SUPREME COURT CASE NO. 76,234

STRESSCON, a general partnership whose partners are LONE STAR FLORIDA PENNSUCO, INC. and ADELAIDE BRIGHTON CEMENT (FLORIDA), INC.,

Petitioner,

vs.

REYNALDO and VIVIANA MADIEDO,

Respondents.

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ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, OF FLORIDA, THIRD DISTRICT

CASE NO. 89-02872

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REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, STRESSCON, a general partnership whose partners are LONE STAR FLORIDA PENNSUCO, INC. and ADELAIDE BRIGHTON CEMENT (FLORIDA), INC. (Plaintiff and Appellant below), seeks reversal of the trial court's Order and the Third District Court of Appeal's affirmation granting the Respondents', REYNALDO and VIVIANA MADIEDO (Defendants and Appellees below), Renewed Motion for Summary Judgment with instructions on remand that a summary judgment be entered on behalf of the Petitioner.

The underlying action consists of a suit for foreclosure of a mechanic's lien, as well as a separate count for quantum meruit against the owners of an improved piece of property.

All references to the Initial Brief filed by the Petitioner and the Answer Brief filed by the Respondents will be designated by "IB" and "AB," respectively.

All references to the Record on Appeal will be designated by the letter "R." All references to the Appendix to this Brief will be designated by the letter "A."

References to the Appendix **(A.)** are to tab number and to page, section, or paragraph as appropriate. The transcription **(TR.)** of hearings and depositions are referenced: **(A.____TR at [page]).**

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STATEMENT OF THE CASE AND FACTS

The Petitioner readopts and restates its Statement of the Case and Facts as set forth in its Initial Brief on the Merits. The Petitioner seeks to clarify various issues raised by the Respondents in their Statement of the Case and Facts.

The Respondents, in their Answer Brief, mention an alleged discrepancy between the Claim of Lien which set forth that the Petitioner was due and owing the sum of $24,150.00 **(A.4)**, and the response of Petitioner to Florida Statute § **713.16(2)** dated November 9, 1987 claiming that $25,236.75 was due and owing **(A.7)**. The difference is not a discrepancy but simply interest which accrued due to the Respondents' non-payment. The Respondents failed to raise this issue at the deposition of Laura Kopystianski as well as at the trial where Ms. Kopystianski, as well as the comptroller for Petitioner, were witnesses. No other pleading was ever filed on behalf of the Respondents concerning this alleged issue **(A.32)**. Further, the Respondents have never challenged the truth or accuracy of the information in the Statement of Account, even after the circuit court twice denied their Motion for Summary Judgment. Therefore, such difference is not an issue to this proceeding.

The Respondents have made two erroneous payments to Pentagon Construction. First, the Respondents did not require or receive a Release of Lien from Stresscon[1], or a contractor's affidavit from Pentagon Construction, including prior to any of their payments to

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[1]Article 9 of the contract between the Respondents and Pentagon Construction, the general contractor, called for the providing of releases or waivers of lien prior to payment **(A.2)**.

Pentagon Construction (A.43 TR at 18), even though they had received Petitioner's timely Notice to Owner[2] (A.3).

Secondly, at the oral argument before the Third District Court of Appeals on May 22, 1990, the Respondents for the first time disclosed that the Respondents paid the $25,000.00 (which they were withholding to pay the Petitioner) to Pentagon Construction upon the entry of summary judgment in the Dade County Circuit Court action. This payment was premature, as the Respondents were aware that the Petitioner was appealing the circuit court's ruling.

[2]Petitioner's work was included in Pentagon Construction's payment request number 3 which was paid by the Respondents in July 1987 (A.34 TR at 23), subsequent to receiving Petitioner's Notice to Owner on July 2, 1987 (A.3).

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SUMMARY OF ARGUMENT

The trial court erred in granting the Respondents' Motion for Summary Judgment to foreclose on a mechanic's lien, since the lack of a notary did not prejudice the owners' rights in any way, and the Petitioner complied with the intent of § 713.16(2) of the Florida Statutes by providing a timely and accurate Statement of Account. The information contained in the Statement of Account was not challenged.

Substantial compliance has been a bedrock of Florida jurisprudence in the historical interpretation of the entire Mechanics' Lien Law. In that regard the Mechanics' Lien Law is designed to be read and interpreted in its entirety, **Ceco Corp. v. Goldberg**, 219 So.2d 475 (Fla. 3d DCA 1969), cert. dismissed (Fla.) 230 So.2d 149, and should be liberally construed to accomplish its purpose of protecting the laborers and materialmen. See **Crane Co. v. Fine**, 221 So.2d 145 (Fla. 1969).

Even though only two statutes of the Mechanics' Lien Law specifically provide forgiveness for errors and omissions in the body of the statute[3], numerous statutes allow for substantial compliance, to wit; Fla. Stat. §§ 713.01 et seq., 713.06, 713.08, 713.18, 713.22 and 713.23. Thus, substantial compliance is not precluded from being the standard used to interpret and apply the Mechanics' Lien Law in its entirety. See **Maule Industries, Inc. v.**

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[3]Respondents in their Answer Brief (AB at 6-8) state that only Fla. Stat. §§ 713.06 and 713.08 allow for substantial compliance and would have this Court believe that case law supports substantial compliance only under said statutes. That is incorrect and a misstatement of case law.

Von Decken-Luers, 186 So.2d 301 (Fla. 4th DCA 1966).

The underlying theme of the Mechanics' Lien Law is notice. The purpose of the law is two-fold: 1) to protect a non-contracting owner from having to pay twice for the same work; and 2) to protect laborers and materialmen which have not been paid. The dual purpose of balancing both the lienor's right to receive fair compensation and the owner's right of not having to make double payments, is accomplished by requiring that the owner pay the materialmen, so long as the materialmen provide the owner with timely notice of their work. The Petitioner complied not only with Fla. Stat. **§ 713.16(2)**, but with the underlying purpose, intent and necessary requirements of the entire Mechanics' Lien Law.

A ruling in the Petitioner's favor would be perfectly consistent with the stated purpose of the entire Mechanics' Lien Law, including Fla. Stat. § 713.16(2), as well as sixty-five years of case law. Any ruling must be based on equity and justice. Equity and justice favor the Petitioner.

ARGUMENT

MAY THE FAILURE TO NOTARIZE AN OTHERWISE TIMELY AND ACCURATE STATEMENT OF ACCOUNT UNDER SUBSECTION 713.16(2), FLORIDA STATUTES (1987), BE CURED BY VERIFICATION AFTER THE FACT, SO LONG AS THERE IS NO PREJUDICE TO THE OPPOSING PARTY?

A. The Petitioner's lien should be upheld as the Petitioner has complied with the underlying requirements of the Mechanics' Lien Law without prejudice to the Respondents.

The common thread throughout the cases interpreting the Mechanics' Lien Law is that the owner be given sufficient timely notice by the lienor that the lienor is looking to the owner for payment of labor and materials supplied to the project so that the owner is not prejudiced. See Roughan v. Rogers, 199 So. 572 (Fla. 1941)(rehearing denied).

The Mechanic's Lien Law finds sanction in the dictates of natural justice and in the equitable principle that everyone who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation.

In this case the Petitioner has complied with the underlying premise permeating the entire Mechanics' Lien Law, i.e., that the owners of the property improved be given timely notice of the amount they owe. The Notice to Owner, Claim of Lien and Statement of Account were all truthful, accurate and filed or served timely.

The Respondents herein attempt to mislead the Court by implying that only Fla. Stat, §§ 713.06 and 713.08 are entitled to substantial compliance treatment. The reality is that only Fla. Stat. §§713.06 and 713.08 specifically state that errors or omissions shall not prevent the enforcement of the claim against one

who has not been adversely affected.

However, there are a number of statutes where the courts have ruled that substantial compliance was sufficient where the statute involved did not specifically provide forgiveness for errors and/or omissions, to wit; **(Fla. Stat. § 713.01)**, the Third District Court of Appeals in Russell v. Farrey's Wholesale Hardware Co., 163 So.2d 513 (Fla. 3d DCA 1964), held that substantial compliance is all that is necessary to comply with the entire Mechanics' Lien Law where no prejudice is shown; **(Fla. Stat. § 713.18)**, the First District Court of Appeals in Bowen v. Merlo, 353 So.2d 668 (Fla. 1st DCA 1978), applied substantial compliance in holding that the Mechanics' Lien Law was complied with, despite the fact that the claim of lien was mailed to the owner by regular mail rather than by certified or registered mail, where the actual delivery was accomplished; **(Fla. Stat. § 713.22)** the Fourth District Court of Appeals in **Maule Industries, Inc. v. Von Decken-Luers**, **supra**, reversed the trial court's summary judgment decree ruling a lis pendens filed by a mechanics' lienor, pursuant to the Mechanics' Lien Law, substantially complied with Fla. Stat. § **84.21** in form and content, although a description of the improvements and the time of filing the claim of lien were omitted; the Second District Court of Appeals in **B & H Sales, Inc. v. Fusco Corp.**, 342 So.2d 105 (Fla. 2d DCA 1977) ruled that Fla. Stat. § **713.22** had been substantially complied with, and that it would have been unjust to literally enforce a one year limitation period under the circumstances involved; **(Fla. Stat. §** 713.23), the Fifth District Court of

Appeals in <u>**Walter E. Heller & Company Southeast, Inc. v. Palmer-Smith**</u>, 504 So.2d 511 (Fla. 5th DCA 1987) held that a supplier had adequately complied with Fla. Stat. § 713.23 where it had sent the general contractor a copy of the Notice to Owner which contained all information required for notice to the contractor except for a statement that the supplier would look to the contractor's bond for payment of its work; see also **Broward County Carpenters Health and Welfare Trust Fund v. Seygo Construction Co.**, 570 F.Supp 817 (S.D. Fla. 1983); the Supreme Court **In re Advisory Opinion Non-Lawyer Preparation and Notice to Owner and Notice to Contract**, 544 So.2d 1013 (Fla. 1989) ruled that substantial compliance with the furnishing of the Fla. Stat. § 713.23 notice will not defeat a claim against a person who has not been adversely affected. Further, this Court by allowing lay people to prepare these notices was, in fact, laying the ground work for the type of situation in the case at bar. Laura Kopystianski is not an attorney. She never has been. She was unaware of the technicalities of Fla. Stat. § 713.16(2) and its penalties. If the Supreme Court were to rule in favor of the Respondents, it would, in effect, be contradicting its prior ruling **In re Advisory Opinion Non-Lawyer Preparation and Notice to Owner and Notice to Contract**, supra, in that substantial compliance with the statutes is contemplated due to the fact that non-lawyers would be preparing such documents.

This Court in **Masterbilt Corp. v. S.A. Ryan Motors, Inc.**, 6 So.2d 818 (1942) stated "A mechanic's or materialmen's lien is statutory and before a person may have such a lien, it is necessary

that there be a substantial compliance with the several statutory provisions." Emphasis added. Id. at 820.

The Respondents cite in their Answer Brief **(AB at 13)** that the reason the legislature requires a sworn statement is to attach the criminal penalty of perjury as a deterrent from having the individual signing the statement lie. The salutary effect which is cited in the case of **Shaw v. Del-Mar Cabinet Co.**, 63 So.2d 264 (Fla. 1953) has been more than adequately met in this case. Ms. Kopystianski signed three Affidavits setting forth and swearing to the matters contained in her November 9, 1987 Statement of Account **(A.8)(A.11)(A.14)**. Ms. Kopystianski gave a sworn deposition on May 16, 1988 **(A.32)**, and she testified under oath at trial **(A.25)**. The fact is that none of the statements contained in the November 9, 1987 Statement of Account are in dispute. The Respondents are merely clinging to a technicality to arrive at an unjust and inequitable result.

The courts in Florida have long been balancing the rights of the lienor who has furnished labor, services and/or materials and has not been paid monies owed, **George J. Motz Construction Corp. v. Coral Pines, Inc.**, 232 So.2d 441 (Fla. 4th DCA 1970), against the owner's rights of not being prejudiced by not having been given sufficient notice. See **Bryan v. Owsley Lumber Co.**, 201 So.2d 246 (Fla. 1st DCA 1967).

Such balancing has resulted in overwhelming precedent for the proposition that where an owner has not been prejudiced, the lienor need only comply substantially with the mechanic's lien

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statute at issue. In <u>Fidelity and Deposit Co. v. Delta Painting</u>, 529 So.2d 781 (Fla. 4th DCA 1988), the Fourth District Court of Appeals ruled that the materialmen substantially complied with the provisions of Fla. Stat. § 713.06, where the materialman had forwarded the notice to owner to the address listed on the notice to commencement, even though the individual designated in the notice of commencement as the person upon whom notice or other document could be served was not the correct addressee. That court also ruled that where the final affidavit omitted the reference to a bank as trustee, the materialmen, for purposes of service under the Mechanics' Lien Law, substantially complied by simply providing the bank with the contractor's affidavit; the Fourth District Court of Appeals in <u>Symons Corporation v. Tartan/Lavers Del Ray Beach, Inc.</u>, 456 So.2d 1254 (Fla. 4th DCA 1984), held that the materialmen substantially complied with Fla. Stat. §§ 713.06 and 713.18 in that the notice to owner was sufficient, even though the name of the owner, although similar, was listed erroneously in the notice to owner; the Second District Court of Appeals in <u>Midstate Contractors, Inc. v. Halo Development Corp.</u>, 342 So.2d 1078 (Fla. 2d DCA 1977) held that although the mechanics' lien set forth the stated unpaid amount as between $30,000 and/or $56,500, the materialman substantially complied with Fla. Stat. § 713.08; <u>see</u> <u>also</u> <u>Bowen v. Merlo</u>, <u>supra</u>; <u>Gator Culvert Company v. Snapp</u>, 467 So.2d 766 (Fla. 4th DCA 1985).

The cases which have held that the mechanic's lien statute in question is to be strictly construed involved situations where

the owners were prejudiced, due to the fact that a particular notice requirement was not complied with. See e.g., **Falovitch v. Gunn and Gunn Construction Co.**, 348 So.2d 560 (Fla. 3d DCA 1977) (contractor's mechanics' lien is invalid against the owner under direct contract due to the fact that the contractor had failed to give the owner the required affidavit); **Kettles v. Charter Mortgage Co.**, 337 So.2d 1012 (Fla. 3d DCA 1976) (Fla. Stat. § **713.09** must be strictly complied with where the owner tried to perfect a single lien on several lots); **Gold v. M & G Services, Inc.**, 491 So.2d 1297 (Fla. 3d DCA 1986) (contractor cannot pursue a mechanics' lien against the owner without first delivering to the owner the statutorily mandated affidavit under Fla. Stat. § **713.06[3][d]**); **Continental Home Parks, Inc. v. Goland Triangle Asphalt Paving Co.**, 291 So.2d 49 (Fla. 2d DCA 1974) (mechanics' lien denied as the owner was not properly served with the Notice to Owner as required by Fla. Stat. § **713.18**). In each of these cases the owner was able to show prejudice.

Even the cases that the Respondents have cited as their standard bearers do not stand up to this test. In each and every case the owner was prejudiced by not being provided with sufficient notice, and as a result the court in question ruled that the statute must be strictly complied with. The case of **Home Electric of Dade County v. Gonas**, 537 So.2d 590 (Fla. 3d DCA 1988), rev'd. 547 So.2d 109 (Fla. 1989), which the Respondents have relied on heavily, involved a situation where the lienor failed to send any statement whatsoever in response to the Fla. Stat. § **713.16(2)** request by the

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owner. The facts were the same in <u>Palmer Electric Services, Inc. v. Filler</u>, 482 So.2d 509 (Fla. 2d DCA 1986), i.e., the subcontractor failed entirely to respond to the property owner's letter demanding a statement, pursuant to Fla. Stat. § 713.16(2); and in <u>Babes Plumbing, Inc. v. Maier</u>, 194 So.2d 666 (Fla. 2d DCA 1966), where the subcontractor again failed to provide any statement whatsoever to the owner's request. These cases are easily distinguishable from the case at bar with two substantial differences. The Petitioner herein did provide the requested statement under Fla. Stat. § 713.16(2), and the Respondent, Reynaldo Madiedo, testified that he had full knowledge of the pertinent facts and, therefore, was not surprised by the contents of the Petitioner's Fla. Stat. § 713.16(2) Statement of Account. In the case at bar and as determined by the Third District Court of Appeals, the Respondents were not prejudiced[4].

Case law clearly establishes that the courts will uphold a claim of lien based upon substantial compliance with the requirements of the Mechanics' Lien Law, given the owner's failure to demonstrate how the lienor's failure to strictly comply with the statute resulted in injury. <u>See</u> <u>Russell v. Farrey's Wholesale Hardware Co.</u>, <u>supra</u>.

To further display the key element of prejudice in

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[4]Respondent, Reynaldo Madiedo, in his deposition, p. 28, lines 7-25, and p. 29, lines 1-9 (A.43 TR at 28 and 29) stated that he was aware of all pertinent facts concerning Stresscon's labor and materials provided to the project, as well as the sums owed to Stresscon. At p. 16-17, he also stated that he believed it was "Stresscon's money."

determining Mechanics' Lien Law disputes, several cases have held that Fla. Stat. §§ 713.06 and 713.08 must be strictly complied with. The reason: prejudice to the owner. In Partin v. Konsler Steel Co., 336 So.2d 684 (Fla. 4th DCA 1976), the Notice to Owner was not mailed or delivered within the forty-five day period from the first date of furnishing materials, as required by **§ 713.06(2)(a)**. The Fourth District Court of Appeals ruled that this statute must be strictly complied with before a lien is perfected. The basis for the ruling was prejudice to the owner. The Third District Court of Appeals required strict compliance in a case involving **§ 713.08** of the Florida Statutes, where there was a discrepancy between the description of the materials to be furnished in the contract and the description of the materials in the Claim of Lien. **Lofter v. Rashide**, 523 So.2d 1230 (Fla. 3d DCA 1988).

These cases are consistent with other Florida courts' interpretation of the Mechanics' Lien Law, where substantial compliance was sufficient, since at least a notice of some type was received and, therefore, the owner was not prejudiced. See **Suchman v. National Hauling, Inc.**, 549 So.2d 200 (Fla. 3d DCA 1989); **Warren v. Billy Ray Construction Co.**, 269 So.2d 25 (Fla. 3d DCA 1972); **Westinghouse Electric Supply Co. v. Midway Shopping Mall, Inc.**, 277 So.2d 809 (Fla. 3d DCA 1973); **Symons Corp. v. Tartan/Lavers Del Ray Beach, Inc.**, supra; **Fidelity and Deposit Co. v. Delta Painting**, supra; and **Blinn v. Dumas**, 408 So.2d 683 (Fla. 1st DCA 1982).

As stated above, the Mechanics' Lien Law, being remedial in its nature, has notice as its fundamental purpose. Thus, no matter

which statute is involved, if the owner is prejudiced, strict compliance is required. If there is no prejudice to the owner, substantial compliance is allowed. See **Midstate Contractors, Inc. v. Hale Development Corp.**, supra.

Clearly, the Respondents have not been prejudiced. They acknowledge being aware from the very beginning that the Petitioner was on the job site, what labor and materials the Petitioner provided, the Petitioner was still owed money, and the amount owed to the Petitioner. They received a timely notice to owner, claim of lien and statement of account. The Petitioner provided the Respondents with every notice they were entitled to, all of which were accurate, honest and uncontested by Respondents. In fact, the Respondents withheld $25,000 to pay the Petitioner.

B. A ruling in the Petitioner's favor would not have catastrophic effects on the Mechanics' Lien Law. On the contrary, it would be perfectly consistent with sixty-five years of Florida case law.

The Respondents would have this Court believe that a ruling in favor of the Petitioner would destroy years of precedent. The opposite is true. In Crane Co. v. Fine, supra, this Court ruled that the failure to provide the owner with a notice to owner within forty-five days of commencing to furnish the materials, pursuant to Fla. Stat. § 713.06, was not fatal to the contractor's lien right to recover under its mechanic's lien where the lienor had served a notice on the owner long before the improvement was completed, and the owner had made many progress payments to the contractor after receipt of the Plaintiff's notice. In making that ruling this Court

distinguished **Tarlow v. Helmholtz**, 198 So.2d 109 (Fla. 2d DCA 1967), and **Babes Plumbing, Inc. v. Maier**, supra, two cases relied upon by Respondents. In **Babes Plumbing, Inc. v. Maier**, supra, the Second District Court of Appeals ruled as the Supreme Court did in **Home Electric of Dade County v. Gonas**, supra, that if the lienor fails to provide a response to a Fla. Stat. § 713.16(2) request, he loses his lien rights. However, this Court in **Crane Co. v. Fine**, supra, allowed the mechanics' lien holding that in **Tarlow v. Helmholtz**, supra and **Babes Plumbing, Inc. v. Maier**, supra no notice whatsoever was given by the materialmen to the owner, whereas in **Crane Co. v. Fine**, supra, the Notice to Owner was given although not within the forty-five days of commencement. In the instant case all notices were timely provided.

The limitations period of Fla. Stat. § 713.16(2) would not be extended by the proper ruling of this Court since the notice requirement was satisfied without prejudice to the owner. Sixty-five years of case law would be preserved by the Court's review of the Mechanics' Lien Law as a whole, **Hendy Lumber Co. v. Bryant**, 189 So. 710 (1939), and by applying the principles of equity, **Ceco Corp. v. Goldberg**, supra.

** As stated in the Original Brief, and due to the Respondents' pre-existing knowledge, the only purpose for the request for a Statement of Account was to lure the unsuspecting subcontractor into a trap. This is not the intent of the law nor the reward to be provided by the judicial system.

CONCLUSION

The Mechanics' Lien Law is to be liberally construed to accomplish its purpose of protecting the laborers and materialmen, as well as protecting the owner from having to pay more than the contract price. This Court can uphold both principles by ruling in favor of the Petitioner.

The right of the materialmen to be paid must be balanced with the owner's right of not being prejudiced by lack of notice of the materialmen's claim. As the Third District Court of Appeal held, there was no prejudice to the Respondents in the instant case. The principles of equity thus require a ruling protecting the lienor. Such a ruling would not have a catastrophic effect. However, to deny the Petitioner it's lien would, in fact, destroy years of jurisprudence on this very issue as well as the layman's faith in the judicial system as being fair and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Petitioner on the Merit was hand-delivered the 17th day of October, 1990 to: **Lawrence Heller, Esq.**, Counsel for Respondent, Gilbride, Heller & Brown, One Biscayne Tower, Suite 1946, Two South Biscayne Boulevard, Miami, Florida 33131.

Respectfully submitted,

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