

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC04-222

4DCA CASE NO. 4D03-711  
L.T. CASE NO. AP 01-9039 AY

PIERSON D. CONSTRUCTION, INC.,

Plaintiff/Petitioner,

vs.

MARTIN YUDELL and JUDITH YUDELL,

Defendants/Respondents.

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**PETITIONER'S BRIEF ON JURISDICTION IN  
SUPPORT OF NOTICE TO INVOKE  
DISCRETIONARY JURISDICTION TO REVIEW  
DECISION OF THE FOURTH DISTRICT COURT  
OF APPEAL OF THE STATE OF FLORIDA**

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## **PRELIMINARY STATEMENT**

Petitioner, PIERSON D. CONSTRUCTION is a Plaintiff below in the County Court in and for Palm Beach County, Florida. Respondents, MARTIN YUDELL and JUDITH YUDELL are the Defendants in the case.

In this brief, the respective parties will be referred to as "Petitioner" and "Respondent". References to the Appendix filed by Petitioner shall be designated as (A. \_).

## STATEMENT OF THE CASE AND FACTS

This is a petition to invoke the discretionary jurisdiction of this Court pursuant to *Fla. R. App. P.* 9.030(a)(2)(A)(iv). The decision below (the "Decision"), dated December 31, 2003 was rendered final for appellate purposes by the Fourth District's order denying Petitioner's motion for rehearing entered January 29, 2004. App. "A". Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court on February 5, 2004.

Preliminarily the decision below follows several courts' struggles, including that of the 4<sup>th</sup> District, with this Court's opinion in *Holding Electric, Inc. v. Roberts*, 530 So.2d 301 (Fla.1988) and the First District's holding in *Coquina, Ltd. v. Nicholson Cabinet Co.*, 509 So.2d 1344 (1<sup>st</sup> DCA 1987).

Essentially the facts below are quite simple and are somewhat set out in the 4<sup>th</sup> District's Opinion, App. "A".<sup>1</sup>

As a result of this struggle, the trial court entered an order dismissing Petitioner's complaint with prejudice; however, certifying it to the Circuit Court in its appellate capacity.

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<sup>1</sup> Appellant disagrees with some of the factual assertions in the 4<sup>th</sup> District's Opinion; however, for the purposes of review, the facts found therein cannot be reargued in a jurisdictional brief.

The Circuit Court in and for Palm Beach County, Florida then certified the issue to the 4<sup>th</sup> District Court of Appeal and transferred the case without ruling.

The Fourth District entered its opinion on December 31, 2003 and after motion for rehearing was filed, its opinion was rendered final after denial of rehearing.

## **SUMMARY OF THE ARGUMENT**

The Decision of the Fourth District Court of Appeal in the instant case represents a significant departure from this Court's opinion in *Roberts*, supra and conflicts with *Coquina*, supra.

The issue was certified as a matter of great public importance by both the County and Circuit Courts.

## **ARGUMENT**

THE FOURTH DISTRICT'S OPINION CONFLICTS WITH THIS COURT'S OPINION AND THAT OF THE FIRST DISTRICT ON AN ISSUE CERTIFIED AS A MATTER OF GREAT PUBLIC IMPORTANCE.

The trial court essentially found, and the 4<sup>th</sup> District affirmed, that the filing of a contest of lien shortens the "statute of limitations" to bring a cause of action for contractor's lien foreclosure to 60 days from the date of the contest of lien. §713.22, Fla. Stat. The statute governing the Final Contractor's Affidavit, §713.06(3), Fla. Stat. is not addressed in §713.22, Fla. Stat. Nonetheless, the trial court found that it could not ignore the strictures of §713.22(2), Fla. Stat. and found that the action was barred by the "statute of limitations" due to the technical deficiency of the Contractor's Final Affidavit not being "filed" (sic) rather than served within the 60 day period commenced by the Appellee's filing of a contest of lien pursuant to §713. 22(1), Fla.

Stat.

This Court's opinion in *Holding Electric* requires that the Contractor's Final Affidavit be served within the one (1) year time-frame set forth in §713.22(1), Fla. Stat. as, §713.22(2), Fla. Stat. merely serves to **shorten** the time to **commence or initiate** the cause of action in order to **continue the lien**, and thus it cannot serve as a "statute of limitations" or a procedural bar to serving the Contractor's Final Affidavit within the one (1) year time frame set out in §713.22(1), Fla. Stat. If it was intended by the legislature that §713.22, Fla. Stat. be a statute of limitations, then the legislature would have indicated as much within that subsection of the law. Instead, the legislature very specifically utilized the language , "**Duration**" and "**Continue**" when referring to the temporal aspects of the claim of lien itself. Hence, once the litigation is timely instituted (as was below), **the lien continued in duration**, and the Contractor's Final Affidavit was merely a procedural element needed to "**maintain**" the cause of action on the continued duration of the lien. Since the contractor's final affidavit was **served** and **filed** with leave of court below, as a part of the amended complaint, and pursuant to the *Holding* decision of the Florida Supreme Court, it related back to the **initiation** of the law suit, and it did not act as a bar to the **continuation of the lien**, hence the action to **enforce the lien**.

The First District's opinion in *Coquina, Ltd. v. Nicholson Cabinet Co.*, 509 So.2d 1344 (1<sup>st</sup> DCA 1987), held that the Contractor's failure to serve a contractor's final affidavit **was not fatal** to the cause of action specifically **because the owner had already manifested its intention not to pay the contractor's claim by filing a notice of contest of lien.**

“In the present case, by virtue of filing a notice of contest of lien, Coquina gave notice of its election not to pay Nicholson's claim for the cabinetry it built and installed in Coquina's shopping center. **Once the owner has manifested its intention not to pay the claim, the five (5) day period provided by section 713.06(3)(d)1 loses its significance, and the only issue remaining with respect to entitlement to sue is whether the claimant has perfected his lien...**Appellant's contention that Nicholson had *no lien* because the contractor's affidavit was not served five days before suit is erroneous, since the statute, even in cases where applicable, does not purport to delay the acquisition of a lien until five days after serving the affidavit.... The five day provision, although enacted at the same time as the 1963 amendment (Ch. 63-135, Laws of Florida (1963)) adding the provision (now 713.22(2)) allowing formal contest of the claim by the owner and shortening the period for suit to sixty days, is not shown by appellants to serve any valid legislative purpose with respect to the operation of the provision for notice of contest. **We therefore find no basis upon which to hold that the five day requirement should be incorporated into the wholly unrelated sixty-day provision so as to arbitrarily bar a lien claimant who becomes subject to this reduced period for institution of legal action on his claim.** (emphasis supplied). *Id* at 1346-7.

Under *Coquina*, once the landowner formally manifests his intent not to pay, or contests the claim of lien **in any fashion**, the contractor's final affidavit becomes

irrelevant to the enforcement and ultimate foreclosure of the claim of lien.

As this Court found in *Holding Electric*, the contractor's final affidavit could be served late, so long as the cause of action was commenced timely, and the affidavit was served within one (1) year of the claim of lien.

Furthermore, the trial court found that because *Holding Electric* concerned a case in which **no contest of lien had been filed**, by analogy, the filing of the contest of lien shortened the time to file the contractor's final affidavit from one year to 60 days. This ruling was clearly erroneous. First, as noted by *Coquina*, supra, the First District found that the contractor's final affidavit was completely unrelated to §713.22(2), Fla. Stat. and in fact was a separate provision. Second, the *Coquina* court properly found that the contractor's final affidavit was irrelevant to the foreclosure of a lien, **once the property owner filed a contest of lien**.

The trial court and the Fourth District inappropriately and erroneously assumed that the failure to serve the contractor's final affidavit within the sixty day contest of lien period, was somehow fatal to the continuation or foreclosure of Appellant's contractor's lien.

Respectfully, the opinion below is in error and conflicts with this Court's opinion in *Roberts* and the First District's opinion in *Coquina*.

## CONCLUSION

In accordance with *Fla. R. App. P.* 9.030(a)(2)(A)(iv) and *Fla. Const. Art. V* §3(b)(3), this Court may exercise discretionary jurisdiction to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law".

Petitioner respectfully requests that this court accept jurisdiction in this case based upon the express and direct conflict created by the decision of the Fourth District Court of Appeal. This Court should accept jurisdiction to resolve the conflict and preserve uniformity of the law.

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**CERTIFICATE OF FONT SIZE AND STYLE**

Counsel for Petitioner hereby certifies that this brief was typed in Times New Roman 14- point font.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this \_\_\_\_ of March 2004 to Morris (“Skip”) Miller, Esq., 1551 Forum Place, Bldgs 200 and 400, PO Drawer 3948, West Palm Beach, FL 33402-3948.

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