for summary judgement. That would be dispositive of this appeal.

II.

Did the Court of Appeals err in affirming conversion by Respondents of the Motion to Dismiss into a Summary Judgement Motion, because the grounds argued in the Memorandum of Law received by Appellant two (2) days prior to the hearing were different than those stated in Respondents' Motion to Dismiss?

Specifically, Respondents filed, *sans* any affidavit, on January 19, 2017 a Motion to Dismiss Mechanics Lien (R. p. 37). The sole grounds for dismissal vaguely mentioned in the Motion were Section 29-5-10, which is a general statute which describes and defines a mechanics lien, and Section 29-5-100, captioned "Proceedings not invalidated by inaccuracy of statement of account." The Motion to Dismiss also twice cites SCRCP Rule 56(a), which is the basis of summary judgement for *claimant*. (Respondents are not claimants.) The Motion to

Dismiss concludes with the sentence "Defendants may supplement with a memorandum of law to be filed prior to the hearing of this matter."

The ultimate basis of the circuit judge for granting summary judgement was that the mechanic's lien was not filed and served within 90 days of Plaintiff providing the labor or materials, which is Section 29-5-90, which statute was not cited in the Motion to Dismiss nor raised as an affirmative defense in Respondents' Amended Answer and Counterclaim. Section 29-5-90 was first raised by Respondents in their Memorandum of Law, which was served by U.S. mail on Appellant April 20, 2017 and physically received by the attorney for Appellant April 23, 2017.

Appellant, noting the incongruity between the affidavit of Samuel Friedman she had received April 17, 2017 and any defenses raised in Respondents' Answer and Counterclaim or Motion to Dismiss, had moved to strike the affidavit, specifically citing this discrepancy (R. p.46). Appellant's counsel also objected on the record to the discrepancy between the statutes cited in the Motion to Dismiss and the grounds that were argued at the time of the hearing (R. p.63, line 9-p. 64, line 22). Appellant's objection was continued in her Motion to Alter or Amend. (R. p.49)

This Court in Higgins v. Medical University, expressed concern about the:

> practical effect of the [12(b)(6)] conversion rule is to require non-movants to be vigilant and adequately prepare whenever a movant submits a 12(b)(6) motion coupled with affidavits. We hope that movants will not, as a strategic device, submit 12(b)(6) motions with affidavits, anticipating that the non-movant will appear at the hearing without having served supporting affidavits [citing authorities] It is a fundamental rule that 'if the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the [trial] court is required under Rule 56, to grant summary judgment...' Higgins v. Medical University, 326 S.C. at 598, 486 S.E.2d at 272

Here, Respondents have taken an even more ambush-like approach than envisioned by the Court of Appeals in *Higgins*: A Motion to Dismiss not supported by any affidavits was filed in January 2017, prior to any discovery being taken. The depositions of the parties were taken earlier in the month of April, before the April 25th Motion hearing, and on April 14th and April 20th Respondents served by mail affidavits utilized by the trial court in the April 25th motion hearing. The statutes and court rule cited in the Motion to Dismiss were completely different

than the statute argued in the Memorandum of law mailed April 20th to counsel for Appellants. (Compare R. p.37; R. pp.71-95)

A basic rule of pleading, set forth in SCRCP Rule 7(b)(1) is that "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

Appellant's Motion to Strike specifically objected to the Friedman affidavit because the "affidavit fails to support the only raised affirmative defense in the Answer and Counterclaim of Defendants which is relevant to their Motion to Dismiss..." (R. p.46)

Also, at argument during the motion hearing, counsel for Appellant again objected to the discrepancy in the grounds of the Motion to Dismiss and §29-5-90, which had been raised only two days before, in Respondents' Memorandum of law:

> So her affidavit shows that she worked well within the ambit of the 90 days allowed on the lien, and it was timely served and filed. ***I also object to this ground because it's not raised in their –their answer and counterclaim in this case, too.***
> You know, Mr. Krawczyk – I guess because he is doing the best he can, is real close to the best of me about whatever he is objecting to in this motion to dismiss because I can't tell reading on its face what error of law or fact they are asserting is incorrect.
> There is nothing specifying about the lien wasn't served timely. It just says it just fails to comply with the mechanic's lien statute. So this is the first time I've heard him say that, but I'm not worried about that.
> That's a transparently incorrect fact because our affidavit, as well as what I submitted to you today, as well as my client's deposition establishes facts work well within the mechanic's lien statute.
> The dates are disputed at the very – at the very least under the summary judgement if we're proceeding under Rule 56. There's plenty of disputes of fact contained in the two affidavits in front of you, Dr. Friedman and Ms. Comose's.
> In addition, he claims that the lien doesn't apply because the cabinets weren't installed in the kitchen. That is incorrect. At least a portion of the cabinets that my client has paid Crystal cabinets for, but she has not in turn been paid by her customer the Friedmans for, were installed, the cabinet, by the follow-up contractor, a fellow individual Vigiano..." (R. p. 63, line 9 - p. 64, line 13) (emphasis added)

Because there is no overlap in the grounds stated in the Motion to Dismiss and the grounds argued by Respondents at the motion hearing, there is nothing to convert.

Again, this Court, after issuance of a Writ of Certiorari, can and should reverse the Opinion of the Court of Appeals solely on the issue of the error of conversion of a Motion to Dismiss to a Motion for Summary Judgment, when the grounds stated in the Motion to Dismiss were completely different than the grounds for which summary judgement were sought. That would be dispositive of this appeal.

III.

Did the Court of Appeals err in holding that "Kitchen Planners is bound by the dates asserted in its pleadings and on the face of the lien," because the provisions of Section 29-5-180, South Carolina Code of Laws Annotated allow amendments?

Section 29-5-180 provides *in toto* "The court may at any time allow either party to amend his pleadings as in other civil actions." SCRCP Rule 15(c), Relation Back of Amendments, provides in part that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

Here, discovery had been ongoing through the month of April 2017, when all the parties were deposed. It was apparent from both the deposition testimony as well as documentary exhibits that work on this kitchen design project extended well beyond August 18, 2015. A copy of the September 29, 2015 check written by the Appellant to pay for cabinets had been recently produced in discovery. Derrick Tackett, the Crystal Cabinets representative with whom Appellant continued to work to finish the job, had not as yet been deposed. Two days before the motion hearing, on April 23, 2017 Appellant's counsel had received the Memorandum of law from Respondents, in which was raised, for the very first time, the issue of whether or not the lien had been timely filed pursuant to Section 29-5-90.

The Court of Appeals, in its Opinion, under **I. Timeliness**, stated:

> Although Kitchen Planners argues it was entitled to amend its complaint to change the date it last provided materials, it never requested leave of the circuit court to amend its pleadings; rather, it raises this argument for the first time on appeal. Thus, we find this argument is unpreserved.

It is ironically insult to injury for the Court of Appeals, given the flagrant violations by Respondents of timeliness of notice and specificity of grounds, to hold that Appellant should have formally moved to amend her complaint and statement of lien in the two days prior to the hearing.

Appellant can easily move, with or without the consent of Respondents, to amend her Lien and Complaint to allege September 29, or some November date in 2015 as the last date labor and materials were furnished, when she wrote a check and continued to coordinate on the project with the Crystal Cabinets representative.

However, a formal amendment of pleadings should not be necessary in the context of deciding a Motion for Summary Judgement. Here, evidence adduced in ongoing discovery via depositions as well as production of documents established that Appellant continue to work and communicate with Derrick Tackett, the manufacturer's representative for Crystal Cabinets through mid-November, 2015, as well as earlier writing a check on September 29, 2015 for $550.60 when she reordered drawers for the island in the kitchen. (R. p.96; R. p.110, lines 2 – p.111, line 7; R. p.164, lines 6 -22) These were evidentiary facts in the record at the motion hearing, and tried by consent of the parties. Respondents did not object to any of these evidentiary facts. The pleadings themselves are amended pursuant to SCRCP Rule 15(b) to conform to the evidence. These facts, whether contested or uncontested, are in the record and militate the denial of summary judgement, even assuming conversion was proper.

Appellant respectfully submits the Court of Appeals overlooked and misapprehended the pettiness of holding inflexibly that "Kitchen Planners is bound by the dates assert in its pleadings and on the face of the lien." It is well established that amendments are granted freely and liberally to serve the interest of justice. This Opinion incorrectly stops short with the pleadings when it should proceed to look at the evidence subsequent discovery has revealed in the case. SCRCP Rules 15 and 56 instruct that a Motion for Summary Judgement is decided on the facts, and not the pleadings.

IV.

Did the Court of Appeals err in failing to reverse the Trial Court because of the repeated improper findings concerning the weight of the evidence and credibility made by the Trial Court in the Order on appeal?

It is well settled that, as the Court of Appeals acknowledged in the Opinion here, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgement." Hancock v. Mid-S. Mgmt. Co, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony..." Nevertheless, the Orders on appeal of the circuit court below make numerous factual findings and determinations of credibility. The Court of Appeals has also made its own numerous factual findings and determination of credibility in the appellate Opinion for which issuance of a Writ of Certiorari is sought.

The statements by the Trial Judge in the Orders on appeal are patently erroneous – "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. "(R. p.4); "The Court found that the affidavit [of Appellant] was not credible as it was 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 Ms. Comose's own sworn testimony that she provided no materials after June 18, 2015..." (R. p. 9) "Even if Ms. Comose's affidavit were creditable...." (R. p. 9) "[T]he Court finds Ms. Comose's affidavit unpersuasive..." (R. p. 9)

The Court of Appeals, in footnote two of its Opinion, stated "Though we note witness credibility is not a proper consideration in deciding a motion for summary judgement, given our standard of review on appeal, we need not consider this argument," [that the Order should be reversed because of the trial judge's findings of credibility]. The Court of Appeals has misconstrued and misapprehended the whole point of the appeal, which is that the trial court erroneously disregarded conflicting facts under the pretense of weighing credibility. Clearly the Court of Appeals recognizes the error of the lower court. The trial judge improperly weighed evidence and made findings of credibility in granting summary judgement. The Court of Appeals should have directly addressed and reversed this clear error, instead of affirming it.

A simple review of the short affidavit of Appellant reveals a credible, straight forward affidavit which is totally consistent with the deposition testimony of Appellant. (R. pp. 96-104) This affidavit clearly constitutes at least a scintilla of evidence and can not be overlooked. There was never any claim by Respondents that this is a sham affidavit. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 411 (Ct.App. 2014).

The Court of Appeals has overlooked and misapprehended and misapplied the standard of review of the Orders upon appeal; indeed, the Court of Appeals has committed the same error on appellate review as the trial judge did below, in weighing the evidence and judging credibility.

The Court of Appeals in its Opinion gives lip service to the appropriate standard of review, that "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment", citing Hancock v. Mid-S Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, the Court of Appeals in its Opinion still states "[W]e find the evidence was not sufficient to contest the Friedmans' assertion that August 18, 2015, was the last date labor or materials were furnished." **(I., Timeliness)** The Court of Appeals then follows with a detailed factual discussion, weighing the evidence, questioning why Appellant never testified she was specifically requested or directed to reorder drawers, and noting that Appellant offered no testimony to show that the drawers were ever delivered, could not offer an explanation as to why she wrote the check in September, and did not prove that these additional items were delivered.

In fact, the record shows that Appellant in her deposition clearly was motivated / instructed / told to reorder these drawers by Respondent Jane Friedman (R. p.164, lines 6- 22). The record shows that at some point after the reorder, the boxes were delivered to her, and Derrick had someone pick them up and take them to the house (R. p.212, line 21 – p. 213, line 7).

In short, the Court of Appeals on appeal has still erred in weighing the preponderance of the evidence. It has utilized the incorrect standard of review, a preponderance of evidence, instead of a mere scintilla.

All Appellant needs to do to avoid entry of summary judgement is show inferences which create genuine issues of material fact, and the check September 29, 2015 (R. p.249) does just that, as well as Appellant's affidavit stating she continued to work until mid-November with the

Crystal Cabinet representative on the project (R. p. 96). Also, Respondents' kitchen remodeling was concluded by a third party contractor, Viggiano Remodeling, LLC, and the estimate dated August 25, 2015, rendered by Mr. Viggiano notes "all usable hardware and drawers from the existing Crystal Cabinets will be reflected as a credit in final price.", which again shows incorporation of materials into Respondents' home at some point in time after August 18, 2015 (R. pp.102-104).

The labor in writing the check and the funds are labor and materials furnished toward completion of the job. The date of the check September 29, 2015 shows that Appellant continued to work on the project, even though she did not return to the home of Respondents after June 18, 2015. The Viggiano estimate clearly intends to cannibalize the Crystal Cabinets to finish the job Appellant started. These are issues of fact which make summary judgement inappropriate.

Opposing counsel in argument to the circuit court below certainly recognized that Appellant's affidavit and the check created disputed issues of fact. He stated on the record in argument "And so those were undisputed dates of … as of … until this affidavit was filed, those were undisputed dates." (R. p. 59, lines 10-12).

Counsel continued:

> And now we get an affidavit saying she did something. Your Honor, direct -- directly against her testimony in here. So I think even under their dates -- in this September date of, obviously, looking at what she said -- all she said that she did, for example, 'I reordered drawer boxes for the island in the kitchen and paid $550 after.' Your Honor, nobody was on the job after that. Everybody was fired. She, obviously, couldn't order things from my client after that point. (R. p. 67, lines 7-15)

Counsel for Respondents in argument himself articulated disputed issues of fact in this case. Summary Judgement was improperly granted and this should be reversed.

The Court of Appeals also overlooked and misapprehended the genuine issue of material fact created by the Viggiano estimate, when it instead affirmed the Order of the lower Court granting summary judgment on the alternate ground that materials were not actually installed in Respondents' residence.

Specifically, in its Opinion, the Court of Appeals held;

> Further, the Viggiano estimate does not create a genuine issue of material fact because the statement '[a]ll useable hardware and drawers from the existing Crystal cabinets will be reflected as a credit in final price' is not probative of whether any such items were actually installed. Based on the foregoing, we find the only reasonable inference that can be drawn from the pleadings and evidence is that the materials were never installed in the Friedman's home.

This statement certainly does not give Appellant every benefit of the doubt, as the Court of Appeals nevertheless should.

Actually, it is the opposite inference which is drawn from the Viggiano estimate – a licensed contractor hired by Respondents to do the work states in his estimate that credit will be given for materials installed. He knows the materials furnished by Appellant are useful and he intends to use them. That is a genuine issue of material fact.

Both the Trial Court as well as the Court of Appeals sit in this case to recognize disputed facts, not decide them. The Viggiano estimate makes a clear, favorable inference that the Crystal cabinets were cannibalized and parts installed in the residence by Viggiano, a contractor who has now completed the cabinet job for the Respondents.

Ultimately, at trial, if Respondents seek to void the lien regarding whether or not the cabinets were installed and utilized by them, Appellant will also be free to argue to the jury the legal defense of estoppel. Given the posture of the pleadings, Appellant has not needed to file a Reply raising this legal defense. Clearly on the facts of the skeleton record before this Court, there is an inference of fact that a jury would need to decide, as to whether or not the Respondents, who are in possession of $50,000 worth of Crystal custom cabinets, which are unfit to be utilized by anyone other than Respondents in their own kitchen, can void a mechanic's lien by merely electing not to install them.

V.

Did the Court of Appeals err when it failed to reverse as a matter of law the Trial Court's erroneous finding that Kitchen Planners claimed entitlement to more than was due under the lien, in violation of Section 29-5-100, South Carolina Code of Laws Annotated?

In the Orders on Appeal, the Circuit Judge below erroneously found that the "Plaintiff willfully and knowingly claimed more than her due....", and that the "Lien is seeking solely overhead and profit." (R. p. 5).

Here, the written contract between the parties is an Exhibit attached to Appellant's Affidavit (R. pp. 98-101). The amount of the lien, the third of three agreed upon instalments of $16,594.68, is the amount owing on a written contract negotiated and entered into by the parties. Unquestionably, under the South Carolina Supreme Court's decision in Sentry Engineering & Construction, Inc. v. Mariner's Cay Dev. Corp, 287 S.C. 346, 338 S.E.2d 631 (1985), "overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien."

This is a clear cut, established principle of law in South Carolina. The Court of Appeals overlooked and misapprehended its obligation, as a reviewing Court, in failing to address this clear error and instead affirming. This is plain error and should be reversed.

VI.

Did the Court of Appeals err in affirming the award of attorney's fees?

The Trial Court, and the Court of Appeals affirmed, a whopping $16,594.68 attorney's fee, in the amount of the lien sought. The fee Affidavit unitemized, conclusory was attached to the Memorandum of Law served by mail April 20, 2015. (R. pp.93-95) The Court of Appeals slightly modified the language from its original Opinion in the reissued Opinion:

> However, Kitchen Planners failed to challenge the Friedmans' submission of the fee affidavit during the summary judgement hearing and challenged the contents of the fee affidavit for the first time in its Rule 59(e), SCRCP, motion. Therefore, we find this argument unpreserved for our review. (III, Attorney's Fees)

Respectfully, this is a nonsensical statement. The first Kitchen Planners could protest the reasonableness in the amount of any fees awarded was by post hearing Motion to Alter and Amend, and Appellant has clearly done so. (R. p. 50) Prior to that, repeated objections because of untimely service.

It is outrageous to claim, as Respondent's attorney nevertheless has, that Respondents have incurred over $20,000 in fees and costs in connection with this lien. 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 Crystal Cabinets 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. [R. pp. 43-44]. This Motion was not scheduled to be heard April 25, although the Order of the Trial Judge, denying Plaintiff's Motion to Alter or Amend, gratuitously and improperly grants the Motion for Protective Order, in a backhand fashion, in connection with denial of Appellant's request that the attorneys' fee award be vacated. [R. p. 11].

By challenging the sufficiency and contents of the fee affidavit Appellant certainly challenges the reasonableness of the fees, which are frankly exorbitant.

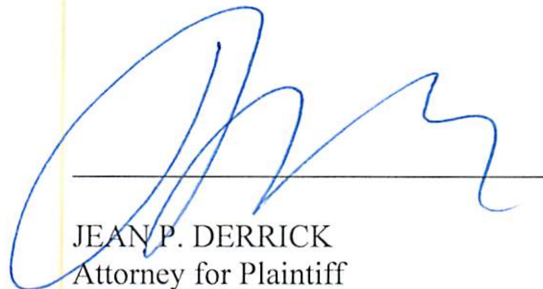
Clearly, a reversal of the Orders of the Trial Judge on any of the above argued questions presented militates the reversal of this fee award, but also the insufficiency of Respondents' fee affidavit and the failure of the Trial Court to discuss the six factors necessary to determine the amount of the award also militate reversal.

CONCLUSION

This case offers the Supreme Court of South Carolina an attractive opportunity to discuss, for the benefit of the bench and bar, procedural safe guards when allowing conversion of Motions to Dismiss to Motions for Summary Judgement. This conversion doctrine, incorporating the ten day notice provisions of SCRCP Rules 6 and 56 in the conversion procedure, was established by case law in the 1990's. There has been another generation of judges and lawyers entering the practice of law since, and it would be instructive to reiterate these procedural safeguards. Certainly, the present failure of both the Trial Court as well as the Court of Appeals to afford Appellant ten days notice of affidavits as well accurate grounds for

the motion is alarming. Appellant would respectfully request issuance of a Writ of Certiorari to the Court of Appeals to reverse this Opinion.

Respectfully submitted



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