

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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MAY 20 2013

Case No. 2009-CP-15-0595

S.C. Supreme Court

THE SPRIGGS GROUP, P.C.,..... Respondent,

v.

GENE R. SLIVKA, Petitioner.

RESPONDENT'S RETURN TO PETITIONER'S WRIT OF CERTIORARI

James A. Bruorton IV
A. Bright Ariail
Rosen, Rosen & Hagood, LLC.
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726

Attorneys for Respondent

Other Counsel of Record

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Petitioner

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STATEMENT OF THE CASE

This is a breach of contract lawsuit accompanied by a mechanic's lien foreclosure under S.C. Code Ann. § 29-5-10 et seq. and demand for payment of attorneys' fees under S.C. Code Ann. § 27-1-15 related to architectural services rendered pursuant to a written agreement dated November 17, 2006 between the Respondent, The Spriggs Group, P.C. and the Petitioner, Gene R. Slivka ("Agreement"), (R. pp. 346 – 351). Respondent designed all buildings on Petitioner's Colleton County Plantation, including a 24,000 sq. ft main house, two 1,500 sq. ft. detached garages with fully finished 700 sq. ft. apartments above them, a 280 sq. ft. potting shed, a 1,000 sq. ft. conservatory, a 4,000 sq. ft. stable, and a 500 sq. ft. grotto. (R. pp. 339 – 340).

Per the Agreement, Respondent was paid one half of the Agreement amount at the start of the design process. Respondent invoiced Petitioner for the remaining contract balance, as well as additional agreed upon services pursuant to the Agreement and has not been paid in full. (R. pp. 354 – 365). Petitioner, admittedly, has not paid Respondent any additional money since the initial one half payment in 2007. Respondent filed a mechanic's lien against Petitioner's property on April 13, 2009 and commenced a foreclosure action on the lien on July 8, 2009 asserting claims of foreclosure of mechanic's lien, breach of contract, breach of contract accompanied by a fraudulent act, and quantum meruit. (R. pp. 376 – 386). Petitioner's Motion to Dismiss Respondent's Complaint was denied. (R. p. 1). Petitioner counterclaimed against Respondent for slander of title, Violation of the Frivolous Claims Sanctions Act (S.C. Code Ann. § 15-36-10), tortuous interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien. (R. pp. 55 – 67). Petitioner sought punitive damages, fees and costs, and interest on its counterclaims. (R. pp. 55 – 67).

Prior to trial, Respondent filed a Motion to Strike Petitioner's Affirmative Defenses and Counterclaims on June 23, 2010 (R. pp. 438 – 448). Petitioner filed a Motion for Summary Judgment as to all causes of action asserted by Respondent on January 17, 2011. (R. pp. 449 – 452). Respondent countered with its own Motion for Summary Judgment on January 31, 2011 (R. pp. 453 – 460). At the hearing on these motions, Petitioner agreed to withdraw certain counterclaims and Respondent's remaining motion for summary judgment was denied. (R. pp. 2 – 3). Petitioner's motion for summary judgment was also denied. (R. pp. 2- 3). The parties proceeded to trial on all of Respondent's causes of action and on Petitioner's counterclaims for slander of title, tortuous interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien.

The Honorable William H. Seals, Jr. and the jury heard three (3) full days of testimony from witnesses for both parties. At the conclusion of Respondent's case in chief and at the conclusion of trial, Judge Seals denied Petitioner's motion for directed verdict as to Respondent's causes of action of foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15. Respondent voluntarily withdrew its claims for breach of contract accompanied by a fraudulent act and quantum meruit. Petitioner did not seek directed verdict as to Respondent's breach of contract claim. The trial court also denied Respondent's motion for directed verdict as to Petitioner's slander of title cause of action. Petitioner voluntarily withdrew its claims for tortuous interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien. Respondent's claims of foreclosure of mechanic's lien, breach of contract and failure to comply with S.C. Code Ann. § 27-1-15 were submitted to the jury along with

Petitioner's claim for slander of title. After hours of deliberation, the jury returned a unanimous verdict in favor of the Respondent on all three of its causes of action and in favor of the Respondent as to Petitioner's slander of title claim. The Petitioner chose not to return to the courtroom and be present for the verdict reading.

Both parties requested ten (10) days to submit post trial motions. Petitioner made post trial motions seeking judgment notwithstanding the verdict as a matter of law on the Respondent's foreclosure of mechanic's lien claim and as to Respondent's claim for failure to comply with S.C. Code Ann. § 27-1-15. (R. pp. 522 – 535). Respondent filed a memorandum in opposition to Petitioner's motion. (R. pp. 555 – 566). Petitioner did not make a post trial motion as to the verdict rendered on Respondent's breach of contract action. The trial court denied Petitioner's post trial motion. (R. pp. 24 – 25). Petitioner filed a motion pursuant to Rule 59(e) asking the trial court to alter, amend or reconsider its order. (R. pp. 567 – 573). Respondent submitted a written reply to the Court. (R. pp. 574 – 575). Petitioner's motion was denied. (R. pp. 26 – 30).

Respondent made a post trial motion seeking attorneys' fees and costs based on both S.C. Code Ann. § 27-1-15 and the Mechanic's Lien Statute, as well as interest pursuant to S.C. Code Ann. § 34-31-20(A). (R. pp. 465 – 521). The trial court awarded the Respondent attorneys' fees and costs in the amount of \$235,030.31 pursuant to S.C. Code Ann. § 27-1-15 and the mechanic's lien statute. (R. pp. 19 – 23). The trial court awarded Respondent prejudgment interest in the amount of \$37,413.92 pursuant to S.C. Code Ann. § 34-31-20(A), making the total judgment ordered against the Petitioner \$446,434.76. (R. pp. 19 – 23). Petitioner filed a motion to reconsider the trial court's order awarding interest, fees and costs. (R. pp. 26 – 30). Petitioner's motion was denied. (R. pp. 26 – 30).

Petitioner then appealed Judge Seals' denial of Petitioner's motion for directed verdict and subsequent post trial motions on Respondent's causes of action for foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15 and Judge Seals' post trial award of interest, fees and costs to Respondent. (R. pp. 598 – 600). After receiving briefs and hearing oral arguments by Counsel, the Court of Appeals issued a unanimous decision determining that Respondent's services fell within the definition of labor contained in section 29-5-10(a) and affirming the Circuit Court's award of prejudgment interest and denial of Petitioner's directed verdict motions as to Respondent's section 27-1-15 and mechanic's lien claims. See Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 502 (Ct. App. 2013). The Court of Appeals reversed the Circuit Court's award of attorney's fees and remanded the issue for further consideration. Id. Specifically, the Court of Appeals ordered the Circuit Court to identify the statutory authority for its award and the fees incurred under each statute. Id. Finally, Petitioner submitted a petition to the Court of Appeals for a rehearing, which subsequently was denied. Order, unpublished, Appellate Case No. 2011-204366 (Ct. App. Mar. 22, 2013).

STATEMENT OF THE FACTS

Petitioner approached Respondent in the fall of 2006 about a new construction project in which Petitioner was interested in having the Respondent provide architectural and engineering services. The project was to be Respondent's new plantation residence ("Project"). (R. p. 206 ln. 3 – p. 209 ln. 19). After communications between Petitioner and Respondent, Respondent attempted to write a scope of work for the project based upon information provided by Petitioner. (R. pp. 400 – 402). Respondent outlined the scope of work for the Project and set forth three assumptions as to critical details about the Project. (R. pp. 400 – 402). First, the project was going to be located in McIntosh County, Georgia on Petitioner's plantation where Respondent

had previously done some work. (R. p. 211 ln. 22 – p. 212 ln. 9). Second, Petitioner was going to hire a reputable contractor, JT Turner, to serve as the general contractor for the project. (R. p. 212 ln. 10 – p. 213 ln. 7). Third, Petitioner was going to hire a civil engineer for site work on the project. (R. p. 213 ln. 8 – p. 214 ln. 4). The assumptions impact the price Respondent conveyed to Petitioner for the scope of design and engineering work on the Project. (R. p. 210 ln 11 – p. 214 ln. 14). Respondent received no indication from Petitioner that the scope outlined by Respondent had any inaccuracies. (R. p. 214 ln. 5-14). In follow up to Respondent's initial project scope outline, Respondent prepared and submitted a proposal to Petitioner for the architectural and engineering work for the Project. (R. pp. 346 – 353).

Respondent's November 20, 2006 proposal letter to Petitioner forms the Agreement at issue between the parties¹. (R. p. 223 ln 22 – p. 224 ln 2). The Agreement provides that the architectural and engineering services would be provided by Respondent for a lump sum fee with restrictions and limitations noted. (R. pp. 346 – 353). Paragraphs 1-13 of the Agreement set forth the obligations of the Petitioner, including contracting directly with a civil engineering firm which ultimately was not done. Id. Pursuant to the terms of the Agreement, the parties agreed that once construction documents began, any changes would be performed on an hourly basis. Id. Further, requested construction phase services by Respondent or staff would be billed on an hourly basis. Id. Respondent's expert, Myles Glick, testified that the contract entered between Respondent and Petitioner provides for a fixed fee with additional services to be compensated at an hourly rate. (R. p. 281 ln. 22 – p. 282 ln. 14). Mr. Glick testified that the fee was derived on a per sheet basis for the number of drawings to be produced to provide a basic set of drawings. He also testified that any services provided by Respondent during construction were to be done

¹ The parties do not dispute that a contract exists and agree that it (R. pp. 400 – 402) represents the Agreement.

on an hourly basis. (R. p. 279 ln. 2 – p. 280 ln. 17).

After the Agreement was entered into between the parties, the three critical project detail assumptions made by Respondent turned out to be different than what Respondent had anticipated based upon the information provided by Petitioner. First, the location of the project was changed from McIntosh County, Georgia to Colleton County, South Carolina. (R. p. 226 ln. 8 – p. 229 ln. 24). The significance of this change to the Project is Colleton County's requirement that a licensed structural engineer must prepare and stamp structural drawings for any structural work performed. (R. p. 138 ln. 3-17 & p. 405 ln. 22 – p. 406 ln. 10). Ordinarily, architects or even home builders can prepare structural drawings on residences. (R. p. 210 ln. 3-17). As a result, Respondent was required to hire a structural engineer to produce structural drawings for every building on the Project. (R. p. 210 ln. 12-17). Respondent invoiced Petitioner for the structural drawings, which were not part of the original Agreement, and has not been paid for this labor. (R. p. 238 ln. 23 – p. 240 ln. 20). The per sheet formula used by Respondent to charge for the structural drawings was based upon the same formula Respondent used to delete sheets from the drawings when Petitioner decided he did not want to construct a boathouse. (R. p. 224 ln. 3 – p. 225 ln. 13 & p. 239 ln. 19-23).

Second, Petitioner did not hire a civil engineer for the project. (R. p. 221 ln. 13 – p. 222 ln. 6). The lack of a civil engineer creates additional costs for site grading, well, piping, septic tanks, and drainage fields. (R. p. 213 ln. 8 – p. 220 ln. 1). Third, Petitioner fired the general contractor and served as his own general contractor during the course of the project. (R. p. 236 ln. 10-19). The lack of a general contractor made Respondent's involvement in the project expand from what was originally proposed. For example, Respondent was asked to assist in the recommendation of independent contractors to be engaged by Petitioner after Petitioner

terminated the general contractor. (R. p. 235 ln. 20 – p. 236 ln. 5). Mr. Glick testified the minute you don't have a general contractor, the architect's work goes up exponentially. It goes through the roof in terms of time allocated. (R. p. 283 ln. 17 – p. 284 ln. 4).

In addition to the critical changes in the Project details, Petitioner requested numerous and complex changes during the course of the Project. Andy Bozeman, an employee of Respondent, spent hours testifying as to all the changes made to the drawings after the initial design had been prepared by Respondent. (R. pp. 138 & 392 – 397). Pursuant to Paragraph 19 of the Agreement, "once we begin construction documents, any changes in room layout, sizes, window locations, door locations, and exterior elevation design will be performed on an hourly basis." (R. pp. 346 – 353). Respondent invoiced Petitioner for the labor associated with these changes and has not been paid. (R. pp. 354 – 363).

While the Respondent admits that it did not notify Petitioner every time an additional service was being billed to the contract, Petitioner's expert admitted that the contract between the parties does not set forth a notice requirement when additional services are being billed. (R. p. 312 ln. 13 – p. 313 ln. 24). Each additional service requested by Petitioner was billed on an hourly basis pursuant to Paragraphs 18 or 19 of the Agreement. At the end of the project, Respondent billed for the remaining contract balance, which included the construction administration services, additional design services, and reimbursable expenses for the project, but has not been paid. (R. pp. 354 – 365 & p. 278). Petitioner admitted at trial that he owed Respondent at least a portion of the remaining contract balance and would have paid it had a proper invoice for only the amount he agreed was owed had been submitted. (R. p. 110 ln. 8-12 & p. 114 ln. 1 – p. 115 ln. 3). Petitioner admitted at trial that he asked Respondent to design a garden wall, but has not paid them for it. (R. p. 111 ln. 23 – p. 113 ln. 6). Further, Petitioner

admitted at trial that he agreed to pay Respondent for a two hour construction meeting, but has not paid them for it. (R. p. 113 ln 7 – 25). Despite his own admissions, Petitioner has refused to pay Respondent any additional money since his initial payment in February 2007.

Petitioner testified that he terminated the Respondent in December 2008. (R. p. 118 ln. 16-18). According to Mr. Spriggs, a termination was never communicated to Respondent. (R. p. 265 ln. 20 – p. 266 ln. 5). As a result, Respondent continued to perform construction administration services under the Agreement with Petitioner. For example, Respondent took a call from Petitioner’s plumbing contractor on January 13, 2009 and Respondent worked through the details for approving a substitution of the plumbing pipe on the Project. (R. p. 198 ln. 23 – p. 200 ln. 11; pp. 398 – 399; pp. 403 – 436). In approving the substitution of the plumbing pipe, Mr. Spriggs testified that he had to consider the percentage of toilets, sinks and fixtures being used to analyze whether a reduction in pipe size would be workable. (R. p. 230 ln. 19 – p. 232 ln. 11). Mr. Spriggs then testified that the plumbing engineer was consulted to assess the amount of water flow with the substituted pipe in order to determine whether it was acceptable. (R. p. 232 ln. 12-15).

Further, in May 2009, Respondent provided labor to assist in the preparation of an Appraisal that was requested by Petitioner. (R. p. 196 ln. 11-25). Petitioner admitted that Respondent was authorized to perform this type of labor on the Project. (R. p. 132 ln 21-25). Petitioner further admitted that he never communicated to Respondent not to respond to calls from contractors in the field. (R. pp. 131 – 134 & pp. 303 – 309). Respondent provided labor on the Project through May 2009 not knowing it had allegedly been terminated. Respondent has invoiced Petitioner for this labor pursuant to the Agreement and has not been paid. (R. pp. 354 – 365).

Despite Petitioner's claim that Respondent was terminated from the project, the drawings prepared by Respondent were the sole drawings used by Petitioner to obtain permits for construction. (R. p. 129 ln. 17 – p. 130 ln. 8). Respondent served as the only design professional on the Project, and Petitioner used the drawings solely prepared by Respondent to construct all the buildings on his Colleton County plantation. (R. p. 129 ln. 17-23 & p. 137 ln. 22-25). Petitioner had a complete set of design drawings when he allegedly terminated Respondent from the project. As of the date of the alleged termination, all buildings on the Project had been built with the exception of the 500 sq. ft. grotto. (R. p. 118 ln. 6 – p. 119 ln. 4).

In February 2009, Respondent submitted invoices to the Petitioner for payment in accordance with the terms of the Agreement. (R. pp. 354 – 363). Respondent testified what labor was performed related to each invoice and if the invoice related to additional labor or expenses, why it was considered additional under the Agreement. (R. p. 232 ln. 4 – p. 258 ln. 15). Mr. Spriggs testified that when he sent the invoices for payment in February 2009, he was unaware of Respondent having been allegedly terminated. (R. p. 258 ln. 16 – 19). Respondent sent additional invoices to Petitioner in May 2009 and in November 2009 capturing all construction administration time for the close out of the project. (R. p. 259 ln. 2 – p. 263 ln. 21). Petitioner testified that upon receipt of the invoices in February, he called Respondent and disputed the amount owed. (R. p. 299 ln. 7-9). Petitioner asked Respondent to send a corrected invoice for the amount Petitioner agreed he owed and he would pay it. (R. pp. 121 – 122). The problem was Petitioner's opinion of what was left to be paid was not the same as Respondent's. Petitioner admitted on more than one occasion at trial that he owed Respondent at least a portion of the remaining contract balance and would have paid it had a proper invoice for only the amount he agreed was owed had been submitted. (R. p. 110 & pp. 114 – 115). Despite knowing

he owed Respondent money under the terms of the Agreement, Petitioner continually refused to pay Respondent anything unless a “corrected” invoice was submitted. Ironically, Petitioner paid Respondent the first half of the contract balance without an invoice having been submitted. (R. p. 123 ln. 20 – p. 124 ln. 21).

As a result of Petitioner’s refusal to pay Respondent in accordance with the terms of the Agreement, Respondent placed a mechanic’s lien on Petitioner’s property. (R. pp. 376 – 386) Petitioner continued to refuse to pay Respondent. Instead, Petitioner chose to post a cash bond to remove Respondent’s lien from the property. (R. pp. 387 – 391). Respondent filed a lawsuit to foreclose on the mechanic’s lien and asserted additional causes of action for breach of contract and quantum meruit. (R. pp. 31 – 54). All of Respondent’s claims related to the debt Petitioner owed Respondent for labor performed pursuant to the Agreement. On March 15, 2010, Respondent, by and through its counsel, made a demand on Petitioner pursuant to S.C. Code Ann. § 27-1-15 asking Petitioner to make a reasonable and fair investigation of Respondent’s claim and paying the portion of Respondent’s claim Petitioner deemed valid. (R. pp. 366 – 375). Despite admittedly knowing he owed Respondent money, Petitioner still refused to make any payment to Respondent, later using the fact that the parties were involved in a lawsuit as his justification for not making payment to Respondent. Respondent then amended its complaint to add a cause of action for failure to comply with S.C. Code Ann. § 27-1-15 and breach of contract accompanied by a fraudulent act. (R. pp. 68 – 93). The Respondent’s claims for the debt owed proceeded to a trial on the merits.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SERVICES PERFORMED BY RESPONDENT IN JANUARY 2009 CONSTITUTED LABOR PURSUANT TO THE DEFINITION OF LABOR IN SOUTH CAROLINA CODE OF LAWS SECTION 29-5-10(A).

Petitioner asserts that S.C. Code Ann § 29-5-10 is inapplicable to this case. The statute provides as follows:

As used in this section, **labor performed or furnished in the erection**, alteration, or repair of any building or structure upon any real estate **includes** the preparation of plans, specifications, and design drawings **and the work of making the real estate suitable as a site for the building or structure**. The work is **considered to include, but not be limited to**, the grading, bulldozing, leveling, excavating, and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes, and the disposal of any construction and demolition debris, as defined in Section 44-96-40(6), including final disposal by a construction and demolition landfill. Any private security guard services provided by any person at the site of the building or structure during its erection, alteration, or repair is considered to be labor performed or furnished within the meaning of this section.

S.C. Code Ann. § 29-5-10 (emphasis added). In this case, the Court of Appeals held:

We find the construction administration services provided by [Respondent] are labor pursuant to the definition of labor in section 29-5-10(a). While the statute provides labor includes the preparation of plans, specification, and design drawings, it also states labor includes the work of making the real estate suitable as a site for the building or structure. Here [Respondents'] discussions with the plumber and engineer in January 2009 were part of its architectural services overseeing the proper construction of the property.

Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 501 (Ct. App. 2013), reh'g denied (Mar. 22, 2013).

In his Writ of Certiorari, Petitioner simply argues that because the statute includes site work such as grading and paving, the statute is inapplicable to this case and is a basis for

granting of his Writ of Certiorari. Petitioner's interpretation of S.C. Code Ann. § 29-5-10 is misguided because the list of lienable services is expressly neither exclusive nor exhaustive. Rather, the statute defines labor broadly as "the work of making the real estate suitable as a site for the building or structure." S.C. Code Ann. § 29-5-10(a). The record fully supports the fact that Respondent's services from January 2009 were labor within the meaning of the statutory language. See (R. p. 199 ln 1 – p. 200 ln 11; p. 230 ln. 19 – p. 232 ln. 3; pp. 354 – 364; pp. 398 – 399; pp. 435 – 436). Accordingly, the Court of Appeals' proper determination that Respondent's services constituted labor under Section 29-5-10(a) does not establish a basis for challenging the findings in this case.

II. THE COURT OF APPEALS ORDER IN THIS CASE DID NOT EXPAND THE LANGUAGE OF SOUTH CAROLINA CODE OF LAWS § 29-5-10(A) AND ARE SUPPORTED BY THE EVIDENCE AND RECORD.

A. Construction administration services performed by Respondent are within South Carolina's Mechanic's Lien Statute's meaning of labor.

In his Writ of Certiorari, Petitioner again sets forth the unsuccessful argument he presented in the Circuit Court and at the Court of Appeals – that South Carolina's Mechanic's lien statute does not provide for any lien rights associated with the performance of construction administration services. Petitioner insinuates that because the Section 29-5-10(a) defines labor to include the preparation of plans, specifications, and design drawings that it somehow excludes contract administration services from the type of labor for which a lien is allowed.

As noted, the language in Section 29-5-10(a) is clearly not exclusive; rather, it is meant to illustrate. No South Carolina law supports Petitioner's position that construction administration services cannot be deemed labor. In fact, the illustrative list of services that constitute labor even provides "[a]ny private security guard services provided by any person at the site of the building

or structure during its erection, alteration, or repair is considered to be labor performed or furnished within the meaning of this section.” S.C. Code Ann. 29-5-10(a). How could security guard services during construction be services for which a lien is created but not architectural services overseeing and supporting proper construction of a residence? Construction administration supports erection, alteration, or repair of any building based upon plans and specifications, which are specifically identified as labor giving right to a lien. See S.C. Code Ann. § 29-5-10. Construction administration labor is instrumental in delivering an appropriate residence or structure, which the statute includes in its definition of “labor”. Id. In fact, construction administration labor actually supports the erection of a building even more so than the preparation of plans, specifications and design drawings related to the project.

In a 1918 decision, this Court held that an architect who furnished the plans and specifications and supervised the construction of a building had furnished labor within the meaning of South Carolina’s mechanic’s lien statute. Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E.2d 407 (1918). In so holding, the Court ruled that “labor furnished” was not limited to manual labor, but also encompassed mental labor. Id. Respondent is unaware of a single South Carolina case where construction administration services were excluded as the type of labor for which a lien can be filed under South Carolina’s mechanic’s lien.

Petitioner cites Clo-Car Trucking Co., Inc. v. Cliffure Estates of S.C., 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984) as legal precedent regarding the definition of “labor” under the South Carolina Mechanic’s Lien Statute. In Clo-Car, the court found that the work performed by a clearing and grading subcontractor who was clearing land for the construction of roads did not constitute “structure” within the meaning of the statute. Id. at. 577. The court in Clo-Car dealt with the definition of “structure” and “building”, not with the definition of “labor” within the

mechanic's lien statute. This case is distinguishable significantly from Clo-Car. In this case, the project is the physical construction of various buildings and/or structures on a plantation, not the clearing of land for the construction of roads. Respondent through the preparation of its design plans and specifications and its construction administration services during construction played an integral part in the erection of Petitioner's main house, garages, stable, potting shed, grotto and conservatory. (R. pp. 339 – 340). The labor provided by Respondent on January 13, 2009 – January 15, 2009 includes design development services during the construction phase of the project to verify and discuss details in support of construction. (R. p. 364 & pp. 403 – 436). Specifically, labor on January 13, 2009 dealt with Respondent addressing plumbing subcontractor's request to substitute the size of plumbing lines used on the project. (R. pp. 199 ln 1 – p. 200 ln 11 & p. 230 ln. 19 – p. 231 ln. 19); (R. pp. 398 – 399).

Other jurisdictions provide for contract administration services to support a lien and specifically exclude the preparation of plans, specifications and design drawings from the labor for which lien rights arise. In Pennsylvania, an architect has no lien for merely drawing plans and specifications for the building, but does have rights to a lien for providing construction administration services that furthers the plans and specifications prepared. See Lee v. Du-Rite Products, Co., Inc., 366 Pa. 548, 79 A.2d 218 (1951). South Carolina follows the rule that mechanic's lien statutes, being remedial, are to be given liberal construction and the law is to be construed in a most liberal and comprehensive manner in favor of lien claimants. Clo Car, 282 S.C. at 575. The court can apply the rule of liberal construction to create a lien where one is intended by the legislature. Id. at 576. To infer that South Carolina's legislature would allow a lien for preparation of plans, specifications and design drawings but not the services that further and support the design is contrary to legislative intent, illogical and without merit.

B. The evidence presented in this case support the findings of the Circuit Court and Court of Appeals that Respondent's services constituted labor under South Carolina Code Section 29-5-10.

Petitioner argues that no evidence exists that Respondent performed work which entitled it to a lien within ninety days of filing the lien that is the subject of this action. Petitioner asserted several variations of this same argument before the Circuit Court and the Court of Appeals but now adds that as a threshold matter, the services provided by Respondent were allegedly not performed or furnished in the erection, alteration, or repair of any building or structure upon any real estate.² Such an argument does not align with the findings of the Circuit Court and Court of Appeals in this case. As a preliminary matter, Respondent would have had no reason to perform such services on Petitioner's behalf if not for the purposes stated in Section 29-5-10.

Respondent presented evidence by way of invoices, timesheets, emails and testimony that Respondent performed work on this project up to January 13, 2009 and then again in May 2009 for 3.5 hours. (R. p. 196 ln. 11 – p. 200 ln. 11; p. 364; pp. 398 – 399; pp. 403 – 436). Petitioner testified that the Respondent was authorized to respond to questions from the field from various contractors and he admitted that he never told Respondent to stop responding to these questions prior to the labor performed on January 13 2009. (R. p. 302 ln 24 – p. 303 ln 18). Respondent's mechanic's lien was filed on April 13, 2009, which is within ninety (90) days of January 13, 2009 and prior to the work performed in May 2009. (R. p. 376 ln. 2 – p. 386 ln. 25). Further,

² In his Writ of Certiorari, Petitioner fails to offer support for this argument or any clarification why Respondent's January 2009 services could not be deemed to be performed for such a purpose.

Petitioner testified that he asked for the appraisal which Respondent submitted details for in May 2009. (R. pp. 135 – 136). Mr. Spriggs testified that Respondent’s final work effort was after the first month of 2009. (R. p. 230 ln. 17 – p. 232 ln. 3)

Both the Circuit Court and the Court of Appeals concluded that the evidence supported the conclusion that Respondent’s January 2009 services were lienable under § 29-5-10. Because Respondent properly filed the mechanic’s lien in accordance with S.C. Code Ann. § 29-5-10 for services furnished in the erection, alteration, and repair of Petitioner’s building within ninety days of the last work performed, the lien was timely filed. See Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257 (2006) (“The deadline to serve and record a mechanic’s lien begins running from the date the last material was furnished or work performed, *regardless of whether such material or work is insignificant and regardless of whether the final work is delayed*, provided the reason for the delay is not to improperly extend the period for perfecting the lien.”) (emphasis added). Evidence was presented before the Court that Respondent properly followed the statutory requirements and Petitioner failed to pay for labor and services provided by Respondent within the scope of the mechanic’s lien statute. Respondent’s cause of action under S.C. Code of Laws § 29-5-10, *et al.* against Petitioner, as well as Petitioner’s counterclaim for slander of title were properly submitted to the jury and a unanimous verdict was returned in favor of Respondent.

III. THE FACTUAL ISSUE OF WHETHER A REASONABLE INVESTIGATION AND UNDISPUTED PAYMENT WAS MADE PURSUANT TO S.C. CODE ANN. § 27-1-15 WAS PROPERLY SUBMITTED TO THE JURY AND A UNANIMOUS VERDICT RETURNED IN FAVOR OF THE RESPONDENT

In this case, a factual issue existed as to whether a fair and reasonable investigation was made by Petitioner in compliance with S.C. Code Ann. § 27-1-15 and the issue was properly

submitted to the jury. Under S.C. Code Ann. § 27-1-15, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, *or whatever portion of it is determined valid*, within forty-five days from the date of mailing the demand. See S.C. Code Ann. § 27-1-15. If a person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand. Id.

The issue as to whether a reasonable and fair investigation of Respondent's claim has been made and whether a valid portion of the claim was paid in a timely manner *is a question of fact*. See Hardaway Concrete Company, Inc. v. Hall Contracting Corporation, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) (emphasis added) (citing Moore Elec. Supply, Inc. v. Ward, 316 S.C. 367, 450 S.E.2d 96 (Ct. App. 1994)). As the Court of Appeals correctly noted in this case, "[w]e find whether a fair and reasonable investigation of Spriggs' claim has been made and whether a valid portion of the claim was paid in a timely manner are questions of fact for the jury." Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 502 (Ct. App. 2013) (citing Hardaway, 374 S.C. at 229, 647 S.E.2d at 495 (Ct. App. 2007)).

Petitioner admitted at trial that he owed Respondent at least a portion of the remaining contract balance and would have paid it had a proper invoice for only the amount he agreed was owed was submitted. (R. p. 110 ln. 8-12; p. 114 ln. 1 – p. 115 ln. 3). Petitioner admitted at trial that he asked Respondent to design a garden wall, but has not paid for it. (R. p. 111 ln. 23 – p. 113 ln. 6) Furthermore, Petitioner admitted at trial that he agreed to pay Respondent for a two hour construction meeting, but also failed to pay Respondent. (R. p. 113 ln 7 – 25). Petitioner's continual explanation for why he did not pay Respondent was that he had paid his money by paying it into escrow with the Court. Yet, Petitioner wrote Respondent a letter in June of 2009,

after he had paid money into the Court, indicating he would pay 50% of the \$151,000 upon receipt of a corrected invoice. (R. p. 340). After three full days of listening to the evidence in this case, the jury correctly and unanimously determined that Petitioner had not made a reasonable and fair investigation of the claim and paid the proper portion to Respondent within forty-five days of the date of the demand. (R. p. 337).

In his Writ of Certiorari, Petitioner offers no support for his argument that a jury cannot make a factual determination whether any reasonable investigation was performed following Respondent's demand letter. Petitioner merely alleges that a jury is not qualified or competent to make such a determination but cannot cite to any legal precedent in support of his position. As the Court of Appeals correctly observed, Petitioner's argument is inconsistent with South Carolina law and should therefore not be a basis to grant Petitioner's Writ of Certiorari.

IV. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER ABANDONED HIS ARGUMENTS RELATED TO SOUTH CAROLINA CODE § 27-1-15, NONE OF WHICH ARE SUPPORTED BY SOUTH CAROLINA LAW

Petitioner next contends that the arguments he asserted on appeal related to Respondent's § 27-1-15 demand should not have been deemed abandoned on appeal. On appeal, Petitioner argued that submission of Respondent's failure to comply with S.C. Code Ann. § 27-1-15 cause of action to the jury is reversible error for the following three reasons: (1) Respondent failed to present any evidence that Petitioner did not perform a fair and reasonable investigation; (2) because claims were pending between the parties at the time Respondent's demand was made, there is no way to conclude what would have been a "valid" amount to be paid to Respondent; and (3) because Petitioner had paid an amount which exceeded the entire amount of

Respondent's claim into the court, his failure to make a payment at the time the statutory demand was made cannot be said to be reasonable.

None of the three arguments were supported by legal precedent on appeal and Petitioner presented only conclusory arguments on each theory.³ As the Court of Appeals noted related to Petitioner's defenses to Respondent's § 27-1-15 cause of action, "Slivka fails to cite any legal precedent to support these arguments. Accordingly, we find these arguments are abandoned on appeal." Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 502 (Ct. App. 2013) (citing Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App.2006) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal).

In his Writ of Certiorari, the essence of Petitioner's argument is that because the factual basis surrounding Respondent's § 27-1-15 claim and Respondent's purported defenses existed at the time of trial, Respondent should be able to freely raise these issues on appeal, despite his failure to provide any support for these theories at trial. On appeal and in his Writ of Certiorari, Petitioner has offered no legal precedent for his three arguments. Moreover, § 27-1-15 contains no statutory language or legislative history that would support such an interpretation. Furthermore, even if Petitioner's arguments were properly preserved for appeal, they would have been issues of fact which would have been determined by a jury.

In his Writ of Certiorari, Petitioner solely cites Carolina Steel Corporation v. Palmetto Bridge Construction, 444 F.Supp.2d 577 (D.S.C. 2006). On appeal, Petitioner cited Carolina Steel for the proposition that the court found that because an investigation had occurred and a

³ In his Writ of Certiorari, Petitioner has modified these arguments slightly by substituting the first argument with his allegation that good faith discovery in active litigation "as a matter of law" satisfies the reasonable investigation requirement of § 27-1-15, which is likewise not supported by legal precedent. See Writ of Certiorari, pp. 15-16

dispute existed, no attorney's fees pursuant to the statute would be awarded. In Carolina Steel, the Defendant made an investigation of the claims of the Plaintiff prior to Plaintiff's demand under the statute and paid what was considered valid. Id. at 581. This case is distinguishable from Carolina Steel in that Petitioner never paid Respondent either prior to Respondent's demand or after Respondent's demand despite admitting he owed Respondent a portion of the original contract amount and additional services for a construction meeting and design of garden wall. Thus, Carolina Steel does not support Petitioner's argument on appeal or the general proposition asserted his Writ of Certiorari.

Petitioner concludes in his Writ of Certiorari that as a matter of law Petitioner cannot be said to have violated § 27-1-15 for failing to pay what he may not have owed. Petitioner appears to misunderstand the very purpose of § 27-1-15. Petitioner chose not to pay what, at a minimum he admittedly owed Respondent. Petitioner took the risk of failing to perform a fair and reasonable investigation of Respondent's demand or pay *any* amount he admittedly owed to Respondent. Based on these facts, the jury determined that Petitioner failed to make a fair investigation or otherwise unreasonably refused to pay the claim or proper portion of Respondent's demand and Petitioner was determined liable under § 27-1-15 by a jury in accordance with South Carolina law. Petitioner's attempt to revive three defensive theories asserted in his appellate brief, none of which are supported by legal precedent or preserved for appeal, is not grounds for granting Petitioner's Writ of Certiorari.

V. THE COURT OF APPEALS CORRECTLY UPHELD THE CIRCUIT COURT'S RULING THAT RESPONDENT WAS ENTITLED TO RECOVER PARALEGAL FEES AS PART OF ITS ATTORNEY'S FEE AWARD.

On appeal and in his Writ of Certiorari, Petitioner argues that time spent by paralegals is not recoverable in Respondent's claim for attorneys' fees as the prevailing party under the

mechanic's lien statute nor under an award pursuant to S.C. Code Ann. § 27-1-15. Again, Petitioner sets forth no legal basis for this assertion and South Carolina case law precedent is to the contrary. In Charleston Lumber Co. v. Miller Housing Corp., the South Carolina Court of Appeals reviewed an award of attorneys' fees that included paralegal fees in an action upon a promissory note. 318 S.C. 471, 482-83, 458 S.E.2d 431, 438 (Ct. App. 1996); see also McElveen v. McElveen, 332 S.C. 583 (Ct. App. 1998). The Charleston Lumber court ruled that the trial court did not abuse its discretion in awarding the attorneys fees, including the paralegal fees, because the note authorized an award of "reasonable attorney's fees." Id. The language "reasonable attorney's fees" found in the note is the same exact language found in the mechanic's lien statute.

The Affidavits of A. Bright Arial filed in this case show that the paralegal performing work on the file was (1) qualified through education, training or work experience to perform substantive legal work, (2) the substantive legal work was performed at the direction and supervision of an attorney, (3) the nature of the legal work performed, (4) the hourly rate being charged for the legal assistant, and (5) the number of hours expended in the performance of the services by the legal assistant. (R. pp. 593 – 595). The Affidavits of A. Bright Ariail satisfy the five requirements set forth and noted by Petitioner in Gill Sav. Asso. v. International Supply Co., 759 S.W.2d 697 (Tex. App. Dallas 1998).

In this action, the time spent by paralegals in support of Respondent's counsel represents \$29,180.85 of the total attorney's fee award. (R. pp. 593 – 595). Both paralegals, Ms. Skelly and Mrs. Whitsett, are qualified legal professionals with thirty (30) years of combined paralegal experience whose time billed in this matter supported the legal services provided and furthered the prosecution of the case. (R. p. 595 ¶¶ 6-7). In addition, 8.76 hours were billed to Plaintiff at

\$110.00 per hour for legal research performed by law clerks. (R. pp. 593 – 595). Thus, the trial court’s discretion in awarding paralegal fees as part of the overall attorneys’ fees award is proper under the mechanic’s lien statute and under S.C. Code Ann. § 27-1-15 and correctly upheld by the Court of Appeals.

VI. THE COURT OF APPEALS CORRECTLY FOUND THAT THE FEES AWARDED UNDER THE MECHANIC’S LIEN STATUTE ARE NOT LIMITED TO THE AMOUNT OF THE CASH BOND POSTED BY PETITIONER WITH THE CLERK OF COURT.

Petitioner argues that the cash bond posted with the Court pursuant to S.C. Code Ann. § 29-5-110 limited Respondent’s total recovery to the amount of the bond. Petitioner provides no legal support for this argument. The statutory language quoted by Petitioner in his Writ of Certiorari is misconstrued and nothing within the quoted language limits the judgment to the amount of the cash bond posted. See S.C. Code Ann. § 29-5-110. The statute notes that judgment shall be paid out of the cash deposited. Id. It does not contain language indicating that the cash deposited caps the amount of recovery. See id.

Furthermore, as the Court of Appeals noted, § 29-5-110 relates to the amount of the judgment and makes no mention of attorney’s fees. Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 502 (Ct. App. 2013). Under South Carolina’s Mechanic’s Lien Statute, the cost which may arise in enforcing or defending against the lien, including a reasonable attorney’s fee, may be recoverable by the prevailing party *up to the amount of the lien*. See S.C. Code Ann. § 29-5-10 (emphasis added). The express language of the statute indicates that a party is entitled to a judgment up to twice the amount of the lien.

Petitioner’s filing of a bond pursuant to S.C. Code Ann. § 29-5-110 does not void the express language of the South Carolina Mechanic’s Lien Statute. Under Petitioner’s theory, a

claimant would only be entitled to attorney's fees in the amount of one third of the lien amount in all circumstances⁴. This theory is clearly in contradiction to the legislative intent of the attorney's fees provision within the mechanic's lien statute. Petitioner's interpretation of S.C. Code Ann. § 29-5-110 is inconsistent with the express language of S.C. Code Ann. § 29-5-10. Thus, the Court of Appeals was correct in finding that Respondent's recovery under the mechanic's lien statute should not be reduced to the amount of the cash bond.

VII. PETITIONER HAS ALSO NOT PRESERVED ANY ISSUES FOR APPEAL ON THE VERDICTED RENDERED AS TO RESPONDENT'S BREACH OF CONTRACT CLAIM

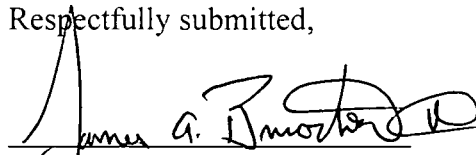
The evidence submitted at trial supports Respondent's claim for breach of contract and a unanimous verdict in the amount of \$173,990.53 was returned by the jury. (R. p. 337). The trial court then assessed prejudgment interest in the amount of \$37,413.92 to the verdict based upon Respondent's prayer for pre-judgment interest on the amount claimed due under all causes of action. (R. pp. 14 – 23). Thus, the total verdict as to Respondent's breach of contract action is \$211,404.45. Petitioner failed to raise any legal issues in his post-trial motions or on appeal to challenge the verdict as to Respondent's breach of contract theory. An issue is not preserved where the trial court does not explicitly rule on an argument and the Petitioner does not make a Rule 59(e) motion to alter or amend the judgment. Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct.App.2004). As a result, Respondent's verdict as to its breach of contract and the court's subsequent award of pre-judgment interest on that amount must not be altered.

CONCLUSION

For the above mentioned reasons, the Court of Appeals order filed February 6, 2013 is not in error and this Court should not grant Petitioner's Writ of Certiorari.

⁴ Pursuant to S.C. Code Ann. § 29-5-110, the amount of the cash bond includes the amount of the lien plus one-third.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James A. Bruorton IV". The signature is written over a horizontal line.

James A. Bruorton IV
A. Bright Ariail
Rosen | Hagood
151 Meeting St., Suite 400
Charleston, SC 29401
(843) 577-6726
(843) 724-8036 (f)
Attorneys for Respondent

May 16, 2013
Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

MAY 20 2013

S.C. SUPREME COURT

Case No. 2009-CP-15-0595

THE SPRIGGS GROUP, P.C.,..... Respondent,

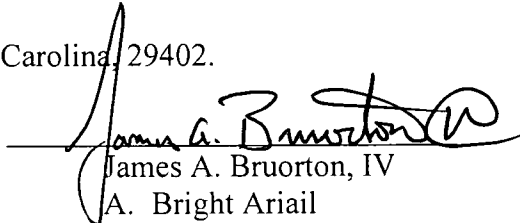
v.

GENE R. SLIVKA, Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on May 17, 2013, addressed to their attorney of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, 342 East Bay Street, Post Office Box 773, Charleston, South Carolina, 29402.

May 16, 2013



James A. Bruorton, IV
A. Bright Ariail
Rosen Hagood
PO Box 893
Charleston, SC 29402
(843) 577-6726
cbruorton@rrhlawfirm.com
bariail@rrhlawfirm.com
Attorneys for Respondent