

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV

Appellate Case No. 2019-001950

RECEIVED

Aug 06 2020

SC Court of Appeals

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

v.

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

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP3201746

J & H Grading & Paving Llc
PLAINTIFF(S)

Clayton Construction Company Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter comes before the Court pursuant to Plaintiff's Motion for Summary Judgment. This Court finds that material issues of fact remain in dispute. Therefore, the Motion is respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/02/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al
Case Number: 2018CP3201746
Type: Order/Electronic Form 4

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-06-02 22:01:47 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP3201746

J & H Grading & Paving Llc
PLAINTIFF(S)

Clayton Construction Company Inc
DEFENDANT(S)

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☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
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- ☐ **STAYED DUE TO BANKRUPTCY**
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☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter comes before the Court pursuant to Defendant's Motion for Summary Judgment. This Court finds that material issues of fact remain in dispute. Therefore, the Motion is respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

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Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al
Case Number: 2018CP3201746
Type: Order/Electronic Form 4

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-06-02 22:02:17 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP3201746

J & H Grading & Paving Llc
PLAINTIFF(S)

Clayton Construction Company Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
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- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
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- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter comes before the Court pursuant to each parties' competing claims for Summary Judgment. After review of the parties' briefs and arguments, and after a review of the relevant statutory and case law, this court finds that material factual disputes remain as to each parties' causes of action. For instance, an evidentiary hearing should be convened to determine if defendant's delay was a reasonable and fair investigation under the circumstances. Also, the parties disagree over when the payment became due. It is necessary for a finder of fact to make these determinations after the presentation of evidence. The parties' respective motions are, therefore, respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/04/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al
Case Number: 2018CP3201746
Type: Order/Electronic Form 4

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-06-04 14:19:33 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
J&H Grading & Paving, Inc.,	)	CASE NO. 2018-CP-32-01746
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
Clayton Construction Company, Inc.,	)	
	)	
Defendant.	)	
_____	)	

This matter came before this Court on Plaintiff's Motion to Reconsider pursuant to Rule 59(e), SCRPC. Specifically, Plaintiff seeks this Court to alter or amend its judgment entered on October 4, 2019. This motion was timely filed on October 9, 2019 and arises out of a bench trial conducted on August 14, 2019 in which Defendant prevailed.

After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

Accordingly, this Court hereby DENIES Plaintiff's Motion to Reconsider pursuant to Rule 59(e) SCRPC to Alter or Amend Judgment of this Court's Order entered on or about October 4, 2019. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

s/Walton J. McLeod, IV
Walton J. McLeod, IV
Presiding Judge
Eleventh Judicial Circuit

October 29, 2019
Columbia, South Carolina



Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al
Case Number: 2018CP3201746
Type: Order/Amend

So Ordered

s/Walton J. McLeod, 2765

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, Inc.,	)	Civil Action No.: 2018-CP-32-01746
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
Clayton Construction Company, Inc.,	)	
	)	
Defendant.	)	

This matter is before the Court pursuant to an action filed by J & H Grading & Paving, Inc. (“Plaintiff” or “J&H”) against Clayton Construction Company, Inc. (“Defendant” or “Clayton”). The parties filed cross-motions for summary judgment. Plaintiff contends that Clayton owes J&H attorney’s fees and interest for failure of Defendant to timely pay J&H for J&H’s work under the parties’ subcontract after receiving proper demand under South Carolina Code Section 27-1-15. Defendant argues that its pay-when-paid clause allowed Clayton to withhold J&H’s payment for an indefinite number of months until it received payment from the project owner, Herlong.

This was called for a bench trial before this Court on August 14, 2019, at the Lexington County Courthouse. Plaintiff was represented by Wesley D. Peel and J. Croom Hunter of Bruner, Powell, Wall and Mullins, LLC. Defendant was represented by W. Townes Jones, IV of William T. Jones, PA. The Parties stipulated to the introduction of all exhibits and waived opening statements. Plaintiff moved to conform the pleadings to the facts, and the motion was granted without objection. Josh Baggot, the President and Owner of J& H Grading & Paving, Inc. testified for Plaintiff regarding the facts *infra*. Defendant presented no witnesses. The

Court incorporates the pleadings, exhibits, testimony, and arguments of the Parties in reaching the following ruling.

Findings of Fact

In a bench trial, the trial judge acts as the finder of fact. *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). “[T]he judge, as the finder of fact, may believe all, some, or none of the testimony, even when [the testimony] is not contradicted.” *Id.* (internal citation omitted). A trial judge will be accorded great deference where matters of credibility are involved. *Id.* (internal citations omitted).

The facts are undisputed. Defendant was the General Contractor for the construction of a new dealership for Herlong Chevrolet Buick (“Herlong” or “Owner”), and Defendant subcontracted with Plaintiff to perform site work at the project location. The subcontract (Plaintiff’s Exhibit 1), dated September 24, 2015, was for \$688,075.00. The payment language provided for progress payments with 10% held back as retainage. Over the course of several change orders, an additional \$28,855.70 was ultimately added to the contract price, bringing the contract total to \$716,930.70. After completion of Plaintiff’s work, the amount remaining to be paid was \$75,298.00, which included the 10% retainage and a small outstanding balance. Under contract Article 1, progress payments and retainage are due “no later than seven (7) days after receipt by Contractor of final payment from Owner for Subcontractor’s work.” Clayton claims it was reasonable to withhold payment to J&H because it had not been paid (Plaintiff’s Exhibit 8). Clayton offers no other justification for holding the money that undisputedly J&H had earned for the satisfactory performance of its work.

The following facts and dates are undisputed:

1. The Certificate of Occupancy (Plaintiff's Exhibit 2) was issued on March 20, 2017, at which point, the owner of the Project was able to begin using the building.
2. Plaintiff submitted the final pay application on April 26, 2017. Plaintiff was not tasked to perform any further work on the Project, and neither Defendant nor the Project's owner reported any deficiencies with Plaintiff's work.
3. Plaintiff, having not received payment, resubmitted the final pay application via email on July 25, 2017. Clayton responded on August 1, 2017 that "We have not been paid retainage by Mr. Herlong and therefore we cannot issue your remaining retaining until paid." (Plaintiff's Exhibit 4).
4. Plaintiff's last day of work on the Project, finishing miscellaneous punch list items was in December 2017.
5. On January 19, 2018, Plaintiff again requested payment from Clayton. Clayton responded "Joe Ben (Herlong) still has not paid per his contract ..." owing to a dispute between Clayton and Herlong which was unrelated to any of J&H's work. (Plaintiff's Exhibit 5).
6. On January 25, 2018, Plaintiff again demanded payment via letter. (Plaintiff's Exhibit 6). Payment was not forthcoming.
7. Plaintiff recorded a mechanic's lien on the property on February 27, 2018.
8. Plaintiff subsequently sent Clayton a demand letter (Plaintiff's Exhibit 7) pursuant to S.C. Code Ann. § 27-1-15, dated March 2, 2018, requesting a reasonable and fair investigation and demanding payment in full and warning that failure to do so could result in an award of interest and attorney's fees.

9. Counsel for Clayton responded to the § 27-1-15 demand on March 9, 2018, via letter (Plaintiff's Exhibit 8), in which he relied on the "pay when paid" language in the subcontract to support continued nonpayment, writing "As you may also be aware, Clayton has not received payment for the work from the owner of the project ... and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to J&H at this time."

10. On May 21, 2018, Plaintiff filed suit against Defendant as well as the Project owner to foreclose the mechanic's lien and for breach of contract.

11. Almost a year later and pursuant to mediation, in February of 2019 the Project owner paid Plaintiff the outstanding amount and was released from the suit. J&H reserved its rights to seek its attorney's fees and interest from Clayton.

Plaintiff now seeks the payment of attorney's fees by Defendant for the costs incurred to pursue recovery.

Conclusions of Law

1. The "Pay When Paid" clause is unenforceable.

Defendant relies on an unenforceable and illegal contract provision as its only defense to Plaintiff's payment demand under Section 27-1-15, claiming it is reasonable to hold the money for years past the due date. The original subcontract between the parties, drafted by Defendant, provides that final payment will not be made to Plaintiff until Defendant receives payment from the owner. This language, known as a "pay when paid" provision, is unenforceable in this state, and therefore Clayton's refusal to pay is unreasonable on its face.

The South Carolina Code states in the Subcontractors' and Suppliers' Payment Protection Act ("the Protection Act"), "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.” S.C. Code Ann. § 29-6-230. The statute then goes on to explicitly forbid “pay when paid” arrangements, stating, “The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, a condition precedent for payment to the construction subcontractor.” *Id.* Importantly, “**Any agreement to the contrary is not enforceable.**” *Id.* (emphasis added).

Clayton is seeking the Court’s ratification of the pay-when-paid language it included in its contract with Plaintiff by arguing it was reasonable to withhold payment indefinitely and that under Section 27-1-15, it conducted a fair and reasonable investigation and paid nothing. Specifically, the contract provides, “Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor’s Work.” This language is the only defense Defendant offered to duly demanded payment under Section 27-1-15. This language, interpreted by Defendant to allow withholding of payment until the owner pays, is contrary to statutory law. The Protection Act explicitly forbids the use of a payment condition precedent like the one asserted by Defendant. *See* S.C. Code Ann. § 29-6-230. The meaning of this language is plain.

There are nor reported cases in South Carolina interpreting the Subcontractor Protection Act; however, in a North Carolina case construing a statute almost identical to South Carolina’s, the court concluded that pay-when-paid clauses in subcontracts are unenforceable and illegal, writing

“Our General Statutes state that ‘payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable.’ N.C.

Gen. Stat. § 22C-2 (2003). ‘When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced.’ *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 532 (1973). We therefore conclude that the "pay when paid" clause of the contract is indeed unenforceable, but that it is severable from the rest of the contract and does not defeat the other portions of the contract, such as the notice of delay provision, which are in no way dependent on the illegal provision.”

Am. Nat’l Elec. Corp. v. Poythress Commer. Contractors, Inc., 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (applying N.C. Gen. Stat. § 22C-2). The same is true in this case.

While this situation has not been discussed in any South Carolina cases that the Court is aware of, it has been addressed by scholarly publications. An article in South Carolina Lawyer discussed the Protection Act, asserting “if a subcontractor performs in accordance with the terms of its contract, it is entitled to payment. . . . Payment to the subcontractor by the contractor is not conditioned upon payment to the contractor from the owner. Importantly, **the parties cannot contract around this.**” Joshua D. Spencer, *You Can’t Rob Peter to Pay Paul: South Carolina Statutory Payment Protections in Construction Projects*, S.C. Lawyer, Sept. 2012 at 24 (emphasis added). Again, the plain language of the statute controls.

The Court notes that Defendant relies on a 1976 case to claim “reasonableness” in its investigation and failure to pay. *See Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). Defendant’s premise is that the *Elk* court concluded that pay-when-paid clauses are not “conditions precedent” and therefore do not violate Payment and Protection Acts. This Court disagrees; it is not that pay-when-paid clauses “are not conditions precedent,” it is that payment by the owner may not be used as a condition precedent. The holding in *Elk* was that contractors have a reasonable time after receiving an invoice to pay their subcontractor. Clayton’s interpretation of *Elk* would require a

subcontractor to work on a project indefinitely without payment. That is not a reasonable expectation.

At most, the precedent set by *Elk* merely serves to give the contractor a **reasonable** amount of time to attempt to obtain payment from the owner before paying the subcontractor. In fact, the *Elk* Court held “As a practical matter the suppliers and small contractors on large construction projects need reasonably prompt payment for their work and materials in order for them to remain solvent and stay in business.” *Elk*, 267 S.C. at 418, 229 S.E.2d at 262. The Court further held “We do not think sub-paragraph (iv) created a condition precedent but rather only postponed payment ... for a reasonable time so as to afford ... an opportunity to obtain funds from the owner. The evidence created a jury issue as to what constitutes such a reasonable time.” *Id.* The Court notes, however, that *Elk* was decided in 1976, and the General Assembly passed the Protection Act in 2000, almost a quarter of a century later. That “the legislature is presumed to intend that its statutes accomplish something” when it enacts them is a well-established principle of statutory construction. *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) (citing *S.C. Coastal Conserv. League v. S.C. Dep’t of Health and Envtl. Control*, 354 S.C. 585, 582 S.E.2d 410 (2003)). Further, “When a statute’s language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning.” *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 556 (2013) (quoting *Regions Bank v. Strawn*, 399 S.C. 530, 541, 732 S.E.2d 230, 236 (Ct. App. 2012)). The Protection Act unequivocally forbids conditioning payment to a subcontractor on payment by an owner. While the Court finds *Elk* instructive, it is not controlling, given the legislature’s adoption of the plain and unambiguous language that any agreement “to the contrary” is unenforceable.

Accordingly, the Court finds the “pay when paid” clause in the subcontract between the parties is unenforceable.

2. Plaintiff was forced to wait an unreasonable amount of time for payment.

Given the Court’s finding *supra*, the Court must now address what is a reasonable amount of time Plaintiff should be expected to wait after demanding payment. Although the Court does not find *Elk* to be controlling with regards to the enforceability of “pay when paid” clauses, it does provide some guidance as to what may constitute a reasonable delay in payment. “As a practical matter the suppliers and small contractors on large construction projects need reasonably prompt payment for their work and materials in order for them to remain solvent and stay in business.” *Elk*, 267 S.C. at 418, 229 S.E.2d at 262. The *Elk* Court quoted a Sixth Circuit case, writing

“In our opinion paragraph 3 of the subcontract is a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. To construe it as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, which may never occur, is to give it an unreasonable construction which the parties did not intend at the time the subcontract was entered into.”

Thos. J. Dyer Co. v. Bishop International Engineering Co., 303 F. (2d) 655 (6th Cir. 1962). Indeed, while there is no controlling jurisprudence in South Carolina of which this Court is aware, in looking to other jurisdictions which have held “pay when paid” clauses are unenforceable, the courts seem to be of a similar mind. See *Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 506, 464 S.E.2d 349, 357 (1995) (holding that the default interpretation of “pay when paid” clauses is that they require payment within a reasonable time); *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1565 n.4 (10th Cir. 1995) (“Moreover, with respect to construction contracts, the general rule is that such pay-when-paid provisions

do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party ... To the contrary, these provisions are viewed as only postponing payment for a reasonable time and merely establishing a convenient time for payment.”); *Paul Morrell, Inc. v. Kellogg Brown & Root, Inc.*, 682 F. Supp. 2d 606, 630-631, 2010 U.S. Dist. LEXIS 7532, 64-65 (“Under most circumstances, pay-when-paid provisions are not “suspensive conditions” but rather terms for payment that only delay a contractor’s obligations to make payment, and then only for a limited time”).

Thus, it becomes the purview of this Court, as the trier of fact, to determine what constitutes a reasonable delay under the facts of this case. In the case at bar, this Court holds that delaying payment to the Plaintiff longer than ninety days was *per se* unreasonable. Plaintiff finished work on the Project and submitted its final pay applications in December of 2017. As such, Plaintiff was required to file its mechanic’s lien within ninety days in order to preserve its rights.

In South Carolina, mechanics' liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them. *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977). As a general rule, mechanics' liens arise when a contractor, subcontractor, or other person improves real property by furnishing labor and/or materials for a building or structure. 22 S.C. Jur. *Mechanics' Liens* § 2 (1994). "Because the improvements usually attach to and become an inseparable part of the structure, the lien statutes give the persons responsible for the improvements a security interest, or a lien on the improvement to the value of the amount due them." *Id.* § 3 (footnote omitted). *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014). "The lien arises, inchoate, when the

labor is performed or the materials are furnished." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 26, 336 S.E.2d 488, 489 (Ct. App. 1985). Section 29-5-90 requires that, within ninety days after he ceases to furnish labor or materials for a building or structure, the party asserting a lien must serve upon the owner (or person in possession of the property) and file with the register of deeds or clerk of court a notice or a certificate that includes a statement of the amount due him, together with a description of the property intended to be covered by the lien, the name of the owner of the property, if known, and other required information. S.C. Code Ann. § 29-5-90 (2007). "If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt." *Id.* "On the other hand, if he fails to take any one of these steps, the lien against the property is dissolved pursuant to Sections 29-5-90 and 29-5-120." *Id. Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 342-343, 762 S.E.2d 561, 567 (2014).

Thus, according to the Mechanic's Lien Statute, Plaintiff would foreclose any possibility of protecting his rights without initiating proceedings within ninety days. At that point, Plaintiff began to accumulate legal bills, through no fault of its own, in order to recover money that no one disputes it was owed. Suspending payment past the statutory deadline for filing the mechanic's lien required Plaintiff to initiate legal proceedings which dragged on for two years before Plaintiff was finally paid.¹ This unreasonable delay occurred despite the facts that there was no dispute that J&H had satisfactorily completed their work, the Certificate of Occupancy was issued prior to J&H even submitting the final pay application, and the amount owed J&H was undisputed. Presumably Defendant would have the Court believe that a time

¹ The Court notes that it was the owner of the Project, not Defendant, who finally paid Plaintiff for its work.

period exceeding two years is a reasonable amount of time to delay payment to a subcontractor. The Court can not reconcile this argument with the interests of justice.

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). Whether a party's steps taken were “reasonable and fair” is a question of fact. *Id.*

This Court finds that a reasonable amount of delay is such that would not force Plaintiff to resort to legal action in order to comply with the provisions of the Mechanic’s Lien Statute. It can not be reasonable to expect a party to waive a statutory remedy in the hope that one day they might get paid, and it cannot be reasonable to expect a party who bears no fault to resort to legal proceedings to collect what they are owed under a contract when the quality of the work and the amount owed are undisputed.

This Court additionally finds Clayton failed to conduct a reasonable and fair investigation pursuant to South Carolina Code Section 27-1-15 where Clayton knew the amount owed was undisputed yet still refused to make payment to J&H.

Accordingly, this Court finds that the delay in payment beyond the statutory deadline for filing a mechanic’s lien and preserving Plaintiff’s rights was unreasonable.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that:

1. The “pay when paid” clause in the subcontract is unenforceable;
2. The delay in payment to Plaintiff past the statutory deadline for filing a mechanic’s lien was unreasonable;

3. Judgment is hereby entered against Defendant; and
4. Defendant may seek payment for reasonable attorney's fees and costs incurred in bringing this action by filing a motion for such relief in the ordinary course.

IT IS SO ORDERED.

The Honorable Walton J. McLeod, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina
October 3, 2019



Lexington Common Pleas

Case Caption: J & H Grading & Paving Llc VS Clayton Construction Company Inc
, defendant, et al

Case Number: 2018CP3201746

Type: Order/Other

So Ordered

s/Walton J. McLeod, 2765

Electronically signed on 2019-10-04 09:50:50 page 13 of 13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, LLC,	)	Lis Pendens No.: 2018-LP-32-_____
	)	Civil Action No.: 2018-CP-32-_____
Plaintiff,	)	
	)	
v.	)	
	)	LIS PENDENS
Clayton Construction Company, Inc.,	)	
Herlong Family Properties, LLC, and	)	
Herlong Chevrolet Buick, Inc.,	)	
	)	
Defendants.	)	

NOTICE IS HEREBY GIVEN that an action has been commenced and is pending or is about to be commenced in the Court of Common Pleas for Lexington County upon a complaint by the above-named Plaintiff against Herlong Family Properties, LLC to foreclose a Notice and Certificate of Mechanic's Lien in the amount of \$84,432.89, plus interest, attorney's fees, expenses, and court costs, said notice having been dated February 26, 2018 and recorded in the Lexington County Register of Deeds on February 27, 2018, in Book 19832 at page 280. The premises that is the subject of this action is described on **Exhibit A**, which is attached hereto and incorporated herein by reference.

BRUNER, POWELL, WALL & MULLINS, LLC

s/ Chelsea J. Clark
Wesley D. Peel, S.C. Bar No. 9283
Chelsea J. Clark, S.C. Bar No. 102211
Post Office Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for the Plaintiff

May 21, 2018
Columbia, South Carolina

EXHIBIT "A"

Lexington County Parcel/TMS No.: 005900-07-005 & 005900-07-011

Owner: Herlong Family Properties, LLC

Location Address: 130 E. Church Street, Batesburg-Leesville, South Carolina

Legal Description:

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying, and being in the Town of Batesburg-Leesville (29070), County of Lexington, State of South Carolina, containing 5.881 acres, more or less, as shown by plat prepared for Dallas Baker Trust, Helen Baker Trust, Louis L. Jones III, and Frank H. Jones, Trustee, by Jonathan C. Clark, PLS# 21633, of Freeland & Associates, Inc., dated April 6, 2009, revised May 18, 2009, and recorded June 11, 2009 in Record Book 13661 at Page 12, Office of the Register of Deeds for Lexington County, South Carolina and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

ALSO

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying, and being in the Town of Batesburg-Leesville (29070), County of Lexington, State of South Carolina, containing 0.736 acre, more or less, as shown by plat prepared for Dallas Baker Trust, Helen Baker Trust, Louis L. Jones III, and Frank H. Jones, Trustee, by Jonathan C. Clark, PLS# 21633, of Freeland & Associates, Inc., dated April 6, 2009, revised May 18, 2009, and recorded June 11, 2009 in Record Book 13661 at Page 12, Office of the Register of Deeds for Lexington County, South Carolina and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

DERIVATION: This being the identical property conveyed to Joe Ben Herlong by deed of JBH Properties, LLC dated March 16, 2011 and recorded in Record Book 14781 at Page 81, Office of the Register of Deeds for Lexington County, South Carolina.

TMS# 005900-07-005 & 005900-07-011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, LLC,	)	Civil Action No.: 2018-CP-32-_____
	)	
Plaintiff,	)	
	)	
v.	)	SUMMONS
	)	
Clayton Construction Company, Inc.,	)	
Herlong Family Properties, LLC, and	)	
Herlong Chevrolet Buick, Inc.,	)	
	)	
Defendants.	)	

TO THE ABOVE-CAPTIONED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint upon the undersigned subscriber at Post Office Box 61110, Columbia, South Carolina 29260, within thirty (30) days after service upon you, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

BRUNER, POWELL, WALL & MULLINS, LLC

s/ Chelsea J. Clark
Wesley D. Peel, S.C. Bar No. 9283
Chelsea J. Clark, S.C. Bar No. 102211
Post Office Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for the Plaintiff

May 21, 2018
Columbia, South Carolina

7. This new dealership is located at 130 E. Church Street, Batesburg-Leesville in Lexington County, South Carolina ("Property").

8. The Property is owned by Defendant Herlong Properties, while the dealership located thereon is owned by Herlong Chevrolet.

9. Defendant Clayton Construction was the general contractor for the Project.

10. On or about September 24, 2015, Plaintiff entered into a contract with Defendant Clayton, wherein Plaintiff agreed to perform extensive site work for the Project as a subcontractor of Clayton. A true and accurate copy of the contract is attached as **Exhibit A**.

11. The price for Plaintiff's work was set forth in the contract as \$688,075.00. The parties agreed that payment would be allocated into progress payments with a retainage of 10%.

12. Plaintiff has completed the work agreed to in the contract.

13. Plaintiff has also completed additional work, authorized in change orders from Clayton Construction, or done at the behest of J. B. Herlong ("Mr. Herlong"), the agent and operator of both Herlong companies named herein.

14. Plaintiff's last day of work on the Property was in December 2017.

15. Plaintiff has not been paid for the work listed on its last invoice, nor has Plaintiff receive the 10% retainage held back from previous payments. Combined, the unpaid invoice and retained amount to \$84,432.89.

16. Plaintiff has submitted payment requests for the unpaid funds to no avail.

17. On February 27, 2018, Plaintiff filed a mechanic's lien against the Property pursuant to S.C. Code Ann. § 29-5-10, *et seq.*

18. On March 2, 2018, Plaintiff sent a demand letter to Defendants Clayton Construction and Herlong Properties, requesting payment of \$84,432.89, pursuant to S.C. Code Ann. § 27-1-15.

19. Despite proper demand, payment has not been made in full to Plaintiff.

20. In addition, Plaintiff is still owed reimbursement of \$6,620.00 for funds paid to an engineering firm for drawings related to the Project.

21. Plaintiff has been damaged and is entitled to recover from Defendants the sums of \$84,432.89 and \$6,620.00 plus pre- and post-judgment interest, costs, and attorney's fees.

FOR A FIRST CAUSE OF ACTION
(Foreclosure of Mechanic's Lien)

22. Plaintiff incorporates the foregoing allegations herein to the extent required by, but not inconsistent with the following allegations.

23. Within ninety (90) days of the last date Plaintiff furnished labor, materials, or equipment for the improvement of the Property, Plaintiff filed a Notice and Certificate of Mechanic's Lien in the Lexington County Registrar of Deeds Office and served the same on the owner of the Property. A true and accurate copy of the lien is attached hereto as **Exhibit B**, which is incorporated herein by reference.

24. Within the preceding six months, Plaintiff has furnished labor, materials, or equipment for the improvement of the Property with the authorization and consent of the property owners.

25. Plaintiff has a valid and enforceable lien on the Property pursuant to S.C. Code Ann. § 29-5-10, *et seq.* in the amount set forth herein.

26. The amount due for the labor, services, or materials Plaintiff supplied Defendants is \$84,432.89, plus pre- and post-judgment interest, costs, and attorney's fees.

27. Plaintiff is therefore entitled to immediate foreclosure of the Property; to a determination of the amount due Plaintiff, including interest, reasonable attorney's fees and costs; to a public sale of the Property; and to an order distributing the proceeds from the sale of the Property as provided by law.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

28. Plaintiff reiterates the allegations alleged hereinabove to the extent they are not inconsistent with the following allegations.

29. Plaintiff entered into a valid and enforceable contract with Clayton Construction, whereby Plaintiff agreed to perform site work and related services and Clayton agreed to pay for the same.

30. Mr. Herlong, agent of both Herlong corporations, directed Plaintiff in its execution of the contract with Clayton Construction, instructing Plaintiff in the execution of its work and enticing Plaintiff to do additional work. By his actions Mr. Herlong assumed, on behalf of his companies, the duties and rights of Clayton Construction under the contract, and thereby is bound by the same obligation to pay Plaintiff.

31. Alternatively, Mr. Herlong separately contracted with Plaintiff for additional work on the Project, whereby he is obligated to pay Plaintiff for the labor and materials provided.

32. Plaintiff has fully performed all of its obligations under the contract(s), but has received only partial payment from Defendants.

33. Defendants have breached the contract(s) by failing and refusing to pay in full for the services provided.

34. As a result, Plaintiff has suffered actual damages and is entitled to judgment against Clayton Construction, for \$91,052.89, plus interest at 18% per annum as stated in the agreement

between the parties, or pre- and post-judgment interest; costs; and attorney's fees.

FOR A THIRD CAUSE OF ACTION
(Quantum Meruit)

35. Plaintiff reiterates the allegations alleged hereinabove to the extent they are not inconsistent with the following allegations.

36. Plaintiff conferred a benefit on Defendants by providing labor, equipment, services, and/or materials used to improve the Property with the consent and/or at the request of Defendants.

37. Defendants have realized the benefit the Plaintiff conferred.

38. Defendants have retained the benefit the Plaintiff conferred under conditions that make it unjust for them to retain it without paying its value.

39. The reasonable value of the labor, equipment, and or materials Plaintiff provided for the improvement of the Property for which payment has not been made is \$91,052.89.

40. Plaintiff is therefore entitled to judgment against Defendants for the value of the benefit conferred, plus pre- and post-judgment interest, and costs and attorney's fees as allowed by law.

WHEREFORE, Plaintiff prays for judgment as follows:

- A. On its First Cause of Action, for judgment in favor of Plaintiff in the amount of \$84,432.89 plus attorney's fees, cost, and pre- and post-judgment interest, for Plaintiff's claim to be declared and adjudged a lien on the aforesaid property, and that said lien be foreclosed and the property be sold as provided by law and the proceeds distributed as provided by law.
- B. On its Second Cause of Action, for judgment in favor of Plaintiff in the amount of \$91,052.89, plus interest at 18% per annum as stated in the agreement between the parties, or pre- and post-judgment interest; costs; and attorney's fees.
- C. On its Third Cause of Action, for judgment in favor of Plaintiff in the amount of \$91,052.89, which is the reasonable value of the labor, services, and materials furnished, together with interest.
- D. For other and further relief as the Court may deem just and proper.

[signature page to follow]

BRUNER, POWELL, WALL & MULLINS, LLC

s/ Chelsea J. Clark

Wesley D. Peel, S.C. Bar No. 9283

Chelsea J. Clark, S.C. Bar No. 102211

Post Office Box 61110

Columbia, South Carolina 29260

(803) 252-7693

Attorneys for the Plaintiff

May 21, 2018

Columbia, South Carolina



JOB NO.: 15-074

DATE September 24, 2015



ACCOUNT CODE:

SUBCONTRACT (SHORT FORM)

This agreement is made this **24th** day of **September 2015**, and effective the **Twentyfourth** day of **September 2015**, by and between **Clayton Construction Company, Inc.** (Contractor) and **J&H Grading & Paving, LLC** (Subcontractor) to perform the Work identified in Article 2 in accordance with the Project's Contract Documents.

PROJECT: Herlong Chevrolet
OWNER: Herlong Chevrolet-Buick, Inc.
ARCHITECT: Christopher Booker &
CONTRACTOR: Clayton Construction Company, Inc.
SUBCONTRACTOR: J&H Grading & Paving, LLC
1579 Edgefield Highway
Aiken, SC 29801
Attn: Kevin Walters [REDACTED] phone [REDACTED] fax [REDACTED]

ARTICLE 1

CONTRACT PAYMENT. The Contractor agrees to pay Subcontractor for satisfactory performance of Subcontractor's Work the sum of **Six Hundred Eighty-Eight Thousand Seventy-Five And Xx / 100 Dollars (\$688,075.00)**. Progress 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. Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor's Work. These payments are subject to receipt of such lien waivers, affidavits, warranties, and guarantees required by the Contract Documents or Contractor.

ARTICLE 2

SCOPE OF WORK. Subcontractor agrees to commence Subcontractor's Work hereinafter described upon notification by Contractor and to perform and complete such Work in accordance with Contract Documents and under the general direction of Contractor in accord with Contractor's schedule. This shall include all work necessary or incidental to complete the:

Site work including mobilization, traffic control, demo building, clearing & grubbing, erosion control, grading, water & sewer, storm drainage, concrete (excluding 4" sidewalk and ADA ramp), 6" stone base, 2" asphalt, 8" stone base, 3" asphalt, SCDOT base & paving, and traffic lines and HC signs per your quote revised 9/4/2015.

Work for the Project as more particularly, though not exclusively specified in

Attachment A; B (list of drawings); C (schedule); D (lien waiver).

ARTICLE 3

SCHEDULE OF WORK. Time is of the essence. Subcontractor shall provide Contractor with any requested scheduling information of Subcontractor's Work. The Schedule of Work, including that of this Subcontract shall be prepared by Contractor and may be revised as the Work progresses.

Subcontractor recognizes that changes may be made in the Schedule of Work and agrees to comply with such changes without additional compensation.

Subcontractor shall coordinate its work with all other contractors, subcontractors and suppliers on the Project so as not to delay or damage their performance, work, or the Project.

Payment Agreement Contract Herlong Chevy Batesburg
Site-work Contract

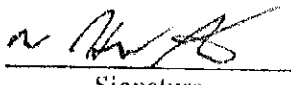
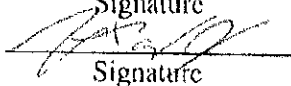
This is a payment agreement between Joe Ben Herlong owner of Herlong Chevy of Batesburg, Clayton Construction Company the General Contractor for the project and J&H Grading & Paving the grading company hired for the site work for the aforesaid project.

Clayton Construction the General Contractor and Joe Ben Herlong the owner of Herlong Chevy of Batesburg agree that all paperwork for the construction project has been filed and approved by all parties involved for the aforesaid construction project. Joe Ben Herlong the owner of Herlong Chevy of Batesburg and Clayton Construction the General Contractor hired for the project agree to pay J&H Grading & Paving the site work contractor within 30 days from the date on the invoice. All discrepancies with the invoice must be resolved by all parties within 10 days of the invoice date if this is not accomplished the invoice will stand and payment should be made. If payment is not made within the allotted 30 days then a finance charge will be applied if the new balance is unpaid 30 days from the invoice date. *This agreement does not pertain to retaining union Herlong releases it*

Herlong Chevy Owner

	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date

General Contractor

	 Signature	<i>Harry Clayton</i> Printed	<i>4-27-16</i> Date
Witness	 Signature	<i>Jody Taylor</i> Printed	<i>4-27-16</i> Date

J&H Grading Owner

	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date

The finance charge will be computed by a periodic rate of 1 1/2 % per month which is an annual percentage rate of 18% applied to unpaid balance.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
J&H Grading & Paving LLC)
Plaintiff,)
v.)
Herlong Family Properties, LLC,)
Defendant.)

**NOTICE AND CERTIFICATE
OF MECHANIC'S LIEN**

License No.: 116178

TO THE ABOVE-NAMED DEFENDANT:

NOTICE IS HEREBY GIVEN that a Mechanic's Lien is claimed pursuant to *S.C. Code Ann. § 29-5-10* and/or *20 et. seq. (1976, as amended)* by J&H Grading & Paving LLC, above-named, and is being filed in the Office of the Register of Deeds for Lexington County, South Carolina on behalf of the above-named Plaintiff for labor and/or materials furnished and actually used in the erection, alteration or improvements to the real estate, known as Herlong Chevrolet Buick, 130 E. Church Street, Batesburg-Leesville, SC, and more fully described in **Exhibit A** attached hereto and incorporated herein by reference and that the undersigned Plaintiff has furnished labor, services, and materials in improving said real estate by virtue of an agreement with or the consent of the owner(s) of said real estate. Plaintiff craves reference to **Exhibit B** attached hereto and incorporated herein by reference, which is a just and true statement of account of monies due in the amount of \$84,432.89 to the Plaintiff for such labor, services or materials provided at the request of or with the consent of the owners of said real estate or with their authorization.

That by virtue thereof, by the serving and filing of this Notice and Certificate, and pursuant to the provisions of the Code of Laws of South Carolina in such cases as have been made and provided,

EXHIBIT "A"

Lexington County Parcel/TMS No.: 005900-07-005 & 005900-07-011

Owner: Herlong Family Properties, LLC

Location Address: 130 E. Church Street, Batesburg-Leesville, South Carolina

Legal Description:

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying, and being in the Town of Batesburg-Leesville (29070), County of Lexington, State of South Carolina, containing 5.881 acres, more or less, as shown by plat prepared for Dallas Baker Trust, Helen Baker Trust, Louis L. Jones III, and Frank H. Jones, Trustee, by Jonathan C. Clark, PLS# 21633, of Freeland & Associates, Inc., dated April 6, 2009, revised May 18, 2009, and recorded June 11, 2009 in Record Book 13661 at Page 12, Office of the Register of Deeds for Lexington County, South Carolina and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

ALSO

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying, and being in the Town of Batesburg-Leesville (29070), County of Lexington, State of South Carolina, containing 0.736 acre, more or less, as shown by plat prepared for Dallas Baker Trust, Helen Baker Trust, Louis L. Jones III, and Frank H. Jones, Trustee, by Jonathan C. Clark, PLS# 21633, of Freeland & Associates, Inc., dated April 6, 2009, revised May 18, 2009, and recorded June 11, 2009 in Record Book 13661 at Page 12, Office of the Register of Deeds for Lexington County, South Carolina and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

DERIVATION: This being the identical property conveyed to Joe Ben Herlong by deed of JBH Properties, LLC dated March 16, 2011 and recorded in Record Book 14781 at Page 81, Office of the Register of Deeds for Lexington County, South Carolina.

TMS# 005900-07-005 & 005900-07-011

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

J& H Grading & Paving, LLC,)

Plaintiff,)

v.)

Herlong Family Properties, LLC,)

Defendant(s).)

CERTIFICATE OF SERVICE

I, Lacey E. Segars, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff/Lien Claimant, do hereby certify that on the 27th day of February, 2018, I served the pleadings/documents set forth below on the person(s) identified below, by depositing copies thereof in the U.S. Mail, (Certified Mail, Return Receipt Requested, Delivery Restricted to Addressee), in an envelope securely sealed:

Pleadings/Documents Served:

Notice and Certificate of Mechanic's Lien (with Exhibits A & B)

Person(s) Served:

Joe B. Herlong
354 SC Highway 121
Johnston, SC 29832



Lacey E. Segars

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	C. A. No. 2018-CP-32-01746
	)	
J&H Grading & Paving, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT’S ANSWER
	)	
Clayton Construction Company, Inc.,	)	
Herlong Family Properties, LLC, and	)	
Herlong Chevrolet Buick, Inc.,	)	
	)	
Defendants.	)	
	)	

TO: CHELSEA J. CLARK, ESQ., ATTORNEY FOR PLAINTIFF:

COMES NOW, the defendant, Clayton Construction Company, Inc. (hereinafter “Defendant”), and hereby answers the Complaint of the plaintiff, J&H Grading & Paving, LLC (hereinafter “Plaintiff”), by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further respond as follows:

FOR A FIRST DEFENSE

1. Upon information and belief, Defendant admits the allegations of Paragraph 1 of Plaintiff’s Complaint.
2. Defendant admits the allegations of Paragraph 2 of Plaintiff’s Complaint.
3. Upon information and belief, Defendant admits the allegations of Paragraph 3 of Plaintiff’s Complaint.
4. Upon information and belief, Defendant admits the allegations of Paragraph 4 of Plaintiff’s Complaint.
5. Defendant admits the allegations of Paragraph 5 of Plaintiff’s Complaint.

6. Upon information and belief, Defendant admits the allegations of Paragraph 6 of Plaintiff's Complaint.

7. Defendant admits the allegations of Paragraph 7 of Plaintiff's Complaint.

8. Defendant admits so much of allegations of Paragraph 8 of Plaintiff's Complaint that the Property is owned by Defendant Herlong Properties. Defendant has insufficient information to either admit or deny the remaining allegations of Paragraph 8 of Plaintiff's Complaint and, accordingly, denies same and demands strict proof thereof.

9. Defendant admits the allegations of Paragraph 9 of Plaintiff's Complaint.

10. Defendant admits so much of allegations of Paragraph 10 of Plaintiff's Complaint that Plaintiff entered into a contract with Defendant. With regard to the remaining allegations of Paragraph 10 of Plaintiff's Complaint, Defendant would state that the written agreement between the parties speaks for itself. Defendant, accordingly, denies any allegations which are contrary to the written agreement and demands strict proof thereof.

11. The written agreement between the parties speaks for itself. Defendant, accordingly, denies any allegation of Paragraph 11 of Plaintiff's Complaint which are contrary to the written agreement between the parties and demands strict proof thereof.

12. Defendant admits so much of allegations of Paragraph 12 of Plaintiff's Complaint that the work has been completed. Defendant denies the remaining allegations of Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

13. Defendant admits so much of allegations of Paragraph 13 of Plaintiff's Complaint that additional work has been completed. Defendant denies the remaining allegations of Paragraph 13 of Plaintiff's Complaint and demands strict proof thereof.

14. Defendant has insufficient information to either admit or deny the allegations of Paragraph 14 of Plaintiff's Complaint and, accordingly, denies same and demands strict proof thereof.

15. With regard to the allegations of Paragraph 15 of Plaintiff's Complaint, Defendant would state that no amounts are currently due and owing pursuant to the written agreement between the parties. Defendant, accordingly, denies any allegations contrary thereto and demands strict proof thereof.

16. With regard to the allegations of Paragraph 16 of Plaintiff's Complaint, Defendant would state that no amounts are currently due and owing pursuant to the written agreement between the parties. Defendant, accordingly, denies any allegations contrary thereto and demands strict proof thereof.

17. Upon information and belief, Defendant admits the allegations of Paragraph 17 of Plaintiff's Complaint.

18. With regard to the allegations of Paragraph 18 of Plaintiff's Complaint, Defendant would state that any letters between the parties can speak for themselves. Defendant, accordingly, denies any allegations contrary thereto and demands strict proof thereof.

19. With regard to the allegations of Paragraph 19 of Plaintiff's Complaint, Defendant would state that no amounts are currently due and owing pursuant to the written agreement between the parties. Defendant, accordingly, denies any allegations contrary thereto and demands strict proof thereof.

20. With regard to the allegations of Paragraph 20 of Plaintiff's Complaint, Defendant would state that no amounts are currently due and owing pursuant to the written agreement

between the parties. Defendant, accordingly, denies any allegations contrary thereto and demands strict proof thereof.

21. Defendant denies the allegations of Paragraph 21 of Plaintiff's Complaint and demands strict proof thereof.

22. Paragraphs 22 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

23. Paragraphs 23 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

24. Paragraphs 24 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

25. Paragraphs 25 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

26. Paragraphs 26 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

27. Paragraphs 27 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

28. Paragraphs 28 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

29. Defendant admits so much of allegations of Paragraph 29 of Plaintiff's Complaint that Plaintiff entered into a contract with Defendant. With regard to the remaining allegations of Paragraph 29 of Plaintiff's Complaint, Defendant would state that the written agreement between the parties speaks for itself. Defendant, accordingly, denies any allegations which are contrary to the written agreement and demands strict proof thereof.

30. Paragraphs 30 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

31. Paragraphs 31 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

32. With regard to the allegations of Paragraph 32 of Plaintiff's Complaint, Defendant would state that Plaintiff has been paid all amounts which have been due and owing pursuant to the written agreement between the parties. Defendant denies the remaining allegations of Paragraph 32 of Plaintiff's Complaint and demands strict proof thereof.

33. Defendant denies the allegations of Paragraph 33 of Plaintiff's Complaint and demands strict proof thereof.

34. Defendant denies the allegations of Paragraph 34 of Plaintiff's Complaint and demands strict proof thereof.

35. Paragraphs 35 of Plaintiff's Complaint does not require a response from this answering defendant, but, to the extent that it does, Defendant denies same and demands strict proof thereof.

36. Plaintiff entered into a written agreement with Defendant and any benefits therein speak for themselves. Defendant, accordingly, denies any allegation of Paragraph 36 of Plaintiff's Complaint which are contrary to the written agreement and demands strict proof thereof.

37. Plaintiff entered into a written agreement with Defendant and any benefits therein speak for themselves. Defendant, accordingly, denies any allegation of Paragraph 37 of Plaintiff's Complaint which are contrary to the written agreement and demands strict proof thereof.

38. Defendant denies the allegations of Paragraph 38 of Plaintiff's Complaint and demands strict proof thereof.

39. Defendant denies the allegations of Paragraph 39 of Plaintiff's Complaint and demands strict proof thereof.

40. Defendant denies the allegations of Paragraph 40 of Plaintiff's Complaint and demands strict proof thereof.

41. Defendant denies the allegations of the WHEREFORE Paragraph of Plaintiff's Complaint and demands strict proof thereof.

WHEREFORE, the Defendant, having answered the Complaint of the Plaintiff, prays that this Court:

- (a) Dismiss Plaintiff's Complaint with prejudice;
- (b) Costs of this action;
- (c) For such other and further relief that this Court deems just and proper.

Respectfully submitted this 21st day of June 2018,

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

TOWNES B. JOHNSON III, LLC

PO Box 9246

Greenville, South Carolina 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Defendant

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
J & H Grading & Paving, LLC,	)	C. A. No. 2018-CP-32-01746
	)	
Plaintiff,	)	
v.	)	DEFENDANT'S MOTION
	)	FOR SUMMARY JUDGMENT
Clayton Construction Company, Inc.,	)	
Herlong Family Properties, LLC, and	)	
Herlong Chevrolet Buick, Inc.,	)	
	)	
Defendants.	)	
	)	

TO: CHELSEA J. CLARK, ESQ., COUNSEL FOR PLAINTIFF:

COMES NOW, the defendant, Clayton Construction Company, Inc. ("Clayton"), pursuant to *South Carolina Rules of Civil Procedure* Rule 56(c), and hereby moves this Court, at such date and time as the Court shall direct, for an Order granting Summary Judgment in its favor on: 1) all claims of plaintiff, J & H Grading & Paving, LLC ("Plaintiff")'s complaint and 2) the "pay when paid" provision of the agreement between Plaintiff and Clayton being enforceable. This Motion is based on Plaintiff's receipt of final payment within seven (7) days of Clayton's receipt of same from Defendant Herlong Family Properties, LLC. A true and correct copy of Plaintiff settlement for the work J & H Grading & Paving, LLC performed as a subcontractor to Clayton is attached hereto as "**Exhibit A**".

For the foregoing reasons, Clayton respectfully requests that the Court enter an Order granting Summary Judgment in its favor.

Respectfully submitted this 12th day of February, 2019.

/s/ Townes B. Johnson III
Townes B. Johnson III (SC Bar# 75412)
TOWNES B JOHNSON III, LLC
PO Box 9246
Greenville, South Carolina 29604
PH: (864) 757-4899
tjohnson@sc.legal
Attorneys for Defendant

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

AGREEMENT between J & H Grading & Paving, Inc. ("J&H"); Clayton Construction Company, Inc. ("Clayton"); Herlong Family Properties LLC, and Herlong Chevrolet Buick, Inc. (collectively "Herlong"), made this ____ day of February 2019.

WHEREAS, Herlong entered into a contract with Clayton for the construction of Herlong Chevrolet in Batesburg-Leesville, SC (hereinafter "the Project"); and

WHEREAS, Clayton entered into a subcontract with J&H for the sitework portion of the Project; and

WHEREAS, J&H alleged that it was not paid by Clayton for its final draw and retainage, which is contested by Clayton, and J&H filed a lien against Herlong's property, and thereafter commenced an action for foreclosure of the lien and breach of contract against Clayton (hereinafter "the Suit");

WHEREAS, unrelated to its subcontract with Clayton on the Project, J&H had contracted directly with Herlong to perform certain work on Herlong's Edgefield dealership (hereinafter "the Edgefield Project") and Herlong brought certain counterclaims in the Suit against J&H for J&H's work on the Edgefield Project,

WHEREAS, the parties to this agreement have reached a partial settlement of J&H's claims and wish to dismiss J&H's claims against Herlong and their property;

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Herlong agrees to release \$75,298.00 under its contract with Clayton directly to J&H as payment for J&H's subcontract with Clayton on the Project.

2. It is agreed and understood that \$7,530 of this payment will be escrowed with Herlong's counsel pending satisfaction of the Edgefield Project terms listed in Paragraph 9, below.

3. Herlong shall be entitled to a credit of \$75,298.00 against any monies owed under Herlong's contract with Clayton and, subject to any claims arising under the contract, the principal amount claim by Clayton is reduced to \$105, 817.01.

4. Clayton is entitled to the full credit of \$75,298.00 as payment for work performed by J&H on the Project under J&H's subcontract with Clayton.

5. J&H expressly reserves all of its claims and rights against Clayton as set forth in the Suit for interest on the contract balance, statutory or contractual attorney's fees, and any other balance to the contract between J&H and Clayton as may be due pursuant to the contract or by law and, accordingly, and does not release Clayton from the Suit.

6. Specifically, J&H still claims additional funds are due from Clayton representing interest on the alleged wrongfully withheld contract balance and for attorney's fees.

7. Upon release of the \$75,298.00 in accordance with Paragraph 1, above, J&H shall dismiss Herlong from the Suit and cancel its lien against Herlong's property.

8. Upon the escrow of \$7,530 by Herlong's attorney in accordance with Paragraph 2, above, Herlong shall dismiss its counterclaims in the Suit against J&H.

9. J&H shall perform repair work to the Edgefield Project by June 1, 2019, to repair an area of pavement that his holding water. J&H shall ensure that the repair is performed to prevailing industry standards. Herlong's attorneys shall retain the \$7,530 in their trust account until the earlier of the repair work being performed in full or June 2, 2019. Should the work under item 4 not be performed in full by June 2, 2019; Herlong shall have the right to use the retained funds to complete the repair work.

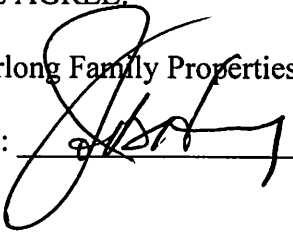
The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY:  _____,

ITS:  _____

Clayton Construction Company, Inc.

BY: _____,

ITS: _____

J&H Grading and Paving, Inc.

BY: _____,

ITS: _____

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY: _____, ITS: _____

Clayton Construction Company, Inc.

BY: _____, ITS: _____

J&H Grading and Paving, Inc.

BY: Joshua E. Buggs ITS: Owner/President

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY: _____, ITS: _____

Clayton Construction Company, Inc.

BY: , ITS: President

J&H Grading and Paving, Inc.

BY: _____, ITS: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, Inc.,	)	Civil Action No.: 2018-CP-32-01746
	)	
Plaintiff,	)	
	)	PLAINTIFF'S NOTICE OF MOTION
v.	)	AND MOTION FOR SUMMARY
	)	JUDGMENT
Clayton Construction Company, Inc.,	)	
	)	
Defendants.	)	

TO: TOWNES B. JOHNSON III, ATTORNEY FOR THE DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that Plaintiff, J & H Grading & Paving, Inc., will move before the Presiding Judge of the Lexington County Court of Common Pleas in Lexington, South Carolina, on the tenth day after service hereof, or at such time as the Court may schedule, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting summary judgment in Plaintiff's favor as to all causes of action against the Defendant, Clayton Construction Company, Inc., because there are no genuine issues of material fact and Plaintiff is entitled to a judgment as a matter of law. Plaintiff would show that it is entitled to interest on the money not paid to the Plaintiff under the contract, despite being due for over a year, and to attorney's fees, pursuant to S.C. Code Ann. § 27-1-15, for the Defendant's failure to pay the money owed after proper demand was made. This Motion is based upon the pleadings in this matter, statutes and rules, case law, responses to interrogatories, document production, depositions, affidavits, memoranda, stipulations of fact/and or other materials as may be filed and served upon the parties in accordance with Rule 56, SCRCF, prior to the hearing on this motion. Pursuant to Rule 11, SCRCF, the undersigned has no duty to consult with opposing counsel before filing this Motion.

[signature page to follow]

BRUNER POWELL WALL & MULLINS, LLC

s/Wesley D. Peel

Wesley D. Peel, Bar No. 9283

Chelsea J. Clark, Bar No. 102211

1735 St. Julian Place, Suite 200

Columbia, South Carolina 29204

(803) 252-7693

wpeel@brunerpowell.com

cclark@brunerpowell.com

Attorneys for the Plaintiff

Columbia, South Carolina
February 27, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, Inc.,	)	Civil Action No.: 2018-CP-32-01746
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	SUPPORT OF ITS MOTION FOR
v.	)	SUMMARY JUDGMENT AND IN
	)	OPPOSITION OF THE DEFENDANT'S
Clayton Construction Company, Inc.,	)	MOTION FOR SUMMARY JUDGMENT
	)	
Defendant.	)	

STATEMENT OF THE CASE

This matter is before the Court pursuant to a summons and complaint filed by J & H Grading & Paving, Inc. ("Plaintiff") against Clayton Construction Company, Inc. ("Defendant"). Defendant filed a motion for summary judgment on February 26, 2019, erroneously arguing that "pay when paid" provisions for payment to subcontractors are enforceable. Plaintiff filed its cross-motion for summary judgment on February 27, 2019. Plaintiff opposes Defendant's motion for summary judgment on the basis that Defendant's legal position is indefensible in the face of South Carolina statutory law and public policy. Plaintiff moves for an order entering summary judgment against Defendant on the ground that there are no genuine issues of material fact in this case and Plaintiff is entitled to judgment as a matter of law.

BACKGROUND

Defendant is a commercial contractor based in Spartanburg, South Carolina. Defendant entered into an agreement to build a new dealership for Herlong Chevrolet Buick in Lexington County. Defendant then entered into a subcontract with Plaintiff for the grading and paving work needed for the new dealership. The total price of the subcontract between the parties, dated September 24, 2015, was \$688,075.00. As is typical in construction contracts, the payment language provided

for progress payments with 10% held back as retainage. *See* Contract attached as **Exhibit A**. Over the course of several change orders, an additional \$28,855.70 was ultimately added to the contract price, bringing the contract total to \$716,930.70. After completion of Plaintiff's work, the amount remaining to be paid was \$75,298.00, which included the 10% retainage and a small outstanding balance.

Plaintiff's work on the project was substantially completed in early 2017, but Defendant consistently refused to pay Plaintiff the outstanding balance and retainage despite requests and inquiry. For instance, on August 1, 2017, Defendant's project manager indicated that the sole reason Defendant was refusing to pay Plaintiff its retainage was that Defendant had not been paid by the project owner. *See* email from Brandon Klein attached as **Exhibit B**. Ultimately, Plaintiff was compelled to retain counsel and record a mechanic's lien on the dealership property after it completed punch list work without payment. This lien was recorded on February 27, 2018. Again, no payment was forthcoming. On March 2, 2018, Plaintiff sent a letter to Defendant demanding an investigation and prompt payment pursuant to Section 27-1-15 of the South Carolina Code. *See* Demand Letter attached as **Exhibit C**. Again, no payment was forthcoming. Instead, Defendant sent Plaintiff a letter stating that the reason no payment was remitted was that the owner of the project had yet to pay Defendant. No other defense or justification, other than the unenforceable "pay when paid" language in the subcontract between the parties was put forward. *See* Response Letter attached as **Exhibit D**.

Plaintiff subsequently filed suit against Defendant and the owner of the dealership project on May 21, 2018. Plaintiff was eventually able to obtain payment from the project owner in the amount of \$75,298.00, which resolved the principal amount of the outstanding balance. However, Plaintiff has not been compensated for the nearly two-year delay in payment or for the need to hire counsel to obtain payment. Even though there is no question that Plaintiff was owed the sum paid, it was forced

to retain counsel, record a mechanic's lien, file a lawsuit, and pay court costs to obtain the funds. Because there is no dispute that payment was due and owing Plaintiff from Defendant, yet Defendant deliberately withheld payment, Plaintiff seeks summary judgment under the remedies provided subcontractors by the South Carolina General Assembly for cases like this one.

STANDARD OF REVIEW

Rule 56, SCRCP, provides for summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citations omitted).

ARGUMENT

The facts in this matter are not disputed. Defendant failed to pay Plaintiff money due and owing following a demand letter requesting payment under Section 27-1-15 of the South Carolina Code. Plaintiff was forced to file the instant lawsuit to receive payment of the principal balance owed. Nearly a year passed between Plaintiff's demand and the payment of the outstanding balance by another party. Nearly two years passed between Plaintiff's final pay application in for the outstanding balance and the payment of those funds. For Plaintiff to obtain the money it was undisputedly owed, Plaintiff was forced to take steps, including retaining counsel, recording a mechanic's lien, and filing the instant suit, which otherwise would have been entirely unnecessary. For this reason, Plaintiff seeks summary judgment as a matter of law and requests that the Court award Plaintiff attorney's fees, costs, and interest, pursuant to Section 27-1-15.

Section 27-1-15 of the South Carolina Code provides that if a party duly demands payment for improvements to real property, the person owing the funds must undertake a reasonable and fair

investigation of the merits of the claim and pay it within forty-five (45) days of 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 Ann. § 27-1-15. Plaintiff sent a demand letter invoking its rights under this statute on March 2, 2018. Defendant response contained no meritorious reason for its failure to pay. Plaintiff was not paid the outstanding principal balance until February 2019, nearly a year later. Therefore, because of Defendant’s unreasonable behavior, Plaintiff is entitled to attorney’s fees and interest at the judgment rate from the date of the demand, pursuant to the statute. *Id.*

Defendant relies on an unenforceable and illegal contract provision as its only defense to Plaintiff’s payment demand under Section 27-1-15. *See Exhibit D.* The original subcontract between the parties, drafted by Defendant, provides that final payment will not be made to Plaintiff until Defendant receives payment from the owner. *See Exhibit A.* This language, known as a “pay when paid” provision, is illegal and unenforceable in this state, pursuant to statutory law. The South Carolina Code states in the Subcontractors’ and Suppliers’ Payment Protection Act (“the Protection Act”), “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.” S.C. Code Ann. § 29-6-230. The statute then goes on to explicitly forbid “pay when paid” arrangements, stating, “The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, a condition precedent for payment to the construction subcontractor.” *Id.* Importantly, “**Any agreement to the contrary is not enforceable.**” *Id.* (emphasis added).

In this case, Defendant is seeking the Court’s ratification of the pay-when-paid language it included in its contract with Plaintiff. Specifically, the contract provides, “Final payment of the

balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor's Work." See **Exhibit A**. This language is the only defense Defendant offered to duly demanded payment under Section 27-1-15. See **Exhibit D**. This language, interpreted by Defendant to allow withholding of payment until the owner pays, is directly contrary to statutory law. The Protection Act explicitly forbids the use of a payment condition precedent like the one asserted by Defendant. See S.C. Code Ann. § 29-6-230.

In discussing the Protection Act and related law, an attorney wrote for South Carolina Lawyer, "if a subcontractor performs in accordance with the terms of its contract, it is entitled to payment. . . . Payment to the subcontractor by the contractor is not conditioned upon payment to the contractor from the owner. Importantly, **the parties cannot contract around this.**" Joshua D. Spencer, *You Can't Rob Peter to Pay Paul: South Carolina Statutory Payment Protections in Construction Projects*, S.C. Lawyer, Sept. 2012 at 24 (emphasis added). The law does not permit parties to avoid its application, but "interjects itself intimately into the payment process on construction projects." *Id.* at 27. The statute behind this rule expresses a clear public policy mandate from the General Assembly, ensuring "that those who perform work are paid for it without being required to take the financial risk of someone further up the chain not paying the party with whom they contracted." *Id.* "While this undoubtedly creates a burden for those in the middle of such transactions, it represents a legislative shift of such risks to the parties most capable of achieving payment." *Id.*

Defendant will likely assert that the pay when paid language its contract is similar to language in Section 29-6-30, which states as follows:

When a contractor or a subcontractor has performed in accordance with the provisions of his contract, the owner shall pay the contractor by mailing via first class mail or delivering the undisputed amount of any pay request within twenty-one days of receipt by the owner of any pay request based upon work completed or

service provided under the contract, and the contractor shall pay to his subcontractor and each subcontractor shall pay to his subcontractor, within seven days of receipt by the contractor or subcontractor of each periodic or final payment, by mailing via first class mail or delivering the full amount received for that subcontractor's work and materials based on work completed or service provided under the subcontract.

S.C. Code Ann. § 29-6-30 (hereinafter, the "deadline statute"). However, this statute has no effect on Plaintiff's claim under the Protection Act and Section 27-1-15 for three reasons.

First, the plain language of the Protection Act controls. "When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 556 (2013) (quoting *Regions Bank v. Strawn*, 399 S.C. 530, 541, 732 S.E.2d 230, 236 (Ct. App. 2012)). The Protection Act unequivocally forbids conditioning payment to a subcontractor on payment by an owner and no further inquiry into the law is required.

Second, the deadline statute and the Protection Act do not conflict and may be read in harmony. When construing the law, "[i]t is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Hodges v. Rainey*, 341 S.C. 79, 88–89, 533 S.E.2d 578, 583 (2000) (quoting *Justice v. Pantry*, 330 S.C. 37, 43–44, 496 S.E.2d 871, 874 (Ct. App. 1998)) (internal punctuation omitted). The deadline statute provides that a subcontractor must be paid within seven days when the contractor has received payment from the owner. This statute prevents a contractor from withholding received funds from a subcontractor. But the statute in no way endorses or allows the contractor to withhold payment indefinitely because the owner has not paid. That scenario is addressed squarely by the Protection Act. Each statute in question covers a different situation and both may be read together and applied without conflict. The sum result is that a

contractor must always pay a subcontractor that has completed its work. The contractor must pay even if the owner has not paid, but if the owner has paid, then it must pay no later than seven days.

Third, even if the two statutes are read as conflicting, the Protection Act controls as both the more recent and more specific statute. Although repeal by implication because of conflict is an undesirable result in statutory construction, the courts are nonetheless clear that “[w]hen two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute.” *Stone v. State*, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994) (citing *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992); *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991)). In this case, the deadline statute is contained in a more general section of the Code, which addresses payments to contractors, subcontractors, and suppliers. See S.C. Code Ann. § 29-6-10, *et seq.* Further, that general section of the Code, contained in Article 1 of Title 29, was enacted in 1990. However, the Protection Act was enacted ten years later in 2000 and is specifically designed to address payments to subcontractors and suppliers. The Protection Act is more specific, it is more recent, and it shows clear intent by the General Assembly to ensure that subcontractors like Plaintiff get paid for work completed regardless of the contractor’s relationship with the project owner. The contractor, under the public policy of this state, is the party that assumes the risk of non-payment and the contractor cannot pass that risk to the subcontractor or argue that it can avoid payment of retainage to its subcontractors in perpetuity because it has failed to secure payment from the owner.

Defendant drafted a subcontract that contains payment language that is unenforceable under state law. Plaintiff completed the work under the subcontract and duly requested payment. Defendant refused to pay. Plaintiff filed a mechanic’s lien. Defendant refused to pay. Plaintiff sent a demand letter pursuant to Section 27-1-15, invoking the right to an investigation. Defendant

refused to pay, relying solely on the unenforceable contract language. *See Exhibit D.* Because Defendant has withheld funds from Plaintiff in contravention of Section 27-1-15 and the Protection Act, Plaintiff is entitled to the remedies set in place by the General Assembly. Plaintiff sent a Section 27-1-15 demand letter on March 2, 2018. Under the law, Plaintiff is owed interest from the date of that demand and reasonable attorney's fees. Taking a principal balance of \$75,298.00, Defendant owes Plaintiff interest of \$5,576.18 at the judgment rate of 8.5% for March 2, 2018 to January 14, 2019 and \$863.03 at the judgment rate of 9.5% for January 15, 2019 to February 25, 2019, for a total of \$6,439.21 in interest. Additionally, Defendant owes Plaintiff for its attorney's fees. *See* Affidavit attached as **Exhibit E.** For representation in this matter, Plaintiff has incurred \$25,661.00 in fees. Therefore, Plaintiff requests that the Court enter judgment against Defendant in the amount of Thirty-Two Thousand One Hundred Dollars and Twenty-One Cents (**\$32,100.21**).

CONCLUSION

Defendant's legal position in this case is untenable to the point of frivolousness. Defendant's attempt to enforce pay-when-paid language against a subcontractor violates blackletter South Carolina law and public policy. There is no genuine issue of fact at issue in this case. The law provides that Defendant had an obligation to timely pay Plaintiff for its work. Defendant patently refused to comply with the law after being duly notified of its obligation and the statutorily-imposed consequences. Therefore, summary judgment providing for attorney's fees and interest should be entered for the Plaintiff against Defendant.

-signature page to follow-

BRUNER POWELL WALL & MULLINS, LLC

s/ Wesley D. Peel

Wesley D. Peel, Bar No. 9283
Chelsea J. Clark, Bar No. 102211
1735 St. Julian Place, Suite 200
Columbia, South Carolina 29204
(803) 252-7693

wpeel@brunerpowell.com

cclark@brunerpowell.com

Attorneys for the Plaintiff

Columbia, South Carolina
May 17, 2019

EXHIBIT A



JOB NO.: 15-074

DATE September 24, 2015



ACCOUNT CODE:

SUBCONTRACT (SHORT FORM)

This agreement is made this **24th** day of **September 2015**, and effective the **Twentyfourth** day of **September 2015**, by and between **Clayton Construction Company, Inc.** (Contractor) and **J&H Grading & Paving, LLC** (Subcontractor) to perform the Work identified in Article 2 in accordance with the Project's Contract Documents.

PROJECT: Herlong Chevrolet
OWNER: Herlong Chevrolet-Buick, Inc.
ARCHITECT: Christopher Booker &
CONTRACTOR: Clayton Construction Company, Inc.
SUBCONTRACTOR: J&H Grading & Paving, LLC
1579 Edgefield Highway
Aiken, SC 29801
Attn: Kevin Walters [REDACTED] phone [REDACTED] fax

ARTICLE 1

CONTRACT PAYMENT. The Contractor agrees to pay Subcontractor for satisfactory performance of Subcontractor's Work the sum of **Six Hundred Eighty-Eight Thousand Seventy-Five And Xx / 100 Dollars (\$688,075.00)**. Progress 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. Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor's Work. These payments are subject to receipt of such lien waivers, affidavits, warranties, and guarantees required by the Contract Documents or Contractor.

ARTICLE 2

SCOPE OF WORK. Subcontractor agrees to commence Subcontractor's Work hereinafter described upon notification by Contractor and to perform and complete such Work in accordance with Contract Documents and under the general direction of Contractor in accord with Contractor's schedule. This shall include all work necessary or incidental to complete the:

Site work including mobilization, traffic control, demo building, clearing & grubbing, erosion control, grading, water & sewer, storm drainage, concrete (excluding 4" sidewalk and ADA ramp), 6" stone base, 2" asphalt, 8" stone base, 3" asphalt, SCDOT base & paving, and traffic lines and HC signs per your quote revised 9/4/2015.

Work for the Project as more particularly, though not exclusively specified in

Attachment A; B (list of drawings); C (schedule); D (lien waiver).

ARTICLE 3

SCHEDULE OF WORK. Time is of the essence. Subcontractor shall provide Contractor with any requested scheduling information of Subcontractor's Work. The Schedule of Work, including that of this Subcontract shall be prepared by Contractor and may be revised as the Work progresses.

Subcontractor recognizes that changes may be made in the Schedule of Work and agrees to comply with such changes without additional compensation.

Subcontractor shall coordinate its work with all other contractors, subcontractors and suppliers on the Project so as not to delay or damage their performance, work, or the Project.

ARTICLE 4

CHANGES. Contractor, without nullifying this Agreement, may direct Subcontractor in writing to make changes to Subcontractor's Work. Adjustment, if any, in the contract price or contract time resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Contract Documents.

ARTICLE 5

FAILURE OF PERFORMANCE. Should Subcontractor fail to satisfy contractual deficiencies within three (3) working days from receipt of Contractor's written notice, then the Contractor, without prejudice to any right or remedies, shall have the right to take whatever steps it deems necessary to correct said deficiencies and charge the cost thereof to Subcontractor, who shall be liable for payment of same, including reasonable overhead, profit and attorneys fees.

ARTICLE 6

INSURANCE. Prior to the start of Subcontractor's Work, Subcontractor shall procure and maintain in force for the duration of the Work, Worker's Compensation Insurance, Employer's Liability Insurance, Comprehensive General Liability Insurance and all insurance required of Contractor under the Contract Documents. Contractor, Owner and Architect shall be named as additional insureds on each of these policies, except for Worker's Compensation.

ARTICLE 7

INDEMNIFICATION. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and Contractor from all damages, losses, or expenses, including attorneys fees, from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to tangible property, other than the Work itself. This indemnification shall extend to claims resulting from performance of this Subcontract and shall apply only to the extent that the claim or loss is caused in whole or in part by any negligent act or omission of Subcontractor or any of its agents, employees, or subcontractors. This indemnity shall be effective regardless of whether the claim or loss is caused in some part by a party to be indemnified. The obligation of Subcontractor under this Article shall not extend to claims or losses that are primarily caused by the Architect, or Architect's consultant's performance or failure to perform professional responsibilities.

ARTICLE 8

WARRANTY. Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and agrees to satisfy same without cost to Owner or Contractor for a period of one (1) year from the date of Substantial Completion of the Project or per Contract Documents, whichever is longer.

ARTICLE 9**SPECIAL PROVISIONS.**

SEE ATTACHMENT "A" SIGN AND RETURN

Business License and/or Permit(s), if required, are the responsibility of the Subcontractor

If the contract is modified in any way without authorized initials by CCC at each change the contract is not binding.

Subcontractor is required to attend all progress meetings per specifications and/or required by Clayton Construction Co., Inc.

Extra work will not be paid by Clayton Construction Company, Inc. unless approved by Change Order-Lump Sum or Hourly

Each Subcontractor is responsible for obtaining/paying for plans & specifications for preparation of shop drawings/submittals

In witness whereof, the parties have executed this Agreement under Seal, the day and year first written above.

J&H Grading & Paving, LLC

SUBCONTRACTOR (FIRM NAME)

Josh Bassett Owner/President
BY (Type or print signer's name and title)

Clayton Construction Company, Inc

CONTRACTOR (FIRM NAME)

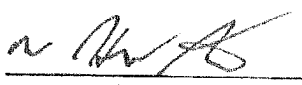
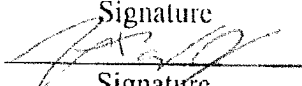
Harry Clayton/IIIc PRESIDENT
66 BY (Type or print signer's name and title)

Payment Agreement Contract Herlong Chevy Batesburg
Site-work Contract

This is a payment agreement between Joe Ben Herlong owner of Herlong Chevy of Batesburg, Clayton Construction Company the General Contractor for the project and J&H Grading & Paving the grading company hired for the site work for the aforesaid project.

Clayton Construction the General Contractor and Joe Ben Herlong the owner of Herlong Chevy of Batesburg agree that all paperwork for the construction project has been filed and approved by all parties involved for the aforesaid construction project. Joe Ben Herlong the owner of Herlong Chevy of Batesburg and Clayton Construction the General Contractor hired for the project agree to pay J&H Grading & Paving the site work contractor within 30 days from the date on the invoice. All discrepancies with the invoice must be resolved by all parties within 10 days of the invoice date if this is not accomplished the invoice will stand and payment should be made. If payment is not made within the allotted 30 days then a finance charge will be applied if the new balance is unpaid 30 days from the invoice date.

*THIS agreement does not pertain to retaining
unless Herlong releases it*

Herlong Chevy Owner	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date
General Contractor	 Signature	<i>Harry Clayton</i> Printed	<i>4-27-16</i> Date
Witness	 Signature	<i>Jay Taylor</i> Printed	<i>4-27-16</i> Date
J&H Grading Owner	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date

The finance charge will be computed by a periodic rate of 1 1/2 % per month which is an annual percentage rate of 18% applied to unpaid balance.

EXHIBIT B

From: [Brandon Klein](#)
 Sent: Tuesday, August 1, 2017 3:38 PM
 To: jandh1579@gmail.com; [Harry Clayton](#); [Christy Clark](#); [JB Herlong](#)
 Cc: [Townes Johnson](#)
 Subject: RE: Herlong Chevy

Heather,
 Hope all is well. We have not been paid retainage by Mr. Herlong and therefore we cannot issue your remaining retaining until paid.

Thanks
 BK

Brandon Klein
 Project Manager



PO Box 2998 • Spartanburg, SC 29304
 p: 864.576.1901 • f: 864.574.1974 • c: 407.558.0716
www.claytonconstruction.net

From: jandh1579@gmail.com [<mailto:jandh1579@gmail.com>]
 Sent: Tuesday, August 01, 2017 9:37 AM
 To: Harry Clayton <hclayton@claytonconstruction.net>; Christy Clark <cclark@claytonconstruction.net>; Brandon Klein <bklein@claytonconstruction.net>; JB Herlong <jbh@herlong.net>
 Subject: FW: Herlong Chevy

Sent from [Mail](#) for Windows 10

From: jandh1579@gmail.com
 Sent: Tuesday, July 25, 2017 8:45 AM
 To: [Brandon Klein](#)
 Subject: FW: Herlong Chevy

Good morning,

I was asked to resubmit this pay application and to see why the balance has not been paid. Thank you.

Heather Wilson
 J&H Grading & Paving, LLC
 (803)641-1412

Sent from [Mail](#) for Windows 10

EXHIBIT C

BRUNER, POWELL, WALL & MULLINS, LLC

WARREN C. POWELL, JR., P.A. **
HENRY P. WALL
E. WADE MULLINS III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON
CAITLIN C. HEYWARD
CHELSEA J. CLARK

** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: WPEEL@BRUNERPOWELL.COM

March 2, 2018

VIA U.S. MAIL

Mr. Harry Clayton
Clayton Construction Company, Inc.
P.O. Box 2998
Spartanburg, SC 29304

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. L.W. Clayton, Jr., Registered Agent
Clayton Construction Company, Inc.
1173 Partridge Rd.
Spartanburg, SC 29302

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Joe B. Herlong, Registered Agent
Herlong Family Properties, LLC
354 S.C. Highway 121
Johnston, SC 29832

Re: J&H Grading & Paving, LLC v. Clayton Construction Company, Inc. and Herlong
Family Properties, LLC—*Herlong Chevrolet Project*
Our File No.: 5-2989.100

Dear Mr. H. Clayton, Mr. L.W. Clayton, and Mr. Herlong:

We represent J&H Grading & Paving, LLC, your subcontractor on the above-referenced project. You are indebted to J&H Grading & Paving, LLC for \$84,432.89 for work completed on the project. The purpose of this letter is to demand payment of the amount due J&H Grading & Paving, LLC.

Pursuant to S.C. Code Ann. § 27-1-15, demand is hereby made upon Clayton Construction Company, Inc. for \$84,432.89. Under this statute, it is the duty of Clayton Construction Company, Inc. to make a reasonable and fair investigation of the merits of these claims and to pay them, or whatever portion of them that is determined as valid, within forty-five (45) days from the date of this letter.

Herlong Project
March 2, 2018
Page 2

If Clayton Construction Company, Inc. fails to make a fair investigation or otherwise unreasonably refuses to pay these claims or the proper portions thereof, then they will be liable to J&H Grading & Paving, LLC for reasonable attorney's fees and interest at the judgment rate, 8.5% compounded annually, from the date of this letter until paid.

Also, under S.C. Code Add. § 29-6-30 *et seq.*, payment is due to the subcontractor within seven days of receipt each periodic payment. Failure to do so invokes interest at the rate of one percent a month.

In addition, we have filed a mechanic's lien on the subject property. If payment is not received in ten days, we intent to file suit to foreclose on the lien, as well as seek any other remedies available to J&H

Lastly, we request that you provide us with copies of the payment bonds, in a reasonable amount of time, that you have for the above referenced project.

I hope that this matter can be resolved quickly. Please feel free to contact me if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,



Wesley D. Peel

WDP:cjc

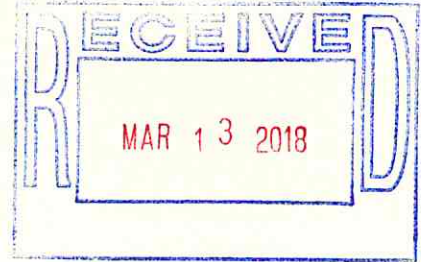
EXHIBIT D



March 9, 2018

Townes B. Johnson III
(8640 757-4899)
tjohnson@sc.legal

Wesley D. Peel, Esq.
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110



RE: J&H Grading & Paving, LLC

Dear Wesley:

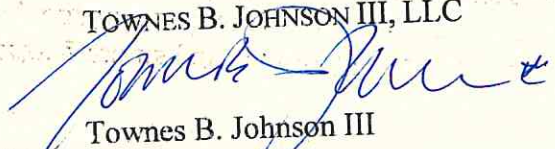
Please be advised that this firm represents Clayton Construction Co., Inc. ("Clayton"). This letter is in reply to J&H Grading & Paving, LLC ("J&H")'s March 2, 2018 demand upon Clayton in accordance with South Carolina Code Ann. § 27-1-15.

As I am sure you are aware, J&H's subcontract agreement with Clayton on the Herlong Chevrolet Dealership project provides that "payments... shall be made to [J&H] for Work satisfactorily performed no later than seven (7) days after receipt by [Clayton] of payment from Owner for [J&H]'s Work." As you may also be aware, Clayton has not received payment for the work from the owner of the project, Herlong Family Partnership ("Herlong"), and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to J&H at this time.

That said, as soon as Herlong remits payment to Clayton or the litigation against Herlong is fully adjudicated, Clayton will remit any undisputed contract balances to J&H and Clayton welcomes J&H's pursuit of any and all claims it may have against Herlong in order to accomplish same.

Sincerely,

TOWNES B. JOHNSON III, LLC


Townes B. Johnson III

Clayton Construction Co., Inc.

PO Box 9246
Greenville, SC 29604

Third Floor - Suite 302

www.sc.legal

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
J & H Grading & Paving, Inc.,	)	Civil Action No.: 2018-CP-32-01746
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF ATTORNEY'S FEES
	)	
Clayton Construction Company, Inc.,	)	
	)	
Defendant.	)	

PERSONALLY APPEARED BEFORE ME, Wesley D. Peel, attorney for the above-named Plaintiff, being first duly sworn, deposes and states as follows:

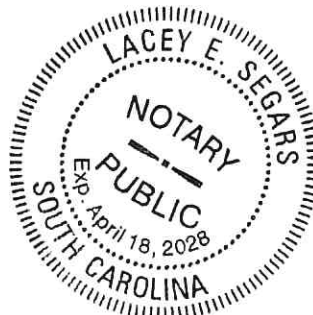
1. I am an attorney with the firm Bruner, Powell, Wall & Mullins, LLC, in Columbia, South Carolina, and this firm represents the Plaintiff, J & H Grading & Paving, Inc., in the above-captioned matter. This firm was retained to collect money owed by the above-named Defendant.

2. For representation in this action, which previously involved three Defendants, Plaintiff has incurred attorneys' fees in the amount of Twenty-Five Thousand Six Hundred Sixty-One Dollars and Zero Cents (\$25,661.00) as of May 17, 2019. This amount reflects 99.25 hours of work at the rates of \$300/hour for partners, \$150/hour for associates, and \$80/hour for paralegals and law clerks.

FURTHER AFFIANT SAYETH NOT.


Wesley D. Peel, Esq.

SWORN TO and subscribed before me
This 17th day of May, 2019
Lacey E. Segars (L.S.)
Notary Public for South Carolina
Printed Name: Lacey E. Segars
My Commission Expires: 04/18/2028



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	C. A. No. 2018-CP-32-01746
	)	
J&H Grading & Paving, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	DEFENDANT'S
	)	PRE-TRIAL BRIEF
Clayton Construction Company, Inc.,	)	
Herlong Family Properties, LLC, and	)	
Herlong Chevrolet Buick, Inc.,	)	
	)	
Defendants.	)	
	)	
	)	

COMES NOW, the Defendant, Clayton Construction Company, Inc., (hereinafter "Clayton") hereby submits its pre-trial brief:

STATEMENT OF RELEVANT FACTS

On March 2, 2018, plaintiff, J & H Grading & Paving, LLC ("Plaintiff" or J&H) sent Clayton a demand letter pursuant to South Carolina Code Ann. § 27-1-15. ***See Exhibit A: Plaintiff's Demand Letter.*** After its receipt of Plaintiff's demand letter, Clayton investigated Plaintiff's claim and on March 9, 2018, Clayton responded to Plaintiff's demand and stated:

"... [Plaintiff]'s subcontract agreement with Clayton on the Herlong Chevrolet Dealership project provides that "payments... shall be made to [Plaintiff] for Work satisfactorily performed no later than seven (7) days after receipt by [Clayon] of payment from Owner for [Plaintiff]'s Work. As you may also be aware, Clayton has not received payment for the work from the owner of the project Herlong Family Partnership ("Herlong"), and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to [Plaintiff] at this time."

See Exhibit B: Clayton's Response. Within seven (7) days of Herlong's payment under its agreement with Clayton for Plaintiff's work, Plaintiff was paid. ***See Exhibit C: Settlement***

Agreement with Herlong Family Partnership. The subcontract between the parties does not have an attorneys' fees provision and no is Plaintiff contractually entitled to interest on retainage.

See Exhibit D: Subcontract.

ARGUMENT

1. CLAYTON'S INVESTIGATION WAS REASONABLE AND NO PAYMENT WAS CONTRACTUALLY DUE ON MARCH 9, 2018.

On March 2, 2018, J&H served Clayton with a demand letter pursuant to South Carolina Code Ann. § 27-1-15, which required Clayton to investigate J&H's claim and pay any undisputed portion thereof within forty-five (45) days of J&H's demand. *See South Carolina Code Ann. § 27-1-15. See Exhibit A.* Seven (7) days later, on March 9, 2018, after investigating the claim, Clayton responded to J&H citing the "pay when paid" provision and stating that there were no contract balances due and owing *at that time*". *See Exhibit B.* Clayton further stated that it was pursuing payment from the owner of the project and once that was resolved, Clayton would remit the undisputed contract balance to J&H. Clayton's March 9, 2018 response, accordingly, was timely, contractually accurate and perfectly in line with the Supreme Court's holding in *Elk & Jacobs Drywall* that Clayton be afforded a reasonable time to obtain funds from the owner. Being that Clayton's investigation and response was in perfect harmony with the prevailing case law, Clayton's investigation was reasonable as a matter of law and, as of March 9, 2018, it cannot be disputed that no payment was due J&H under the contract. J&H, accordingly, is not entitled to the recovery of attorneys' fees or interest under South Carolina Code Ann. § 27-1-15.

2. CLAYTON MET ITS BURDEN UNDER SOUTH CAROLINA CODE ANN. § 27-1-15

J&H argues it is entitled to the recovery of attorneys' fees or interest because it was "not paid for its work for nearly two years after correctly performing its contracted work" and it "was

not paid for nearly a year after sending a Section 27-1-15 demand letter”. This argument is a diversion from requirements of South Carolina Code Ann. § 27-1-15 which only dictate that Clayton make reasonable and fair investigation of the merits of J&H’s claim and pay whatever portion of it was determined as valid within forty-five (45) days from the date of mailing the demand. Clayton appropriately answered within the statutory period and did not have any obligation under South Carolina Code Ann. § 27-1-15 to respond to that demand again. Further, at no time after March 2, 2018 did J&H send another demand letter to Clayton in accordance with South Carolina Code Ann. § 27-1-15.

3. PAY WHEN PAID CLAUSES ARE NOT AGAINST PUBLIC POLICY

Pursuant to South Carolina Code Ann. § 29-6-230, a subcontractor is entitled to payment from the party with whom it contracts and an agreement which makes the payment by the owner to the subcontractor a conditions precedent to payment is not enforceable. *See South Carolina Code Ann. § 29-6-230*. Accordingly, outside of a separate invalidating feature, an agreement which does not make the payment by the owner to the subcontractor a conditions precedent to payment is enforceable.

Despite J&H’s rhetoric otherwise, the Supreme Court of South Carolina has determined that the following “pay when paid” provision did NOT create a conditions precedent:

“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 the funds due him for this project”; stating that “[w]e do not think subparagraph (iv) created a condition precedent but rather only postponed payment by [General Contractor] for a reasonable time so as to afford [General Contractor] an opportunity to obtain funds from the owner”. *See Elk & Jacobs Drywall v. Town Contractors, Inc.*, 229 S.E.2d 260, at 262, 267 S.C. 412, at 418 (S.C., 1976) (emphasis added).

Accordingly, as the Supreme Court of South Carolina has determined that “pay when paid” provisions, such as the one in *Elk & Jacobs Drywall*, do not create a conditions precedent, “pay when paid” provisions are not offensive to public policy. *Id* and *See South Carolina Code Ann. § 29-6-230*. J&H’s position that the *Elk & Jacobs Drywall* holding regarding “pay when paid” provisions is in conflict to the first sentence of first sentence of South Carolina Code Ann. § 29-6-230 or is repealed thereby does not logically follow as the *Elk & Jacobs Drywall* case directly stands for the proposition that the subcontractor is entitled to payment from the party with whom it contracts. Further, J&H’s position that “most recent statute overrides any prior law and sets the time for payment to a subcontract” has no effect on the Supreme Court’s interpretation of contract language to determine that “pay when paid” provisions do not create conditions precedents. Additionally, with Legislature’s certain knowledge of the Supreme Court’s contract interpretation on the issue, it could have easily created language to do so. Instead, it used the *Elk & Jacobs Drywall* language to differentiate the enforceability of “pay when paid” provisions and “pay if paid” provisions.

As the “pay when paid” contractual provision at issue in the instant case is similar to the provision in *Elk & Jacobs Drywall* - “[f]inal payment of the balance due shall be made to [J&H] no later than seven (7) days after receipt by [Clayton] of final payment from Owner [for] [J&H]’s Work” – the provision is enforceable and not offensive to public policy.

4. CONTRACTUAL OBLIGATIONS REGARDING ATTORNEYS’ FEES AND INTEREST

Outside of their statutory remedies for attorneys’ fees, J&H does not have a right to recover attorneys’ fees as there is not an attorneys’ fees provision in the contract. *See Exhibit D*. Similarly, J&H does not have the contractual right to interest on any retainage per the terms of the agreement. *Id*.

CONCLUSION

The entire basis for J&H's remaining claims relies on the unenforceability of the "pay when paid" contractual provision between the parties resulting in an unreasonable investigation and unreasonable failure to pay. The Supreme Court of South Carolina, however, has established that such provisions are enforceable. Further, Clayton was reasonable in relying on uncontroverted Supreme Court precedent in replying to J&H's 27-1-15 demand letter. Clayton, accordingly, is not liable to J&H for any attorneys' fees or interest.

Respectfully submitted this 13th day of August 2019,

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

TOWNES B. JOHNSON III, LLC

PO Box 9246

Greenville, South Carolina 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Defendant

Greenville, South Carolina

BRUNER, POWELL, WALL & MULLINS, LLC

WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

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POST OFFICE BOX 61110
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TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON
CAITLIN C. HEYWARD
CHELSEA J. CLARK

** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: WPEEL@BRUNERPOWELL.COM

March 2, 2018

VIA U.S. MAIL

Mr. Harry Clayton
Clayton Construction Company, Inc.
P.O. Box 2998
Spartanburg, SC 29304

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. L.W. Clayton, Jr., Registered Agent
Clayton Construction Company, Inc.
1173 Partridge Rd.
Spartanburg, SC 29302

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Joe B. Herlong, Registered Agent
Herlong Family Properties, LLC
354 S.C. Highway 121
Johnston, SC 29832

Re: J&H Grading & Paving, LLC v. Clayton Construction Company, Inc. and Herlong
Family Properties, LLC—*Herlong Chevrolet Project*
Our File No.: 5-2989.100

Dear Mr. H. Clayton, Mr. L.W. Clayton, and Mr. Herlong:

We represent J&H Grading & Paving, LLC, your subcontractor on the above-referenced project. You are indebted to J&H Grading & Paving, LLC for \$84,432.89 for work completed on the project. The purpose of this letter is to demand payment of the amount due J&H Grading & Paving, LLC.

Pursuant to S.C. Code Ann. § 27-1-15, demand is hereby made upon Clayton Construction Company, Inc. for \$84,432.89. Under this statute, it is the duty of Clayton Construction Company, Inc. to make a reasonable and fair investigation of the merits of these claims and to pay them, or whatever portion of them that is determined as valid, within forty-five (45) days from the date of this letter.

Herlong Project
March 2, 2018
Page 2

If Clayton Construction Company, Inc. fails to make a fair investigation or otherwise unreasonably refuses to pay these claims or the proper portions thereof, then they will be liable to J&H Grading & Paving, LLC for reasonable attorney's fees and interest at the judgment rate, 8.5% compounded annually, from the date of this letter until paid.

Also, under S.C. Code Add. § 29-6-30 *et seq.*, payment is due to the subcontractor within seven days of receipt each periodic payment. Failure to do so invokes interest at the rate of one percent a month.

In addition, we have filed a mechanic's lien on the subject property. If payment is not received in ten days, we intent to file suit to foreclose on the lien, as well as seek any other remedies available to J&H

Lastly, we request that you provide us with copies of the payment bonds, in a reasonable amount of time, that you have for the above referenced project.

I hope that this matter can be resolved quickly. Please feel free to contact me if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,



Wesley D. Peel

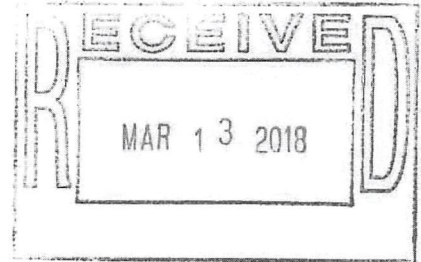
WDP:cjc



March 9, 2018

Townes B. Johnson III
(8640 757-4899
tjohnson@sc.legal

Wesley D. Peel, Esq.
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110



RE: J&H Grading & Paving, LLC

Dear Wesley:

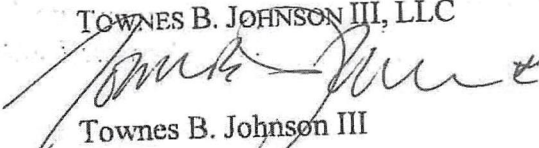
Please be advised that this firm represents Clayton Construction Co., Inc. ("Clayton"). This letter is in reply to J&H Grading & Paving, LLC ("J&H")'s March 2, 2018 demand upon Clayton in accordance with South Carolina Code Ann. § 27-1-15.

As I am sure you are aware, J&H's subcontract agreement with Clayton on the Herlong Chevrolet Dealership project provides that "payments... shall be made to [J&H] for Work satisfactorily performed no later than seven (7) days after receipt by [Clayton] of payment from Owner for [J&H]'s Work." As you may also be aware, Clayton has not received payment for the work from the owner of the project, Herlong Family Partnership ("Herlong"), and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to J&H at this time.

That said, as soon as Herlong remits payment to Clayton or the litigation against Herlong is fully adjudicated, Clayton will remit any undisputed contract balances to J&H and Clayton welcomes J&H's pursuit of any and all claims it may have against Herlong in order to accomplish same.

Sincerely,

TOWNES B. JOHNSON III, LLC


Townes B. Johnson III

Clayton Construction Co., Inc.

EXHIBIT

B

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

AGREEMENT between J & H Grading & Paving, Inc. ("J&H"); Clayton Construction Company, Inc. ("Clayton"); Herlong Family Properties LLC, and Herlong Chevrolet Buick, Inc. (collectively "Herlong"), made this ____ day of February 2019.

WHEREAS, Herlong entered into a contract with Clayton for the construction of Herlong Chevrolet in Batesburg-Leesville, SC (hereinafter "the Project"); and

WHEREAS, Clayton entered into a subcontract with J&H for the sitework portion of the Project; and

WHEREAS, J&H alleged that it was not paid by Clayton for its final draw and retainage, which is contested by Clayton, and J&H filed a lien against Herlong's property, and thereafter commenced an action for foreclosure of the lien and breach of contract against Clayton (hereinafter "the Suit");

WHEREAS, unrelated to its subcontract with Clayton on the Project, J&H had contracted directly with Herlong to perform certain work on Herlong's Edgefield dealership (hereinafter "the Edgefield Project") and Herlong brought certain counterclaims in the Suit against J&H for J&H's work on the Edgefield Project,

WHEREAS, the parties to this agreement have reached a partial settlement of J&H's claims and wish to dismiss J&H's claims against Herlong and their property;

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Herlong agrees to release \$75,298.00 under its contract with Clayton directly to J&H as payment for J&H's subcontract with Clayton on the Project.



2. It is agreed and understood that \$7,530 of this payment will be escrowed with Herlong's counsel pending satisfaction of the Edgefield Project terms listed in Paragraph 9, below.

3. Herlong shall be entitled to a credit of \$75,298.00 against any monies owed under Herlong's contract with Clayton and, subject to any claims arising under the contract, the principal amount claim by Clayton is reduced to \$105, 817.01.

4. Clayton is entitled to the full credit of \$75,298.00 as payment for work performed by J&H on the Project under J&H's subcontract with Clayton.

5. J&H expressly reserves all of its claims and rights against Clayton as set forth in the Suit for interest on the contract balance, statutory or contractual attorney's fees, and any other balance to the contract between J&H and Clayton as may be due pursuant to the contract or by law and, accordingly, and does not release Clayton from the Suit.

6. Specifically, J&H still claims additional funds are due from Clayton representing interest on the alleged wrongfully withheld contract balance and for attorney's fees.

7. Upon release of the \$75,298.00 in accordance with Paragraph 1, above, J&H shall dismiss Herlong from the Suit and cancel its lien against Herlong's property.

8. Upon the escrow of \$7,530 by Herlong's attorney in accordance with Paragraph 2, above, Herlong shall dismiss its counterclaims in the Suit against J&H.

9. J&H shall perform repair work to the Edgefield Project by June 1, 2019, to repair an area of pavement that his holding water. J&H shall ensure that the repair is performed to prevailing industry standards. Herlong's attorneys shall retain the \$7,530 in their trust account until the earlier of the repair work being performed in full or June 2, 2019. Should the work under item 4 not be performed in full by June 2, 2019; Herlong shall have the right to use the retained funds to complete the repair work.

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY: _____

ITS: _____

Clayton Construction Company, Inc.

BY: _____

ITS: _____

J&H Grading and Paving, Inc.

BY: _____

ITS: _____

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY: _____, ITS: _____

Clayton Construction Company, Inc.

BY: _____, ITS: _____

J&H Grading and Paving, Inc.

BY: Josh E. Bagg, ITS: Owner/President

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

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WE AGREE:

Herlong Family Properties LLC

BY: _____, ITS: _____

Clayton Construction Company, Inc.

BY:  _____, ITS: President

J&H Grading and Paving, Inc.

BY: _____, ITS: _____



JOB NO.: 15-074

DATE September 24, 2015



ACCOUNT CODE:

SUBCONTRACT (SHORT FORM)

This agreement is made this **24th** day of **September 2015**, and effective the **Twentyfourth** day of **September 2015**, by and between **Clayton Construction Company, Inc.** (Contractor) and **J&H Grading & Paving, LLC** (Subcontractor) to perform the Work identified in Article 2 in accordance with the Project's Contract Documents.

PROJECT: Herlong Chevrolet
OWNER: Herlong Chevrolet-Buick, Inc.
ARCHITECT: Christopher Booker &
CONTRACTOR: Clayton Construction Company, Inc.
SUBCONTRACTOR: J&H Grading & Paving, LLC
1579 Edgefield Highway
Aiken, SC 29801
Attn: Kevin Walters [redacted] phone [redacted] fax [redacted]

ARTICLE 1

CONTRACT PAYMENT. The Contractor agrees to pay Subcontractor for satisfactory performance of Subcontractor's Work the sum of **Six Hundred Eighty-Eight Thousand Seventy-Five And Xx / 100 Dollars (\$688,075.00)**. Progress 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. Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor's Work. These payments are subject to receipt of such lien waivers, affidavits, warranties, and guarantees required by the Contract Documents or Contractor.

ARTICLE 2

SCOPE OF WORK. Subcontractor agrees to commence Subcontractor's Work hereinafter described upon notification by Contractor and to perform and complete such Work in accordance with Contract Documents and under the general direction of Contractor in accord with Contractor's schedule. This shall include all work necessary or incidental to complete the:

Site work including mobilization, traffic control, demo building, clearing & grubbing, erosion control, grading, water & sewer, storm drainage, concrete (excluding 4" sidewalk and ADA ramp), 6" stone base, 2" asphalt, 8" stone base, 3" asphalt, SCDOT base & paving, and traffic lines and HC signs per your quote revised 9/4/2015.

Work for the Project as more particularly, though not exclusively specified in

Attachment A; B (list of drawings); C (schedule); D (lien waiver).

ARTICLE 3

SCHEDULE OF WORK. Time is of the essence. Subcontractor shall provide Contractor with any requested scheduling information of Subcontractor's Work. The Schedule of Work, including that of this Subcontract shall be prepared by Contractor and may be revised as the Work progresses.

Subcontractor recognizes that changes may be made in the Schedule of Work and agrees to comply with such changes without additional compensation.

Subcontractor shall coordinate its work with all other contractor~~s~~ subcontractors and suppliers on the Project so as not to delay or damage their performance, work, or the Project.



ARTICLE 4

CHANGES. Contractor, without nullifying this Agreement, may direct Subcontractor in writing to make changes to Subcontractor's Work. Adjustment, if any, in the contract price or contract time resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Contract Documents.

ARTICLE 5

FAILURE OF PERFORMANCE. Should Subcontractor fail to satisfy contractual deficiencies within three (3) working days from receipt of Contractor's written notice, then the Contractor, without prejudice to any right or remedies, shall have the right to take whatever steps it deems necessary to correct said deficiencies and charge the cost thereof to Subcontractor, who shall be liable for payment of same, including reasonable overhead, profit and attorneys fees.

ARTICLE 6

INSURANCE. Prior to the start of Subcontractor's Work, Subcontractor shall procure and maintain in force for the duration of the Work, Worker's Compensation Insurance, Employer's Liability Insurance, Comprehensive General Liability Insurance and all insurance required of Contractor under the Contract Documents. Contractor, Owner and Architect shall be named as additional insureds on each of these policies, except for Worker's Compensation.

ARTICLE 7

INDEMNIFICATION. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and Contractor from all damages, losses, or expenses, including attorneys fees, from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to tangible property, other than the Work itself. This indemnification shall extend to claims resulting from performance of this Subcontract and shall apply only to the extent that the claim or loss is caused in whole or in part by any negligent act or omission of Subcontractor or any of its agents, employees, or subcontractors. This indemnity shall be effective regardless of whether the claim or loss is caused in some part by a party to be indemnified. The obligation of Subcontractor under this Article shall not extend to claims or losses that are primarily caused by the Architect, or Architect's consultant's performance or failure to perform professional responsibilities.

ARTICLE 8

WARRANTY. Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and agrees to satisfy same without cost to Owner or Contractor for a period of one (1) year from the date of Substantial Completion of the Project or per Contract Documents, whichever is longer.

ARTICLE 9**SPECIAL PROVISIONS.**

SEE ATTACHMENT "A" SIGN AND RETURN

Business License and/or Permit(s), if required, are the responsibility of the Subcontractor

If the contract is modified in any way without authorized initials by CCC at each change the contract is not binding.

Subcontractor is required to attend all progress meetings per specifications and/or required by Clayton Construction Co., Inc.

Extra work will not be paid by Clayton Construction Company, Inc. unless approved by Change Order-Lump Sum or Hourly

Each Subcontractor is responsible for obtaining/paying for plans & specifications for preparation of shop drawings/submittals

In witness whereof, the parties have executed this Agreement under Seal, the day and year first written above.

J&H Grading & Paving, LLC

SUBCONTRACTOR (FIRM NAME)

BY (Type or print signer's name and title)

Clayton Construction Company, Inc

CONTRACTOR (FIRM NAME)

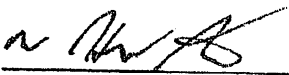
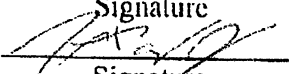
BY (Type or print signer's name and title)

Payment Agreement Contract Herlong Chevy Batesburg Site-work Contract

This is a payment agreement between Joe Ben Herlong owner of Herlong Chevy of Batesburg, Clayton Construction Company the General Contractor for the project and J&H Grading & Paving the grading company hired for the site work for the aforesaid project.

Clayton Construction the General Contractor and Joe Ben Herlong the owner of Herlong Chevy of Batesburg agree that all paperwork for the construction project has been filed and approved by all parties involved for the aforesaid construction project. Joe Ben Herlong the owner of Herlong Chevy of Batesburg and Clayton Construction the General Contractor hired for the project agree to pay J&H Grading & Paving the site work contractor within 30 days from the date on the invoice. All discrepancies with the invoice must be resolved by all parties within 10 days of the invoice date if this is not accomplished the invoice will stand and payment should be made. If payment is not made within the allotted 30 days then a finance charge will be applied if the new balance is unpaid 30 days from the invoice date.

This agreement does not pertain to retainage unless Herlong releases it

Herlong Chevy Owner	Signature	Printed	Date
Witness	Signature	Printed	Date
General Contractor		w Harry Clayton	4-27-16
Witness		Jay Taylor	4-27-16
J&H Grading Owner	Signature	Printed	Date
Witness	Signature	Printed	Date

The finance charge will be computed by a periodic rate of 1 1/2 % per month which is an annual percentage rate of 18% applied to unpaid balance.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
J & H Grading & Paving, Inc.,	)	C. A. No. 2018-CP-32-01746
	)	
Plaintiff,	)	
	)	
v.	)	MOTION TO RECONSIDER
	)	
Clayton Construction Company, Inc.,	)	
	)	
Defendant.	)	
	)	

TO: WESLEY D. PEEL, ESQ. AND CHELSEA J. CLARK, ESQ., COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, Clayton Construction Company, Inc. (“Defendant”), by and through its undersigned counsel, will move before The Honorable Walton J. McLeod, IV, Circuit Court Judge, at such time and place as is convenient to the Court and counsel, for an Order pursuant to *South Carolina Rules of Civil Procedure* Rule 59(e) altering or amending the Order entering judgment in this case, filed October 4, 2019, on the following grounds:

I. “PAY WHEN PAID” PROVISIONS DO NOT CREATE CONDITIONS PRECEDENT TO PAYMENT

The law of South Carolina is clear that “pay when paid” provisions, such as the one at issue in this case, do not create conditions precedent. *See e.g. Elk & Jacobs Drywall v. Town Contractors, Inc.*, 267 S.C. 412, 229 S.E.2d 260 (1976). In *Elk*, the 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. The South Carolina Supreme Court, in looking at this provision, 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.” Further, the rationale that “pay when paid” provisions do not create conditions precedent is even cited from numerous other jurisdictions in the Order itself. *See Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 506, 464 S.E.2d 349, 357 (1995) (holding that the default interpretation of “pay when paid” clauses is that they require payment within a reasonable time); *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1565 n.4 (10th Cir. 1995) (“Moreover, with respect to construction contracts, the general rule is that such pay-when-paid provisions do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party ... To the contrary, these provisions are viewed as only postponing payment for a reasonable time and merely establishing a convenient time for payment.”); *Paul Morrell, Inc. v. Kellogg Brown & Root, Inc.*, 682 F. Supp. 2d 606, 630-631, 2010 U.S. Dist. LEXIS 7532, 64-65 (“Under most circumstances, pay-when-paid provisions are not “suspensive conditions” but rather terms for payment that only delay a contractor’s obligations to make payment, and then only for a limited time”).

This Court’s holding, in finding that “pay when paid” provisions were unenforceable, that “it is not that pay-when-paid clauses ‘are not conditions precedent,’ it is that payment by the owner may not be used as a condition precedent” cannot be reconciled with the standing precedent from the Supreme Court that it didn’t think the “pay when paid” provision created a condition precedent. Accordingly, the Court’s finding of same is erroneous. The Court also erroneously states Defendant’s interpretation of *Elk* in stating that “[Defendant]’s interpretation of *Elk* would require a subcontractor to work on a project indefinitely without payment” when that flies in the face of the entire holding of *Elk* and Defendant’s position that the general contract, under a “pay when

paid” provision, could only withhold payment for a reasonable time so as to afford it an opportunity to obtain funds from the owner.

II. “PAY WHEN PAID” PROVISIONS ARE NOT UNENFORCEABLE UNDER THE SOUTH CAROLINA SUBCONTRACTORS’ AND SUPPLIERS’ PAYMENT PROTECTION ACT

As it is clear that the South Carolina Supreme Court has found that “pay when paid” provisions do not create conditions precedent, “pay when paid” provisions are not unenforceable under the South Carolina Subcontractors’ and Suppliers’ Payment Protection Act (the “SSPPA”).

As the Court points out, the SSPPA 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.

South Carolina Code Ann. § 29-6-230. Pursuant to the SSPPA, therefore, if an agreement between a general contractor and a subcontractor has a condition precedent for payment as one of its terms, like a “pay if paid” provision, it is not enforceable. *Id.* Conversely, it follows that if an agreement between a general contractor and a subcontractor **does not have** a condition precedent for payment as one of its terms, it is not in violation of *South Carolina Code Ann.* § 29-6-230 for violating the prohibition against having a condition precedent for payment. Pursuant to the South Carolina Supreme Court, contracts with “pay when paid” provisions, such as the one at issue, do not have a condition precedent and accordingly, are not in violation of *South Carolina Code Ann.* § 29-6-230 for violating the prohibition against having a condition precedent for payment. The Court’s finding that “pay when paid” provisions create conditions precedent for payment and are, therefore, unenforceable pursuant to the SSPPA is against stated holdings of the South Carolina

Supreme Court, erroneous on its face and is not in violation of the plain language of the statute as the Order erroneously implies.

III. DELAYING PAYMENT LONGER THAN NINETY DAYS IS NOT UNREASONABLE

A. The Supreme Court’s articulated standard is a “reasonable time so as to afford it an opportunity to obtain funds from the owner”

The Supreme Court’s holding in *Elk* mandates 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 when there is a “pay when paid” provision in the agreement between the parties. Ninety (90) days from the subcontractor’s last day of work on the project does not provide a general contractor a reasonable time to afford it a real opportunity to obtain funds from an owner even when the general contractor has pursued its rights in the most expeditious fashion and for the Court to find that payment after ninety (90) days was *per se* unreasonable is an abuse of its discretion.

B. The Court’s rationale for establishing ninety (90) days as *per se* unreasonable is flawed

The Court based its finding that delaying payment to the a subcontractor longer than ninety (90) days was *per se* unreasonable on the premise that the subcontractor, under the mechanics’ lien statute, would have to initiate proceedings and incur legal expenses to protect its rights within (90) days of its last date of work. This premise is erroneous.

Under the mechanics’ lien statute, *South Carolina Code Ann.* § 29-5-10, *et seq.*, all owners have a payment defense and “in no event can the total aggregate amount of liens on the improvement exceed the amount due by the owner”. *See South Carolina Code Ann.* § 29-5-20(B). Thus, with an owner’s payment defense, if a general contractor has already filed a mechanics’ lien which includes the amounts owed to its subcontractors, a subcontractor has no additional rights it

can protect by filing its own mechanics' lien as its claim against the project is contingent on the general contractor prevailing. Accordingly, in instances where the general contractor has already filed a mechanics' lien which includes the amounts owed to its subcontractors, the subcontractor's pursuit of filing of a mechanics' lien is wholly unnecessary and a voluntary undertaking of incurring legal expenses.

In the matter at hand, Defendant's mechanics' lien was already filed when Plaintiff filed its lien and all the rights Plaintiff could have against the project were already protected.

C. All events that transpired after March 9, 2018 are irrelevant.

South Carolina Code Ann. § 27-1-15 requires that the upstream contractor make reasonable and fair investigation of the merits of downstream contractor's 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. Importantly, *South Carolina Code Ann.* § 27-1-15 does not require any obligations after the upstream contractor makes its investigation of the downstream contractor's claim and pays it, or whatever portion of it is determined as valid.

In the matter at hand, Plaintiff mailed its demand pursuant to *South Carolina Code Ann.* § 27-1-15 on March 2, 2018 and Defendant promptly investigated and replied on March 9, 2018 stating that no amounts were due and owing under the contract between the parties at that time. Plaintiff did not make any further demands under *South Carolina Code Ann.* § 27-1-15. Accordingly, the only appropriate analyses are: 1) Are "pay when paid" provisions enforceable; and 2) if so, was it reasonable to rely on that provision on March 9, 2018 when Defendant replied. Instead, the Court's erroneously posited the red herring that the "unreasonable delay [(“two years before Plaintiff was finally paid”)] occurred despite the facts that there was no dispute that J&H satisfactorily completed their work, the Certificate of Occupancy was issued prior to J&H even

submitted the final pay application, and the amount owed J&H was undisputed. Presumably Defendant would have the Court believe that a time period exceeding two years is a reasonable amount of time to delay payment to a subcontractor” and that “[t]he Court can not reconcile this argument with the interests of justice”. The Court additionally erroneously notes that it was not the Defendant who paid Plaintiff for its work when the settlement agreement specifically states that the payment, though direct from the owner, is a payment to Plaintiff under its subcontract with Defendant.

IV. FOLLOWING THE PREVAILING CASE LAW IS FAIR AND REASONABLE ON ITS FACE

As the Court notes, 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 instant case, Defendant precisely followed the holding of *Elk*, the prevailing case law in the State of South Carolina, in its reply to Plaintiff’s demand and, as such, Defendant’s investigation is fair and reasonable on its face.

CONCLUSION

Based on the foregoing grounds, the Defendant respectfully requests that the Court Alter or Amend the Order file October 4, 2019 and find that, based on the “pay when paid” provision in the contract between Plaintiff and Defendant, nothing was owed to Plaintiff on March 9, 2018 and that the Defendant’s investigation into Plaintiff’s claim was fair and reasonable.

Respectfully submitted this 8th of October, 2019.

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

TOWNES B. JOHNSON III, LLC

PO BOX 9246

GREENVILLE, SC 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Defendant

Greenville, South Carolina

State of South Carolina
County of Lexington

Court of Common Pleas

J&H Grading & Paving, LLC)	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2018-CP-32-01746
	)	
Clayton Construction,	)	
et al	)	
	)	
Defendants.)	)	

August 14, 2019
Lexington, South Carolina

B E F O R E:

The Honorable Walton J. McLeod, IV, Judge; and
a jury.

A P P E A R A N C E S:

Wesley Peel, Esquire
Attorney for the Plaintiff

Townes B. Johnson, III, Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

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P R O C E E D I N G S

* * *

THE COURT: All right. This is on the case of J&H Grading & Paving vs. Clayton Construction Company, 2018-CP-32-1746, for a non-jury matter. Both parties appeared at a -- dueling motions for summary judgment before Judge Stilwell back in May, if I'm not mistaken. Both motions were denied at that time.

I spoke with counsel before we went on the record this morning. And it appears that the main issue for determination here is whether the defendant's delay was reasonable, under the circumstances, in making payment, and whether -- and when -- what time payment was owed under the current status of South Carolina law.

Is that an accurate reflection of our discussion?

MR. PEEL: That's correct, Your Honor.

MR. JOHNSON: Yes, sir, Your Honor.

THE COURT: Mr. Peel, I understand that you've got your witness ready to go.

MR. PEEL: Yes, Your Honor. As a matter of housekeeping --

THE COURT: Sure.

1 MR. PEEL: -- to the extent that it's needed,
2 I'd move to conform the pleadings to the facts to
3 assert a 27-1-15 claim against the defendant.
4 Counsel has -- I've got a breach of contract claim.
5 I don't think I need it. But --

6 THE COURT: 27-1-15, the attorney's fees?

7 MR. PEEL: The attorney's fees on statute.

8 THE COURT: If you're successful?

9 MR. PEEL: Yes. That's right.

10 MR. JOHNSON: And no objection. It just wasn't
11 pled. We're just clearing the record.

12 THE COURT: Very well. All right. So noted.

13 MR. PEEL: Yes, Your Honor. I'd call Joshua
14 Baggett to the stand.

15 THE COURT: All right.

16 JOSHUA BAGGETT

17 being first duly sworn, testified as follows:

18 THE WITNESS: Yeah.

19 MR. PEEL: Your Honor, Mr. Johnson and I have
20 agreed to the exhibits --

21 THE COURT: Okay.

22 MR. PEEL: -- that are in. And they've been
23 premarked in this notebook. We can hand them up to
24 the Court.

25 THE COURT: All right. And you left this one

1 in my chambers.

2 MR. PEEL: Okay. Well, this one is marked, so
3 I'll trade with you.

4 THE COURT: Okay.

5 MR. PEEL: And I'll let the witness use this
6 one.

7 THE COURT: Madam Court Reporter, you good on
8 all the exhibits?

9 THE COURT REPORTER: Yes.

10 THE COURT: All right.

11 MR. PEEL: So we've agreed to the ones that --
12 I think there are two statutes and two cases that
13 we've included so Your Honor doesn't have to go pull
14 them. The rest of them are exhibits, and we've
15 agreed to their admissibility ahead of time.

16 THE COURT: All right. Thank you.

17 MR. PEEL: May it please the Court?

18 THE COURT: Yes, sir.

19

20

21 DIRECT EXAMINATION

22 BY MR. PEEL:

23 Q. Mr. Baggett, what is your name for the record,
24 please?

25 A. Joshua Baggett.

1 Q. And what is your company?

2 A. J&H Grading & Paving.

3 Q. And what is your position there?

4 A. President and owner.

5 Q. And you work -- who is this gentleman over here
6 with the beard sitting behind me?

7 A. My father Tommy Baggett.

8 Q. Does he work with the company?

9 A. Yes.

10 Q. We have a notebook there with some exhibits in
11 there that we've agreed to. I'm going to try to
12 just briefly have you go through them, have you
13 identify them. I only got a few questions for you.

14 So if you open it up to tab 1 --

15 And, if counsel doesn't object, I'm going to
16 try to lead him through these real quickly.

17 MR. JOHNSON: No objection. Please.

18 BY MR. PEEL:

19 Q. Is this a contract between you and Clayton
20 Construction?

21 A. Yes.

22 Q. Between your company?

23 A. Yes, sir.

24 Q. And what was this work for? What were you to
25 do?

1 A. Do the side work on a project of utilities and
2 grading and pavement work.

3 Q. Okay. And who was the owner on that?

4 A. Joe Ben Herlong.

5 Q. What were y'all building out there?

6 A. A car lot.

7 Q. Okay. A car dealership?

8 A. Yeah, a dealership.

9 Q. Okay. So did you do that work?

10 A. Yes, sir.

11 Q. Did you complete that work?

12 A. Yes, sir.

13 Q. And did Mr. Herlong get to move into his
14 building out there?

15 A. Yes.

16 Q. Were you ever asked to do any corrective work
17 out there?

18 A. No -- well, we finalized stuff and everything
19 was completed.

20 Q. Okay. Did you put in a final payment request?

21 A. Yes, sir.

22 Q. Were you asked to do any more work to get any
23 more money?

24 A. No, sir.

25 Q. And you were owed -- what was it? Your

1 retainage.

2 A. Yes, sir.

3 Q. And that was about \$70,000 -- \$66,000?

4 A. Yes, sir.

5 Q. Okay. And did they pay you that right away?

6 A. No, sir.

7 Q. Clayton didn't pay you that?

8 A. No, sir.

9 Q. Okay. Did they tell you why?

10 A. They were waiting on their money from your men.

11 Q. Okay. If you'd flip to tab 4, is that an
12 e-mail from -- that's one of them you got to read
13 backwards, I think. The oldest one is in the back.

14 Who is Heather Wilson?

15 A. She's my sister and also my secretary.

16 Q. And she sent an e-mail here on the second page
17 of tab 4 to Brandon Cline. Who is Brandon?

18 A. He was an employee of Clayton.

19 Q. Okay. And she's asking why the balance has not
20 been paid, right?

21 A. Yes.

22 Q. And what does he say on the first page?

23 A. We have not been paid retainage by Mr. Herlong
24 and, therefore, we cannot issue your remaining
25 retainage until it's paid.

1 Q. And, page 5 -- tab 5, is that a similar e-mail
2 that y'all sent to Clayton asking where your money
3 was?

4 A. Yes, sir.

5 Q. Dated January 19, 2018?

6 A. Yes, sir.

7 Q. And they tell you the same thing?

8 A. Yes, sir.

9 Q. Joe Ben -- Joe Ben is Joe Ben Herlong, the
10 owner of the car dealership?

11 A. Yes, sir.

12 Q. Okay. And then if you flip to tab 6, is that a
13 letter dated January 25th, 2018?

14 A. Yes.

15 Q. And that's from you and your dad Tommy
16 Baggette?

17 A. Yes.

18 Q. And you're asking to be paid your final money,
19 is that right, January 2018?

20 A. Yes, sir.

21 Q. Okay. Flip to tab 7. Is that a letter I sent
22 on your behalf to Clayton Construction and
23 Mr. Herlong?

24 A. Yes, sir.

25 Q. Asking that you be paid?

1 A. Yes, sir.

2 Q. Okay. Tab 8, is that their attorney's
3 response? Do you see that?

4 A. Yes, sir.

5 Q. Okay. So in March 2018, you still were not
6 paid --

7 A. No, sir.

8 Q. -- the balance due, nor had you been asked to
9 do any more work; is that correct?

10 A. Yes, sir.

11 Q. Now, if you would, flip over to tab 11. Is
12 this the lawsuit we filed on your behalf in May of
13 2018?

14 A. Yes, sir.

15 Q. And then I'm going to hand this to you. So,
16 ultimately, you got paid this past year, right?

17 A. Yes, sir.

18 Q. By who?

19 A. By Joe B.

20 Q. By Mr. Herlong, correct?

21 A. Yeah; Mr. Herlong.

22 Q. Is this -- that's a copy of the settlement
23 agreement, which would be tab -- exhibit 13. And
24 that was in February of 2019; is that right?

25 A. Yes, sir.

1 Q. So tab 2 was the certificate of occupancy.
2 Would you flip to that, please. What's the date on
3 that, that it was signed by the building official,
4 at the bottom?

5 A. 3/20/17.

6 Q. What does the certificate of occupancy let the
7 owner do?

8 A. To be able to move in the building.

9 Q. Move in and use the building for the purposes
10 intended; is that right?

11 A. Yes, sir.

12 Q. Okay. So he was moved in by the end of March,
13 first of April of 2017; do you recall that?

14 A. Yes, sir.

15 Q. Okay. So they're using the building in 2017.
16 And you got paid --

17 A. It was --

18 Q. -- February of 2019; is that right?

19 A. Yes, sir.

20 Q. Okay. So two years later.

21 And during that time, you weren't asked to come
22 back and do any more work?

23 A. No, sir.

24 MR. PEEL: That's all I have, Your Honor.

25 THE COURT: All right. Any cross-examination?

1 MR. JOHNSON: Briefly, Your Honor. And no
2 objections to the exhibits, obviously, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. JOHNSON:

5 Q. Mr. Baggett, is it your understanding that
6 Clayton Construction was pursuing the monies due
7 your firm from Mr. Herlong?

8 A. I can't quite hear you.

9 Q. Sorry. Is it your understanding that Clayton
10 Construction was and is pursuing the monies that
11 were due you from Mr. Herlong?

12 A. As far as -- yes, sir, as far as I know.

13 Q. Yes. And they were trying to get your money
14 for you from the owner?

15 A. Yes, sir.

16 Q. Okay.

17 MR. JOHNSON: And I'd ask the Court to take
18 judicial notice of Civil Action 2017-CP-32-03062
19 which was filed on August 21st, 2017. That is
20 Clayton Construction's action -- mechanic's lien
21 action against the owner of the property who is
22 withholding funds. And that's still pending, Your
23 Honor.

24 THE COURT: What is that case again? You said
25 that number real fast.

1 MR. JOHNSON: Sorry. 2017-CP-32-03062. And it
2 was filed August 21st of 2017.

3 THE COURT: And that's a lawsuit that was filed
4 by your client against Herlong, the owner of the
5 project in this case?

6 MR. JOHNSON: Correct. And that claim
7 encompassed all monies that were owed at that time
8 to J&H.

9 THE COURT: Okay. I haven't seen the case --

10 MR. PEEL: I don't have any objection. It's
11 just still pending, correct?

12 MR. JOHNSON: It is. It is. I just ask the
13 Court to take judicial notice that it's out there,
14 that we're pursuing the claims.

15 THE COURT: To the extent I can take judicial
16 notice of a case I have not seen but you're telling
17 me exists and counsel knows exists as well, so be
18 it.

19 MR. JOHNSON: Thank you. That's all I have,
20 Your Honor.

21 THE COURT: Thank you.

22 Any redirect?

23 MR. PEEL: No, Your Honor.

24 THE COURT: You may step down, sir.

25 MR. PEEL: And I don't think we need Mr. Tommy.

1 THE COURT: Okay. Just so I'm clear -- we can
2 just kind of have a discussion here -- exhibit 13,
3 the settlement agreement between the parties in this
4 case, that was for the principal amount of 75 grand,
5 right?

6 MR. PEEL: That's basically correct.

7 MR. JOHNSON: Yes, Your Honor.

8 THE COURT: Okay. I haven't read it verbatim.
9 But I assume it allows you to still pursue --

10 MR. PEEL: We reserved all our claims against
11 Clayton for attorney's fees.

12 THE COURT: Okay. All right. Why don't you
13 make a brief closing for me?

14 MR. PEEL: Your Honor --

15 THE COURT: I'm sorry.

16 Do you have a case to -- I didn't mean to get
17 ahead of you. I thought you didn't have any --

18 MR. JOHNSON: I mean, since there's not a jury,
19 I don't see any reason to do directed verdicts or
20 anything like that, unless the Court wants it.

21 THE COURT: Well, no. I don't think we need to
22 do it verbatim. But are you resting?

23 MR. PEEL: Yes.

24 THE COURT: Okay. The plaintiff has rested.

25 Do you have a case to put up?

1 MR. JOHNSON: No, Your Honor.

2 THE COURT: Okay. All right. So we can
3 proceed in summation.

4 MR. PEEL: Thank you, Your Honor.

5 THE COURT: So, really, let's just get -- why
6 didn't y'all comply here?

7 MR. PEEL: Well --

8 THE COURT: Which I haven't read verbatim
9 either. And I know that's the --

10 MR. PEEL: I have to say, yeah, that Townes,
11 being a smart lawyer, he showed up at a hearing with
12 it. So, last time, at the hearing with Judge
13 Stilwell, I was ready to discuss it. But it doesn't
14 really apply because it was -- that's a '76 case.
15 And the Legislature is clearly expressing its intent
16 with the Subcontractors' Payment Protection Act.

17 But I think we can reasonably use the language
18 from that case to discuss what the Legislature means
19 about pay when paid.

20 THE COURT: And I think you refer to the point
21 in the pretrial brief where you essentially noted
22 that Elk sort of laid the groundwork for the
23 protection act.

24 MR. PEEL: That's right. Because it said --
25 yeah. It says pay when paid or pay if paid. But it

1 doesn't mean that. It means you have a reasonable
2 amount of time, General Contractor, to get your
3 money from the owner to pay the subcontractor; they
4 just can't haul off and sue you because they turned
5 in the bill and they want the money tomorrow.

6 And so I think it's generally understood that a
7 reasonable amount of time is probably controlled by
8 the claimant's rights. And what I mean by that is,
9 they got 90 days, once it's due and owing, once
10 they've completed the work and left the job site, to
11 file a lien and assert their rights under the
12 mechanic's lien statute and any other number of
13 other statutes.

14 So I would say any reasonable amount of time
15 that the general contractor has to pay their sub is
16 probably 60 days or less.

17 THE COURT: Which is provided for in
18 statutory --

19 MR. PEEL: Yeah. Because it's 90 days -- you
20 got to perfect and -- you got to file and serve a
21 mechanic's lien within 90 days from the last date of
22 work. And so it really can't drag on any longer
23 than that. And, really, it's got to be a time
24 shorter than that 90 days or you've given up your
25 rights.

1 Because what -- the general contractor in this
2 case is saying, hey, man, it's not even due; under
3 your contract, we've got to pay -- they want to call
4 it a pay-when-paid clause -- we've got a
5 pay-when-paid clause in there and, until the owner
6 pays us, you have no rights. That's the argument.

7 So let's take it a step further. Well, because
8 they want to say that -- their argument is, the
9 payment protection act really outlaws pay-if-paid
10 clauses. In other words, we will pay you if the
11 owner pays us. Well, all pay-when-paid clauses are,
12 eventually, if you take them out, are going to be
13 that, because here we are today and their case is
14 still pending four years down the road from the
15 beginning of the job, over three from when we
16 finished our work, are we supposed to sit around
17 that long? I mean, this is a one-man operation;
18 \$66,000 hanging out there because they're in a
19 dispute with the owner.

20 By the way, that lawsuit has nothing to do with
21 our work. That lawsuit relates to the vertical
22 construction, roof issues, things like that. That's
23 what they're fighting about. They're not fighting
24 about anything that we did.

25 But the Payment Protection Act is meant to say,

1 General Contractors, you're in a better position;
2 you're generally bigger outfits; you've got the
3 money; you're hiring people to do work for you for
4 the benefit of the owner --

5 THE COURT: Well, if, for example, your client
6 had gotten the job and then said, you know, I'm
7 going to sub it out to somebody else, wouldn't they
8 have been on the hook to pay that sub as well?

9 MR. JOHNSON: They would. The act applies to
10 them and applies to sub subs also. So if they --
11 anybody they owe, they've got to pay within a
12 reasonable amount of time or be sued.

13 And I think the act specifically talks about
14 subcontractors owing other subcontractors. It's not
15 an excuse for anybody that you have not been paid.
16 And that's -- there's nowhere else in the world,
17 there's no other line of work where you hire
18 somebody to do something for you and you say I'd
19 like to pay you, but, you know, I hadn't got my
20 money yet.

21 THE COURT: I did notice the statute really
22 doesn't have any -- no recorded cases dealing with
23 the act, because it's new.

24 MR. PEEL: There's not because, quite frankly,
25 it's fairly new. And, on top of that, it's pretty

1 clearcut. You can't -- being paid by the owner is
2 not a condition precedent to be -- for the
3 subcontractor to get paid. And that's what they've
4 made that.

5 Reasonableness is always going to apply. How
6 long can they string us out? I'd say two years is
7 not it. And I'd say the max is 90 days. And it's
8 probably less than that, because the Elk case talks
9 about -- really, it talks about, look, basically,
10 you just need time -- you need to give the general
11 contractor time, under normal circumstances, to get
12 paid from the owner.

13 And normal, I'd submit, is net 30, because
14 that's general -- most everybody is net 30 out
15 there. That's the normal amount of time to get
16 paid. These are extraordinary circumstances. The
17 general contractor has gotten themselves into a fuss
18 with the owner over the quality of their
19 construction, legitimate or not.

20 But they're arguing about the quality of the
21 vertical construction of the building out there.
22 It's nothing to do with our case. And so that is
23 not a normal circumstance.

24 THE COURT: Remind me again what work your
25 client did.

1 MR. PEEL: They did the clearing and grading
2 of, basically, the driveways and the curb and
3 gutter, asphalt.

4 THE COURT: Okay.

5 MR. PEEL: Nothing to do with the buildings.
6 And that's what that lawsuit is over. It's really
7 buildings.

8 THE COURT: All right. I'll come back to you.
9 But anything additionally you want to tell me?

10 MR. PEEL: No, sir. That's it. Thank you.

11 THE COURT: All right. I mean, the question
12 is, does Elk -- the language -- well, I'll let you
13 argue.

14 MR. JOHNSON: Sure, Your Honor. May it please
15 the Court?

16 THE COURT: Yes, sir.

17 MR. JOHNSON: Townes Johnson on behalf of the
18 defendant. I feel like this argument is missing the
19 forest for the trees --

20 THE COURT: Okay.

21 MR. JOHNSON: -- as to what we're talking
22 about. We're talking about a claim under 27-1-15
23 which requires the defendant, Clayton Construction,
24 to make an investigation into the claim and pay any
25 undisputed amount within 45 days. This has nothing

1 to do with the things that happened after that
2 window or after we responded, Your Honor.

3 The whole inquiry before the Court today is
4 whether it was reasonable; when Clayton responded to
5 that letter on March 9th, if the money was due then.
6 And, Your Honor, if a pay-when-paid clause is
7 enforceable, then it's, by definition, reasonable
8 that we were able to look back at Elk, look at the
9 standing case law and say, you know what, this
10 doesn't create a condition precedent; it's not
11 unenforceable by the protection act; there's nothing
12 due at this time. So the whole inquiry --

13 THE COURT: So if you got somebody disagreeing
14 about what the statute says could be reasonable?

15 MR. JOHNSON: That's right.

16 THE COURT: All right.

17 MR. JOHNSON: That's exactly right.

18 And that's our whole position; that our
19 inquiry, within that week that we got letter and we
20 responded, was wholly reasonable because we were
21 looking at the standing case law in South Carolina
22 that says: A pay-when-paid clause is not a
23 condition precedent. And that's the only thing
24 that's outlawed by the statute, Your Honor.

25 It has nothing to do with when they were paid

1 their principal balance in February of this year.
2 That argument is a red herring to what we're before
3 you today on, on the 27-1-15 cause of action.
4 There's nothing that transpired after that 45-day
5 window that could affect our reasonable
6 investigation during that window.

7 And, Your Honor, it may have been different if
8 they had sent a separate 27-1-15. If they had sent
9 one, you know, let's say, in December of '18 and
10 they didn't get the money until February, maybe that
11 falls under Elk that that's an unreasonable delay.
12 But that's not what we're talking about, Your Honor.

13 This is -- purely relates to Clayton's
14 investigation under 27-1-15 and whether that was
15 reasonable. And that was back in March of '18.
16 The --

17 THE COURT: Well, assuming it's a reasonable
18 investigation, that just means you can delay payment
19 indefinitely?

20 MR. JOHNSON: No, Your Honor. And that's what
21 Elk is about. And, Your Honor, I -- if J&H had not
22 been paid today and this case was about the
23 principal balance, then I fully expect that the
24 Court -- because I represent a bunch of subs and
25 suppliers as well.

1 And this -- the Elk case says you can't string
2 someone out indefinitely under a pay-when-paid. And
3 if we came into the case today and the 75 had not
4 been paid and they were owed everything, then I
5 think it's fully reasonable for the Court to award
6 them that under the pay-when-paid, saying it's an
7 unreasonable amount of time. I don't dispute that,
8 Your Honor.

9 But that's not before the Court today. It's
10 purely whether our investigation, back in -- 45 days
11 after March 2nd, 2018, whether that was a
12 reasonable -- to reply back based on the contractual
13 provisions between the parties and reply back on the
14 standing case law from the South Carolina Supreme
15 Court, that nothing was due at that time. And
16 that's exactly what we did, Your Honor.

17 THE COURT: So do you think that your
18 agreement, your contract, was contrary to 29-6-230?

19 MR. JOHNSON: No, Your Honor, I don't.

20 THE COURT: Because, if we agree, that any
21 agreement to the contrary of 29-6-230 would be
22 unenforceable.

23 MR. JOHNSON: That's correct.

24 THE COURT: Okay. Not contrary, because why?

25 MR. JOHNSON: Okay. So in Elk -- in Elk, the

1 provision in question is retainage will be paid --
2 and I'm reading on first page of Elk. It's, I
3 believe, in the last couple pages of your booklet,
4 Your Honor. But on the right-hand side of Elk,
5 under B, retainage, it lists the provision in
6 question.

7 It says: Retainage will be paid 60 days after
8 the later of the following events. And item 4 is:
9 Full and final payment to the contractor, all funds
10 due for this project. Your Honor, that's a similar
11 provision in the current contract in question, which
12 is payment seven days from receipt of owner.

13 The Court goes on to say that -- and this is on
14 page 3, the last paragraph from the bottom of the
15 left-hand page. It says: We hold, therefore, that
16 the lower court erred in directing a verdict on the
17 motion of Town's solely on the basis that it had not
18 received full payment from the owner and,
19 consequently, was not yet liable on the contract of
20 Drywall.

21 We do not think subparagraph 4 -- that's
22 talking about waiting for full payment from the
23 owner -- created a condition precedent, but, rather,
24 only postponed payment by Town for a reasonable time
25 so as to afford Town the opportunity to obtain funds

1 from the owner.

2 So, Your Honor, they're taking --

3 THE COURT: What was the time delay in Elk?

4 MR. JOHNSON: The time delay in Elk is 16
5 months. But, again, Your Honor, that relates to the
6 principal balance. That's not related to the 45-day
7 window of when we were making an investigation.

8 But, Your Honor, Elk says that a
9 pay-when-paid -- and that pay-when-paid is, you
10 know, I'll pay you once I get paid; a pay-if-paid is
11 I'll pay you only if I get paid, which is wholly
12 unproportional. We're in a different category.
13 This is a pay-when-paid. And, per Elk, the only
14 case law on point about this says that that does not
15 create a condition precedent.

16 And then the Subcontractors' Protection Act
17 says: If it does create a condition precedent, it's
18 unenforceable. South Carolina law has determined
19 that this doesn't. And this is -- this is -- it's
20 reasonable to rely on this to say that nothing is
21 due in that 45-day window. And that's exactly what
22 we did.

23 THE COURT: Okay. What's the date of the
24 settlement agreement in this case?

25 MR. JOHNSON: It's February 19, Your Honor. I

1 don't know the --

2 MR. PEEL: February 19th, 2019.

3 THE COURT: February 19th?

4 MR. PEEL: Yes, sir.

5 THE COURT: All right. So the balance was paid

6 23 months after the certificate of occupancy?

7 MR. PEEL: Correct.

8 THE COURT: Or the principal. Excuse me.

9 MR. PEEL: By the owner directly.

10 THE COURT: By Herlong?

11 MR. PEEL: By Herlong.

12 THE COURT: Directly to J&H?

13 MR. PEEL: That's correct; under a mechanic's

14 lien claim.

15 MR. JOHNSON: And, Your Honor, I mean, if you

16 look at paragraph 1 of the settlement agreement,

17 it's payment under its contract with Clayton,

18 directly to J&H.

19 THE COURT: I'm just trying to get a timeline.

20 MR. JOHNSON: Sure.

21 THE COURT: Anything else?

22 MR. PEEL: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. PEEL: I did forget a couple things --

25 THE COURT: Well, I was going to come back to

1 you.

2 MR. PEEL: Oh, I'm sorry.

3 THE COURT: Mr. Johnson?

4 If something comes up, we'll -- I just want to
5 make sure he gets the last word. Go ahead.

6 MR. PEEL: Your Honor, with the timeline
7 reminder, I wanted to kind of go through that as to
8 what's important because, and I'd point out, we
9 didn't discuss this, but tab 12 is Clayton's
10 discovery responses to us -- to J&H. And, in the
11 complaint, our accounting was a little different in
12 the beginning and we had demanded a larger number
13 of -- it was basically \$92,000 -- about \$91,000.
14 And it ended up being that it was really -- the
15 actual number was around 70.

16 And Clayton answered our discovery -- asked
17 them what -- they said it's not due and owing, why
18 is -- and what's wrong with it? They said -- this
19 is Interrogatory Answer No. 9: Identify the invoice
20 Defendants assert are not due and owing for each
21 item or invoice identified and specifically state
22 the reasons for disputing payment. They object.

23 And then they say: Clayton would state no
24 contract balance is due at this time on any open
25 invoice, and Clayton would further state that

1 \$17,954.89 of Plaintiff's invoice is inaccurate.

2 So -- and then they go on in another one to
3 say: We'll do a back charge of that amount of
4 money. So that's the only amount, during this
5 lawsuit, that they were disputing that we were owed.
6 And so let's go back to this idea of reasonableness
7 under the statute.

8 And I think the statute, to the extent that Elk
9 talks about any timing, anything else like that, I
10 think Elk has been subsumed by the statute. But
11 what the case ultimately did was say, in the end,
12 it's a question of reasonableness, question of fact.
13 That's the last sentence of the case. It's a
14 question of fact for the jury.

15 So -- but now, I think, we've got a statute.
16 The General Assembly has answered that question. We
17 keep using this word condition precedent. Well,
18 I've got two e-mails from the general contractor
19 saying we have not been paid, therefore, we don't
20 have to pay you. I've got a letter from their
21 attorney saying we have not been paid, we don't have
22 to pay you.

23 I don't know how else you can read the words
24 "condition precedent" in the statute than how
25 they're using it. We don't have to pay you yet

1 because our contract says we don't have to. That's
2 a condition precedent, however you want to slice it.
3 I don't care what Elk says; I care what the General
4 Assembly says in this case.

5 But I think you do still have the question of
6 reasonableness because they don't have to pay you
7 right away; they don't have to pay you in seven
8 days; they don't have to pay you in, maybe, 30. So
9 what's reasonable? Well, the reason I've got all
10 these attorney's fees, the reason my client has to
11 pay all this money, is because of this mechanic's
12 lien statute.

13 Either we bring that mechanic's lien and file
14 it within 90 days and sue within six months or we
15 forever lose our rights against the owner and we
16 forever lose our rights to the property and the
17 value we've put in property.

18 Well, they won't pay us. We have no choice.
19 It's forced us into it. We had to run up these
20 attorneys' fees, we had to spend all this money
21 because they say, well, it would be more convenient
22 for us if we got paid by the owner first before we
23 get what is lawfully due to you and what we
24 recognize you were owed, but we have not been paid
25 yet. So that's the idea of reasonableness.

1 And I think, under that statute and what the
2 General Assembly's intent were, it's got to be
3 controlled, at least by the mechanic's lien statute,
4 because, otherwise, we're spending a bunch of money
5 that we shouldn't have to spend when it's an
6 undisputed amount and there's -- if this was a case
7 where there was something wrong with our work and
8 there were some issues going around and they had a
9 legitimate objection, well, of course a reasonable
10 amount of time is going to be something completely
11 different; a reasonable and fair investigation is
12 going to be something completely different under
13 27-1-15.

14 But, in this case, it's unreasonable for them
15 to admit that, hey, we owe you this balance, but
16 we're going to sue the owner. And we still wouldn't
17 be paid to this day if the owner hadn't finally just
18 coughed it up because we sued them. Because we sued
19 them, we had to do all that work. And we'd have to
20 sue them within three years of turning in our last
21 invoice. We'd have to sue Clayton; we'd have to sue
22 the owner for not giving it to us.

23 So, you know, statute of limitations is another
24 matter, but I'd say, ultimately, in construction
25 cases, you've got to look at the mechanic's lien

1 statute for this idea of what is reasonable. And
2 I'd say 60 at the most on the amount that's due
3 because, you know, you got to go research the
4 property; you got to get title; you got to get the
5 owner served. So you've got an amount of time that
6 it takes just to perfect your lien.

7 So, in looking at reasonableness, I think
8 that's what we've got to look at. And the
9 investigation in the claim, you know, that they
10 investigated, they knew we owed it -- they knew they
11 owed us. And they sat behind their contract and
12 said we don't have to pay you or we don't have to
13 pay anybody on retainage.

14 THE COURT: Okay.

15 MR. JOHNSON: And, Your Honor, that's exactly
16 why parties put provisions in contracts and parties
17 have a right to rely on provisions and contracts.
18 And the provision in this is that payment wasn't due
19 until seven days after it's received from the owner.
20 Pay when paid.

21 The South Carolina Supreme Court has ruled that
22 that's not a condition precedent. That's the only
23 thing that the Contractor's Payment Act prohibits.
24 So it's saying that this is fully acceptable under
25 Elk; that provision is fully acceptable and it's

1 not a condition precedent. And so when we get a
2 demand letter in March of '18, our obligation is to
3 investigate the claim and respond.

4 Your Honor, we investigated it; we looked at
5 the contractual provision. I knew the case law and
6 I advised them that it's not due and owing at this
7 time; we have a pay-when-paid provision. Based on
8 Elk, you can rely on South Carolina law. It's not
9 contradictory to the payment act.

10 Your Honor, that is as reasonable of an
11 investigation as possible in the confines of
12 27-1-15. And that's the only cause of action here
13 before the Court. The reasonableness -- again, the
14 reasonableness of the principal balance, if they
15 were suing for the full 75 today, I would fully
16 expect for the Court to award them a judgment of
17 that amount.

18 But that claim is not before the Court. This
19 is purely on 27-1-15. And the reasonableness in
20 question -- the only reasonableness in question is
21 the reasonableness of our investigation in March of
22 2018. And, Your Honor, we had a right to rely on
23 the standing law of this state.

24 THE COURT: Okay.

25 MR. PEEL: Well --

1 THE COURT: Yeah. Very briefly. We got to cut
2 it off at some point.

3 MR. PEEL: One quick sentence: If this --
4 let's follow this logic to the end. Let's say we
5 started this job and we turned in our first pay
6 request, second pay request, third pay request, and
7 we didn't get paid; and the reason we didn't get
8 paid was because Clayton was want paying them.
9 Their argument, basically, is, you've got a duty to
10 continue and finish the contract; we don't have to
11 pay you because we've not been paid by owner; we can
12 wait 24 months, 48 months, whatever, while we sue
13 the owner and try to get you paid to finish the job
14 for us. That's where this logic is.

15 THE COURT: All right. Well, your proposed
16 orders -- you know, your summary judgment and your
17 pretrial briefs lay out the stuff and lay out the
18 points already. Obviously, I'm sure you'll
19 incorporate that type of language in your proposed
20 order. But, also focus greatly on the
21 reasonableness aspect; why it is or is not
22 reasonable for the finder of fact to determine.

23 That goes along with the investigation that you
24 talked about, Mr. Johnson, and addressed, and in
25 your arguments, under the law as you argue it, when

1 payment was due. All right? Does that make sense?

2 MR. PEEL: Yes, sir.

3 MR. JOHNSON: Your Honor, I'd say that when
4 payment -- it's not in a -- it doesn't factor in the
5 27-1-15.

6 THE COURT: Well, I'm just -- in part, I'm
7 bringing that up because it was noted in the
8 previous order denying summary judgment. So --

9 MR. JOHNSON: Thank you, Judge.

10 THE COURT: It was addressed previously by the
11 corporate theme to be answered. So even if it's not
12 argued, it needs to be addressed as part of the
13 history.

14 The sooner the better, but please get them to
15 me within ten days. I'd encourage both sides to try
16 again to see if you can resolve it, because you
17 still have a chance to do it on your own terms. It
18 may not be the terms you want, but at least they'd
19 be yours. That time is going to come and go very
20 soon. Anything else for the record?

21 MR. PEEL: No, Your Honor.

22 THE COURT: All right. Thank y'all very much.

23 -- END OF TRANSCRIPT OF RECORD --

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Lexington County, South Carolina, on the 14th of August, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 14, 2020

s/ *Bethanie K. Creppon*

Bethanie K. Creppon
Circuit Court Reporter



JOB NO.: 15-074

DATE September 24, 2015

ACCOUNT CODE:

SUBCONTRACT (SHORT FORM)

This agreement is made this **24th** day of **September 2015**, and effective the **Twentyfourth** day of **September 2015**, by and between **Clayton Construction Company, Inc.** (Contractor) and **J&H Grading & Paving, LLC** (Subcontractor) to perform the Work identified in Article 2 in accordance with the Project's Contract Documents.

PROJECT: Herlong Chevrolet
OWNER: Herlong Chevrolet-Buick, Inc.
ARCHITECT: Christopher Booker &
CONTRACTOR: Clayton Construction Company, Inc.
SUBCONTRACTOR: J&H Grading & Paving, LLC
1579 Edgefield Highway
Aiken, SC 29801
Attn: Kevin Walters 803-641-1412/phone 803-649-6591/fax

ARTICLE 1

CONTRACT PAYMENT. The Contractor agrees to pay Subcontractor for satisfactory performance of Subcontractor's Work the sum of **Six Hundred Eighty-Eight Thousand Seventy-Five And Xx / 100 Dollars (\$688,075.00)**. Progress 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. Final payment of the balance due shall be made to Subcontractor no later than seven (7) days after receipt by Contractor of final payment from Owner Subcontractor's Work. These payments are subject to receipt of such lien waivers, affidavits, warranties, and guarantees required by the Contract Documents or Contractor.

ARTICLE 2

SCOPE OF WORK. Subcontractor agrees to commence Subcontractor's Work hereinafter described upon notification by Contractor and to perform and complete such Work in accordance with Contract Documents and under the general direction of Contractor in accord with Contractor's schedule. This shall include all work necessary or incidental to complete the:

Site work including mobilization, traffic control, demo building, clearing & grubbing, erosion control, grading, water & sewer, storm drainage, concrete (excluding 4" sidewalk and ADA ramp), 6" stone base, 2" asphalt, 8" stone base, 3" asphalt, SCDOT base & paving, and traffic lines and HC signs per your quote revised 9/4/2015.

Work for the Project as more particularly, though not exclusively specified in

Attachment A; B (list of drawings); C (schedule); D (lien waiver).

ARTICLE 3

SCHEDULE OF WORK. Time is of the essence. Subcontractor shall provide Contractor with any requested scheduling information of Subcontractor's Work. The Schedule of Work, including that of this Subcontract shall be prepared by Contractor and may be revised as the Work progresses.

Subcontractor recognizes that changes may be made in the Schedule of Work and agrees to comply with such changes without additional compensation.

Subcontractor shall coordinate its work with all other contractors, subcontractors and suppliers on the Project so as not to delay or damage their performance, work, or the Project.

ARTICLE 4

CHANGES. Contractor, without nullifying this Agreement, may direct Subcontractor in writing to make changes to Subcontractor's Work. Adjustment, if any, in the contract price or contract time resulting from such changes shall be set forth in a Contract Change Order pursuant to the Contract Documents.

ARTICLE 5

FAILURE OF PERFORMANCE. Should Subcontractor fail to satisfy contractual deficiencies within three (3) working days from receipt of Contractor's written notice, then the Contractor, without prejudice to any right or remedies, shall have the right to take whatever steps it deems necessary to correct said deficiencies and charge the cost thereof to Subcontractor, who shall be liable for payment of same, including reasonable overhead, profit and attorneys fees.

ARTICLE 6

INSURANCE. Prior to the start of Subcontractor's Work, Subcontractor shall procure and maintain in force for the duration of the Work, Worker's Compensation Insurance, Employer's Liability Insurance, Comprehensive General Liability Insurance and all insurance required of Contractor under the Contract Documents. Contractor, Owner and Architect shall be named as additional insureds on each of these policies, except for Worker's Compensation.

ARTICLE 7

INDEMNIFICATION. To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Architect, Architect's consultants, and Contractor from all damages, losses, or expenses, including attorneys fees, from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to tangible property, other than the Work itself. This indemnification shall extend to claims resulting from performance of this Subcontract and shall apply only to the extent that the claim or loss is caused in whole or in part by any negligent act or omission of Subcontractor or any of its agents, employees, or subcontractors. This indemnity shall be effective regardless of whether the claim or loss is caused in some part by a party to be indemnified. The obligation of Subcontractor under this Article shall not extend to claims or losses that are primarily caused by the Architect, or Architect's consultant's performance or failure to perform professional responsibilities.

ARTICLE 8

WARRANTY. Subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship and agrees to satisfy same without cost to Owner or Contractor for a period of one (1) year from the date of Substantial Completion of the Project or per Contract Documents, whichever is longer.

ARTICLE 9

SPECIAL PROVISIONS.

SEE ATTACHMENT "A" SIGN AND RETURN

Business License and/or Permit(s), if required, are the responsibility of the Subcontractor

If the contract is modified in any way without authorized initials by CCC at each change the contract is not binding.

Subcontractor is required to attend all progress meetings per specifications and/or required by Clayton Construction Co., Inc.

Extra work will not be paid by Clayton Construction Company, Inc. unless approved by Change Order-Lump Sum or Hourly

Each Subcontractor is responsible for obtaining/paying for plans & specifications for preparation of shop drawings/submittals

Unless whereof, the parties have executed this Agreement under Seal, the day and year first written above.

J&H Grading & Paving, LLC

SUBCONTRACTOR (FIRM NAME)

John Basso Owner/President
BY (Type or print signer's name and title)

Clayton Construction Company, Inc

CONTRACTOR (FIRM NAME)

Henry Clayton, III, Inc. PRESIDENT
BY (Type or print signer's name and title)



CS1.0	COVER SHEET	8/19/2015
	CIVIL	
1	COVER SHEET	
2	EROSION, SEDIMENTATION AND POLLUTION CONTROL MONITORING	8/12/2015
3	EROSION, SEDIMENTATION AND POLLUTION CONTROL SITE DRAINAGE MAP	8/12/2015
4	EROSION, SEDIMENTATION AND POLLUTION CONTROL PRE-DEVELOPED HYDROLOGY DRAINAGE PLAN	8/12/2015
5	EROSION, SEDIMENTATION AND POLLUTION CONTROL POST-DEVELOPED HYDROLOGY DRAINAGE PLAN	8/12/2015
6	EROSION, SEDIMENTATION AND POLLUTION CONTROL BEST MANAGEMENT PRACTICES	8/12/2015
7	EROSION, SEDIMENTATION AND POLLUTION CONTROL BEST MANAGEMENT PRACTICES	8/12/2015
8	EROSION, SEDIMENTATION AND POLLUTION CONTROL BEST MANAGEMENT PRACTICES	8/12/2015
9	GRADING, UTILITY AND DRAINAGE	8/12/2015
10	LANDSCAPING PLAN	8/12/2015
11	DETAIL SHEET	8/12/2015
	Architectural	
A1.0	LIFESAFETY PLAN	8/19/2015
A1.1	FIRST FLOOR PLAN	8/19/2015
A1.2	FRAMING PLAN	8/19/2015
A1.3	FLOOR FINISHES PLAN	8/19/2015
A1.4	FURNITURE PLAN	8/19/2015
A1.5	REFLECTED CEILING PLAN	8/19/2015
A2.0	EXTERIOR ELEVATIONS	8/19/2015
A3.2	WALL SECTIONS	8/19/2015
A3.3	WALL SECTIONS	8/19/2015
A3.4	BUILDING SECTIONS WALL SECTIONS	8/19/2015
A3.5	WALLSECTIONS	8/19/2015
A4.0	INTERIOR ELEVATIONS	8/19/2015
A4.1	INTERIOR ELEVATIONS	8/19/2015
A5.0	FINISH SCHEDULE MATERIALS AND FINISHES	8/19/2015
A5.1	DOOR SCHEDULE WINDOW CONFIGURATIONS	8/19/2015
A5.2	WINDOW CONFIGURATIONS	8/19/2015
	STRUCTURAL	
S-0	GENERAL NOTES AND DESIGN	8/19/2015
S-1	FOUNDATION DESIGN	8/19/2015
S-2	SECTIONS AND DETAILS	8/19/2015
	Plumbing	
P1.0	WASTE PLAN	8/19/2015
P1.1	WATER PLAN	8/19/2015
P2.0	PLUMBING NOTES AND SCHEDULES	8/19/2015
	Mechanical	
M-1	PROJECT MECHANICAL PLAN	8/19/2015
M-2	PIPING AND CONTROLS PLAN	8/19/2015
M-3	OFFICE MECHANICAL PLAN	8/19/2015
M-4	SHOP MECHANICAL PLAN	8/19/2015
M-5	MECHANICAL SCHEDULES	8/19/2015
M-6	MECHANICAL NOTES	8/19/2015
	Electrical	
E1.1	LIGHTING PLAN	8/19/2015
E1.2	POWER PLAN	8/19/2015
E1.3	MECHANICAL POWER PLAN	8/19/2015
E1.4	SIGNAL PLAN	8/19/2015
E2.1	ELECTICAL DETAILS	8/19/2015
E2.2	ELECTRICAL DETAILS	8/19/2015
E3.1	SITE LIGHTING PLAN	8/19/2015
E3.2	SITE POWER PLAN	8/19/2015
C-3	Civil Site Plan	8/19/2015
C-4	Civil Details	8/19/2015

Contract attachment C (please submit with each application for payment)

WAIVER OF LIEN

STATE OF: _____
COUNTY OF: _____

TO WHOM IT MAY CONCERN:

WHEREAS the undersigned has been subcontracted by Clayton Construction Company, Inc. to furnish labor, material and equipment for the premises known as **Herlong Chevrolet-Buick and Herlong Chevrolet-Buick, Inc.** is the owner.

THE undersigned, for and in consideration of _____ and _____/100 (\$ _____) Dollars, and other good and valuable considerations, upon the receipt whereof is hereby acknowledged, does hereby waive and release any and all lien or claim of, or right to lien, under the statutes of the State of South Carolina, relating to mechanics' liens, with respect to and on said above-described premises, and the improvements, thereon, and on the material, fixtures, apparatus or machinery furnished, and on the moneys, funds or other considerations due or to become due from the owner, on account of all labor, services, material, fixtures, apparatus or machinery, furnished to this date by the undersigned for the above-described premises, **INCLUDING EXTRAS.***

DATE _____

NAME _____
ADDRESS _____
CITY, STATE, ZIP _____

SIGNATURE AND TITLE _____

*EXTRAS INCLUDE BUT ARE NOT LIMITED TO CHANGE ORDERS, BOTH ORAL AND WRITTEN TO THE CONTRACT.

CONTRACTOR'S AFFIDAVIT

STATE OF: _____
COUNTY OF: _____

TO WHOM IT MAY CONCERN:

THE undersigned, (Name) _____ being duly sworn, deposes and says that he or she is (Position) _____ of (Company Name) _____ who is the contractor furnishing _____ on the buildings located at **130 East Church Street, Batesburg-Leesville, SC 29070** owned by **Herlong Chevrolet-Buick, Inc.**

That the total amount of the contract including extras* is \$ _____ on which he or she has received payment of \$ _____ prior to the payment. That all waivers are true, correct and genuine and delivered unconditionally and that there is no claim either legal or equitable to defeat the validity of said waivers. That the following are the names and addresses of all parties who have furnished material or labor, or both, for said work and all parties having contracts or sub contracts for specific portions of said work or for material entering into the construction thereof and the amount due or to become due to each, and that the items mentioned include all labor and material required to complete said work according to plans and specifications.

That there are no other contracts for said work outstanding, and that there is nothing due or to become due to any person for material, labor or other work of any kind done or to be done upon or in connection with said work other than above stated.

DATE _____ SIGNATURE _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____

NOTARY PUBLIC _____

Attachment C

NAME OF VENDOR/SUPPLIER/SUB	PHONE NUMBER	WHAT FOR	CONTRACT PRICE INCLDG EXTRAS*	AMOUNT PAID	THIS PAYMENT	BALANCE DUE
TOTAL LABOR AND MATERIAL INCLUDING EXTRAS* TO COMPLETE.						



CERTIFICATE OF LIABILITY INSURANCE

J&HGR-1

OP ID: NT

DATE (MM/DD/YYYY)

09/30/2015

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER ACHS Insurance P.O. Box 15087 Augusta, GA 30919 Jason C. Palmer	CONTACT NAME: Jason C. Palmer
	PHONE (A/C, No, Ext): 706-868-1610 FAX (A/C, No): 706-860-5134
	E-MAIL ADDRESS: jason@achsinsurance.com
	INSURER(S) AFFORDING COVERAGE
	INSURER A: Builders Mutual Insurance Co
	INSURER B: Builders Mutual Insurance Co
	INSURER C:
	INSURER D:
	INSURER E:
	INSURER F:

INSURED J&H Grading and Paving, LLC
1579 Edgefield Hwy
Aiken, SC 29801

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	☒ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS-MADE ☒ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☒ POLICY ☐ PRO-JECT ☐ LOC ☐ OTHER:			CPA0005443	08/20/2015	08/20/2016	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 300,000 MED EXP (Any one person) \$ 15,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000 \$
A	☒ AUTOMOBILE LIABILITY ☒ ANY AUTO ☐ ALL OWNED AUTOS ☒ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS			PCA0014531	08/20/2015	08/20/2016	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
A	☒ UMBRELLA LIAB ☒ OCCUR ☐ EXCESS LIAB ☐ CLAIMS-MAOE DED ☒ RETENTION \$ 10000			UMB0032886	08/20/2015	08/20/2016	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000 \$
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N ☒ Y	N/A	PWC100902304	08/18/2015	08/18/2016	☒ PER STATUTE ☐ OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000
A	Equipment Floater			CPA0005443	08/18/2015	08/18/2016	Rented 100,000 Leased

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER

Clayton Construction Company
Inc.
Fax# 864-574-1974
PO Box 2998
Spartenburg, SC 29304

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE
Jason C. Palmer

© 1988-2014 ACORD CORPORATION. All rights reserved.

Request for Taxpayer Identification Number and Certification

Give Form to the
requester. Do not
send to the IRS.

Print or type
See Specific Instructions on page 2.

1 Name (as shown on your income tax return). Name is required on this line; do not leave this line blank. Joshua Baggott	
2 Business name/disregarded entity name, if different from above J&H Grading & Paving, LLC	
3 Check appropriate box for federal tax classification; check only one of the following seven boxes: ☒ Individual/sole proprietor or single-member LLC ☐ Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶ Note. For a single-member LLC that is disregarded, do not check LLC; check the appropriate box in the line above for the tax classification of the single-member owner. ☐ Other (see instructions) ▶	4 Exemptions (codes apply only to certain entities, not individuals; see instructions on page 3): Exempt payee code (if any) _____ Exemption from FATCA reporting code (if any) _____ <i>(Applies to accounts maintained outside the U.S.)</i>
5 Address (number, street, and apt. or suite no.) 1579 Edgefield Hwy.	Requester's name and address (optional) Clayton Construction Company, Inc. P.O.Box 2998 Spartanburg, SC 29304
6 City, state, and ZIP code Aiken, SC 29801	
7 List account number(s) here (optional)	

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on line 1 to avoid backup withholding. For individuals, this is generally your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the instructions for line 1 and the chart on page 4 for guidelines on whose number to enter.

Social security number								
			-					
or								
Employer identification number								
2	7		-	3	0	7	9	7

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me); and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and
3. I am a U.S. citizen or other U.S. person (defined below); and
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 3.

Sign Here
Signature of U.S. person ▶ *Jimmy Cella*

Date ▶ *09/30/2015*

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future developments. Information about developments affecting Form W-9 (such as legislation enacted after we release it) is at www.irs.gov/fw9.

Purpose of Form

An individual or entity (Form W-9 requester) who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) which may be your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN), to report on an information return the amount paid to you, or other amount reportable on an information return. Examples of information returns include, but are not limited to, the following:

- Form 1099-INT (interest earned or paid)
- Form 1099-DIV (dividends, including those from stocks or mutual funds)
- Form 1099-MISC (various types of income, prizes, awards, or gross proceeds)
- Form 1099-B (stock or mutual fund sales and certain other transactions by brokers)
- Form 1099-S (proceeds from real estate transactions)
- Form 1099-K (merchant card and third party network transactions)

- Form 1098 (home mortgage interest), 1098-E (student loan interest), 1098-T (tuition)
- Form 1099-C (canceled debt)
- Form 1099-A (acquisition or abandonment of secured property)

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN.

If you do not return Form W-9 to the requester with a TIN, you might be subject to backup withholding. See What is backup withholding? on page 2.

By signing the filled-out form, you:

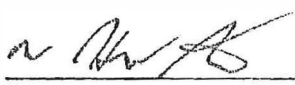
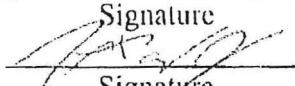
1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income, and
4. Certify that FATCA code(s) entered on this form (if any) indicating that you are exempt from the FATCA reporting, is correct. See *What is FATCA reporting?* on page 2 for further information.

Payment Agreement Contract Herlong Chevy Batesburg Site-work Contract

This is a payment agreement between Joe Ben Herlong owner of Herlong Chevy of Batesburg, Clayton Construction Company the General Contractor for the project and J&H Grading & Paving the grading company hired for the site work for the aforesaid project.

Clayton Construction the General Contractor and Joe Ben Herlong the owner of Herlong Chevy of Batesburg agree that all paperwork for the construction project has been filed and approved by all parties involved for the aforesaid construction project. Joe Ben Herlong the owner of Herlong Chevy of Batesburg and Clayton Construction the General Contractor hired for the project agree to pay J&H Grading & Paving the site work contractor within 30 days from the date on the invoice. All discrepancies with the invoice must be resolved by all parties within 10 days of the invoice date if this is not accomplished the invoice will stand and payment should be made. If payment is not made within the allotted 30 days then a finance charge will be applied if the new balance is unpaid 30 days from the invoice date.

*This agreement does not pertain to retaining
unless hereby releases it*

Herlong Chevy Owner	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date
General Contractor	 Signature	<i>W Harry Clayton</i> Printed	<i>4-27-16</i> Date
Witness	 Signature	<i>Joe Taylor</i> Printed	<i>4-27-16</i> Date
J&H Grading Owner	_____ Signature	_____ Printed	_____ Date
Witness	_____ Signature	_____ Printed	_____ Date

The finance charge will be computed by a periodic rate of 1 1/2 % per month which is an annual percentage rate of 18% applied to unpaid balance.

THE TOWN OF Batesburg-Leesville

Certificate of Occupancy Department of Inspections

This Certificate issued pursuant to the requirements of the International Codes Certifying that at the time of issuance this structure was in compliance with the various ordinances of the Town regulating building construction or use. For the following:

Building Permit Number: 2015-084 Occupant Load: 142 Automatic Sprinkler: N/A

Building Address: 130 East Church Street, Batesburg-Leesville, SC 29070

Owner of Building: Herlong Chevrolet Buick Address: 130 E Church Street

Structure Description: 1 Story, Mixed, B - Business (Car Dealership) / S1- Storage (Repair Garage)

Code Edition: 2015 Type Construction: IIB Non-Sprinklered

Occupancy Use in Accordance with Chapter 3: Yes

Special Stipulations and Conditions: None

Inspected and in Compliance with Referenced Code: Yes

John Caution 3-20-17
Building Official Date

From: jandh1579@gmail.com [mailto:jandh1579@gmail.com]
Sent: Tuesday, August 01, 2017 3:47 PM
To: Brandon Klein <bklein@claytonconstruction.net>
Subject: RE: Herlong Chevy

Brandon,

The last invoice wasn't for retainage?

Thanks,
Heather Wilson

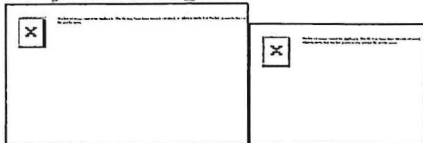
Sent from Mail for Windows 10

From: Brandon Klein
Sent: Tuesday, August 1, 2017 3:38 PM
To: jandh1579@gmail.com; Harry Clayton; Christy Clark; JB Herlong
Cc: Townes Johnson
Subject: RE: Herlong Chevy

Heather,
Hope all is well. We have not been paid retainage by Mr. Herlong and therefore we cannot issue your remaining retaining until paid.

Thanks
BK

Brandon Klein
Project Manager



PO Box 2998 • Spartanburg, SC 29304
p: 864.576.1901 • f: 864.574.1974 • c: 407.558.0716
www.claytonconstruction.net

From: jandh1579@gmail.com [mailto:jandh1579@gmail.com]
Sent: Tuesday, August 01, 2017 9:37 AM
To: Harry Clayton <hclayton@claytonconstruction.net>; Christy Clark <cclark@claytonconstruction.net>; Brandon Klein <bklein@claytonconstruction.net>; JB Herlong <jbh@herlong.net>
Subject: FW: Herlong Chevy

Sent from Mail for Windows 10

om: jandh1579@gmail.com
Sent: Tuesday, July 25, 2017 8:45 AM
To: Brandon Klein
Subject: FW: Herlong Chevy

Good morning,

I was asked to resubmit this pay application and to see why the balance has not been paid. Thank you.

Heather Wilson
J&H Grading & Paving, LLC
(803)641-1412

Sent from Mail for Windows 10

From: jandh1579@gmail.com
Sent: Wednesday, April 26, 2017 3:37 PM
To: Brandon Klein
Subject: Herlong Chevy

Sent from Mail for Windows 10

From: J&H Paving and Grading, LLC
Sent: Wednesday, April 26, 2017 1:36 PM
To: J&H Paving and Grading
Subject: Scan from J&H

Please open the attached document.

Croom Hunter

From: JBHerlong <jbh@herlong.net>
Sent: Friday, January 19, 2018 5:55 PM
To: J&H Grading & Paving, LLC
Subject: Re: Pay App #15 and Retainage Overdue

Ok, thanks

J.B Herlong
Herlong Chevrolet-Buick
Johnston, SC
Sent from my iPhone

On Jan 19, 2018, at 1:14 PM, J&H Grading & Paving, LLC <jandh1579@gmail.com> wrote:

Mr. Herlong,

I'm just forwarding this over to you to keep you informed.

Thank you,
Heather Wilson
J&H Grading & Paving, LLC
(803)641-1412

Sent from Mail for Windows 10

From: Harry Clayton
Sent: Friday, January 19, 2018 9:38 AM
To: J&H Grading & Paving, LLC; Christy Clark; Brandon Klein
Cc: tb69ss56@gmail.com; Joshua
Subject: RE: Pay App #15 and Retainage Overdue

Tommy:

Joe Ben still has not paid per his contract. Perhaps he will be willing to send you a two party check. I know you have done work for him outside our contract. It was evident he wanted you to do work without us knowing and wanted us to be responsible for it.

To update you, we have moved forward with a lawsuit in an attempt to get paid.

Best Regards,

W. Harry Clayton, AC, LEED AP
President
<image002.png>

PO Box 2998 • Spartanburg, SC 29304
p: 864.576.1901 • f: 864.574.1974
www.claytonconstruction.net

From: J&H Grading & Paving, LLC [<mailto:jandh1579@gmail.com>]

Sent: Friday, January 19, 2018 8:46 AM

To: Harry Clayton <hclayton@claytonconstruction.net>; Christy Clark <cclark@claytonconstruction.net>;

Brandon Klein <bklein@claytonconstruction.net>

Cc: tb69ss56@gmail.com; Joshua <jbgrading.09@gmail.com>

Subject: Pay App #15 and Retainage Overdue

If you have any questions, please contact Heather @ (803)641-1412 or Tommy Baggott @ (803)645-4090.

Sent from Mail for Windows 10

<image002.png>

J&H Grading & Paving, LLC
General Contractors
1579 Edgefield Hwy.
Aiken, South Carolina 29801
Phone: (803) 641-1412
Fax: (803) 649-6591
jandh1579@gmail.com

Date: January 25, 2018

Clayton Construction Company, Inc
PO Box 2998
Spartanburg, SC 29304
Attn: Harry Clayton

Mr. Clayton,

I, Tommy Baggott, have spoken with Mr. Herlong about J&H Grading & Paving, LLC's final draw (Pay Application 15) and the retainage due on the Herlong Chevrolet Project. Mr. Herlong informed me that as far as him withholding funds from you, he did that at less than five percent of the original contract. He has also informed me of an ongoing issue he is dealing with, with your company and this project. This issue has resulted in him withholding funds from your company, due to a conflict with the building structure, and this should not, in anyway affect payment in full being made to J&H Grading & Paving, LLC, from the funds you have already received, for the work that has been completed and accepted.

J&H Grading & Paving, LLC is owed in full by Clayton Construction Company, Inc in the total amount of eighty-four thousand, four hundred and thirty-two dollars and eighty-nine cents (\$84,432.89).

- Pay Application 15 (Submitted April 26, 2017) = \$4,124.70
- Interest on Pay Application 15 (1.5% per month) = \$556.83
- Retainage (Submitted April 26, 2017, Punch list completed and final acceptance from SCDOT on December 11, 2017) = \$71,824.00
- Interest on Retainage (1.5% per month) = \$1077.36
- Change Order #6 (submitted on January 23, 2017 for a total of \$9075.00, credited only for \$2,225.00.) = \$6850.00
(Change Order #6 was submitted for errors made by the superintendent on the job site, which cost us additional work and time, and the owner/contractor, additional concrete.
*Removal of stone, cutting 2.5" of sub-grade, and replacing stone, regrading, and

compacting. * Resetting oil/water separator tank. This is a minimal charge for the work that had to be corrected due to the negligence of the superintendent.)

We request payment in full, by February 1, 2018, we look forward to closing this matter with you and your company without further delays or actions taken.

Thank you,

A handwritten signature in black ink, appearing to read "Tommy Baggott", with a long horizontal flourish extending to the right.

Tommy Baggott
J&H Grading & Paving, LLC

Joshua Baggott
J&H Grading & Paving, LLC

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW

1735 ST. JULIAN PLACE, SUITE 200

POST OFFICE BOX 61110

COLUMBIA, SOUTH CAROLINA 29260-1110

TELEPHONE 803-252-7693

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WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.

OF COUNSEL

ANN F. ALLISON

CAITLIN C. HEYWARD

CHELSEA J. CLARK

WARREN C. POWELL, JR., P.A. **

RY P. WALL

E. WADE MULLINS III, P.A.

BRIAN P. ROBINSON, P.A.

WESLEY D. PEEL, P.A.

JOEY R. FLOYD, P.A.

BENJAMIN C. BRUNER, P.A.

** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: WPEEL@BRUNERPOWELL.COM

March 2, 2018

VIA U.S. MAIL

Mr. Harry Clayton

Clayton Construction Company, Inc.

P.O. Box 2998

Spartanburg, SC 29304

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. L.W. Clayton, Jr., Registered Agent

Clayton Construction Company, Inc.

1173 Partridge Rd.

Spartanburg, SC 29302

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Joe B. Herlong, Registered Agent

Herlong Family Properties, LLC

354 S.C. Highway 121

Johnston, SC 29832

Re: J&H Grading & Paving, LLC v. Clayton Construction Company, Inc. and Herlong
Family Properties, LLC—*Herlong Chevrolet Project*
Our File No.: 5-2989.100

Dear Mr. H. Clayton, Mr. L.W. Clayton, and Mr. Herlong:

We represent J&H Grading & Paving, LLC, your subcontractor on the above-referenced project. You are indebted to J&H Grading & Paving, LLC for \$84,432.89 for work completed on the project. The purpose of this letter is to demand payment of the amount due J&H Grading & Paving, LLC.

Pursuant to S.C. Code Ann. § 27-1-15, demand is hereby made upon Clayton Construction Company, Inc. for \$84,432.89. Under this statute, it is the duty of Clayton Construction Company, Inc. to make a reasonable and fair investigation of the merits of these claims and to pay them, or whatever portion of them that is determined as valid, within forty-five (45) days from the date of this letter.

Herlong Project
March 2, 2018
Page 2

If Clayton Construction Company, Inc. fails to make a fair investigation or otherwise unreasonably refuses to pay these claims or the proper portions thereof, then they will be liable to J&H Grading & Paving, LLC for reasonable attorney's fees and interest at the judgment rate, 8.5% compounded annually, from the date of this letter until paid.

Also, under S.C. Code Add. § 29-6-30 *et seq.*, payment is due to the subcontractor within seven days of receipt each periodic payment. Failure to do so invokes interest at the rate of one percent a month.

In addition, we have filed a mechanic's lien on the subject property. If payment is not received in ten days, we intent to file suit to foreclose on the lien, as well as seek any other remedies available to J&H

Lastly, we request that you provide us with copies of the payment bonds, in a reasonable amount of time, that you have for the above referenced project.

I hope that this matter can be resolved quickly. Please feel free to contact me if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,



Wesley D. Peel

WDP:cjc

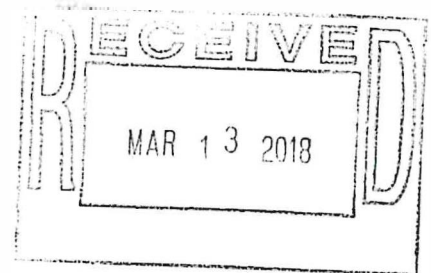


TOWNES B. JOHNSON III, LLC

March 9, 2018

Townes B. Johnson III
(864) 757-4399
tjohnson@isc.legal

Wesley D. Peel, Esq.
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110



RE: J&H Grading & Paving, LLC

Dear Wesley:

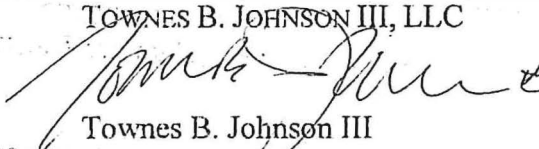
Please be advised that this firm represents Clayton Construction Co., Inc. ("Clayton"). This letter is in reply to J&H Grading & Paving, LLC ("J&H")'s March 2, 2018 demand upon Clayton in accordance with South Carolina Code Ann. § 27-1-15.

As I am sure you are aware, J&H's subcontract agreement with Clayton on the Herlong Chevrolet Dealership project provides that "payments... shall be made to [J&H] for Work satisfactorily performed no later than seven (7) days after receipt by [Clayton] of payment from Owner for [J&H]'s Work." As you may also be aware, Clayton has not received payment for the work from the owner of the project, Herlong Family Partnership ("Herlong"), and is currently in litigation against Herlong seeking same. In accordance with the provisions with the subcontract, therefore, there are no amounts due and owing to J&H at this time.

That said, as soon as Herlong remits payment to Clayton or the litigation against Herlong is fully adjudicated, Clayton will remit any undisputed contract balances to J&H and Clayton welcomes J&H's pursuit of any and all claims it may have against Herlong in order to accomplish same.

Sincerely,

TOWNES B. JOHNSON III, LLC


Townes B. Johnson III

Clayton Construction Co., Inc.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

AGREEMENT between J & H Grading & Paving, Inc. ("J&H"); Clayton Construction Company, Inc. ("Clayton"); Herlong Family Properties LLC, and Herlong Chevrolet Buick, Inc. (collectively "Herlong"), made this 19 day of February 2019.

WHEREAS, Herlong entered into a contract with Clayton for the construction of Herlong Chevrolet in Batesburg-Leesville, SC (hereinafter "the Project"); and

WHEREAS, Clayton entered into a subcontract with J&H for the sitework portion of the Project; and

WHEREAS, J&H alleged that it was not paid by Clayton for its final draw and retainage, which is contested by Clayton, and J&H filed a lien against Herlong's property, and thereafter commenced an action for foreclosure of the lien and breach of contract against Clayton (hereinafter "the Suit");

WHEREAS, unrelated to its subcontract with Clayton on the Project, J&H had contracted directly with Herlong to perform certain work on Herlong's Edgefield dealership (hereinafter "the Edgefield Project") and Herlong brought certain counterclaims in the Suit against J&H for J&H's work on the Edgefield Project,

WHEREAS, the parties to this agreement have reached a partial settlement of J&H's claims and wish to dismiss J&H's claims against Herlong and their property;

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Herlong agrees to release \$75,298.00 under its contract with Clayton directly to J&H as payment for J&H's subcontract with Clayton on the Project.

2. It is agreed and understood that \$7,530 of this payment will be escrowed with Herlong's counsel pending satisfaction of the Edgefield Project terms listed in Paragraph 9, below.

3. Herlong shall be entitled to a credit of \$75,298.00 against any monies owed under Herlong's contract with Clayton and, subject to any claims arising under the contract, the principal amount claim by Clayton is reduced to \$105,817.01.

4. Clayton is entitled to the full credit of \$75,298.00 as payment for work performed by J&H on the Project under J&H's subcontract with Clayton.

5. J&H expressly reserves all of its claims and rights against Clayton as set forth in the Suit for interest on the contract balance, statutory or contractual attorney's fees, and any other balance to the contract between J&H and Clayton as may be due pursuant to the contract or by law and, accordingly, and does not release Clayton from the Suit.

6. Specifically, J&H still claims additional funds are due from Clayton representing interest on the allegedly wrongfully withheld contract balance and for attorney's fees.

7. Upon release of the \$75,298.00 in accordance with Paragraph 1, above, J&H shall dismiss Herlong from the Suit and cancel its lien against Herlong's property.

8. Upon the escrow of \$7,530 by Herlong's attorney in accordance with Paragraph 2, above, Herlong shall dismiss its counterclaims in the Suit against J&H.

9. J&H shall perform repair work to the Edgefield Project by June 1, 2019, to repair an area of pavement that is holding water. J&H shall ensure that the repair is performed to prevailing industry standards. Herlong's attorneys shall retain the \$7,530 in their trust account until the earlier of the repair work being performed in full or June 2, 2019. Should the work under item 4 not be performed in full by June 2, 2019; Herlong shall have the right to use the retained funds to complete the repair work.

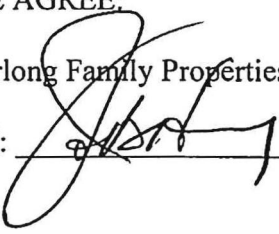
The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY:  _____,

ITS:  _____

Clayton Construction Company, Inc.

BY: _____,

ITS: _____

J&H Grading and Paving, Inc.

BY: _____,

ITS: _____

The parties understand and agree that the release of Herlong is granted for the purpose of settlement and is not to be construed as an admission of liability by any party to this Agreement or waiver of any other claims by any party to this Agreement.

The parties further declare and represent that no promise, inducement or agreement not herein expressed has been made by any parties to this Agreement to any of the parties to this Agreement and that this Agreement contains the entire agreement between the parties hereto.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. This Agreement may contain more than one counterpart of the signature page, all of which may be attached to one copy of this Agreement to constitute the entire executed Agreement. Facsimile or photocopies will be considered originals for all purposes.

WE AGREE:

Herlong Family Properties LLC

BY: _____, ITS: _____

Clayton Construction Company, Inc.

BY: _____, ITS: _____

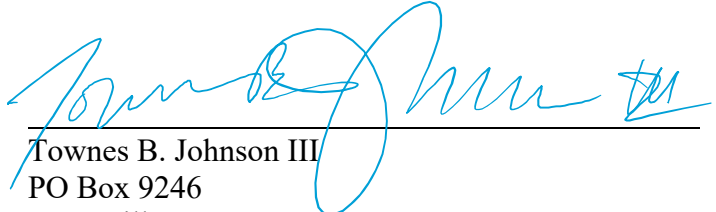
J&H Grading and Paving, Inc.

BY: Josh E. Bazzano, ITS: Owner/President

Certificate of Counsel

The undersigned hereby certified that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 5, 2020



Townes B. Johnson III
PO Box 9246
Greenville, S.C. 29604
(864) 757-4899
tjohnson@sc.legal
Attorneys for the Appellant

RECEIVED

Aug 06 2020

SC Court of Appeals