

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Richland County  
Court of Common Pleas

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

**RECEIVED**

MAR 10 2021

S.C. SUPREME COURT

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Appellate Case No. 2017-001522

Opinion No. 5738  
Heard December 10, 2019 – Filed July 1, 2020  
Withdrawn, Substituted and Refiled December 2, 2020

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The Kitchen Planners, LLC, Petitioner

v.

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

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RESPONDENTS' RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Charles A. Krawczyk  
SC Bar #: 16832  
FINKEL LAW FIRM, L.L.C  
1201 Main Street, Suite 1800  
Post Office Box 1799  
Columbia, South Carolina 29202  
(803) 765-2935  
(803) 973-0333 fax  
ckrawczyk@finkellaw.com  
Attorneys for Respondents

## COUNTERSTATEMENT OF THE CASE

On March 16, 2015 Petitioner the Kitchen Planners contracted with the Respondents Sam and Jane Friedman to provide materials (kitchen cabinets) for the renovation of Respondents' kitchen. Prior to delivery, Respondents paid Kitchen Planners \$33,629.36 of the \$50,284.04 contract price for the cabinets. When the cabinets arrived on May 21, 2015, they were incorrect. When Petitioner failed to address the deficiencies in a timely manner, Respondents contacted the manufacturer Crystal Cabinets directly. On June 18, 2015 Crystal Cabinets took over the job and Petitioner was terminated. By all evidence, affidavits and testimony Petitioner never delivered any more materials to Respondents' home after May 21, 2015. Petitioner never returned to the Respondent's home.

On August 10, 2015 the cabinets ordered by Crystal arrived at Respondents' home. These cabinets had also been ordered incorrectly. On August 18, 2015 Crystal Cabinets was also terminated and they notified Petitioner of that fact that day by e-mail. The Crystal cabinets were never installed in the home and remained in the Respondents' garage until they were finally donated to Habitat for Humanity on January 29, 2021.

Petitioner filed a Mechanic's Lien with the Clerk of the Richland County Court of Common Pleas on November 12, 2015 ("the Lien"). Despite not having provided any material after May 21, 2015, the Lien indicated on its face that the materials were furnished on or about March 11, 2015 (the date of the Contract) through on or about August 18, 2015 (the date of the e-mail dismissing Chrystal Cabinets). The lien was not served upon Respondents until November 17, 2015; 91 days after the last date of work

indicated in the lien (Cert. of Service). Petitioner filed a complaint to foreclose on the Lien on January 13, 2016. The Parties engaged in extensive discovery including depositions of the parties. On April 7, 2017, the deposition of Patricia Comose, (the principal and sole member of Petitioner) was taken. In that deposition Ms. Comose testified as to her involvement at the Respondents' home.

In her testimony Ms. Comose indicated that:

1. She did not order any more materials for the Respondents after June 18, 2015. (R. p. 204, lines 19-25).
2. She did not provide any additional materials for the Respondents after June 18, 2015 (R. p. 214, lines 12-20).
3. She had no knowledge of any more work or materials provided by Crystal Cabinets or anyone else after August 18, 2015. (R. p. 214, lines 12-20).
4. She never delivered the drawers which are referenced in her affidavit provided at the hearing in the Motion for Summary Judgment. As of April 7, 2017, "she still had them" (R p.164 line 24).

On January 19, 2017, Respondents filed a Motion for Summary Judgment pursuant to South Carolina Rules of Civil Procedure 56. On April 13, 2017, Respondent filed an Affidavit of Samuel Friedman which was immediately served upon Counsel for Petitioner. Petitioner filed her own opposing Affidavit of Patricia Comose which was not objected to by Respondents. Respondents filed a Memorandum in Support of the Motion. Both the Motion and the Memorandum referenced that the Motion was being brought pursuant to South Carolina Rules of Civil Procedure 56. The hearing took place on April 25, 2017. During the hearing Counsel for Petitioner

1. Mistakenly argued that the Motion was brought pursuant to South Carolina Rule of Civil Procedure 12(b)6.
2. Did not object to the Motion going forward pursuant to Rule 56. In fact, counsel for Petitioner set forth that the Petitioner's affidavit converted it to a summary judgment motion and proceeded from there (R p.57 lines 24-25)..
3. Did not raise or object to the attorney fee affidavit.
4. Did not seek to amend the lien or its pleadings to alter the dates.
5. Did not request more time to obtain further affidavits from Crystal Cabinets.
6. Did not raise or preserve most of the arguments now raised in this Petition.

On May 11, 2017 an Order was issued granting Summary Judgment in favor of Respondents. On May 30, 2017, Petitioner filed a Motion to Alter or Amend, which motion was denied by and order issued July 5, 2017. The Appellate Court affirmed the Trial Court's decision in an Order filed July 1, 2020. Pursuant to Petitioner's petition, that Order was withdrawn, substituted and refiled December 2, 2020.

South Carolina Code Ann. Title §29-5-90 states:

Such a lien shall be dissolved unless the person desiring to avail himself thereof, **within ninety days** after he ceases to labor on or furnish labor or materials for such building or structure, **serves upon** the owner or, in the event the owner cannot be found, upon the person in possession **and files** in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due (emphasis added).

The trial Court held, and the Appellate Court confirmed, that there was no evidence sufficient to contest the Freidman's assertion that August 18, 2015 was the last possible date that could be used for the furnishing of labor and material. This date came

from the date on the mechanic's lien and the Petitioner's Complaint. This use of this date was favorable to the Petitioner as the evidence provided in discovery showed that the last date that the Petitioner provided materials to the Friedman's home was May 21, 2015, long before August 18, 2015. The trial Court and the Appellate Court both found that the mechanic's lien, having been untimely filed, was invalid and as such Petitioner's cause of action for foreclosure of that lien was also invalid. The trial Court granted summary judgment in favor of the Respondent and granted attorney's fees to the Respondent as required by the South Carolina Mechanic's Lien Statute §29-5-20(a).

Petitioner now seeks certiorari to the South Carolina Supreme Court without reference to any of the prescribed in South Carolina Appellate Practice Rule 242(b).

### **ISSUES ON APPEAL**

Petitioner has listed 5 questions to be addressed by the Court, some of which are different from those raised to the Court of Appeals. It appears that Petitioner may have created new questions or set forth subsidiary questions as issues on appeal. Either way, Respondents will address the contents of the Petition while leaving any improper format issues to the Court.

#### **I. Did the Court of Appeals err in affirming conversion by Respondents of the Motion to Dismiss into a Summary Judgement Motion**

Petitioner continues to blatantly disregard the contents of the initial motion, memorandum of support, arguments at the hearing and the findings of all Courts in putting forth this argument. As the trial Court and the Appellate Court both determined, the motion was never filed pursuant to 12(b)6. The Motion was sought pursuant to Rule 56. Petitioner, has continued to treat the motion as if it was filed pursuant to Rule 12(b)6

ignoring the fact that all of the documents repeatedly made reference to Rule 56 and the summary judgment standard. At the hearing, attorney for the Respondent also clarified this point to Petitioner and the Court. The trial Court held and the Appellate Court confirmed twice that the Petitioner was on notice that the Motion was a Rule 56 motion.

At the hearing Petitioner did not object to hearing going forward pursuant to Rule 56. In fact, Petitioner's counsel conceded that the introduction of her own affidavit was "the opposing affidavit that's converted to a summary judgment motion". ( R. p.57 24-25) At no time did Petitioner object to the Court proceeding under rule 56. None of the Petitioner's references to the record on appeal provide any support to the Petitioner's notion that she objected to the motion going forward under Rule 56. As such the issue was not preserved on appeal.

The only affidavit that was objected to at the trial court hearing was Dr. Friedman's affidavit. Petitioner failed to raise any objection as to any other affidavit and as such the trial Court did not address them. This Court was correct in ruling that this issue was not preserved on 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 Petitioner two (2) days prior to the hearing were different than those stated in Respondents' Motion to Dismiss?**

Petitioner improperly raised this issue for the first time in its Petition for Rehearing. There is nothing on this matter in Petitioner's Appellate brief, and nothing in either of the Appellate Court's Orders regarding this. To the extent that the issue had been raised, Petitioner again bases its argument on the premise that the motion was filed

pursuant to SCRCP 12(b)(6) and that it was thereafter converted to a Rule 56 Motion, which the trial and Appellate Courts indicated was not the case.

In addition, not only was Petitioner given the memorandum of law outlining the basis for the arguments, but Petitioner also filed the affidavit of Ms. Comose in an attempt to counteract the basis of the law cited in the memorandum. At the hearing, counsel for Petitioner indicated that she was "not worried" about the argument that the lien was not filed timely 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" (R p 63). As this issue was not raised in the Petitioner's brief and the Appellate Court did not rule on this issue, it is improper to raise it in a Writ for Certiorari.

**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?**

It is axiomatic that a litigant is bound by the facts asserted in its pleadings. Petitioner takes issue with the Appellate Court referring to the dates in its Complaint and Mechanic's lien as being binding upon her. What Petitioner fails to recognize or point out to the Court is that the dates put forth in the Lien and the Complaint are the most favorable dates possible to Petitioner to establish the timeliness of the lien. The dates put forth in the Lien and the Complaint to which the Appellate Court referred to were months after the Petitioner, by her own testimony, ever provided materials to the Friedman's home.

Respondents agree that Petitioner made no attempt to amend the dates on the pleadings or in the lien and never raised this issue to the trial Court and as such is not preserved for appeal.

Had Petitioner sought an amendment to the Complaint, the evidence would not have supported any new date. The Appellate Court and the trial court did not look solely to the dates in the pleadings, but also looked at all the evidence including Ms. Comose's deposition and affidavit. The Appellate Court held that looking at the facts in the light most favorable to the Petitioner that there was no evidence sufficient to contest the Freidman's assertion that the lien was not timely filed and served. In fact, using the date found in the pleadings actually gave the Petitioner the best and latest possible date for establishing the delivery of materials. Every other piece of evidence indicated a much earlier date. Ms. Cosmoses' deposition testimony established that she provided no materials after June 18, 2015. Ms. Cosmoses' affidavit never mentions delivering material to the home or providing work at the home, which would have been required for a lien right to be established. Petitioner's references to the record on appeal do not support her arguments. Thus, not only was this issue not timely raised and preserved on appeal, but in addition the Appellate Court looked beyond the pleadings to determine that even if properly raised, an amendment to the pleadings would have been futile given the evidence in this case.

#### **IV. The Court Overlooked the Improper Finding of Credibility of the Trial Court**

Petitioner argues that the Appellate Court overlooked the improper finding of credibility by the trial Court, but Respondents would disagree with this assertion. The

Appellate Court addressed this concern in the Order. In addition, the Trial Court's order, while discussing the credibility of the affidavit, did not rely upon credibility in making its findings. The trial court's Order Denying Plaintiff's Motion to Alter or Amend stated:

Even if Ms. Comose's affidavit were credible its contents fail to change the filing date for the Lien. Title §29-5-90 requires that a mechanic's lien be filed and served within 90 days after the materials are **furnished**. Ms. Comose's affidavit merely states that materials were ordered and paid for, but never indicated that they were ever delivered to the Friedman residence. That the materials be actually delivered and used in the structure is essential to a contractor's right to a lien under the statute. (R.p. 9)

Thus, the Trial Court gave the contents of the affidavit full weight and still found it lacking.

Looking at the evidence, including the affidavit of Ms. Comose, in the light most favorable to the Petitioner, the Appellate Court, like the trial court found that the statements in the affidavit did not create a question of fact to extend the date beyond August 18, 2015. Thus, the review of the trial Court's comments about credibility need not be addressed.

In desperate support of establishing some question of fact linked to the affidavit of Ms. Comose, Petitioner cites deposition testimony of Ms. Comose at R. p212 line 21-p213, line 7 for the proposition that the drawers allegedly ordered in September were delivered to the Friedmans. However, as Petitioner is aware, the testimony quoted by Petitioner refers to lazy susan cabinets that were ordered earlier in the year before both Petitioner and Crystal were fired from the job. The testimony cited does not refer to the drawers that were allegedly reordered under the affidavit. As the Appellate Court noted, Ms. Comose testified as to the drawers in her affidavit; "I still have those by the way" (R p.164 line 24) indicating that they had never been delivered.

Petitioner, then provides another new argument not raised in the Appeal. Petitioner contends that the labor involved in writing a check is labor intended to be attached to real estate in accordance with the mechanic's lien statute. This is an absurd premise. The purpose of the mechanic's lien statute is to protect the labor and materials that become affixed to the property. Clearly check writing does not fall into this category. The idea that writing a check amounts to labor would allow a contractor to extend his time for filing a lien *ad infinitum* simply by delaying payment for materials and writing checks at a later date. Or, as in this case, a contractor fired in July could secretly order drawers and pay for them months later in order to extend the time to file a lien. The mechanic's lien statute requires that the material be provided with the knowledge and consent of the owners. Clearly a contractor who admittedly fired in June would not have consent to order drawers in September.

Petitioner reasserts various other arguments on whether or not there is a question of fact that any of the materials provided by Petitioner were installed in the Friedman's home. Respondents would agree with the Appellate Court's analysis on this matter and would also point out that this argument is moot if the lien was not timely filed.

Petitioner's final argument in this section raises unrelated issues not on appeal. Issues of estoppel and contract and other potential issues of fact and law which Petitioner inexplicably attempts to raise despite them having no relevance to the appeal. In these arguments the Petitioner seems to be misguided as to the public purpose and law behind the enforcement of mechanic's liens. This misunderstanding may be at the heart of her inability to comprehend why the dates of delivery and installation of materials are so important. Her misunderstanding can be summed up by quoting the last line of her Petition which states "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**" (emphasis added). The installation and attachment to real property is one of the necessary requirements in establishing a lien on real property under the statute. Petitioner has now admitted that the lien was improper. Petitioner's argument here might be valid if this action had been brought for breach of contract, but under the strict interpretation of the mechanic's lien statute, it simply carries no weight.

**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?**

Petitioner raises a matter which was not addressed by the Appellate court. The Appellate Court found that because Petitioner failed to satisfy the statutory requirements to establish a valid lien that this issue need not be addressed. Respondents would agree with that finding. To the extent that this Court would address this issue Respondents would reiterate their arguments made in the Appellate Court briefs. Overhead and profit is not lienable unless the "terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract". *Zepa Construction, Inc. v. Randazzo* 357 S.C. 32; 591 S.E.2d 29 (2003). Petitioner cites *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985) for the proposition that overhead and profit, when hidden somewhere in the total contract amount, are proper

components of a mechanic's lien. *Zepa* clarified this point by stating that overhead and profit is "only available in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract". *Zepa at 38*. As such neither the trial Court, nor the Appellate Court erred in their rulings.

**VI. Did the Court of Appeals err in Affirming the Award of Attorney's Fees?**

South Carolina Code Ann. § 29-5-20(a) states, "[i]f the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court." "Ordinarily, the award of attorney fees lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *McElveen v. McElveen*, 332 S.C. 583, 601, 506 S.E.2d 1, 10 (Ct. App. 1998), citing *Cudd v. Arline*, 277 S.C. 236, 285 S.E.2d 881 (1981).

Given the findings of the trial Court, there is no question that should the Order be affirmed that Respondents are entitled to a mandatory attorney's fee award. As stated by the Appellate Court, Petitioner was served with the fee affidavit, and took no efforts to challenge the amount during the summary judgment hearing and challenged it only during the Rule 59(e) motion. In so doing Petitioner only challenged the sufficiency and the contents of the fee affidavit rather than the court's findings as to reasonableness. As such the agreement made by petitioner was not persevered for appeal.

## CONCLUSION

Petitioner seeks certiorari to the South Carolina Supreme Court without reference to any of the prescribed reasons in South Carolina Appellate Practice Rule 242(b). In her conclusion Petitioner offers that the basis for seeking certiorari is to give the Supreme Court an attractive opportunity to discuss procedural safe guards. Respondent believes the Appellate Court has already done this. The most important of these safeguards is that Petitioner should raise and argue objections and preserve them for appeal. Clearly in this action Petitioner did not do that for most of her issues. The Petitioner has not raised any new legal issues and the Appellate Court made its decision based upon solid and well-established South Carolina legal precedent. As such, the Petition for Certiorari should be denied.

Respectfully submitted,

**FINKEL LAW FIRM, LLC**  
1201 Main Street, Suite 1800  
Post Office Box 1799  
Columbia, South Carolina 29202  
(803) 765-2935

/s Charles A. Krawczyk  
Charles A. Krawczyk  
SC Bar #: 16832  
Attorneys for Respondents

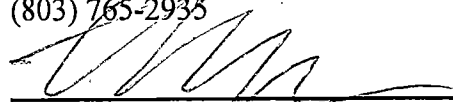
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## CONCLUSION

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Respectfully submitted,

**FINKEL LAW FIRM, LLC**  
1201 Main Street, Suite 1800  
Post Office Box 1799  
Columbia, South Carolina 29202  
(803) 765-2935



Charles A. Krawczyk  
SC Bar #: 16832  
Attorneys for Respondents

Columbia, South Carolina  
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