

STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Oct 30 2023**

**S.C. SUPREME COURT**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Walton J. McLeod, IV

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Opinion No. 6022 (S.C. Ct. App. Filed August 30, 2023)

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Clayton Construction Company, Inc..... Appellant,

v.

J&H Grading & Paving, Inc. ....Respondent.

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**PETITION FOR A WRIT OF CERTIORARI**

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 11, 2023.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that Petitioner failed to comply with *South Carolina Code Ann. § 27-1-15*?
2. Did the Court of Appeals err in overturning *Elk & Jacobs Drywall v. Town Contractors, Inc.*?
3. Did the Court of Appeals err in holding that “pay when paid” provisions were unenforceable?
4. Did the Court of Appeals err in holding that Petitioner refused to pay Respondent?
5. Did the Court of Appeals err in finding that a delay beyond ninety days was unreasonable?
6. Did the Court of Appeals err in finding that actions which occurred prior to Respondent’s *South Carolina Code Ann. § 27-1-15* demand were proper to determine Petitioner’s later liability under *South Carolina Code Ann. § 27-1-15*?
7. Did the Court of Appeals err in finding that the Court’s determination that “pay when paid” provisions are unenforceable should be enforced retrospectively?

## STATEMENT OF THE CASE

Petitioner, the general contractor for the construction of a new car dealership owned by Herlong Chevrolet-Buick, Inc. and Herlong Family Properties, LLC, (collectively, Herlong) entered into a subcontract (the Subcontract) with Respondent on September 24, 2015. Pursuant to the Subcontract, Respondent agreed to complete site work for the project. Petitioner agreed to pay Respondent \$688,075.00 for its work and to make progress payments less retainage of ten percent. Over the course of the project, an additional \$28,855.70 was added to the contract price, bringing the total to \$716,930.70. The Subcontract provided, "Final payment of the balance due shall be made to [Respondent] no later than seven (7) days after receipt by [Petitioner] of final payment from Owner [for Respondent's] work." (hereinafter, "pay when paid" provision). Petitioner made progress payments as agreed.

On March 2, 2018, Respondent mailed Petitioner a demand pursuant to *South Carolina Code Ann. § 27-1-15* requesting payment. In its March 9, 2018 response, Petitioner pointed to the Subcontract's "pay when paid" provision. Petitioner stated it had not received payment from Herlong for the work, was in litigation seeking payment, and would "remit any undisputed contract balances to Respondent" as soon as it received such payment or the litigation was fully adjudicated. Petitioner therefore stated that in accordance with the provisions of the Subcontract, "there [we]re no amounts due and owing to [Respondent]" at the time.

Respondent brought this action against Petitioner and Herlong on May 21, 2018, for foreclosure of its mechanics' lien and alleging causes of action for breach of contract and quantum meruit. In its answer, Petitioner claimed that no amounts were currently due to Respondent pursuant to the Subcontract. In February 2019, Herlong, Petitioner, and Respondent entered into a settlement agreement pursuant to which Herlong "agree[d] to release \$75,298.00 under its contract

with [Petitioner] directly to [Respondent] as payment for [Respondent]'s subcontract with [Petitioner] on the [p]roject" and Respondent agreed to dismiss its claims against Herlong. The settlement agreement provided, however, that Respondent reserved its claims and rights against Petitioner for attorney's fees and interest on the allegedly wrongfully withheld contract balance. Thereafter, both parties filed motions for summary judgment, which the Circuit Court denied.

The Circuit Court held a bench trial on the matter in August 2019. The only issue at trial was whether Respondent was entitled to attorney's fees under *South Carolina Code Ann. § 27-1-15* based on Petitioner's reliance on the "pay when paid" provision in the Subcontract. The Circuit Court found in favor of Respondent and concluded it was entitled to attorney's fees under *South Carolina Code Ann. § 27-1-15*. The Circuit Court rejected Petitioner's argument that pursuant to *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976), "pay when paid" clauses were not conditions precedent to payment such that they violated the South Carolina Subcontractors' and Suppliers' Payment Protection Act (the "Payment Protection Act"). The Circuit Court concluded the "pay when paid" provision in the Subcontract was unenforceable because the plain language of the Payment Protection Act expressly prohibited such terms. It therefore determined "Petitioner's refusal to pay [wa]s unreasonable on its face." The Circuit Court ruled the Payment Protection Act was controlling as to the issue and, at most, *Elk* stood only for the proposition that a contractor had a reasonable time to attempt to obtain payment from the owner before paying a subcontractor. The Circuit Court determined that a reasonable delay was "such that would not force [Respondent] to resort to legal action" to comply with the provisions of the mechanics' lien statute. The Circuit Court found delaying payment to Respondent longer than ninety days after it requested payment was per se unreasonable because Respondent was required to file a mechanics' lien within ninety days of completing its work to preserve its right to payment.

The Circuit Court reasoned that by suspending payment past the statutory deadline for filing the mechanics' lien, Petitioner required Respondent to initiate legal proceedings that dragged on for two years before Respondent was finally paid, even though Petitioner did not dispute the amount or that Respondent had satisfactorily completed its work. The Circuit Court "additionally f[ound] Petitioner failed to conduct a reasonable and fair investigation" pursuant to *South Carolina Code Ann.* § 27-1-15 when it knew the amount owed was undisputed yet still refused to pay Respondent.

At the Court of Appeals, Petitioner set forth the following arguments: I) The Court was erroneous in finding that Petitioner's investigation was not fair and reasonable under *South Carolina Code Ann.* § 27-1-15; II) The Court was erroneous in finding that "Pay when Paid" provisions create conditions precedent to payment; III) The Court was erroneous in finding that "Pay when Paid" provisions are unenforceable under the Payment Protection Act; and IV) The Court was erroneous in finding that any delay in payment beyond ninety days is unreasonable. The Court of Appeals affirmed the judgment of the Circuit Court. Clayton Construction Company, Inc. v. J&H Grading & Paving, Inc., Op. No. 6022 (S.C. Ct. App. Filed August 30, 2023). Petitioner seeks a writ of certiorari to review that decision.

## ARGUMENTS

### **I. The Court of Appeals erred in finding that Petitioner failed to comply with *South Carolina Code Ann. § 27-1-15***

*South Carolina Code Ann. § 27-1-15* provides that:

“Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, 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 as valid, within forty-five days from the date of mailing the demand. If the 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.”

See *South Carolina Code Ann. § 27-1-15*. Accordingly, under *South Carolina Code Ann. § 27-1-15*, a party can only be liable for attorneys’ fees if it “fails to make a fair investigation” or “otherwise unreasonably refuses to pay the claim or proper portion” within forty-five (45) days of the mailing of the demand. *Id.* The party seeking an award of attorney’s fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007); *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 374–75, 450 S.E.2d 96, 100 (Ct.App.1994).

In the matter at hand, Respondent’s demand letter was dated March 2, 2018 and Petitioner investigated and replied by March 9, 2018, clearly within the forty-five (45) statutory requirement. (R. pp. 151, 153). Further, Petitioner’s denial that any monies were due and owing was based on: 1) the agreed upon provisions of the Subcontract; 2) the then prevailing South Carolina case law under *Elk & Jacobs Drywall v. Town Contractors, Inc.* holding that “pay when paid” provisions did not create conditions precedent; and 3) the fact that Herlong had not paid Petitioner for Respondent’s work. See e.g. *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). Accordingly, the fact that Petitioner relied on and accurately followed the then prevailing South

Carolina case law, as discussed below, is determinative that Petitioner's investigation was fair and reasonable and the Court's finding otherwise was patently erroneous.

## **II. The Court of Appeals erred in overturning *Elk & Jacobs Drywall v. Town Contractors, Inc.***

The Payment Protection Act states that:

“Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.”

*See South Carolina Code Ann.* § 29-6-230. Payment Protection Act, accordingly, deems contracts that create conditions precedent payment unenforceable. Prior to the Court of Appeals' opinion in this matter, the law of South Carolina was clear that “pay when paid” provisions did not create conditions precedent and were, thus, not barred by the Payment Protection Act. *See e.g. Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). In *Elk*, the payment provision in question was: “The retainage will be paid sixty (60) days after the later of the following events: ... (iv) Full and final payment to the Contractor of all funds due him for this project...” *Id.* at 261. In looking at this provision, the South Carolina Supreme Court, stated **“[w]e do not think subparagraph (iv) created a condition precedent** but rather only postponed payment by [the general contractor] for a reasonable time so as to afford [the general contractor] an opportunity to obtain funds from the owner.” *Id.* (*emphasis added*).

In the matter at hand, the payment provision in question states that “[p]rogress payments less retainage of 10%, shall be made to Subcontractor for work satisfactorily performed no later than seven (7) days after receipt by Contractor of payment from Owner for Subcontractor's work”. (R. p. 136). Accordingly, the only way for the Court of Appeals to find that the above provision violated the

Payment Protection Act, was to find that the above provision created a condition precedent – a position that is clearly against the Supreme Court precedent of *Elk*.

The Court of Appeals was erroneous in disregarding the precedent the Supreme Court set forth in *Elk*. See *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) (“[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.”), *aff’d as modified on other grounds*, 408 S.C. 198, 758 S.E.2d 215 (2014).

### **III. The Court of Appeals erred in holding that “Pay When Paid” provisions were unenforceable when the Payment Protection Act was enacted to prohibit “paid if paid” provisions**

As discussed, above, prior to the Court of Appeals’ opinion in this matter, the law of South Carolina was clear that “pay when paid” provisions did not create conditions precedent and were, thus, not barred by the Payment Protection Act. See e.g. *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). In 2000, the South Carolina legislature enacted the Payment Protection Act which deemed conditions precedent in subcontracts unenforceable. See *South Carolina Code Ann. § 29-6-230* (*The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.*) The South Carolina legislature, therefore, knowing that “pay when paid” provisions were not conditions precedent, enacted the Payment Protection Act to definitively outlaw “pay if paid” provisions, which do create condition precedents. Accordingly, the Court’s finding that the enactment of the Payment Protection Act would be a “futile act” without making “pay when paid” provisions unenforceable is erroneous.

The Court is correct, though, in saying that a “pay if paid” scenario (“[allowing] the general contractor to avoid paying the subcontractor indefinitely, depending on when – **and if** – it received

payment from the owner” (emphasis added)), “is precisely the scenario section 29-6-230 prohibits”. *Opinion*, Pg. 7 citing *Elk* at 417, 229 S.E.2d at 262. That scenario, however, as determined by the South Carolina Supreme Court, is not the scenario in *Elk* and not the scenario in the matter at hand<sup>1</sup>. The Court, accordingly, in its misapprehension of *Elk* and the Payment Protection Act, has erroneously found that the Payment Protection Act supplants the holding in *Elk* and, thereby, erroneously determined that “pay when paid” provisions are unenforceable because they create conditions precedent. Instead, the Court’s *Opinion* improperly overturns the finding in *Elk* that “pay when paid” provisions do not create conditions precedent to determine that “pay when paid” provisions do create conditions precedent and are, therefore, unenforceable.

Accordingly, the Court of Appeals’ finding that “pay when paid” provisions create conditions precedent and are, therefore, unenforceable was erroneous.

#### **IV. The Court of Appeals erred in holding that Petitioner refused to pay Respondent**

In its misapprehension of *Elk* and the Payment Protection Act and in erroneously finding that “pay when paid” provisions create conditions precedent, the Court repeatedly misapprehends that Petitioner refused to pay Respondent when Petitioner was, instead, relying on the “pay when paid” provision and the standing black letter law precedent from *Elk* that nothing was due “at the time”. *Opinion*, Pg. 3. Petitioner, accordingly, did not refuse to pay Respondent, but instead correctly stated that nothing was then due under the contract between the parties. The Court further erroneously finds that Petitioner “did not dispute the amount of [Respondent]’s demand” when the facts clearly show that Petitioner stated that there were “no amounts due and owing to [Respondent] [on March 9, 2018]”, when it responded to Respondent’s *South Carolina Code Ann.*

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<sup>1</sup> As the Court notes: “[t]he facts of *Elk* are similar to this case. *Opinion*, Pg. 6

§ 27-1-15 demand. Likewise, Petitioner did not unreasonably refuse to pay the claim, because there was nothing that was owed.

Petitioner performed a reasonable and fair investigation of the merits of Respondent's claim, accurately determined (pursuant to *then* South Carolina precedent) that nothing was owed at the time, and timely responded to Respondent's *South Carolina Code Ann. § 27-1-15* demand. The Court, accordingly, in its misapprehension of *Elk* and the Payment Protection Act, has erroneously found that Petitioner failed to comply with the requirements of *South Carolina Code Ann. § 27-1-15*.

**V. The Court of Appeals erred in finding that a delay beyond ninety days was unreasonable**

Assuming, *arguendo*, that “pay when paid” provisions are enforceable and the reasonableness of the time to pay is relevant, the Court's rationale in determining that “a delay beyond ninety days was unreasonable” does not follow the Supreme Court's precedent in *Elk* that a general contractor be given a reasonable time so as to afford it an opportunity to obtain funds from the owner before being required to pay its subcontractor. *See e.g. Elk* 267 S.C. 412, 229 S.E.2d 260 (1976) (*finding that payment delayed by sixteen months was not per se unreasonable*). Instead, the Court's opinion erroneously focuses on the timing of Respondent's collection efforts against Petitioner, not the timing of Petitioner's collection efforts against Herlong. In the matter at hand, the record clearly reflects that Petitioner had diligently pursued collecting against Herlong and had already filed its lien and was in litigation at the time Respondent filed their lien to collect the monies owed to Petitioner and its subcontractors, including Respondent. A general contractor, such as Petitioner, who has seized all opportunities with the South Carolina court system to collect from an owner, cannot be deemed to be unreasonable in seeking its opportunity to obtain funds

from an owner when it is at the mercy of timing of that same legal system; especially when that general contractor is seeking payment on its subcontractors behalf as well as its own.

Accordingly, to the extent that “pay when paid” provisions are enforceable and the reasonableness of the time to pay is relevant, the Court’s departure from the precedent of *Elk* to analyze reasonableness and to, thereby, conclude that a delay beyond ninety days was unreasonable is patently erroneous.

**VI. The Court of Appeals erred in finding that actions which occurred prior to Respondent’s *South Carolina Code Ann. § 27-1-15* demand were proper to determine Petitioner’s later liability under *South Carolina Code Ann. § 27-1-15***

The reasonableness of the time to pay analysis is derived from the holding in *Elk* that “pay when paid” provisions do not create conditions precedent to payment and that a general contractor be given a reasonable time so as to afford it an opportunity to obtain funds from the owner before being required to pay its subcontractor. The Court’s opinion, making all “pay when paid” provisions unenforceable, overturns *Elk* so an evaluation of reasonableness of the time to pay thereunder is futile. *South Carolina Code Ann. § 27-1-15*, on the other hand, requires a reasonable investigation and payment of any undisputed balance within 45 days. This is distinctly different than the contractual requirement to pay. The Court’s misapprehension and conflation of these distinctly different requirements creates an illogical Opinion wherein the Court considers actions that occurred prior to Respondent’s *South Carolina Code Ann. § 27-1-15* demand to determine Petitioner’s later liability under *South Carolina Code Ann. § 27-1-15*; instead of analyzing Petitioner’s fair and reasonable investigation within the forty-five (45) day statutory period.

In the statutory period, the Petitioner relied on and accurately followed the then prevailing South Carolina case law to perform a fair and reasonable investigation into Respondent’s claim and reply thereto. The Court’s finding otherwise was patently erroneous.

**VII. The Court of Appeals erred in retroactively enforcing the prohibition of “pay when paid” provisions**

The Court’s current determination to overturn *Elk* and find that “pay when paid” provisions create conditions precedent and/or that a delay beyond ninety days was unreasonable, should not be retroactively punitive to Petitioner who: i) rightly relied on the *then* precedent of the South Carolina Supreme Court to perform a reasonable and fair investigation of the merits of Respondent’s claim; ii) accurately determined (pursuant to that precedent) that nothing was owed to Respondent at the time; and iii) timely responded to Respondent’s *South Carolina Code Ann. § 27-1-15* demand. Should the Court decide to now make “pay when paid” provisions unenforceable, they should be unenforceable prospectively, not retrospectively as here. Accordingly, the Court should find that Petitioner is not liable to Respondent under *South Carolina Code Ann. § 27-1-15* for attorneys’ fees.

**CONCLUSION**

For the foregoing reasons, Petitioner Clayton Construction Company, Inc. respectfully asks this Court to reverse the Opinion of the Court of Appeals.

Respectfully submitted,



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