

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2008-CP-23-02746

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**RECEIVED**

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**S.C. Supreme Court**

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, Fair Forest of  
Greenville, LLC, Thomas F. Wong and Immedion, LLC,

Defendants,

Of Whom Ferguson Fire and Fabrication, Inc.,

Petitioner,

And Immedion, LLC is

Respondent,

Immedion, LLC,

Third-Party Plaintiff,

v.

Rescom Constructcion, LLC,

Third-Party Defendant.

Appellate Case No. 2012-212191

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**BRIEF OF PETITIONER**

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### QUESTIONS PRESENTED

1. Did the Court of Appeals err in adding requirements for the timing and form of a Notice of Furnishing under S.C. Code §29-5-40?
2. Did the Court of Appeals err in holding that a Notice of Furnishing under S.C. Code §29-5-40 cannot be delivered to an owner until AFTER a materialman delivers all materials to the worksite?
3. Did the Court of Appeals err in holding that a Notice of Furnishing under S.C. Code §29-5-40 must demand payment from the owner?

### STATEMENT OF THE CASE

The Appellant (Ferguson Fire) seeks recovery under a mechanics' lien against the Respondent's property. The Appellant delivered materials to a general contractor for the construction of a fire protection system in the Respondent's property. (R. pp. 44-52). The Appellant gave written notice to the Respondent that stated the amount of materials the Appellant would be providing. (R. pp. 57-58). After receiving this notice, the Respondent paid the general contractor for the fire system, but the general contractor never paid the Appellant. (R. pp. 53-56). The Appellant perfected its lien by filing and serving a statement of mechanics' lien and filed this action to foreclose the lien.

Respondent (Immedion, LLC) leases property at the Global Gateway Center in Greenville. (R. pp. 38-39). On or about August 23, 2007, Respondent hired a general contractor, Preferred Fire Protection ("Preferred"), to install a fire protection system in

their office at the Global Gateway Center. Respondent sent a purchase order to Preferred for \$30,973.00. (R. pp. 42-43).

Preferred ordered materials for the project from the Appellant (Ferguson Fire), and between August 24, 2007, and October 16, 2007, the Appellant delivered materials to Preferred. (R. pp. 44-52).

On August 30, 2007, Respondent paid the general contractor, Preferred, \$15,486.50 of the \$30,973.00 due under the contract. (R. pp. 53-56).

On September 21, 2007, Appellant sent "Notice of Furnishing Labor and Materials" (hereafter, the "Notice" or "Notice of Furnishing") to Respondent stating that it was providing \$15,000 in materials for the job. The Notice provides:

Please be advised that this company is hereby providing you with notice of furnishing labor and materials to the Project described below pursuant to S.C. Code Ann. § 29-5-20(B) and § 29-5-40. This is important to note that this is not a lien. This is a routine procedure to comply with certain state requirements that may exist and should not reflect in any way on the integrity or credit standing of PREFERRED FIRE PROTECTION, FX54842/BR41.

We have been employed by/contracted with:  
PREFERRED FIRE PROTECTION, FXS4842/BR41, 41 S. MAIN.ST STE 1.  
MAULDIN SC 29662- 2260, 864-962-2320.

We have provided or will provide FIRE  
SPRINKLER/PIPE/VALVES/FITTINGS with an estimated value of \$15,000.

The project is known as or located at IMMEDION, 79 GLOBAL  
DRIVE, GREENVILLE, SC, GREENVILLE COUNTY.

The labor, services, or materials were actually furnished or scheduled to be furnished by us to the Project from Sep 10, 2007 through \_\_\_\_\_.

The amount claimed to be due, if any: \_\_\_\_\_.

(R. pp. 57-58).

On October 3, 2007, after receiving the Notice of Furnishing, Respondent paid Preferred \$14,513.50 on the job. (R. pp. 53-56). On October 31, 2007, Respondent paid Preferred the balance of \$973 on the job. (R. pp. 53-56).

Preferred never paid the Appellant for the materials, and the outstanding balance on the materials, exclusive of interest and fees, is \$15,548.93. (R. p. 41, paragraph 6)(R. p. 15).

On January 8, 2008, Ferguson filed and served a Statement of Mechanics' lien.

On April 11, 2008, Ferguson filed a summons and complaint against Preferred Fire Protection, LLC, Immedion, LLC (who is the "Respondent"), Fair Forest of Greenville, LLC and Thomas Wong. The Complaint sought to foreclose a mechanics' lien against the real property interest of Immedion, which leases commercial real property.

The general contractor, Preferred, did not answer the Complaint, and on January 14, 2009, the Plaintiff obtained a default judgment against Preferred. Appellant has not been able to collect its judgment against Preferred. (R. p. 41, paragraph 5).

On June 30, 2008, the Respondent filed its Answer. The Respondent also brought a third-party claim against Rescom, which was general contractor for another construction project on the property.

Respondent and Rescom entered a settlement of the third-party claim, and that claim was dismissed on July 20, 2009. (R. p. 91, line 3 - p.92, line 6).

The Appellant's Complaint named as defendant Thomas Wong and Fair Forest of Greenville, who were believed to be the owners of the property. Mr. Wong and Fair

Forest were dismissed by order dated August 3, 2009.

Appellant and Respondent filed cross-motions for summary judgment.

The Trial Court, Honorable R. Lawton McIntosh presiding, held hearings on September 17, 2009 and October 8, 2009.

On October 16, 2009, the Trial Court entered Judgment in favor of Respondent and awarded Respondent attorneys fees.

On October 28, 2009, the Appellant filed and served notice of appeal.

On February 29, 2012, the Court of Appeals entered an order affirming the Trial Court's decision.

On March 13, 2012, the Petitioner filed a Petition for Rehearing.

On May 2, 2012, the Court of Appeals entered an order denying the Petition for Rehearing.

On May 30, 2012, the Appellant filed a Petition for Certiorari.

On February 6, 2014, this Court granted the Appellant's Petition.

## ARGUMENT

I. THE COURT OF APPEALS ERRED BY ADDING NEW REQUIREMENTS TO THE STATUTORY NOTICE OF FURNISHING UNDER §29-5-40.

This case will determine the proper form and timing of the Notice of Furnishing that materialmen and sub-contractors must provide to property owners to insure that they will be paid for their work or materials. Service of a Notice of Furnishing triggers the owner's obligation to prefer remote claimants, like the Appellant, over the claim of the general contractor. Once an owner receives a Notice of Furnishing from a remote claimant, the owner cannot reduce his lien liability by paying the general contractor. The Appellant served Notice in this case, but the Court of Appeals held that the notice was invalid and the Appellant was not entitled to a lien. In so holding, the Court of Appeals created new requirements for Notice under §29-5-40. These new requirements for Notice upset the balance of interests protected by the mechanics' lien statute, and, if allowed to stand, will eviscerate the ability of remote claimants to protect themselves under the statute.

A. THE SERVICE OF A NOTICE OF FURNISHING UNDER §29-5-40 REQUIRES AN OWNER TO PROTECT THE CLAIMS OF MATERIALMEN AND SUB-CONTRACTORS.

South Carolina's mechanics' lien statute protects materialmen, like the Appellant, and sub-contractors from the possibility that the general contractor refuses to pay for their goods and services. S.C. Code of Laws §29-5-20 provides that parties, who do not have a direct contract with the owner, have a lien against the owner's property for the

value of material or services provided:<sup>1</sup>

(A) Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails.

The lien, or rather the right to this lien, arises inchoate upon the delivery of the materials. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956); Preferred Sav. & Loan Ass'n. Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 3, 389 S.E.2d 853, 854 (1990). However, the lien is not perfected or enforceable until the lienor (1) gives notice to the owners under S.C. Code of Laws §29-5-40, and (2) files a statement of mechanics' lien and serves that statement on the general contractor and the owner within 90 days of providing the materials or labor under S.C. Code of Laws §29-5-90. *Id.*

Section 29-5-40 governs the notice that remote lien claimants, like the Appellant, must give to the owner, and provides:

Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in

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<sup>1</sup> In this case, the lien attaches to a leasehold interest as opposed to a fee interest, but for purposes of this brief, the Appellant will be referred to as the "owner." S.C. Code of Laws §29-5-30 provides: "If the person for whom the work is done or materials are furnished has an estate for life or any other estate less than a fee simple in the land ... the lien before provided for shall bind his whole estate and interest therein ... and the creditor may cause ... whatever other right or estate the owner had in the property to be sold and applied to the discharge of his debt."

writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by Section 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished.

S.C. Code of Laws Ann. §29-5-40. The service of a mechanics' lien statement under §29-5-90 will be considered notice under §29-5-40 unless the notice is given previously.

Lowndes Hill Realty Co., 229 S.C. at 636.

The statute "specifies no time at which or within which notice of the furnishing of material is to be given to the owner. Such notice may be given at any time." Lowndes Hill Realty Co., 229 S.C. at 629 (citing Hughes v. Peel, 221 S.C. 307, 70 S.E.2d 353).

The notice under §29-5-40 itself will not be sufficient to create a lien. In order to create and perfect the lien, the materials must be delivered and the lien perfected under §29-5-90. Lowndes Hill Realty Co., 229 S.C. at 630.

In addition to being a prerequisite to perfection of the lien, the service of a Notice of Furnishing fixes the amount of the potential lien. The service of the Notice of Furnishing triggers the rule that prevents an owner from reducing his lien liability by paying the general contractor. This result is controlled by two Code sections. First, §29-5-40 provides that, "[I]n no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made." This section limits the amount of the lien to the amount owed by the owner to the general. However, where Notice of Furnishing is served on the owner, the owner may not reduce the potential lien by paying the general contractor. The second section is §29-5-50 which prevents an owner who has received notice from reducing the amount of the

potential lien by paying the general contractor. S.C. Code of Laws §29-5-50 provides:

Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be paid in preference to the contractor at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.

Read together, these sections limit the remote claimant's lien to the amount due to the general on the date that the owner receives notice under §29-5-40. Stoudenmire Heating and Air Conditioning, Co. v. Craig Building Partnership, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992). In Stoudenmire, a subcontractor gave notice under §29-5-40 on April 22, 1988, and then filed and served the notice of mechanics' lien on June 28, 1988. The owner argued that the subcontractor's lien was not enforceable because the owner had made all payments due the contractor by June 28, when the statement of mechanics' lien was recorded. The Court held that the proper date for determining the amount of the lien was the date that the owner received notice under §29-5-40. The Court of Appeals remanded the case to determine the amount owed by the owner on the date the owner received the §29-5-40 notice.

These two sections have been held to have the purposes of (1) protecting a party who provides labor or materials in the improvement of the owner's property but does not have a contract with the owner; and (2) protecting the owner of the property by limiting his liability and that of his property. Lowndes Hill Realty Co., 229 S.C. at 629 (citing Snipes v. Horton, 129 S.C. 1, 123 S.E. 321.)

The foregoing legal principals are not in dispute in this case. The issue in this

case is not the effect of the Notice of Furnishing under §29-5-40, but whether the Notice of Furnishing given by the Appellant complied with the requirements of the statute. If the Notice of Furnishing complied with the statute, then the Court of Appeals must be overruled.

B. THE ONLY REQUIREMENTS FOR A NOTICE OF FURNISHING ARE THAT (1) THE NOTICE BE IN WRITING AND (2) THAT THE NOTICE APPRISE THE OWNER OF THE VALUE OF GOODS OR SERVICES PROVIDED.

The form and timing of the Notice of Furnishing under §29-5-40 were addressed specifically by the South Carolina Supreme Court in Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855, 862 (1956). “There is, as we have said, no requirement that the ‘notice’ under Section 45-254<sup>2</sup> be given at any particular time; nor does the statute prescribe the form of the notice, other than that it shall be in writing and shall apprise the property owner ‘of the furnishing of such labor or material and the amount or value thereof.’” Lowndes, supra at 863. Thus, the statute’s only requirements for the form of notice are that it (1) be in writing, and (2) inform the owner the value of such material/labor being furnished.

The Notice provided by Ferguson in this case meets those requirements. The Notice was in writing. The notice stated that it was a Notice of Furnishing under §29-5-40. The Notice stated that the value of materials provided or to be provided was \$15,000. Because the Notice was in writing, apprised the owner of the furnishing of materials and the value of those materials, the Appellant complied with the statute, and the Respondent

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<sup>2</sup> The section cited here is the precursor to §29-5-40, S.C. Code of Laws, and the statutory sections are substantially identical.

could not defeat that lien by payments to the general contractor.

The statute does not require that the Notice of Furnishing be delivered at any particular time. *Id.* Under prior versions of the statute, a materialman was required to provide Notice of Furnishing *before* the delivery of the goods.<sup>3</sup> Prior to 1896, subcontractors and persons contracting with the general contractor were not protected by the statute. In 1896, the legislature amended the mechanics' lien statute to provide that "any subcontractor or person contracting with an original contractor may have such a lien: Provided, That *before* performing or furnishing labor or furnishing materials, or both, he do give notice in writing to the owner of the property to be affected thereby." Lowndes, *supra* at 632. (Emphasis added) Act of February 25, 1896 XXII Stat. At L. 197.

In 1916, the statute was rewritten to substantially its current state. Lowndes, *supra* at 632-33; citing Act of February 29, 1916, XXIX Stat. at L. 686. The 1916 revisions removed the requirement that the Notice of Furnishing be delivered to the owner *prior* to providing the materials. The removal of this requirement expanded the time for delivery of the notice so that a materialman could deliver the notice at any time.

The only statutory reference to the form of a Notice of Furnishing states that it must "in writing notify the owner of the furnishing of such labor or material and the

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<sup>3</sup> Several other state mechanics' lien laws require that the Notice of Furnishing or Preliminary Notice be served *prior* to the furnishing of the labor or materials. See *e.g.* 53 *Am. Jur. 2d Mechanics' Liens* § 185, "Statutes that fix a time for furnishing notice upon an owner require that the pre-lien notice be given to the owner before or upon the commencement of the furnishing of labor or materials, while others do not require the notice until after the labor or materials have been furnished but then require the notice to be given within a certain specified time."

amount or value thereof.” S.C. Code of Laws Ann. §29-5-40. As noted by this Court in Lowndes, “It is thus apparent that in the enactment of the Act of 1916 the General Assembly did not intend to impose upon subcontractors, laborers and materialmen dealing with the prime contractor and not with the owner any requirement for the perfection of their liens other than written notice to the owner ‘of the furnishing of such labor or material and the amount or value hereof.’” Lowndes, *supra* at 862.

C. THE COURT OF APPEALS ERRED BY ADDING NEW REQUIREMENTS TO THE NOTICE OF FURNISHING UNDER §29-5-40.

The decision by the Court of Appeals has altered the statutory mechanics’ lien scheme by adding new requirements to the Notice of Furnishing under §29-5-40. The Court of Appeals states that the Appellant’s Notice is “insufficient under the statute, and has no legal effect.” Ferguson Fire and Fabrication, Inc. vs. Preferred Fire Protection, LLC, 397 S.C. 379, 386 (Ct.App. 2012). The deficiencies noted are: (1) “the Notice never provided a project completion date;” *Id.*; (2) The Notice was sent prior to the completion date and prior to the furnishing of “all of the materials;” *Id.*; and (3) The Notice failed to state that payment was due and demand payment therefore. *Id.* “Accordingly, **Ferguson** Fire failed to follow the requirements of the statute because all of the materials had not been furnished, and it did not identify the final amount of the supplies yet to be delivered when it notified Immedion.” *Id.*

None of the deficiencies cited by the Court of Appeals are set forth in the statute or cases governing a Notice of Furnishing under §29-5-40. In determining whether notice meets the requirements of a statute, the Court must apply the plain language of the

statute. Hard Hat Workforce Solutions, LLC v. Mechanical HVA Services, Inc., 406 S.C. 294 (S.C. 2013). The statute's only requirements for the form of notice are that it (1) be in writing, (2) inform the owner the value or amount of such material/labor provided. Neither the statute, nor the case law cited by the Court of Appeals and Trial Court, contain any reference to a requirement that the Notice demand payment. Nor is there any reference to a requirement that payment be due at the time that Notice is received. Similarly, no prior case has required that the project be completed at the time of delivery of the Notice under §29-5-40. In short, the Court of Appeals failed to measure the Appellant's notice under the existing statute and case law, and instead created new elements to the Notice of Furnishing under §29-5-40.

The Court of Appeals appears to reach this result by applying the requirements of lien perfection to the Notice of Furnishing. Reading §29-5-40, the Court of Appeals correctly held that the *lien does not attach* until after the delivery of the goods/services and after the delivery of notice. "No lien attaches until the materials, which are the subject of the lien, have been delivered, and the written notice, including the value of the materials, is provided to the owner." Ferguson Fire and Fabrication, Inc., 397 S.C. at 385. The Court of Appeals then goes on to reason that, "Ferguson Fire failed to follow the requirements of the statute because all of the materials had not been furnished, and it did not identify the final amount of the supplies yet to be delivered when it notified Immedion." Ferguson Fire and Fabrication, Inc., 397 S.C. at 386.

It is certainly true that a lien cannot be perfected until all materials charged in the lien have been delivered, and the appropriate Statement of Lien is filed and served on the

owner. S.C. Code of Laws Ann. §29-5-90; Lowndes, *supra* at 629. However, the fact a lien cannot be perfected prior to the delivery of materials does not mean that a Notice of Furnishing cannot be served prior to the delivery of materials. The Notice of Furnishing has a purpose that is distinct from the perfection of the lien.

The Notice of Furnishing has two distinct effects. As stated above, the Notice is one of many a prerequisite to the perfection of a lien. The second independent function of the Notice to trigger the owner's obligation to prefer the claimant over the general contractor in payment. S.C. Code of Laws Ann. §29-5-50. Once the owner receives this notice, he may not reduce his liability for a later-perfected lien by payments to the general contractor. Section §29-5-50 does not grant a lien or govern perfection of a lien. This section simply provides that the materialman is entitled to payment in preference of the contractor after the owner receives Notice of Furnishing. This section limits the owner's payment defense by providing that the owner cannot avoid a lien by paying the general contractor after the receipt of Notice.

Because the Notice of Furnishing does not, by itself, perfect a lien, the validity of the Notice of Furnishing should not be measured against the requirements for lien perfection. In equating lien perfection with a Notice of Furnishing, the Court of Appeals is required to add elements to a Notice of Furnishing that are not in the statute, and are not intended to be part of the statute. If a Notice of Furnishing is tantamount to a lien, then the Notice must come after the delivery of the materials because no lien attaches until the delivery of the materials. S.C. Code of Laws Ann. §29-5-20. Because a Notice of Furnishing is not equivalent to a lien, there is no need to deliver the materials prior to

the Notice. Similarly, the Court of Appeals is forced to construct other additions to the Notice of Furnishing. The Court adds the requirements that the project be completed, that the amount be past due and that the Notice contain a demand for payment. All these items are necessary for the perfection of a lien, but to extend them to a Notice of Furnishing defeats the purpose of the Notice as a trigger for an owner's obligation under §29-5-50.

The Trial Court made a similar mistake in its reliance on the fact that the Notice sent in this case contains the phrase, "this is not a lien." The Trial Court held that this section of the Notice rendered the Notice inadequate because it states that the Notice is not a lien. (Trial Court Order; R. pp. 5). What the Trial Court failed to apprehend is that the Notice is not a lien. It serves the dual purpose of triggering the preference provisions of §29-5-50 and serving as one of many prerequisites to perfection of the lien. Therefore, the Notice is entirely accurate in stating that it is not a lien. This Notice language is mere surplusage and does not alter the fact that the Notice complied with the statutory requirements of a Notice of Furnishing.

II. *The Court of Appeals erred in holding that a Notice of Furnishing under S.C. Code §29-5-40 cannot be delivered to an owner until after a materialman delivers all materials to the worksite.*

The Court of Appeals' ruling requires that a materialman complete delivery all materials due under a contract prior to giving Notice under §29-5-40. The Court states that the Notice is invalid unless sent after the "final delivery of materials," and faults Ferguson Fire for failing to state that its "job was completed." There is no language in the statute that requires that the delivery be "complete" prior to Notice of Furnishing. In

this respect, the Court is not equating the Notice of Furnishing with the perfection of a lien, but actually creating a new requirement out of whole cloth. There is no provision in the statute that prevents a party from filing a lien when the job is partially complete, but the Court's ruling would create that requirement.

As stated previously, under earlier versions of the statute, the Notice of Furnishing was required PRIOR to the delivery of materials. Lowndes, *supra* at 632-33. While this requirement was removed in later versions of the statute, there has never been any requirement that the Notice be given after the delivery of goods. Id.

By requiring that all the materials be delivered or work complete, the Court essentially removes remote claimant's remedies under §29-5-50. For example, applying the Court of Appeals' rule in this case, it would have been impossible for Ferguson Fire to obtain a lien for the bulk of the materials because the owner had paid the general contractor all but \$973 by the time of the last delivery. Where, as here, materials are delivered over time, the general contractor will have been paid for earlier-delivered materials prior to the complete delivery of all materials. By requiring that the materialman wait until the delivery of all materials before giving notice, the Court of Appeals prevents materialmen from recovering all materials delivered. The additional notice requirements remove, as a practical matter, any remedy for remote claimants like the Appellant. This Court should not interpret the statute in a way that renders the remedy meaningless. By adding new requirements to the statute, the Court of Appeals has done just that.

The Court of Appeals' holding also prevents remote claimants from protecting

themselves when a general contractor runs into financial difficulty. By way of illustration, if a supplier has provided some, but not all, materials to a project, and the general contractor becomes insolvent or gives an indication that it won't be able to pay, then the supplier cannot protect itself with a lien because it cannot give notice until the "project" is complete. The statute is designed to prevent this problem by giving the materialman the right to payment in preference to the general contractor under §29-5-50. The Court's additional requirement that ALL the materials be delivered before the lien, makes it impossible for a remote claimant to protect himself when a general contractor becomes insolvent during the job. This result does not offer any protection to the remote claimant in this situation, and runs counter to the purpose of the statute.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT A NOTICE OF FURNISHING MUST CONTAIN A DEMAND FOR PAYMENT.

The Court of Appeals also adds a requirement that the remote claimant actually make a demand for payment. As with the other new requirements imposed by the Court of Appeals, the requirement for a demand has no basis in the statute or South Carolina jurisprudence. In holding otherwise, the Court mistakenly relies upon *dicta* in Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008). Moreover, analogous portions of the mechanics' lien statute do not require that a demand for payment be made or that delivery be complete. Therefore, the Court of Appeals erred in holding that the Notice must be delivered prior to the furnishing and contain a demand for payment.

A. SLOAN CONSTRUCTION CO. DOES NOT HOLD THAT THE NOTICE OF FURNISHING MUST CONTAIN A DEMAND FOR PAYMENT.

The Court of Appeals cites Sloan for the proposition that no lien attaches “until an actual demand for payment is made to the owner.” Ferguson Fire, supra at 386. The Court of Appeals misreads the Sloan holding.

As an initial matter, the Sloan case does not even involve a mechanics’ lien. The issue in Sloan Constr. Co. was whether the state government can be liable where it fails to insure compliance with bonding requirements for public projects. The Court held that where a general contractor on a public project fails to obtain the required bond, the government can be liable for the amount due the subcontractor at the time the government receives notice of the general’s non-payment. Arguing by analogy, the Sloan Court then cites §29-5-40 and the Lowndes case for the proposition that a subcontractor lien claim is limited to the amount due the general contractor at the time the owner learns of “the general contractor’s nonpayment.” Sloan Constr. Co. 377 S.C. at 121. Sloan, only addresses the mechanic’ lien statute in *dicta*, as part of an argument by analogy. The Sloan court does not overrule Lowndes’ pronouncements regarding the form of notice. The Sloan court does not even address the form of notice, which is at issue in this case.

Not only is the Sloan case distinguishable on its facts, the Court of Appeals misstates the the Sloan Court’s holding. The Sloan Court referred to the Notice of Furnishing as a notice of “the general contractor’s nonpayment.” The Court of Appeals transmutes notice of “general contractor’s nonpayment” to a “notice of an actual demand

for payment.” These two phrases do not mean the same thing. There is a distinction between a “notice ... of nonpayment” cited by Sloan and a “demand for payment” as interpreted by the Court of Appeals. Section §29-5-40 does not require the notice to contain a demand for payment. However, notice under that statute necessarily implies that the materials have not been paid for. Thus, the notice of §29-5-40 is a notice of that the materials have not been paid for, but is not necessarily a demand for payment, and the Court of Appeals misreads the Sloan case on this point.

While legal effect of the Notice is certainly to demand that the remote claimant be paid in preference to the general contractor, there is no requirement that the notice make an overt demand for payment. In fact, a prudent owner will not simply pay the materialman or subcontractor because there may be a dispute between those two parties. The owner who receives notice under §29-5-40 can simply demand a lien waiver in return for a joint check to the general contractor and materialman. In that way, the owner insures that his property will not be subject to lien and the owner protects the interests of all parties. The joint check serves to replace the lien -- much like posting a bond to remove a lien claim under §29-5-120. Any dispute between the general contractor and materialman can be resolved without interfering with the owner’s property rights.

**B. THE STATUTORY FRAME WORK DEMONSTRATES THAT THE COURT’S ADDITIONAL REQUIREMENTS ARE NOT PROPER.**

This statutory frame work outlined by §29-5-40 and 50 mirrors the relationship between the general contractor and the sub-subcontractor or remote suppliers, as set forth in §29-5-20(B). The relationship between the owner and the subcontractor/supplier is

similar to the relationship between the general contractor and the sub-subcontractor/supplier. In both relationships, a party is trying to limit its liability to another party with whom there is no direct contract. Just as the owner doesn't have a direct contract with the subcontractor/supplier, the general contractor does not have a direct contract with a sub-subcontractor/supplier.

In §29-5-20(B), the general contractor's liability to a sub-subcontractor/supplier is limited to the amount of the contract with the sub-contractor. This is identical to the limitation of liability of an owner to a subcontractor/supplier as set forth in §29-5-40. In both situations, there is an exception to this limitation. For general contractors, the sub-subcontractor/supplier gives Notice of Furnishing pursuant to §29-5-20(B). This exception is similar to the exception for an owner's liability under §29-5-50.

The Notice of Furnishing to a general contractor by a sub-subcontractor/supplier can be provided prior to the furnishing of the material. Section 29-5-20(B)(5) provides that the Notice of Furnishing must state the date when the materials are "scheduled to be furnished." Thus, a Notice of Furnishing under §29-5-20(B) may be served before the materials are furnished. The rule should be similar for a Notice of Furnishing under §29-5-40.

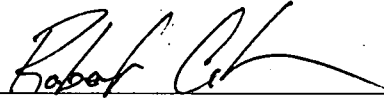
Similarly, there is no requirement that the payment be due at the time of a Notice of Furnishing under §29-5-20(B)(6). That section requires the claimant to state the amount due, "if any." Thus, the Notice of Furnishing can be sent prior to the time that payment is actually due. The rule should be similar for a Notice of Furnishing under §29-5-40.

The policies at play in the relationship between owners and subcontractor/suppliers under §29-5-40 are similar to the policies at play in the relationship between general contractors and sub-subcontractors/suppliers under §29-5-20(B). There is no reason that a Notice of Furnishing under §29-5-40 should be required after delivery, when the same is not true under §29-5-20(B). There is no reason that payment must be due prior to Notice of Furnishing under §29-5-40, when the same is not true under §29-5-20(B). Therefore, the Court should not impose additional requirements on the subcontractor/suppliers, when those requirements do not exist for similarly situated sub-subcontractor/suppliers.

#### CONCLUSION

The Court of Appeals erred in ruling that Ferguson's Notice of Furnishing was invalid. In straining to hold Ferguson's notice invalid the Court of Appeals improperly adds new elements to a Notice of Furnishing under §29-5-40. By adding these new elements, the Court upsets the balance of interests that the Legislature intended in drafting the mechanics' lien statute. This Court should insure that the law continues to protect materialmen and sub-contractors by reversing the Court of Appeals and Trial Court, and hold that the Ferguson Notice was valid.

Respectfully Submitted,



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March 24, 2014

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2008-CP-23-02746

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Ferguson Fire and Fabrication, Inc., Plaintiff,

v.

Preferred Fire Protection, LLC, Fair Forest of  
Greenville, LLC, Thomas F. Wong and Immedion, LLC, Defendants,

Of Whom Ferguson Fire and Fabrication, Inc., Petitioner,

And Immedion, LLC is Respondent,

Immedion, LLC, Third-Party Plaintiff,

v.

Rescom Constructcion, LLC, Third-Party Defendant.

Appellate Case No. 2012-212191


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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Brief of Petitioner complies with Rule 21(b), SCACR.

March 24, 2014

  
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THE STATE OF SOUTH CAROLINA  
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APPEAL FROM GREENVILLE COUNTY  
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R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-02746

**RECEIVED**  
MAR 26 2014  
S.C. Supreme Court

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, Fair Forest of  
Greenville, LLC, Thomas F. Wong and Immedion, LLC,

Defendants,

Of Whom Ferguson Fire and Fabrication, Inc.,

Petitioner,

And Immedion, LLC is

Respondent,

Immedion, LLC,

Third-Party Plaintiff,

v.

Rescom Constructcion, LLC,


Third-Party Defendant.

Appellate Case No. 2012-212191

**PROOF OF SERVICE OF PETITIONER'S BRIEF AND APPENDIX**

I certify that I have served the Brief of Petitioner and Appendix on Respondent Immedion, LLC by depositing a copy of same in the United States Mail, with the correct postage affixed, on March 24, 2014, addressed to Immedion, LLC's attorney of record in the above-referenced action:

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