

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2023-001087
Case Nos. 2018-CP-45-00258 and 2019-CP-45-00193

RECEIVED

Nov 06 2023

SC Court of Appeals

Bank of Newington, Appellant,

v.

LHSC, Inc., Williamsburg County Development Corporation, Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants, of which Williamsburg County Development Corporation and HBC, Inc. are the Respondents,

AND

HBC, Inc., Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,

AND

Williamsburg County Development Corporation, Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in finding and holding that HBC, WCDC, and the the Citizens of Williamsburg County were third-party beneficiaries to the USDA Conditional Commitment and Guarantee?
- II. Did the Trial Court err in finding and holding that the Bank of Newington owed a duty to WCDC and HBC to regulate and control its borrower?
- III. Did general equitable principles allow a Trial Court to override statutes and fashion equitable awards to HBC and WCDC?
- IV. Were the Judgment and claims assigned to the Bank of Newington entitled to full force and effect of the law?
- V. Were the Claims filed by HBC and WCDC timely?
- VI. Did the Trial Court err by denying a stay to maintain funds in a court protected Escrow Account during the pendency of Appeal?

STATEMENT OF THE CASE

On February 24, 2017, the Bank of Newington loaned LHSC, Inc. (“LHSC”) \$3,535,535.00 to purchase property, upfit a building and start a textile manufacturing business in Williamsburg County, South Carolina. The loan was a USDA guaranteed, business and industry loan. LHSC granted the Bank of Newington a purchase money mortgage to secure the loan. The principal of LHSC was Louis Hornick, II (“Hornick”). LHSC purchased the property and an empty speculative building from the Williamsburg County Development Corporation (“WCDC”) for \$500,000. The consideration for the purchase was \$250,000 in cash and WCDC’s receipt of 250 shares of preferred stock in LHSC.

LHSC hired HBC, Inc. (“HBC”) to upfit the building for a total construction cost of \$1,600,000. HBC hired Viking Fire Protection Inc. of the Southeast (“Viking”) to install the sprinkler system for the building. Blake Fickling (“Fickling”) supervised and monitored the loan for the Bank of Newington.

HBC applied for its final draw on November 28, 2017, which was the amount it owed to Viking and its retainage. LHSC refused to pay the draw amount. On February 7, 2018, WCDC issued an \$80,000.00 loan to LHSC, and on February 14, 2018, LHSC granted WCDC a second mortgage to secure the loan. LHSC continued to refuse full payment to Viking and HBC. The project failed.

On March 14, 2018, Viking filed a mechanic’s lien in the amount of \$181,479.00, and on June 8, 2018, Viking filed a lawsuit against LHSC, HBC, the Bank of Newington, and WCDC. The case number of the first case was 2018-CP-45-00258 and it is referred to as the “Mechanic’s Lien Action.” Viking raised a foreclosure of mechanic’s lien against LHSC, breach of contract claim against HBC, claim for violation of S.C. Code § 27-1-15 against HBC, and quantum meruit

claim against LHSC. Viking named the Bank of Newington and WCDC by virtue of their recorded mortgages against the property. All parties answered. HBC and LHSC asserted counterclaims and cross claims.

On July 2, 2018, HBC filed a notice of mechanic's lien claiming \$271,679.00, which included the amount owed to Viking. On November 15, 2018, HBC filed a motion to stay the mechanic's lien action pursuant to an arbitration clause in the construction agreement between it and LHSC. The motion remained pending until June 3, 2019, when HBC withdrew it.

LHSC defaulted on the loan, and on April 4, 2019, the Bank of Newington, filed a foreclosure action against LHSC, WCDC, HBC and Viking. The case number for the second case is 2019-CP-45-00193 and it is referred to as the "Foreclosure Action." WCDC answered asking the court to protect its interest in its mortgage, LHSC did not answer and went into default. HBC answered, counter-claimed, cross-claimed and filed third-party claim against Fickling and Hornick.

HBC's claims against the Bank of Newington were: (1) lien subordination, (2) intentional interference with a contract, (3) breach of covenant of good faith and fair dealing, (4) unjust enrichment, and (5) alter ego. HBC third party claims against Fickling were: (1) intentional interference with a contract, (2) alter ego, (3) breach of covenant of good faith and fair dealing, (4) civil conspiracy and (5) conversion. HBC requested a jury trial in its answer.

Discovery disputes arose between the Bank of Newington and HBC starting in January 2020. Both filed motions to compel, and the Honorable Kristi F. Curtis ("Judge Curtis") partially granted HBC's motion and granted the Bank of Newington's motion.

In September 2021, a potential buyer expressed interest in purchasing the building and property. The Bank of Newington and buyer entered into an agreement for the buyer to purchase

the property for \$2,000,000 subject to the Bank of Newington acquiring title by foreclosure. The parties agreed to allow the property to go through foreclosure and deposit the proceeds in an escrow account that would effectively substitute the account for the property.

The Bank of Newington filed a motion for various relief, which included a request to strike HBC's demand for jury trial and consolidate the Mechanic's Lien Action and Foreclosure Action, and it filed a motion for summary judgment against HBC and Viking. Viking also filed a motion for summary judgment against HBC. HBC filed another motion to compel against the Bank of Newington and a motion to dismiss against the Bank of Newington.

On March 10, 2022, after a hearing on February 9, 2022, the Honorable R. Ferrell Cothran, Jr. ("Judge Cothran") issued a Foreclosure Decree. The Decree granted the Bank of Newington's claim for foreclosure and established the debt owed by LHSC.

On May 19, 2022, Judge Curtis heard the Bank of Newington's motion for various relief and motion for summary judgment. She also heard HBC's motion to compel and motion to dismiss. On June 28, 2022, Judge Curtis denied HBC's motion to compel by a Form 4 Order. HBC filed a motion to reconsider this order.

A public sale was held on June 6, 2022, and the Bank of Newington was the successful bidder. After the Special Referee conveyed title to the Bank of Newington, it completed the sale to the buyer. The Decree required the sales proceeds placed in an escrow account but a dispute arose over the execution of an escrow agreement, and the Bank of Newington filed a motion to enforce the decree against HBC. On June 28, 2022, Judge Cothran filed an Order requiring the HBC and Viking to enter into an Escrow Agreement pursuant to the Decree.

After this Order was signed and filed, the net proceeds from the sale were deposited into the Escrow Account. The Escrow Account was substituted for the Property for all purposes and

with no prejudice to any parties equitable or legal claims. One Million Nine Hundred Eighty-Nine Thousand Five Hundred Sixty and 67/100 Dollars (\$1,989,560.67) was deposited into the Escrow Account. G. Wells Dickson, Jr., who also served as the Special Referee to conduct the public sale, served as Escrow Agent.

On August 4, 2022, the Honorable R. Kirk Griffin (“Judge Griffin”) heard Viking’s motion for summary judgment, and on August 17, 2022, Judge Griffin filed an Order granting summary judgment to Viking in the amount of \$257,538 against HBC plus post judgment interest.

On August 18, 2022, Judge Curtis denied the Bank of Newington’s motion for summary judgment and HBC’s motion to dismiss. She granted the Bank of Newington’s motion to strike HBC’s jury demand and to consolidate the two cases. On September 22, 2022, Judge Curtis partially granted HBC’s motion to reconsider and ordered the Bank of Newington to produce information regarding identity of investors.

On November 21, 2022, WCDC filed a motion to amend its answer and assert counterclaims and third party claims against the Bank of Newington and Fickling. WCDC proposed to add the following claims: (1) breach of contract accompanied by fraud, (2) breach of contract, covenant of good faith and fair dealing, (3) veil piercing in equity, (4) unjust enrichment, (5) fraud and misrepresentation, (6) constructive trust, (7) conversion, and (8) tortious interference with contract. Viking also filed a motion to amend its answer in the Foreclosure Action and raise the same claims. The Court granted the motions on December 9, 2022.

Viking and the Bank of Newington settled Viking’s claims. As part of the settlement, Viking assigned its Judgment and other claims to the Bank of Newington. On January 23, 24 and 25th, Judge Cothran conducted the non-jury trial of the remaining claims. At the end of the trial, Judge Cothran took the matter under advisement. On February 7, 2023, Judge Cothran circulated

an email to counsel outlining his decision to award relief to HBC and WCDC. He instructed counsel for WCDC to draft a proposed order, which he signed and filed on March 13, 2023. The Order awarded WCDC \$621,404.66, which represented grant money it claimed it paid, shares of stock it claimed it owed, attorneys' fees and prejudgment interest. The Order awarded HBC \$620,150.14 which included prejudgment interest, the lien amount it claimed including the amount owed Viking, and attorneys' fees. HBC's award was offset by the amount of Viking's lien without interest or attorneys' fees, which was \$181,479.00. WCDC was given first priority and HBC given second priority over the funds in the Escrow Account. The Bank of Newington's priority was reduced to third, and it would get the balance of the Escrow Account.

On March 13, 2023, the Bank of Newington filed a motion to stay enforcement of the Order, which the Court granted until it heard the motion. On March 22, 2023, the Bank of Newington filed a Motion pursuant to Rules 52(b), 59(a) and (e), SCRCPP, requesting the Court amend its Order or order a new trial. The Court heard the motion and motion to stay on May 12, 2023.

On June 2, 2023, the Court issued an Amended Order reducing the amount awarded to WCDC by its \$250,000 stock investment into LHSC and reducing HBC's award by the full Judgment to Viking as of August 22, 2022, which was \$257,538.00. On June 12, 2023, WCDC filed a motion to amend pursuant to Rules 59 and 60, SCRCPP. Judge Cothran held another hearing on June 29, 2023, to decide the Bank of Newington's motion to stay and WCDC's motion to amend. Also on June 29, 2023, the Bank of Newington filed a notice of appeal of the June 2, 2023, Order.

On July 25, 2023, Judge Cothran denied the motion to stay and denied the motion to amend. The Order directed the Escrow Agent to disburse the amounts set forth in the Order. However,

HBC and WCDC refused to sign instructions that did not provide per diem interest, and the Bank of Newington filed a motion to enforce the Order. The Court indicated an intent to grant the Bank of Newington's motion, but as of this date, it has not signed and filed an order.

On July 26, 2023, HBC and WCDC filed notices of appeal of the July 25th Order and notices of cross appeals against the Bank of Newington's appeal. On August 23, 2023, the Bank of Newington filed a notice of appeal of the Court's Order on the motion to stay. The appeals were consolidated into the instant action. The parties signed Escrow Instructions on August 9, 2023, which disbursed disputed amounts to WCDC of \$376,991.19 and HBC of \$368,286.00. The rest of the money in the Escrow Account was disbursed to the Bank of Newington. The Escrow Account has been closed.

STATEMENT OF FACTS¹

On February 24, 2017, the Bank of Newington and LHSC), whose principal was Hornick, closed a loan with the principal balance of \$3,535,535.00. (Exhibit 7, Loan Package; R____). The loan was a USDA guaranteed Business and Industry Loan. (Trial Transcript, Vol. 1, Testimony of Tripp Sheppard, p. 9, ll. 2-20; R____)² The loan was secured by a purchase money mortgage granted to the Bank of Newington filed on the same date. (Exhibit 7, Loan Package, Recorded Mortgage; R____; *see also* Foreclosure Decree; R_____).

The purpose of the loan was to provide LHSC funding to purchase real property and a speculative building with the address of 77 Commerce Drive, Kingstree, SC (“Property”), upfit the building, purchase inventory, machinery and equipment and to fund other start-up costs such as working capital. (Test. of Sheppard, p. 12, ll. ____; R____;). Williamsburg County promised to obtain grant funds to help with the project, which it eventually did albeit five months later on July 31, 2017, in the amount of \$200,000.00 through a U.T.C. Grant from Santee Electric. (Test. of Sheppard, p. 30, l. 7-p. 31, l. 25; R____; Exhibit 51, Email from Tripp; R____; Trial Transcript, Vol. III, Testimony of Gilleon Frierson³, p. 685, ll. 2-p. 686, l. 12; R____; and Exhibit 12, April 26, 2017, Email; R_____).

WCDC owned the Property, and LHSC agreed to purchase it from WCDC for \$500,000.00. The purchase price was paid in \$250,000 in cash and 250 shares of LHSC stock. WCDC received the cash and stock at closing. The net proceeds from the loan after payment to WCDC, various

¹ During the trial, the Plaintiff presented a binder with several exhibits in it. The Court advised the parties that if it took the notebook, it would consider every exhibit in it. (Trial Transcript, p. 744, l. 16-p. 748, l. 23; R____). The Court took the notebook and no party requested that any exhibits in it be struck. Consequently, the Bank of Newington includes the entire notebook with the record on appeal.

² Tripp Sheppard is the president of the Bank of Newington.

³ Gilleon Frierson is the current executive director of WCDC.

other closing fees and other initial construction and equipment payments were deposited into a control account owned by LHSC and held at the Bank of Newington. (Ex. 7, Settlement Statement; R___; Test. of Sheppard, p. 56, l. 21-p. 57, l. 16; R___ and Exhibit 8, Control Account Statements; R___)

LHSC hired HBC to serve as the general contractor for the upfit. (Exhibit 11, Construction Agreement; R___). HBC agreed to upfit the building for \$1,600,000 and achieve substantial completion within 120 days. (Id. at Article 3.3; R___; Exhibit 9, Assignment of Construction Contract, Construction Timeline; R___; Trial Transcript, Vol. II, Testimony of Blake Fickling, p. 432, l. 7-p. 434, l. 1; R___). HBC hired Viking (“Viking”) to install the sprinkler system in the building. (Exhibit 13, Viking Proposal; R___).⁴

Viking warned HBC and Hornick that a pump was needed for the sprinkler system, but HBC’s superintendent asked Viking to provide a quote without the pump. (Ex. 13, p. 3; R___; Viking Deposition Excerpt, p. 27, ll. 14-18; R___)⁵. However, in March, Viking confirmed a pump was needed; Hudson testified that Hornick resisted the additional cost. (Trial Transcript, Vol. III, Testimony of Jeff Hudson⁶, p. 853, ll. 6-25; R___).

The July construction deadline passed and the building was not complete, which meant that equipment could not be installed and the facility could not open. The delay created a cash drain on LHSC.⁷ (Test. of Sheppard, p. 40, l. 3-p. 41, l. 1; 72, ll. 7-11; R___ and Test. of Fickling, p.

⁴ Steven Skinner, who was HBC’s superintendent located and selected Viking for the job.

⁵ The Bank of Newington noticed and submitted the deposition excerpts to the Court. HBC objected but the Court did not rule on the objection. The Court told the litigants at the end of the trial that he was considering everything given to him which presumptively includes the deposition excerpts meaning the objection was overruled. The objection was not renewed at the end of the trial.

⁶ Jeff Hudson is the principal of HBC.

⁷ As is true with almost all loans, interest on the loan began accruing at closing and was required to be paid every month after closing. (Test. of Sheppard, p. 50, ll. 1-9 and p. 52, ll. 7-10; R___).

434, ll. 2-14; R____). The pump was installed and the sprinkler system finished, in late October, more than three months after the construction deadline. (Test. of Hudson, p. 871, ll. 4-14; R____). Viking billed all of its work to HBC which totaled \$181,479.00 by November 20, 2017. (Exhibit 26, Viking Invoices; R____).

In early November, HBC applied for a final certificate of completion, but the building failed the inspection. (Id.; R____ and Exhibit 18, WC Inspection Report; R____). Despite failing the inspection, HBC applied for final payment on November 28, 2017 misrepresenting to Partner, that a certificate of occupancy had been issued. (Exhibit 20, Partner Report, Application and Certification for Payment and Section 4.1; R____ and Exhibit 19, HBC Rep of C.O.; R____). When he submitted the final pay application, Hudson knew trouble was coming. (Test. of Hudson, p. 875, ll. 9-24; R____). He had not even received a punch list yet. (Id.)

The final payment request was for \$262,496.50, which consisted of a reduced amount of \$170,000 to Viking and \$92,496.50 to HBC for its retainage. (Id.). However, Hornick refused to authorize the payment based on his contention that Viking caused the delay in construction. (Id. at Funds Control Owner's Certification & Authorization for Disbursement; R____). Hornick demanded that Viking accept a \$50,000 reduction to the amount it was owed. (Id.).

Viking refused the demand and refused to sign a conditional lien waiver based on the mistaken assertion that the property was governmental property and no lien waiver was necessary. (Exhibit 22, Email December 2017; R____ and Test. of Hudson, p. 878, l. 22-p. 880, l. 5; R____).

Based on Hornick's refusal to authorize payment and Viking's refusal to sign a conditional lien waiver, the Bank of Newington would not and could not force a payment from the control account. (Test. of Sheppard, p. 80, l. 9-81, l. 7; R____ and Test. of Fickling, p. 497, l. 4-p. 500, l. 9; R____). As of the end of December 2017, HBC had not obtained a certificate of completion

and the plant was not operational. LHSC did not have sufficient funds to finish paying for the remaining start-up costs and it requested a loan from WCDC.

WCDC with no underwriting or even a vote by its board, agreed to loan LHSC \$80,000.00. (Test. of Frierson, p. 730, l. 5-p. 732, l. 15; R____). WCDC knew LHSC owed money to a contractor when it loaned LHSC the money. (Id.). The loan was interest only and secured by a second mortgage expressly subordinate to the first mortgage of the Bank of Newington. (Id. and Exhibit 55, Email from Moore 2nd lien; R____).

WCDC's loan agreement with LHSC does not reference HBC or Viking, and WCDC paid the money directly to LHSC and not to either contractor. (Exhibit 52, 2nd Mtg loan docs; R____; Test. of Frierson, p. 737, l. 17-p. 740, l. 3; R____; and Deposition Excerpts of Jim Moore, p. 29, ll. 4-25; R____). The listed use of the loan proceeds did not include specific payment to contractors. (Ex. 52, Loan Agreement, Ex. G; R____). The loan agreement references and designates the Bank of Newington's mortgage a "permitted lien" and a "prior lien." (Ex. 52, Loan Agreement, p. 2; R____ and Exhibits C and D to Loan Agreement; R____).

WCDC does not dispute that its mortgage was subordinate to the Bank of Newington's mortgage. (Test. of Frierson, p. 742, l. 1-p. 743, l. 3; R____). WCDC finally closed the loan on February 7, 2018, two months after the shortfall was noticed, and it recorded the second mortgage on February 13, 2018. (Ex. 52; R____).

After obtaining the loan, LHSC refused to authorize full payment to Viking. (Test. of Sheppard, p. 94, l. 16-p. 95, l. 7; R____). Hudson admitted paying Viking was HBC's responsibility, but he testified that he was not going to pay Viking until HBC was paid. (Test. of Hudson, p. 851, ll. 10-12, 872, l. 24-p. 873, l. 15; R____). This was HBC's ordinary business practice. (Id.). Expectantly, after not receiving payment, Viking filed a mechanic's lien on March

14, 2018 for \$181,479.00. (Exhibit 32, Viking's Mechanic's Lien; R____). HBC followed by filing its own lien effectively on July 2, 2018, for \$271,679.00 which included the amount owed to Viking. (Exhibit 34, HBC Amended Mechanic's Lien; R____).⁸

Viking commenced the Mechanic's Lien Action on June 8, 2018 and it raised other claims against HBC and LHSC. LHSC defaulted on the loan, and the Bank of Newington filed the Foreclosure Action on April 4, 2019. HBC answered, counterclaimed, cross claimed and filed a third party action against Fickling and Hornick. Viking obtained a judgment against HBC in August 2022 when HBC finally admitted four years later that it owed Viking.

Viking and the Bank of Newington settled, and as part of the settlement Viking assigned its Judgment against HBC and other claims to the Bank of Newington. On November 21, 2022, WCDC amended its answer to raise claims against the Bank of Newington. The Court allowed the amendment on December 9, 2022. A non-jury trial was finally held on January 23, 24 and 25th. On February 7, 2023, the Court sent an email to counsel outlining its decision and asked WCDC to draft a proposed order. On March 13, 2023, the Court filed the Order. After post trial motions, the Court amended the Order and filed it on June 2, 2023.

A fair summary of the Order as written is that it imposes liability against the Bank of Newington for improperly disbursing funds from an account owned by LHSC to LHSC which rendered LHSC unable to open its drapery manufacturing business, despite that construction was complete. The Order assumes that had the Bank of Newington not improperly disbursed the funds to LHSC, LHSC would have operated a successful business that would benefit Williamsburg County. Moreover, the Order provides that the listed improper disbursements by the Bank of

⁸ HBC had to amend its lien based on its mistaken use of Viking's license number on the original lien. (Test. of Hudson, p. 794, ll. 2-13; R____).

Newington to LHSC of LHSC's loan funds caused LHSC to default on LHSC's loan with the Bank of Newington. The Bank of Newington respectfully contends that the Court's findings and conclusions were in error and not supported by the evidence.

ARGUMENT AND CITATION OF AUTHORITY

A foreclosure action is an action in equity. Historic Charleston Holdings, LLC v. Mallon, 365 S.C. 524, 533, 617 S.E.2d 388, 392 (Ct. App. 2005). In an equity case, the appellate court may view the evidence, find facts, and reverse a finding of fact based on its own view of the preponderance of the evidence. Id.; *see also* Forester v. Forester, 226 S.C. 311, 85 S.E.2d 187, 188 (1954).

- I. The Trial Court erred in finding and holding that HBC, WCDC and the citizens of Williamsburg County were third-party beneficiaries to the USDA issued Conditional Commitment and Guarantee.

The Order finds and holds that the Bank of Newington breached multiple provisions of the Conditional Commitment and Guarantee issued by the USDA in conjunction with the loan. The Order also finds and holds, despite not being referenced anywhere in either document, that HBC and WCDC are third-party beneficiaries to the two agreements. The findings and holdings are not supported by the evidence or South Carolina appellate court decisions.⁹

- A. Conditional Commitment issued by the USDA, Form RD 4279-3

In a form document titled "Conditional Commitment" dated February 1, 2017, the USDA committed to guarantee ninety percent of the loan to LHSC. (Exhibit 6, Conditional Commitment

⁹ The Court held that the Commitment and Guarantee were clear and unambiguous. Order, Findings of Fact ¶ 2. Consequently, the interpretation of the Conditional Commitment and Guarantee is a matter of law. Holden v. Alice Mfg., 317 S.C. 215, 220, 452 S.E.2d 628, 631 (Ct. App. 1994).

and Guarantee; R____). The parties to the Commitment were the USDA, the Bank of Newington and LHSC. (Id.) The function of the Conditional Commitment is to provide the conditions for the USDA to issue a guarantee of the loan. (Ex. 6, Conditional Commitment, p. 1; R____ and Test. of Sheppard, p. 15, l. 20-p. 18, l. 19; R____). Once the conditions are met, the USDA issues a guarantee. (Id.)

The Commitment stated the purpose of the loan was to provide “long-term financing for the start-up of a curtain/drapery manufacturing business at a commercial property located at 77 Commerce Dr., Kingstree, SC 29556 to be used as a manufacturing facility.” (Exhibit 6, p. Commitment, Attachment to Form RD 4279-3, ¶ 3; R____). Nowhere does the loan purpose state that the purpose of the Commitment was to directly benefit the citizens of Williamsburg County. (Id.) There is no such provision in the document. (Id.).

The use of the loan proceeds was broken down into six categories and based on a budget provided by LHSC: (1) real estate acquisition (\$250,000.00), (2) real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital & contingency (\$637,530) and fees & costs associated with the loan (\$369,420). (Testimony of Sheppard, p. 29, ll. 5-22;p. 36, l.12-p. 38, l. 3; R____). Nowhere in the Commitment does the USDA require the Bank of Newington to maintain any certain type of accounting document. (Id.)

There is no mention of a duty owed to a third party to make sure LHSC did not exceed these budget items. (Ex. 6, Conditional Commitment; R____). A failure to allow a borrower to overspend or underspend loan proceeds in one category will only lead to the potential claim by the USDA for reimbursement on the guarantee if the loan goes into default. (Test. of Sheppard, p. 37, ll. 10-23; R____).

The Commitment goes onto list several other items that the Bank of Newington must

complete to receive the guarantee. (Ex. 6; R____). These items include that the Bank of Newington enter into a loan agreement with LHSC that: (1) limits dividend payments (pph 9(d)), (2) prohibits LHSC encumbering collateral without agreement by the Bank of Newington (9(e)), and (3) requires consent from the Bank of Newington prior to LHSC receiving outside investments or loans from stockholders (9(h)). (Id. at ¶ 9; R____). The loan agreements between the Bank of Newington and LHSC meet these requirements. (Ex. 7, Loan Package; R____).

The USDA required the Bank of Newington to hire a monitoring firm, which it did by hiring Partner. (Id. at ¶ 12; R____; Test. of Sheppard, p. 78, ll. 20-25; R____.)¹⁰ Partner was hired to inspect construction progress, interview the contractor, and make recommendations to the Bank of Newington for the bank's use only as to whether to pay a construction draw. (Ex. 20, Cover Letter; R____).

The Bank of Newington was also required to make sure that the project was completed with available funds, which is not defined in the Commitment. (Ex. 6, ¶ 12; R____). The common and ordinary meaning of "available funds" is money that is cash in hand or accessible for immediate use. Black's Law Dictionary, 2nd Ed., Definition of Available Monies.

The Commitment required the Bank of Newington to have a plan that prohibits disbursing loan proceeds to a contractor before the bank obtained lien waivers from "all contractors and materialmen." (Ex. 6, ¶ 12(b)(iii); R____). This prohibition is present in the loan agreements. (Ex. 7, Loan Package, Construction Loan Agreement, p. 3; R____). The Commitment was issued on February 1, 2017, approximately three weeks prior to closing. (Ex. 6, p. 1; R____). There is no

¹⁰ The Order references a requirement that the Bank of Newington ensure that project facilities are estimated by a professional. (Order, pp. 8; R____). The Agreement between HBC and LHSC included a cost estimate, and an appraisal was done to determine the value as built. (Exhibit 9, HBC Agreement; R____ and Test. of Sheppard, p. 13, ll. 3-9; R____).

default paragraph in the Conditional Commitment. (Id.)

The Conditional Commitment does not refer to either WCDC or HBC. (Id.) The Conditional Commitment does not list any financial projections for the project. (Id.)

B. The USDA Guarantee, Form 4279-5.

Once the Bank of Newington demonstrated compliance with the terms in the Commitment, then the USDA issued the Guarantee at Closing. (Ex. 6, Loan Note Guarantee, Form RD 4279-5; R____; and Test of Sheppard, p. 36, ll. 2-8; R____). The Guarantee is a separate document from the Conditional Commitment. (Ex. 6, R____; and Test. of Sheppard, p. 15-16, l. 12 and p. 19, ll. 2-;R____). The Order incorrectly conflates the two documents and cites to provisions as if they were in the same agreement. See for example, Order, ¶ 8. (Order; R____).

The purpose of the Guarantee is to demonstrate the USDA's agreement supported by the full faith and credit of the United States to pay the loss amount or guaranteed portion of the loan to any "holder." (Test. of Sheppard, p. 20, ll. 5-10 and p. 22, l. 1-p. 23, l. 10; R____ and Ex. 6, Guarantee, ¶ 3; R____). The lender, who is the Bank of Newington, is allowed to sell the guaranteed portion of the loan on the secondary market to investors who become "holders" of the guarantee. (Id.).

The Bank of Newington is required to maintain the non-guaranteed portion of the loan, which was approximately \$353,000 in this case. (Test. of Sheppard, p. 23, ll. 15-17; R____). The Bank of Newington is required to service the loan, which requires the Bank of Newington to collect interest and disburse to investors, and it must remain the secured party, which requires the Bank of Newington to pursue default and collection efforts. (Ex. 6, Guarantee, ¶ 1; R____).

The Guarantee expressly grants the Bank of Newington or the holder the right to seek payment from the USDA against the guaranteed portion of the note. (Ex. 6, Guarantee, ¶ 3; R____).

The provision goes onto say that the USDA is not required to pay on the guarantee if a loss is occasion of negligent loan servicing. (Id.) The Guarantee does not mention, and it does not provide relief or even describe a benefit to HBC, WCDC, any contractor, or any entity providing grant money or the citizenry of Williamsburg County. (Id.)

The Guarantee is a negotiable instrument, and the only signatory to the Guarantee was the USDA. (Id.) Moreover, the only parties referenced in the Guarantee are USDA, the Bank of Newington, the holders of the guarantee and LHSC. (Id.) Neither WCDC nor HBC are parties to the Guarantee and neither purchased any portion of the note and they are not “holders.” (Id.)

C. WCDC, HBC and the Citizens of Williamsburg County are not direct beneficiaries of the Commitment or Guarantee.

The Court held that HBC, WCDC and citizens of Williamsburg County were direct beneficiaries to the Commitment and the Guarantee. (Order, ¶ 5; R___). “The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract].” Windsor Green Owners Ass’n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). A clear and explicit contract must be construed “according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.” Id. A contract must receive a sensible and reasonable construction and not a construction that would lead to an absurd result. Holden v. Alice Mfg., 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994).

To prevail on a third-party beneficiary claim, the plaintiff must prove that the parties to a contract intended to create a direct, rather than an incidental or consequential, benefit to a third-party. Id. at 17-20. In sum, a clear agreement must demonstrate on its face a direct benefit to a third-party.

In Beverly v. Grand Strand Reg'l Med. Ctr., a plaintiff insured sued a hospital that had entered into a contract with the plaintiff's group health insurer in which the hospital agreed to seek payment first from the group health insurer and not the individual insured patients. 435 S.C. 594, 597, 869 S.E.2d 812, 814 (2022).¹¹ The South Carolina Supreme Court held that the hospital's agreement not to collect against the insureds first made the insured and thus the plaintiff direct beneficiaries of the agreement to enforce this agreement. Id.

Conversely, in this case the purpose of the Commitment is to provide conditions which the USDA would issue a guarantee for the Bank of Newington. The Guarantee is the USDA's agreement to pay to any Holder 100 percent of any loss sustained on the guaranteed portion of the loan which the Holder owns. There is no argument or evidence that WCDC and HBC were "Holders." The only direct beneficiary to the Commitment was the Bank of Newington and arguably the only direct beneficiaries to the Guarantee were the Bank of Newington and the Holders.

A plaintiff made similar claims as WCDC and HBC, post trial, make in this case in Windsor Green Owners Ass'n, 362 S.C. at 15, 605 S.E.2d at 752. The plaintiff in that case was a homeowner's association who said it was a third party beneficiary to a lease agreement between the owner of a condominium and a renter. Id. The lease agreement made the renter liable for damage it caused to the property, including the common areas owned by the association. Id.

The South Carolina Court of Appeals held that the agreement did not imply any liability on the renter for damage to anyone other than the owner, who was the other party to the agreement.

¹¹ To the extent that Beverly v. Grand Strand Reg'l Med. Ctr. changed the law in South Carolina, it would not apply to the Commitment and Guarantee. These documents were executed in 2016 and February 2017, well before the decision in Beverly v. Grand Strand Reg's Med. Ctr. in 2022.

Id. at 18 and 753. Despite that the association was an implicit beneficiary to the liability provision, it was not a third-party beneficiary who could bring an action under the lease. Id.

In this case, a breach of the Commitment enables the USDA to terminate the Commitment and not issue the guarantee (Ex. 6, Conditional Commitment, page 1; R___), and a breach of the Guarantee enables the USDA to possibly recover all or a portion of the guaranteed part of the loan against the Bank of Newington (Ex. 6, Guarantee, ¶ 9; R___). The Commitment and Guarantee do not obligate the Bank of Newington to guarantee the project's success so the people of Williamsburg County will experience jobs and increased revenue growth. Such an interpretation is the definition of an incidental or consequential benefit.

Similarly, the Bank of Newington did not agree to disburse loan proceeds directly to contractors or manage the loan to make sure contractors are paid. Rather, the Commitment requires the Bank of Newington to have a plan and the Guarantee impose obligations on the Bank of Newington to restrict and monitor the use of funds to protect the USDA's risk in the project. Again, that HBC may benefit from the Bank of Newington's loan servicing requirements is merely incidental or consequential.

Neither WCDC nor HBC are referenced in the Commitment or Guarantee. The only reference to Williamsburg County is in the provision requiring LHSC to obtain grant funds to satisfy the Commitment and proceed with the loan. There is no language in the provision that requires the Bank of Newington to protect the issuers of the grant money. Interpreting the Conditional Commitment and Guarantee to provide that all the citizens and residents of Williamsburg County are third party beneficiaries leads to an absurd result and is not a proper interpretation.

D. HBC did not raise a third party beneficiary claim.

HBC did not claim it was a third-party beneficiary to the Commitment and Guarantee in its answer and counter-claim, and it never moved to amend to add such a claim. WCDC first raised the claim in its amended answer and counterclaims filed on November 21, 2022, a few months before trial.

Motions to amend pleadings to conform to proof may be made on motion of any party at any time and are within the discretion of the trial judge. Rule 15(b), SCRCP; *see also* Ball v. Canadian Am. Express Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). However, if the late amendment will prejudice the opposing party, the Court should either deny the amendment or grant a continuance to allow the party to respond to the amendment. Id.

HBC never moved to amend its answer to include a claim for recovery under a third-party beneficiary theory. For that reason alone, the Court erred in awarding HBC damages as a third-party beneficiary to the Conditional Commitment and Guarantee.

In addition, the amendment, had a motion ever been made, would have prejudiced the Bank of Newington. Prejudice occurs when the amendment states a new claim that requires the opposing party to introduce additional or different evidence to prevail in the amended action. Id. During the trial, the Bank of Newington had no reason to believe it would defend a claim that HBC was a beneficiary to the USDA agreements. The Bank of Newington could have offered additional evidence and argument that HBC was not a beneficiary. Consequently, the Bank of Newington is prejudiced by the post trial amendment adding a third party beneficiary claim to HBC's answer.

E. The Bank of Newington did not breach either the Commitment or Guarantee, and it received no unjust enrichment.

The Conditional Commitment was deemed satisfied by the USDA which led to it issuing the Guarantee. (Test. of Sheppard, p. 35, l. 7-p. 36, l. 11; R___). At that point, the terms and

conditions in the Conditional Commitment were fully performed and no breach could have occurred. All the Court's findings, except those that refer to negligent loan servicing, that the Bank of Newington breached the Commitment and Guarantee stem from terms in the Commitment. (Order, ¶¶ 3-28, 32-37, 41, 44-46; R___). The findings that the Bank of Newington breached the Commitment after its terms were performed and the guarantee was issued must be reversed.

Moreover, the USDA correctly determined that the Bank of Newington complied with the Conditional Commitment. The Bank of Newington: (1) hired a third party engineering firm, who was Partner, to help oversee construction and draws; (Order 9-10, 22; R___), (2) established the control account which only disbursed available funds to LHSC (Order, 14-17; R___), (3) obtained cost estimates from HBC (Order, 8-10; R___), and (4) established a contingency budget item (Order, 11; R___). The evidence demonstrates that the Bank of Newington complied with the Commitment, and the Court's findings otherwise are based on an incorrect interpretation and application of the Commitment.

The Guarantee references negligent loan servicing and defines the term as the failure to perform the services a reasonably prudent lender would perform in processing or servicing its own portfolio of loans that are not guaranteed. (Ex. 6, Guarantee, ¶ 3; R___). After closing, the loan funds were paid to LHSC and deposited into its control account held at the Bank of Newington. (Test. of Sheppard, p. 56, l. 21-p. 57, l. 24; R___). The Commitment did not contemplate and the Guarantee did not impose a specific procedure governing the disbursements to LHSC from the control account, except for disbursements to contractors who could potentially impose liens against collateral. The evidence at trial demonstrated that the Bank of Newington required and received

documentation for every disbursement to LHSC from the control account. (Exhibits 56 Distribution of Loan Funds and Exhibit 57, Document Production Disbursements; R___).

The loan proceeds were not required to be paid directly to vendors, and disbursements not made to vendors were wired to LHSC's operating account with TD Bank. (Test. of Sheppard, p. 396, ll. 5-17; R___). Every dollar spent on the project that went through the control account was accounted for and a reason for the expenditure known and documented.¹²

The Loan was not limited to construction costs, and it included amounts intended for start-up working capital and inventory. (Id. at p. 36, l. 17-p. 37, l. 9; R___). Working capital is a catch all business category and includes business expenses such as compensation and travel. (Id.). Inventory was expressly provided for in the loan.

The Order speaks of breached general duties, but every alleged violation arises from the Bank of Newington's disbursement of loan proceeds to LHSC or LHSC's designated vendor. There was no finding and no evidence that the Bank of Newington misappropriated any loan proceeds. The Bank of Newington serviced the guaranteed portion of the loan the same as it serviced its other loans. (Test. of Sheppard, p. 181, ll. 8-13; R___).

The most scandalous findings and accusations against the Bank of Newington are that it collected interest on the loan after closing and sold the guaranteed portion to investors. There is nothing improper or unjust in doing this and the Guarantee contemplates it. In addition, the Order

¹² The Bank of Newington with input from Hornick maintained an internal budget spreadsheet that tracked the categories set out in the Conditional Commitment to help report to the USDA if a loss occurred. (Test. of Sheppard, p. 37, ll. 13-23; R___). The Bank of Newington produced the data underlying the spreadsheet in May 2019 and again in December 2019. LHSC produced its version of the spreadsheet in its discovery responses in 2020. In an abundance of caution, the Bank of Newington produced the spreadsheets again in October 2022 even though HBC did not raise a claim for breach of the commitment or guarantee and no order had required production of the internal spreadsheets.

misstates the amount of interest that the Bank of Newington collected on its own account and does not include the costs and expenses related to the fees or collections. (Order, 40-43; R___).

The evidence established that the Bank of Newington only owned 10% of the loan or the non-guaranteed portion, and it received only 10% of the interest LHSC paid, the rest went to investors. (Pretrial Brief Second Supplement; R___). The Bank of Newington received no monetary profit from the loan. (Id.)

The Bank of Newington offered justifiable business reasons for every disbursement or non-disbursement. The disbursement decision at the heart of the litigation is the decision whether to pay the final draw to HBC. LHSC refused to authorize payment, HBC lied about a certificate of occupancy and Viking refused to sign a conditional lien waiver. This refusal was especially concerning based on Viking's threat to file a mechanic's lien and the Bank of Newington's agreement to obtain lien waivers prior to construction draws.

The mortgage and loan agreement also allow the Bank of Newington to require that LHSC authorize disbursements, obtain lien waivers and wait for a certificate of occupancy to release the final construction draw. (Ex. 7, Loan Agreement, p. 3; R___). Finally, the loan agreements limit liability against the Bank of Newington for disbursements. (Ex. 7, Loan Agreement, p. 3; R___). The Partner report was for the exclusive use of the Bank of Newington and did not bind the Bank of Newington to any course of action in favor of HBC. (Ex. 20, Cover Letter; R___).

As to DSI, the Bank of Newington wired the money to LHSC's operating account at Hornick's request for accounting reasons. (Test. of Sheppard, p. 61, l. 18-p. 63, l. 10; R___). Immediately upon discovering that some of the money did not make it to DSI, the Bank of Newington followed up and obtained confirmation from DSI's principal, Eddie Burgess, that all was fine. (Id. and Exhibit 37, Email chain with Burgess; R___). The Bank of Newington

discovered a few months before trial that Burgess and Hornick had entered into a payment plan for the missing money. (Id. and Exhibit 38, DSI and LHSC Agreement; R___). The Bank of Newington had no knowledge of this side deal. (Id). Regardless, by the time that the first DSI disbursement was made in March, HBC had begun construction and calling the loan was not a viable option.

The Conditional Commitment, the Guarantee, and the loan documents did not require the Bank of Newington to assume that LHSC was committing fraud and micromanage the start-up process. This is true even though LHSC went over budget on construction and on other start-up costs. The Bank of Newington did what the Commitment required and the loan documents allowed it to do. It is not liable for doing what the agreements expressly allow it to do. See First Federal Savings & Loan Association v. Dangerfield, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (Ct. App. 1992)(no breach of covenant of good faith and fair dealing when party to a contract does what the contract allows it to do).

For the Bank of Newington to do otherwise places too much control and oversight on the Bank of Newington, and it risks liability from its borrower or a holding that the bank is a partner in the venture. See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 142, 425 S.E.2d 764, 770-771 (Ct. App. 1992)(extending liability to a bank under joint venture theory). The Bank of Newington was not the guarantor of the project.

At a minimum, the Bank of Newington exercised slight care in disbursing LHSC's proceeds to it or its vendors. Consequently, the Order does not support the finding and holding that the Bank of Newington was grossly negligent. Clyburn v. Sumter Cnty. Sch. Dist. #17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994).

The Court's findings and holdings that the Bank of Newington violated contractual and legal duties owed to HBC and WCDC are not supported by the evidence and should be reversed.

F. The Bank of Newington disbursements to LHSC did not cause the project to fail

HBC and WCDC must prove that the Bank of Newington caused the project to fail despite HBC's representation that construction was finished, and caused HBC and WCDC to incur damages. In breach of contract and negligence actions, a plaintiff must show the defendant's actions proximately caused its damages. Winthrop Univ. Trs. v. Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 161-62, 791 S.E.2d 152, 162-63 (Ct. App. 2016). Proximate cause requires the plaintiff to prove causation in fact and legal cause. Id. Causation in fact is proven by establishing the injury would not have occurred but for the defendant's negligence or breach. Id. Legal cause is proven by establishing foreseeability, which is determined by looking to the natural and probable consequences of the defendant's conduct. Id.

The failure of the project is not the natural and probable consequence of the Bank of Newington releasing LHSC's own loan funds to it. If that reasoning was sound, then Williamsburg County and WCDC are liable. Williamsburg County sent the grant funds directly to LHSC's control account. (Test. of Frierson, p. 726 at ll. 18-25; R____). WCDC sent loan funds directly to LHSC, even though it knew a dispute existed with a contractor. (Exhibit 52, 2nd Mtg loan docs; R____ and Test. of Frierson, p. 737, l. 17-p. 740, l. 3; R____; see also Deposition Excerpt of Jim Moore, p. 29, ll. 4-25; R____).

Assigning liability to the Bank of Newington fails the causation in fact and legal cause tests. Moreover, HBC claims that construction was complete when it applied for final payment, and the decision not to release final payment to HBC could not have caused the project to fail

anymore than it would had HBC been paid. The Bank of Newington did not cause the project to fail and it did not cause damages to HBC and WCDC.

G. Conclusion

HBC, WCDC and the Citizens of Williamsburg County are not third-party beneficiaries to the Conditional Commitment and Guarantee. Regardless, the Bank of Newington fully performed the terms in the Conditional Commitment and did not breach any provisions in either agreement. Finally, HBC never asserted a third-party beneficiary claim. The Court's findings and holdings that the Bank of Newington is liable to WCDC or HBC based a third-party beneficiary claim were made in error and must be reversed.

II. The Trial Court erred in finding and holding that the Bank of Newington owed a duty to HBC and WCDC to regulate and control its borrower.

The relationship between a bank and a customer is lender-borrower. Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 331, 759 S.E.2d 724 (2014). A bank owes no special duty to its customer unless it undertakes to advise its customer as part of the services it offers. Id. The South Carolina Supreme Court has not extended this limited duty to non-customers including the shareholders of a customer. Id. at 334. This refusal to extend a duty from the bank to a related non-customer is consistent with the previous decisions of the South Carolina Court of Appeals in First Federal Savings & Loan Association v. Dangerfield, 307 S.C. 260, 265, 414 S.E.2d 590, 593 (Ct. App. 1992); *see also* Regions Bank v. Schumauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003)(no duty extended to guarantor of a loan that was in default).

The undersigned has found no reported decision by the appellate courts in South Carolina and the Order does not cite any decisions that impose a duty on a lender to make sure that its borrower pays the borrower's contractual debts and succeeds so that a community will benefit.

The evidence presented at trial, which is not disputed by the Order, is that neither the Bank of Newington nor Fickling agreed or promised to pay or secure payment for either HBC (Test. of Hudson, p. 851, l. 10-p. 852, l. 8 and 891, l. 24-p. 892, l. 7; R___) or WCDC (Test. of Frierson, p. 742, l.1-p. 743, l. 3). The Bank of Newington did not owe any duties to WCDC and HBC to safeguard funds, make sure they were paid or ensure the project succeeded, and the Court's findings and holdings otherwise should be reversed.

III. General equitable principles did not allow the Trial Court to override statute and fashion equitable awards to HBC and WCDC.

The Court relied on its general equitable powers to: (i) award damages including attorneys' fees and prejudgment interest to WCDC and HBC, (ii) create equitable liens in favor of HBC and WCDC to allow them immediate recovery against the Property, and (iii) subordinate the Bank of Newington's priority lien against the Property despite express statutory and contractual limitations.

A. Mechanic's Lien Statute

A contractor and subcontractor who are owed debt for labor or materials furnished and used in the erection of a building has a lien upon the building or land to secure the payment due. S.C. Code § 29-5-10. However, "in no event shall the aggregate amount of any liens on the improvement exceed the amount due by the owner." S.C. Code § 29-5-20. Moreover, the attorneys' fees awarded to a contractor may not exceed its lien amount. S.C. Code § 29-5-10(a). Finally, a mechanic's lien is unenforceable against a previously recorded mortgage. S.C. Code § 29-5-70.

The mechanic's lien statutes are clear in that HBC's lien could not exceed the amount of work that HBC, not Viking, claimed it had performed and was owed. HBC never identified at trial the amount it was owed independent of Viking, and the Order does not specify the amount. This failure of evidence should have led to the denial of the claim. Removing Viking's amount from

HBC's lien equals \$92,496.50. This amount is the most HBC could have obtained as a lien against the Property, and any attorneys' fees awarded to it could not exceed \$92,496.50.

Regardless, even the reduced amount is unenforceable against the Bank of Newington's previously recorded mortgage. Consequently, pursuant to the mechanic's lien statutes, HBC's lien and attorneys' fees could not exceed \$184,993.00, and this amount cannot obtain priority over the Bank of Newington's mortgage. The Order does not attempt to deal with the express limitations in the mechanic's lien statutes despite the Bank of Newington's arguments at trial and on its motion to reconsider.

B. WCDC's Second Mortgage

WCDC's loan to LHSC was secured by a second mortgage which by its terms was subordinate to the Bank of Newington's mortgage. Moreover, the loan was given to LHSC, and the second mortgage recorded almost a year after the Bank of Newington's purchase money mortgage. WCDC knew about the Bank of Newington's mortgage and its subordinate position when it made the loan. The Bank of Newington's prior recorded mortgage gives it priority over WCDC's second mortgage. S.C. Code § 30-7-10.

Moreover, Williamsburg County, not WCDC, paid the U.T.C. grant funded by Santee Electric on July 28, 2017, five months after the Bank of Newington's loan and mortgage were issued and recorded. Williamsburg County knew the loan and mortgage existed when it paid the grant money as reimbursement for work done. Neither Williamsburg County nor WCDC required LHSC to enter into a performance agreement or any other type of agreement that could lead to the reimbursement of the grant funds. The Bank of Newington's loan and mortgage are entitled to priority over the unsecured grant.

C. There was no creation of equitable liens in favor of HBC and WCDC

An equitable lien only arises if the plaintiff proves (1) there is a debt owed from the defendant to the plaintiff, (2) specific property which the debt attaches, and (3) an intent, expressed or implied, that the property will serve as security for the payment of the debt. Doe v. Roe, 323 S.C. 445, 452, 475 S.E.2d 783, 787 (Ct. App. 1996); *see also* Nutt Corp. v. Howell Rd, LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011).

No evidence was presented at trial and the Order neither holds nor finds that the Bank of Newington owed a debt to HBC or WCDC and pledged the Property as security for the debt. Conversely, the evidence demonstrates that neither WCDC nor HBC asked for security from the Bank of Newington and the Bank of Newington never promised or agreed to provide security for a debt. None of the elements necessary for an equitable lien were established.

Even if equitable liens were established by WCDC and HBC, they would attach only at trial, and they are subordinate to the Bank of Newington's previously recorded purchase money mortgage.

- D. No contract or statute supported the award of attorneys' fees and the amounts awarded were unreasonable.

Attorneys' fees are generally not recoverable unless authorized by contract or statute. Blumberg v. Nealco, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The Bank of Newington did not have an agreement with either HBC or WCDC. No statute supports and no caselaw is cited to support an award of attorneys' fees to WCDC against the Bank of Newington. WCDC has no basis to recover attorneys' fees against the Bank of Newington.

The Order cites the mechanic's lien statute to award HBC attorneys' fees, but as demonstrated above, HBC's alleged lien is unenforceable against the Bank of Newington's mortgage. S.C. Code § 29-5-70. Moreover, HBC's attorneys' fees were two and a half times the amount of its lien which violates S.C. Code § 29-5-10.

Moreover, the amounts of the attorneys' fees awarded to WCDC and HBC are unreasonable. The loan documents for the \$80,000 loan between WCDC and LHSC are the only available authority to award WCDC attorneys' fees and costs against LHSC. The amount awarded to WCDC for attorneys' fees is \$71,561.84 which nearly equals the principal balance of the loan. The amount is unreasonable and must be reduced. Similarly, as stated above, the attorneys' fee awarded to HBC is \$229,937.22. This is two and a half times the amount of HBC's damages. This amount is unreasonable.

E. The award of prejudgment interest was not supported by the evidence.

The claims by HBC and WCDC against the Bank of Newington are not the subject of prejudgment interest. While prejudgment interest is permitted if the sum is certain or capable of being reduced to certainty, it may be awarded only if the "measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Vaughn Dev., Inc. v. Westvaco Dev. Corp., 372 S.C. 576, 579, 642 S.E.2d 757, 759 (Ct. App. 2007).

The Bank of Newington had no contract with HBC or WCDC and the Order does not find that it does. The measure of recovery by the parties against the Bank of Newington was unknown and not fixed until the Order was filed. The Order awards HBC prejudgment interest on the amount owed to Viking and an amount that HBC ultimately did not receive. Even assuming the award to HBC was proper, the prejudgment interest on the amount owed to HBC should be derived from \$92,496.50 which with prejudgment interest added totals \$138,078.65.

WCDC and HBC are not entitled to prejudgment interest against the Bank of Newington. In the alternative, the amount of prejudgment interest awarded to HBC is derived from \$92,496.50.

F. WCDC and HBC were awarded damages they did not incur

WCDC did not pay \$200,000 in grant money. During depositions, WCDC's executive

director mistakenly denied, despite receiving email evidence from the prior executive director to the contrary, that a U.T.C. grant was issued for the project. (Test. of Frierson, p. 685, ll. 2-22; R___); and Exhibit 12, April 26, 2017, email; R___). Mr. Frierson admitted to his mistake at trial and admitted that WCDC only facilitated a \$200,000 U.T.C. grant from Santee Electric. (Test. of Frierson, p. 685, l. 24-p. 686, l. 12; R___).¹³ A U.T.C. grant limits its use of funds to infrastructure costs, and the grant was only released upon proof that work was done and paid. (Exhibit 47a, Email from Moore; R___).

Jim Moore, who was the executive director at the time of the project, had no problem remembering that the grant was a U.T.C. grant and not eligible for use to pay for a sprinkler system installed inside the building. (Deposition Excerpts of Jim Moore, P. 40, ll. 24-25, p. 41, ll. 1-25 and p. 42, ll. 1-13; R___). He also truthfully testified that the grant money was only used for reimbursement of completed items and was paid from an account with Williamsburg County not WCDC. (Dep. Excerpts from Jim Moore, p. 44, ll. 20-25, p. 45, ll. 1-25, p. 46, ll. 1-25; R___). Hudson sent Williamsburg County proof that the infrastructure work was done and paid on June 23, 2017. (Exhibit 47, Email from Hudson; R___ and Test. of Frierson, p. 725, l. 2-p. 726, l. 11; R___.) Because the grant was for reimbursement of paid invoices, WCDC cannot reasonably argue and the Court could not find that the grant funds were not used for construction costs.

Even more surprising, WCDC, who claims it handled the grant from Santee Electric, did not require LHSC to enter into any type of grant agreement or performance agreement, it just handed the money over to LHSC. (Test. of Frierson, p. 701, l. 8-p. 703, l. 5 and p. 726, l. 15-p. 728, l. 3; R___). WCDC never attempted to recoup the money from LHSC, nor could it have;

¹³ Mr. Frierson strained to reason that the money went through WCDC and thus was WCDC's money. However, the payment to LHSC was from Williamsburg County and not WCDC.

WCDC gave the money to LHSC with no claw back rights. (Id.). The only money that came from WCDC was the \$80,000 loan and mortgage, which was expressly subordinated behind the Bank of Newington's mortgage.

Hudson admitted that HBC received full payment for the work it performed, except retainage. (Test. of Hudson, p. 867, l. 6-p. 869, l.1; R___). The retainage should have been reduced by the \$20,000 payment that Hudson misrepresented HBC paid to Viking in April's payment application (Test. of Hudson, p. 856, l. 20-p. 857, l. 25; R___ and Exhibit 15, Pay Application 3; R___). This amount is a credit against HBC's alleged damages.

G. WCDC and HBC are not "innocent parties" and are not entitled to equitable relief including unjust enrichment.

HBC received \$1,347,000 for the work it performed on the project. (Exhibit 17, Pay App September; R___; and Test. of Hudson, p. 867, l. 6-p. 869, l.1; R___). HBC incurred only \$990,080.67 in costs, which includes the unpaid invoices Viking sent HBC starting in August. (Test. of Hudson, p. 869, ll. 6-25 and p. 885, l. 20-p. 886, l. 24; R___ and Plaintiff's Exhibit 35, HBC Cost Detail; R___). Removing the \$181,479 owed to Viking which Hudson admits HBC should have paid but did not, HBC made more than \$500,000 profit on the project. (Id.; Test of Hudson, p. 851, ll. 10-12, p. 872, l. 24-p. 873, l. 15 and p. 888, ll. 7-13; R___).

HBC did not suffer any loss on the project. Moreover, HBC refused to pay Viking based on its admitted illegal business practice of not paying subcontractors until it was paid in violation of S.C. Code § 29-6-230. (Test. of Hudson, p. 851, ll. 10-12, 872, l. 24-p. 873, l. 15; R___). Finally, HBC did not ask for any security on the project such as a bond or line of credit to secure payment when it began work. (Test. of Hudson, p. 851, l. 10-p. 852, l. 8.; R___).

WCDC, and the party who actually paid the grant, did not have a performance agreement or any contract allowing it to claw back or recover on the grant. Moreover, WCDC loaned LHSC \$80,000 knowing a construction dispute existed with HBC and that WCDC was subordinate to the Bank of Newington's first mortgage.

HBC and WCDC are not innocent parties.¹⁴ See First Federal Sav. & Loan Ass'n v. Finn, 300 S.C.228, 231-232, 387 S.E.2d 253, 254 (S.C.)(owner who obtained title to real property knowing of the mortgage on the property is not entitled to an equitable lien superior to the mortgage despite allegations of negligent or wrongful loan servicing). They are not entitled to equitable priority over the Bank of Newington.

In addition, to prevail on a claim for unjust enrichment, HBC and WCDC needed to establish that: (1) a benefit was conferred on the Bank of Newington by WCDC and HBC; (2) realization of that benefit by the Bank of Newington; and (3) retention of the Bank of Newington under conditions that make it unjust for it to retain without paying value. Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). Neither WCDC nor HBC conferred a benefit on the Bank of Newington, and no dispute exists that the Bank of Newington had no agreement with either to pay or secure their alleged investments in the project.

As demonstrated above, the Bank of Newington did not realize a benefit from either party and has not retained any such benefit. The fees and percentage of interest the Bank of Newington charged are outweighed by the loss it has incurred arising from LHSC's default, which was more

¹⁴ The cases cited by the Order for the proposition that the "innocent party" prevails favor resolution to the Bank of Newington. For example, in Myrtle Beach Lumber Co. v. Willoughby, a supplier who sold lumber to a financially unstable contractor was not the "innocent party" as it should have protected itself from a loss to the contractor. 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981).

likely caused by construction delays and Hornick than anything the Bank of Newington did or did not do. No unjust enrichment exists in this case.

H. HBC and WCDC had adequate remedies at law

“The function of equity is to supplement the law, not to displace it.” Nutt Corp, 396 S.C. at 327. An equitable lien and any equitable claim are generally only available when a party is “without an adequate remedy at law.” Id. An adequate remedy is “one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” Id.

HBC did not pursue any claims against LHSC at trial and focused on the Bank of Newington and Fickling. Consequently, HBC did not obtain or even attempt to obtain a judgment or recovery against LHSC, who was, as Hudson admitted during trial, responsible for paying HBC the construction costs.

WCDC never sent a notice of default or attempted to collect from LHSC on the note or grant. (Test. of Frierson, p. 754, l. 22-p. 755, l. 4; R___). Adequate legal remedies were available to HBC and WCDC against LHSC, but they chose not to pursue them.

I. Conclusion

The Mechanic’s Lien statute expressly states that a subsequently recorded mechanic’s lien is not enforceable against a previously recorded mortgage and it caps a contractor’s lien amount and attorneys’ fees. The statutes are clear and is the province of the Legislature. Wigfall v. Tideland Utils., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2002). “[E]quity cannot prevail over a positive legislative enactment.” Id. The Court is not permitted to exercise equitable powers to override and displace the clear language in the Mechanic’s lien statutes. Enforcing HBC’s mechanic’s lien against the Bank of Newington’s prior recorded mortgage ignores and overrides

the clear intent and language and such enforcement is not permitted. Similarly, giving priority to WCDC's second mortgage overrides South Carolina's notice statute and is not permitted.¹⁵

IV The Judgment and claims assigned to the Bank of Newington must be given the full force and effect of the law.

Viking filed a mechanic's lien and sued HBC for breach of contract and for attorneys' fees under S.C. Code § 27-1-15. HBC denied and contested Viking's claims against it. Despite this, Viking obtained summary judgment against HBC when it finally admitted responsibility four years after the Mechanic's Lien Action was filed. (Plaintiff's Exhibit 27, Transcript of Judgment; R___).

Viking was entitled to recover this amount plus post-judgment interest going forward from HBC. The Bank of Newington and Viking settled. As part of the settlement, the Bank of Newington purchased this Judgment and all of Viking's claims, interests, and liens in the two actions against HBC and others. (Plaintiff's Exhibit 29, Fully Executed Settlement Agreement, ¶¶ 3 and 4; R___).

The assignment of a judgment is absolute and enforceable. Watts v. Copeland, 170 S.C. 449, 456, 170 S.E. 780, 783 (1933). The Bank of Newington is entitled to recover the Judgment amount plus post judgment interest, which as of June 2, 2023, was \$272,267.74, against any amount awarded to HBC. Although the Order reduced the amount owed to HBC by \$257,538.00, the Bank of Newington is entitled to recover the interest awarded on the Judgment from the date of Judgment to the date of the Order, which would be an additional \$14,729.74 offset. Hudson admitted at trial with knowledge that the Bank of Newington owned the Judgment that HBC must pay the Viking Judgment. (Test of Hudson, p. 891, ll. 17-20; R___).

¹⁵ The Order does not grant equitable liens to WCDC or HBC; rather, it gives their mechanic's lien, mortgage lien and judgment amount super priority over the Bank of Newington's prior recorded mortgage.

The Bank of Newington, as assignee, is also entitled to recover attorneys' fees from HBC for Viking's claim under S.C. Code § 27-1-15.

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.

S.C. Code § 27-1-15. The South Carolina Court of Appeals recently issued an opinion confirming that a contractor's refusal to pay a subcontractor indefinitely until it is paid is *per se* unreasonable, and the excuse does not allow a contractor to delay payment with no liability under Code Sections 29-6-230 and 27-1-15. J&H Grading & Paving, Inc. v. Clayton Constr. Co., 892 S.E.2d 558 (S.C. Ct. App. 2023).

Hudson admitted that HBC was responsible for paying Viking but that he refused to pay it until HBC was paid. HBC's books, which it waited until January 3, 2023, to produce, demonstrated that it had made an enormous profit on the project and pocketing the amount owed to Viking added to this profit. HBC willfully refused to pay Viking, and Viking was entitled to recover reasonable attorneys' fees.

Because of the assignment of claims, the Bank of Newington should be awarded the fees. The attorneys' fees the Bank of Newington paid to complete the two actions and close the sale of the subject real property as of trial was \$222,718.28. (Affidavit of Attorneys' Fees; R ____). The total amount that the Bank of Newington is entitled to collect in interest and attorneys' fees from any award to HBC is \$494,986.02.

V. The claims by HBC and WCDC are untimely and barred.

A contractor must file a statement of account within 90 days after he ceases to labor or furnish labor or materials for such building or structure. S.C. Code § 29-5-90. A contractor must demonstrate that the goods and services furnished were not merely done as a gratuity or act of friendly accommodation. Kitchen Planners, LLC v. Friedman, 432 S.C. 267, 277, 851 S.E.2d 724, 730 (Ct. App. 2020). The goods and services furnished must be at the request of the owner, in good faith or for the purpose of completing the contract. Id.

HBC claimed it completed work on November 28, 2017, when it made its final payment request. (Plaintiff's Ex. 20, p. 11; R___). HBC submitted an email at trial indicating that it kept a dumpster at the site for four months. The reasonable inference is that HBC kept the dumpster at the site to attempt to keep the time to file a lien running, assuming its representation that it completed work on November 28, 2017, is true.

Hudson admitted at trial that Hornick did not request that he do this work. (Test of Hudson, p. 884, l. 16-p. 885, l. 14; R___). Moreover, the date provided by HBC at trial contradicts the date HBC provided under oath in its Mechanic's Lien affidavit. (Exhibit 34, Amended Mechanic's Lien dated July 2, 2018; R___). On its face, HBC's mechanic's lien is untimely.

WCDC waited to file its claims against the Bank of Newington and Blake Fickling until December 12, 2022. This was more than four years after LHSC defaulted on its loan with WCDC on May 1, 2018. (Exhibit 52, Note between WCDC and LHSC, Inc.; R___). WCDC has been a defendant in these proceedings since the commencement of the Mechanic's Lien action in June 2018.

The applicable statute of limitations for WCDC to file the claims against the Bank of Newington and Blake Fickling was three years. S.C. Code § 15-3-530(1) and (5). The relation

back rules in Rule 15(c), SCRCP, apply only if the amended claims arise out of the same transaction and occurrence alleged in the original pleading.

WCDC's amended claims do not challenge the enforceability of the Bank of Newington's note against LHSC, Inc. and do not arise out of the same transaction and occurrence as set forth in the initial complaint. Carolina First Bank v. BADD, LLC, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015). Pursuant to this authority, Judge Curtis held in her Order dated August 18, 2022, that the claims against the Bank of Newington by HBC and by extension the similar claims by WCDC are separate occurrences. Consequently, WCDC is not entitled to the benefit of the relation back rule, and its claims are barred by the statute of limitations.

The Order provides that WCDC discovered the claims during the production of an updated spreadsheet during the 30(b)(6) deposition of the Bank of Newington on December 1, 2022. However, WCDC filed its motion to amend before the deposition directly contradicting that finding.

Moreover, under the discovery rule, "the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 370-71, 597 S.E.2d 27, 29 (Ct. App. 2004). Under this objective test, a person is charged with knowledge when the "facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist." Id. Frierson testified that they knew the project was in trouble when they made the loan in February 2018. (Test. of Frierson, p.759, ll. 1-19; R___).

WCDC was in the best position to know that the facility never opened. WCDC sent the loan proceeds on February 7, 2018 and Williamsburg County sent the grant money to the Bank of

Newington on July 31, 2017. WCDC knew the money was held at the Bank of Newington, that contractors were not paid, its loan money was not used to pay Viking and the project failed when Viking filed its mechanic's lien on March 14, 2018, and the latest when HBC filed its answer and third party complaint on June 9, 2019.

In addition, the Bank of Newington produced a disbursement sheet outlining the disbursements made from the control account in May 2019. (Exhibit 56; R___). WCDC did not request to see the document and it chose not to participate in discovery until December 2022. WCDC knew of its alleged injury on March 14, 2018, if not before when it made the loan and should have known of its claims no later than June 9, 2019. Consequently, its claims are untimely and barred by the statute of limitations.

VI. The Trial Court erred by denying a stay to keep proceeds in a court protected Escrow Account pending appeal.

At the time of the Order, the Escrow Proceeds had been deposited and maintained in an interest-bearing escrow account pursuant to the Foreclosure Decree and Order Enforcing the Decree. Rule 62 provides that a court may stay enforcement of an order during the pendency of appeal by giving a bond or pursuant to a statute. Rule 62(d) and (f), SCRCP.

In cases not provided for in Sections 18-9-130 or 150 to 180, a notice of appeal automatically stays enforcement of an order. S.C. Code § 18-9-220; *see also* Rule 241(a), SCACR. None of the referenced statutes apply except arguably S.C. Code § 18-9-170 assuming the Escrow Account was the "Property." This statute provides for no stay unless security is posted to prevent waste. S.C. Code § 18-9-170.

The money awarded to HBC and WCDC was in a Court controlled escrow account, and the account held nearly double the amount that HBC and WCDC would have recovered from the fund. If the statute applies, the escrow account provided sufficient security to stay collection.

A stay is particularly proper in this case based on the prejudice to the Bank of Newington. A complete reversal or new trial will require the Bank of Newington to attempt to recover the disbursed money from WCDC and HBC. WCDC is a shell holding corporation, and Hudson testified he transferred the assets from HBC before he began work on the project. (Test. of Hudson, p. 890, l. 2-p. 891, l. 12; R___). The Court should have stayed enforcement of the Order pending appeal, and the Bank of Newington requests that the Court of Appeals require WCDC and HBC to refund the money if a new trial is ordered.

In addition, HBC and WCDC were not entitled to additional interest and costs. In Russo v. Sutton, the South Carolina Supreme Court held that depositing a judgment amount pursuant to a court order stops the accrual of interest. 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995). The amount awarded to WCDC and HBC was held in a court created and controlled interest-bearing escrow account. Moreover, the Bank of Newington was the prevailing party in the post-trial motion, and WCDC and HBC should not benefit from the delay in disbursement. Part of the delay in disbursement resulted in WCDC filing a motion to amend, which it lost, and HBC and WCDC refusing to comply with the Order to disburse. Consequently, post judgment interest should not have accrued against the Bank of Newington.

WCDC and HBC also were not entitled to additional costs incurred to challenge the post-judgment motions. The Court awarded costs in the Order, and the Bank of Newington was the prevailing party in the post-trial motions.

If the Court does not reverse, the recovery by HBC and WCDC should be reduced to the amount they received in the Order on June 2, 2023.

CONCLUSION AND RELIEF REQUESTED

The Bank of Newington respectfully requests that the Court of Appeals reverse the Court's decision based on the Court's erroneous findings and holdings set forth above including that: (1) HBC and WCDC are third party beneficiaries to the USDA Conditional Commitment and Guarantee, (2) HBC's mechanic's lien has priority over the Bank of Newington's prior recorded mortgage, (3) the Bank of Newington breached duties owed to WCDC and HBC and (4) WCDC and HBC timely filed their claims. This reversal leads to the Bank of Newington recovering the entire amount that was held in Escrow.

In the alternative, the Bank of Newington requests that: (1) the Court of Appeals reverse the award of attorneys' fees to WCDC and HBC or reduce the attorneys' fees awarded to a reasonable amount which in the case of HBC cannot exceed \$92,496.50, based on the limitation set forth in the Mechanic's lien statute, (2) reverse the decision to award prejudgment interest to WCDC and HBC, (3) reverse and reduce the lien amount and prejudgment interest awarded to HBC to \$138,078.65 which is based on the amount HBC was allegedly unpaid, \$92,496.50, and prejudgment interest on this amount, (4) reverse and increase the amount the Bank of Newington is entitled to recover as assignee of Viking's Judgment to the prejudgment interest up to the date of the Order, which totals \$272,267.74, (5) amend the Order to award the Bank of Newington attorneys' fees based on the assignment of Viking's claims which entitles the Bank of Newington an offset against the amount awarded to HBC of \$494,986.02.

In the second alternative, the Bank of Newington requests that the Court of Appeals reverse and order a new trial based on erroneous application of the law and findings not supported by the preponderance of the evidence.

November 6, 2023

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