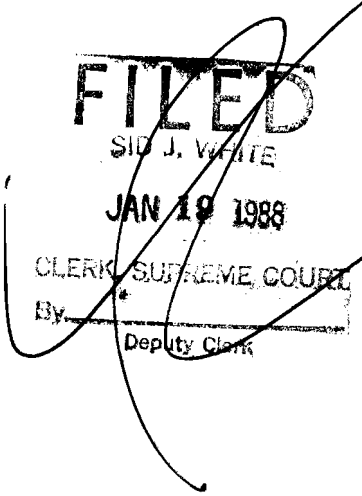
IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No. 71,387



HOLDING ELECTRIC, INC.,

Petitioner,

v.

LINDA M. ROBERTS,

Respondent.

ANSWER BRIEF OF RESPONDENT,
LINDA M. ROBERTS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
STATE OF FLORIDA, THIRD DISTRICT
Case No. 87-108

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PRELIMINARY STATEMENT

The Petitioner, HOLDING ELECTRIC, INC., will be referred to as Petitioner or Plaintiff. Respondent, LINDA M. ROBERTS, will be referred to as Respondent or Defendant. Amicus Curiae, American Subcontractors Association of Florida, Inc., will be referred to as Amicus. The Record on Appeal will be referred to as (R.____). Citations to the Initial Brief of Petitioner will be (P.____). Citations to the Initial Brief of Amicus Curiae will be (A.___).

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the statement of the case presented by the Petitioner and Amicus with the exception of the following clarifications.

Respondent was not a party to the trial court proceedings at the time the trial court entered its Order granting leave to file an Amended Complaint for the purpose of "pleading the delivery of the Affidavits to Contractor" and therefore could not object. (R. 18) Respondent was first joined as a party to the trial court proceeding when it was served with the Second Amended Complaint (R.36-54). Respondent timely raised its objection to Petitioner's failure to file the contractor's affidavit at the first possible opportunity in her Motion to Dismiss the Second Amended Complaint. (R. 55) Petitioner's cause of action against Respondent was purely statutory in that it was premised only upon Florida's mechanics' lien law and not upon any contractual or other basis. (R. 36-54)

As counsel for Petitioner argued at the hearing before the trial court on Respondent's Motion to Dismiss Appellant's Second Amended Complaint, Respondent was no more than an innocent purchaser of a condominium unit. Petitioner's counsel stated "At the time we filed this case we didn't want to pursue all the purchasers. It was not their fault that this all happened so we just foreclosed the lien against the owner, the general contractor. Unfortunately, the general contractor went bankrupt." (R. 90)

SUMMARY OF THE ARGUMENT

Petitioner's admitted failure to comply with the unambiguous statutory requirement of serving a contractor's affidavit prior to instituting its exclusively statutory mechanics' lien action constitutes a jurisdictional defect. According to longstanding and substantial judicial precedent, and the unambiguous legislative mandate, this defect requires dismissal of Petitioner's Complaint and therefore is fatal to Petitioner's cause of action.

The case at bar was correctly decided and should not be overruled. It is entirely consistent with the unambiguous requirements and purpose of Florida's mechanics' lien law. The Third District's decisions herein and in Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. 3d DCA 1975) give effect to several statutory sections which, among other things, not only specifically provide that a contractor is not entitled to payment, or to institute an action, until after service of the affidavit; but which also expressly prohibit the owner from making payment until after the affidavit is served. To allow a contractor to institute an action first, and then serve a contractor's affidavit, would render the affidavit useless for the purpose for which it was designed. The result of overruling these decisions would be to put the owner in an unacceptable quandry by unfairly forcing him to choose between either: (1) paying the contractor without the affidavit at the

risk of double payment and in violation of the statutory prohibition against payment; or (2) withholding the demanded payment and subjecting himself to suit by the contractor, including exposure for prejudgment interest and attorneys' fees.

Moreover, the Third District opinions should not be overruled because their holdings are mandated by express legislative rules of non-liberal construction and rules of strict compliance applicable to purely statutory remedies. The decisions should not be overruled, because that act would constitute a forbidden judicial exercise of legislative power, rather than an authorized judicial enforcement or review of the constitutionality of a legislative act.

Finally, it would be inequitable to allow Petitioner to maintain an exclusively statutory mechanics' lien foreclosure where Petitioner's inability to invoke the trial court's jurisdiction resulted from Petitioner's own failure to comply with the express statutory requirements, its act of inviting trial court error upon learning of its non-compliance, and its conscious decision not to initiate proceedings against Respondent until six months after instituting suit (R.36-54)[1/].

[1/] Although the Initial Brief of Petitioner indicates it filed its Complaint herein on December 18, 1986, (P.2) actually the Complaint was filed on December 18, 1985 (R.1-14).

ARGUMENT

The issue to be determined by this Court is whether the failure to serve a contractor's affidavit upon an owner at least five (5) days prior to filing a suit to foreclose a lien mandates dismissal of the action. Petitioner contends that dismissal is not, or should not, be mandated and that the trial court should have granted it leave to amend its complaint to allege that it served the affidavit five (5) days prior to the amendment rather than grant dismissal.

The only reason the Plaintiff has petitioned this Court is because dismissal has operated to bar any attempt to refile the action against Respondent. Under normal circumstances, dismissal would not be fatal to Petitioner's cause of action in that it could serve the affidavit and, if payment was not made within five (5) days, it could institute new proceedings. However, in this instance, the trial court's dismissal of Petitioner's complaint was fatal to its action against Respondent's property because Petitioner can only refile beyond the one (1) year limitation period. Further, inasmuch as the action is entirely premised upon a statutory right to foreclose a lien Petitioner has no other cause of action against Respondent.

In that Petitioner has admitted its failure to serve the affidavit ". . .before instituting this action to enforce its lien." (P. 6), Respondent will restrict its argument to what the law is, and should be, with respect to this issue. Respondent will not focus upon whether or not Petitioner complied with the Statute.

I.

THE THIRD DISTRICT OPINION IS NEITHER INCORRECT NOR UNFAIR, AND SHOULD BE UPHELD BECAUSE IT IS ENTIRELY CONSISTENT WITH THE UNAMBIGUOUS REQUIREMENTS AND PURPOSE OF FLORIDA'S MECHANICS' LIEN LAW.

The decisions in Mardan and this case should be upheld because they are neither incorrect nor unfair and are entirely consistent with the express requirements and purpose of Florida's mechanics' lien law, particularly § 713.06(3)(d)1, Fla. Stat. (1985). The statute states that: ". . . The contractor shall have no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit. The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his lien under this chapter, ..." The decisions are in complete accord with this unambiguous statutory requirement. In the decisions, the Third District held that failure to serve the contractor's affidavit prior to filing suit, as required by the statute, is a jurisdictional defect which mandates dismissal of the action. Mardan clearly held that amendment is futile where the affidavit has not been timely filed. Amendment would be futile because no amendment could ever be made to allege service of the contractors affidavit prior to institution of the action.

This reasoning has been applied by other courts, such as the United States Court of Appeals in Ramada Development Company v. Rauch, 644 F.2d 1097, 1109 (5th Cir. 1981), wherein the court stated:

> The five-day delivery requirement is far from insignificant to the Florida courts. Failure to allege service of the affidavit, as required, results in a dismissal of the claim upon motion. Falovitch v. Gunn & Gunn Constr. Co., 348 So.2d 560 (Fla. Dist. Ct. App. 1977). The party seeking to enforce the lien has the burden of pleading and proving compliance with the statute. Atlantic Gardens Landscaping, Inc. v. Boca Raton Land Development, Inc., 360 So.2d 1278 (Fla. Dist. Ct. App. 1978). If the affidavit has not been timely delivered a dismissal without leave to amend is proper even if the affidavit was, in fact, delivered, because amendment would be futile. Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. Dist. Ct. App. 1975).[2/]

Clearly, the decisions cannot be considered to be incorrect or unfair on the grounds that they are inconsistent with the express terms of the statute. To the contrary, to overrule the opinions would enable contractors to serve the affidavits after filing suit and, therefore, effectively negate the express terms of the statute.

[2/] Amicus' Initial Brief incorrectly states that Ramada, supra, conflicts with the decision under review. (A. 5). However, as the quoted portion of Ramada clearly demonstrates, Ramada supports the decision under review and was relied upon by Respondent in prior argument.

In fact, overruling the Third District holdings in the case at bar would be manifestly unfair to owners of property. The purpose of requiring that a contractor serve the affidavit on an owner prior to acquiring any right to sue is to protect the owner against the risk of having to pay for the same service or materials more than once. In effect, the section:

> [A]fford(s) to the owner the right, without being deemed in default, to withhold payments due on the general contract until proof has been given that subcontractors, materialmen and laborers have in fact been paid, or that specified amounts are due and owing such preferential lienors which the owner may lawfully pay out of the money due the general contractor.

Hardee v. Richardson, 47 So.2d 520, 524 (Fla. 1950) (interpreting former Section 84.04(3)). The owner has the right to rely on the affidavit and protect himself from subsequent claims without exposing himself to litigation prior to receipt. Climatrol Corp. v. Kent, 370 So.2d 394, 395 (Fla. 3d DCA 1979). Without the affidavit, the owner may be unaware of subcontractors, materialmen or laborers who do not have a direct contract with him, who may be owed money and who may have lien rights they may exercise upon the owner's property. The decisions of the Third District and other jurisdictions simply insure that the purpose of the statute is carried out by providing that a complaint is subject to dismissal if the plaintiff lienor cannot allege that it has complied with the statute and supplied the owner with a contractor's affidavit

prior to filing the action. The decisions guaranty that an owner cannot be in default and subject to a maintainable suit for failure to tender payment until the contractor has served the affidavit on the owner and removed the risk of double payment.

The decisions are also in complete accord with, and give effect to, other sections of Florida's mechanics' lien law, which must be construed together and in harmony with §713.06(3)(d)1, Fla. Stat. (1985). Garner v. Ward, 251 So.2d 252 (Fla. 1971). For example, §713.06(3)(f), Fla. Stat. (1985), provides: "No contractor shall have any right to require the owner to pay any money to him under a direct contract if such money cannot be properly paid by the owner to the contractor in accordance with this section." Where the contractor has not served the affidavit, the money cannot be properly paid to him by the owner because §713.06(3)(d)5, Fla. Stat. (1985), expressly provides: "The owner shall retain the final payment due under the direct contract that shall not be disbursed until the contractor's affidavit under subparagraph (d)1 has been furnished to the owner." It is, therefore, clear that, if the owner has not yet received the contractor's affidavit, the contractor is not entitled to require payment under §713.06(3)(f), Fla. Stat. (1985), and the owner will be in violation of §713.06(3)(d)5, Fla. Stat. (1985), if he pays the contractor.

There are additional statutory sections which depend upon timely service of the contractor's affidavit for their continued viability. Section 713.06(3)(c)4, Fla. Stat. (1985) and §§ 713.06(3)(d)2, 3 and 6 Fla. Stat. (1985) all contain provisions regarding entitlement to, timing of and propriety of payments to laborers, materialmen and contractors that are dependent upon the service of a contractor's affidavit. Section 713.06(2)(a), Fla. Stat. (1985) specifies the times within which Notices to Owner must be served and depends, in certain circumstances, upon when the contractor's affidavit is filed. If an owner is subject to suit prior to the service of the required affidavit, it will have a chaotic effect on the rights and responsibilities of all owners, and parties in privity and not in privity with them, regarding payment and rights to initiate litigation with respect thereto. In short, if the Third District and other supporting jurisdictions are overruled, owners will be subject to maintainable litigation as a result of their compliance with express statutory requirements and prohibitions, and their reliance upon express statutory rights. They will also be subject to litigation in circumstances where they are unsure of what their obligations are or whether those obligations have been fulfilled. This will put owners in a wholly unacceptable quandry. The owners will be unfairly forced to choose between either paying the contractor, subcontractors, laborers or materialmen without

receiving an affidavit, thereby violating statutory prohibitions and facing substantial risks of having to pay twice for the same service or materials; or, alternatively, withholding the requested payment and subjecting themselves to suit. If the opinions are overruled, it would rewrite the Florida Statutes by depriving the owner of his right to protection against double payment by effectively eliminating his right to a contractor's affidavit and allowing him to be subject to suit and attorneys' fees and pre-judgment interest while in compliance with statutory mandates and prohibitions against making payment. If the decisions are overruled, the various statutory provisions dependent upon the service of the contractor's affidavit will become meaningless.

II.

THE HOLDINGS OF THE THIRD DISTRICT IN THE CASE AT BAR AND IN MARDAN ARE MANDATED BY THE RULES OF NON-LIBERAL CONSTRUCTION EXPRESSED BY THE LEGISLATURE AND THE REQUIREMENT OF STRICT COMPLIANCE APPLICABLE TO PURELY STATUTORY REMEDIES.

The Third District Court of Appeal decisions in Mardan and the case at bar are not only fair, but are mandated by the rules of construction expressed by Florida's legislature in §713.37, Fla. Stat. (1985), which provides:

> Rule of Construction - This part shall not be subject to a rule of liberal construction in favor of any person to whom it applies.

It is fundamental that a plaintiff seeking the remedy of foreclosure of a mechanics' lien must comply strictly with statutory prerequisites affording relief thereunder. Shaw v. Del-Mar Cabinet Co., Inc., 63 So.2d 264 (Fla. 1953) (en banc); Sprinkler Fitters and Apprentices Local Union No. 821 v. F.I.T.R. Service Corp., 461 So.2d 144, 146 (Fla. 3d DCA 1984), pet. review denied, 472 So.2d 1182 (Fla. 1985); Gold v. M & G Services, Inc., 491 So.2d 1297, 1298 (Fla. 3d DCA 1986).

Moreover, strict compliance and non-liberal statutory construction are fundamental doctrines necessarily applied to purely statutory remedies, because they create new rights of action that did not exist in the common law. Thus, the requirements of the statute enter into, and become a part of, the right of action itself. Regal Wood Products, Inc. v. First Wisconsin National Bank of Milwaukee, 347 So.2d 643 (Fla. 4th

DCA 1977). If the Third District opinions are overruled, a contractor will be able to invoke jurisdiction of a court where no cause of action or jurisdiction exists by statute. The contractor will be able to exercise and enforce, through judicial process, a purely statutory right which he does not possess. Such a result would constitute a judicial revision of Florida's mechanics' lien laws. Moreover, overruling the decisions will effectively liberally construe those sections and eliminate the requirement of strict statutory compliance.

III.

OVERRULING THE HOLDINGS OF THE THIRD DISTRICT WOULD BE AN EXERCISE OF LEGISLATIVE POWER AND NOT AN AUTHORIZED JUDICIAL ENFORCEMENT OR REVIEW OF THE CONSTITUTIONALITY OF A LEGISLATIVE ACT.

To the extent overruling the opinion of the Third District Court of Appeal which followed Mardan would constitute a rewriting of §713.06, Fla. Stat. (1985) and other sections, or have the effect of liberally construing that section without requiring strict compliance, such a judicial act would constitute a constitutionally forbidden exercise of a power reserved exclusively for the legislature. State v. Barquet, 262 So.2d 431, 433 (Fla. 1972). "It is not within the province of the court to interfere with the judgment of the legislature and . . . absent a clear showing that the subject of the statutory enactments was outside the power of the legislature, ..." State Department of Agriculture & Consumer Services Division of Animal Industry v. Denmark, 366 So.2d 469, 471 (Fla. 4th DCA 1979). It is neither the court's duty nor prerogative to modify clearly expressed legislative intent. Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). Quite simply, the court has no power to change the law simply because that law seems to be inadequate in some particular case. Flagler v. Flagler, 94 So.2d 592 (Fla. 1957). Rather, the duty of the court is restricted to carrying out legislative intent and enforcing the policy of the law and measuring the judgment of

the legislature only on the basis of whether its acts are constitutional. Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976); Pepper v. Pepper, 66 So.2d 280, 284 (Fla. 1953); In re Apportionment Law Senate Joint Resolution No. 1305, 263 So.2d 797, 806 (Fla. 1972).

Because the opinions of the Third District Court of Appeal clearly hold in accordance with unambiguous legislative intent, they should not be overruled. Further, there has been no demonstration, nor even a suggestion, that the statutory requirement of serving a contractor's affidavit prior to institution of an action is unconstitutional in any respect. In the absence of a constitutional defect, the express terms of the statute should be enforced as they are in Mardan and the decision before this Court.

IV. AMICUS AND PETITIONER MISAPPLY AND MISCONSTRUE THE AUTHORITIES UPON WHICH THEY RELY.

Amicus has argued that "the decision under review is in direct conflict with the earlier decisions of this Court and with decisions of all appellate districts including the Third District from which this decision emanated." (A. 15-16). However, in their zeal to find support for their position, both Amicus and Petitioner have butchered the holdings of numerous cases and applied warped interpretations of their meanings based upon facts not found in the cases.

Amicus has suggested that the Third District en banc probably misapplied Mardan to this case. (A. 12,15). To reach the conclusion Amicus fabricates a fact not even suggested by that opinion: "... the only logical construction of Mardan is that the affidavit was not given during the life of the lien." (A. 13). The result urged by Amicus is completely without basis in that Mardan's holding is clear:

> The court was correct in denying the motion to amend and in dismissing the complaint without prejudice since neither the complaint alone nor with the amendment added to it, could present a valid action for mechanic's lien foreclosure. The affidavit is a statutory requirement, and dismissal for failure to comply therewith is proper. Oper v. Russell, Inc., Fla. App. 1967, 197 So.2d 13. Where the complaint fails to allege that the affidavit required by statute as a prerequisite to institution of suit has been filed, such omission is jurisdictional in nature and requires that the complaint be dismissed. Potts v. Orlando Building Service, Inc., Fla. App. 1968, 206 So.2d 221.

Id. at 770. Quite simply, Mardan and its numerous progeny, mandate dismissal for failure to serve the contractor's affidavit prior to instituting suit. They do not provide for leave to amend to be granted, and are not contingent upon whether the affidavit was served within the life of the lien.

Amicus also relies upon this Court's decisions in Hardee v. Richardson, 47 So.2d 520 (Fla. 1950) and Moore v. Crum, 68 So.2d 379 (Fla. 1953) and argues that those decisions directly conflict with the decisions under review. (A. 5). However, Amicus' reliance upon these decisions, as well as the decisions of Johnson v. West Florida Gas & Fuel Company, 105 So.2d 373 (Fla. 1st DCA 1958) and Townsend v. Giles, 133 So.2d 451 (Fla. 1st DCA 1961), is misplaced.

This Court, in Hardee, held that dismissal was not proper because an answer to the complaint had already been filed. However, this Court stated:

> In construing this statute this court has held that where a bill of complaint filed by a contractor against the owner to enforce a lien for improvements upon the owner's property fails to allege that the contractor has given the owner the sworn statement required by the statute as to full payment of all lienors contracting with or employed by the contractor, or the names of lienors and the amounts not paid, if such be the case, the bill of complaint will be subject to a motion to dismiss on the ground that it is without equity.

Id. at 522. This Court cited numerous cases in support of that principle and further held:

> While the fact that the service of the statement was not made upon the owners until after the institution of the suit might have been good ground for moving to dismiss the suit as premature until section 84.04(3) had been complied with, such ground is not now available in view of the answer filed by the defendants.

Id. at 524. Hardee, therefore, supports the decisions of the Third District.

However, even though Hardee supports Respondent's position, Hardee, Moore, Johnson, and Townsend are inapplicable because they were all decided prior to the 1963 amendment to the mechanics' lien statute. In 1963, the Statute was amended to expressly eliminate any issue as to whether a lienor could serve the affidavit after instituting suit. The old Section 84.04 was amended in 1963 to add in pertinent part:

> The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his lien under this chapter ...

Chapter 63-134, Laws of Florida (1963). This language has continued to be a part of § 713.06(3)(d) Fla. Stat. (1985) to this day and should not be nullified by cases which preceded it.

Amicus is also incorrect in its contention that the decision under review creates intra-district conflict with Walter Harvey Corp. v. Cohen-Ager, Inc., 317 So.2d 775 (Fla. 3d DCA 1975) and Oppenheim v. Newport Systems Development Corp.,

348 So.2d 328 (Fla. 3d DCA 1977). Oppenheim is inapplicable because it involved an architect's lien. Pursuant to § 713.03(3) Fla. Stat. (1985) which provides for liens for professional services:

> No lienor under this section shall be required to serve ... an affidavit concerning unpaid lienors as provided in Section 713.06(3).

Therefore, Oppenheim is inapplicable because where architects are involved there is no requirement to serve a contractor's affidavit.

Walter Harvey Corp. is also inapplicable to the case at bar. Walter Harvey Corp. follows the line of cases holding:

> Ordinarily, the general contractor must furnish the sworn statement as a condition precedent to the right to maintain an action to foreclose a mechanic's lien unless the complaint alleges facts clearly avoiding the necessity to furnish it, and the circumstances peculiar to each case govern. Brown v. First Federal Savings & Loan Association of New Smyrna, Fla. App. 1964, 160 So.2d 556.

Walter Harvey Corp. at 776. In Walter Harvey Corp., the contract attached to the complaint showed that certain lienors were to be paid by the owner and, therefore, the need for the affidavit was obviated under the circumstances peculiar to that case. No "...facts clearly avoiding the necessity to furnish it..." were alleged in the Complaint and therefore the limited exception suggested in Walter Harvey Corp. is not applicable.

Further, Petitioner's and Amicus' reliance on Bishop Signs Inc. v. Magee, 494 So.2d 532 (Fla. 4th DCA 1986) and Shores of Indian River, Inc. v. Gart Urban Associates, Inc., 478 So.2d 893 (Fla. 4th DCA 1985) is misplaced. Petitioner argues those cases follow McMahan Construction Co., Inc. v. Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984) which allows amendment of a complaint where service of the affidavit occurred after filing. However Bishop did not cite McMahan with approval but rather concluded that McMahan was inapplicable. Also, it is impossible to ascertain whether Shores approved McMahan or is even applicable to the case at bar. Shores refers to unstated "facts" which "are distinguishable from prior cases on the issue of the filing of a contractor's affidavit as a condition to maintaining an action for foreclosure of a mechanics' lien." Id. at 893. There is nothing in that decision to indicate what distinguishing facts the Fourth District found dispositive in either Shores or McMahan. Although Shores denies a petition for writ of certiorari on the basis of McMahan, it also relies on Leader Mortgage Co. v. Rickards Electric Service, Inc., 348 So.2d 1202 (Fla. 4th DCA 1977), on the issue of the filing of a contractor's affidavit as a condition precedent to maintaining an action for foreclosure of a mechanics' lien. Leader's holding is consistent with that of Mardan. In fact, if any inference at all can be made from Shores, it would be that it

involved facts wholly inapplicable to the case at bar in that there exist many prior cases that cannot be distinguished on factual or other grounds.

Finally, Petitioner has argued that the decision of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), is persuasive as to whether this Court should overrule the opinion at Bar or that in Mardan. Petitioner's position is without merit, however, because Commercial Carrier does not reach the issue of whether the statutory "condition precedent" of serving notice prior to maintaining suit had been complied with or whether the Plaintiff therein merely failed to allege compliance. All Commercial Carrier states is that "it was alleged that proper notice had been given to both governmental defendants, but there was no allegation that timely written notice was given to the Department of Insurance as is also required by Section 768.28(6)." Id. at 1023.

Further, even if Commercial Carrier does indicate that service of the required notice may occur after institution of the proceedings, Commercial Carrier is inapplicable herein because it involves only issues pertaining to governmental immunity and not Florida's mechanics' lien law. The purpose of the notice in Commercial Carrier is only to warn the sovereign that suit is imminent. By contrast, the contractor's affidavit is an integral part of the mechanics' lien law and provides protection to the owner from double payment by providing him

with information which enables him to make proper payment. Thus, the holding of Commercial Carrier does not result in placing any party in an unfair position of choosing between exposing himself to a lawsuit or violating express statutory prohibitions. Further, Commercial Carrier involves the principle of sovereign immunity from causes of action which would normally exist in the common law but for the fact that the Defendant is a governmental entity. On the other hand, the case at bar involves a claim that would never exist unless it was created by Statute. Therefore, the concepts of strict statutory compliance so often applied by the courts to Florida's mechanics' lien laws need not be so strictly construed in Commercial Carrier.

V. RESPONDENT HAS STANDING TO RAISE PETITIONER'S FAILURE TO COMPLY WITH STATUTORY PREREQUISITES.

Petitioner's argument that Respondent has no standing to claim lack of timely delivery of the contractor's affidavit is incorrect. Petitioner argues that § 713.06(3)(d)1 applies and affords protections only to "owners" in that it provides "The contractor shall have no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit." (P. 16-17). Petitioner reasons that Respondent is not an "owner" under the statutory definitions and therefore cannot "bootstrap" her way into the "owners" position. (P. 16-17). Assuming arguendo that Respondent is not an "owner", Petitioner's argument fails because the statute expressly provides, "The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of <u>any action</u> to enforce his lien under this chapter ..." (emphasis added). Clearly, service of the contractor's affidavit is a prerequisite to the institution of <u>any action</u> to foreclose a lien and that protection is <u>not</u> limited only to "owners".

Moreover, Petitioner seeks to deprive Respondent of her property to satisfy a debt she did not incur on the basis of a cause of action that would not exist but for the statute. Certainly, under these circumstances, it is fundamentally fair

and correct to allow Respondent to raise any statutory non-compliance as a defense to Petitioner's cause of action, particularly failure to comply with a jurisdictional prerequisite.

VI. IT WOULD BE INEQUITABLE TO ALLOW PETITIONER TO MAINTAIN AN EXCLUSIVELY STATUTORY MECHANICS' LIEN FORECLOSURE WHERE PETITIONER'S INABILITY TO INVOKE THE TRIAL COURT'S JURISDICTION RESULTED FROM PETITIONER'S OWN FAILURE TO COMPLY WITH THE EXPRESS STATUTORY REQUIREMENTS, ITS ACT OF INVITING TRIAL COURT ERROR UPON LEARNING OF ITS NON-COMPLIANCE, AND ITS CONSCIOUS DECISION NOT TO PROCEED AGAINST RESPONDENT.

Petitioner contends that the dismissal of its' mechanics' lien action without leave to amend operates an inequitable result in this instance. However, to reverse the trial court and allow Petitioner to maintain a purely statutory remedy, without first requiring Petitioner to comply with the statutory prerequisites, would operate a far more inequitable result. It was Petitioner's failure to comply with the statute, not the act of any other party, that has lead to the appropriate dismissal of its Second Amended Complaint. The Petitioner, not the Respondent, should be held responsible for that failure.

Petitioner also argues that it was lulled into a false sense of security when the trial court entered its Order allowing Petitioner to amend its Complaint. Petitioner contends that had the trial court entered an Order dismissing Petitioner's Complaint without leave to amend, it was then free to serve the contractor's affidavit in accordance with the statutory requirement. It could have refiled its mechanics'

lien foreclosure proceeding after dismissal because it could have refiled the action within the one year statute of limitations.[3/]

Petitioner, however, is estopped from asserting that the Order was in error in that the Order was the very relief sought by Petitioner. As such, the Order granting Petitioner leave to amend constituted "invited error", if error at all, and Petitioner is barred from arguing that its entry was erroneous. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Poller v. First Virginia Mortgage & Real Estate Investment Trust, 471 So.2d 104 (Fla. 3d DCA 1985); review denied, 479 So.2d 118 (Fla. 1985).

Petitioner not only invited error, but it placed itself in its present position by electing not to join Respondent as defendant in the trial court proceedings until it discovered that the primary defendant had initiated bankruptcy proceedings. At the hearing on Respondent's Motion to Dismiss,

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[3/] Section 713.22(1), Fla. Stat. (1985) in pertinent part states:

> (1) No lien provided by part 1 shall continue for a longer period than 1 year after the claim of lien has been recorded, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction.

If Petitioner refiled its action at this point after serving the Contractor's Affidavit, it would be beyond the applicable statute of limitations.

counsel for Petitioner stated: "At the time we filed this case we didn't want to pursue all the purchasers. It was not their fault that this all happened so we just foreclosed the lien against the owner, the general contractor. Unfortunately the general contractor went bankrupt." (R. 90) Petitioner therefore knowledgeably ran the risk of having his Complaint dismissed outside of the one-year statute of limitations applicable to mechanics' lien actions by consciously electing not to proceed against Respondent until the bankruptcy occurred.

To allow a party to amend a complaint alleging service of the affidavit five days prior to an amendment could, in certain circumstances, allow a Plaintiff to "institute" an action against a Defendant beyond the one-year statutory limitation. A lien claimant, for example, could file an action toward the end of the limitation period and fail to serve the contractor's affidavit. If, as Petitioner suggests, this Court should interpret the statutory requirement of serving the affidavit five days prior to "instituting" the proceedings to mean five days prior to "amending" as well, a foreclosing plaintiff could institute an action by obtaining jurisdiction over a particular defendant beyond the limitation period. To so allow a Plaintiff to first obtain jurisdiction over a Defendant beyond the limitation period has been prohibited by statute, and the Florida courts have consistently ruled:

> The Mechanics' Lien statute created for subcontractors a new right of action that did not exist in the common law, and expressly provided that no mechanics' lien shall continue for a longer period than one year after the claim of lien has been recorded unless within that time an action to enforce the lien is commenced. Section 713.22(1). This is not like an ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such right of action becomes extinguished and is gone forever.

Regal Wood Products at 644.

Finally, Respondent purchased the condominium unit from the primary defendant, Bonefish Yacht Club, Inc., and was not a party to the contractual dealings between Petitioner and Bonefish Yacht Club, Inc. (R. 90) As Petitioner's counsel stated "It was not their fault that all this happened so we just foreclosed the lien against the owner, the general contractor." (R. 90) To allow Petitioner to proceed with the mechanics' lien action against this innocent purchaser without itself strictly complying with the statute would operate an inequitable result. Therefore, if equitable considerations are taken into account by this Court, it is clear that it was appropriate for the trial court to dismiss Petitioner's Second Amended Complaint without leave to amend for failure to comply with the statutory prerequisites.

CONCLUSION

For the foregoing reasons, the decisions of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, Linda M. Roberts, was furnished by U.S. first class mail, postage prepaid, to: John W. Conlin, Esquire, Attorney for Appellant, Post Office Box 97, Marathon, Florida 33050; and Ronald P. Gossett, Esquire, Gossett, McDonald, Gossett & Crawford, P.A., Attorneys for Amicus Curiae, 3595 Sheridan Street, Suite 204, Hollywood, Florida 33021, this 19th day of January, 1988.

W. WYNDHAM GEYER, JR.
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