THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Court Judge

Opinion No. 4947 (S.C. Ct. App. Filed February 29, 2012)

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. is — Petitioner,

and Immedion, LLC is — Respondent.

Appellate Case No. 2012-212191

BRIEF OF RESPONDENT

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This matter is before the Court following the Court's grant of a writ of certiorari to review the South Carolina Court of Appeal's ruling below. The Court of Appeal's ruling upheld summary judgment for Respondent Immedion, LLC, finding that the "Notice of Furnishing" issued by Petitioner Ferguson Fire and Fabrication, Inc. did not constitute a valid notice of lien under S.C. Code Annotated § 29-5-40 and therefore Petitioner could not enforce a mechanic's lien against Respondent. Petitioner contends in its brief that its "Notice of Furnishing" was adequate simply because it was in writing and stated materials were scheduled to be furnished in the amount of $15,000. The fallacy of this argument, as made clear by the Court of Appeals' decision below, is that Petitioner's notice failed to comply with the clear terms of the mechanic's lien statutes and fundamental mechanic's lien law. Moreover, Petitioner's claim contradicts basic common sense, policy, and the structure and intent of the mechanic's lien laws. The Court of Appeals properly found Petitioner's notice was inadequate, and its decision should be affirmed.

STATEMENT OF ISSUES ON APPEAL

I. **Did the Court of Appeals err in finding that Petitioner's Notice of Furnishing was ineffective as a notice of lien under S.C. Code Annotated § 29-5-40?**

II. **Did the Court of Appeals err in holding that a notice of furnishing must demand payment from an owner to be effective notice under S.C. Code Annotated § 29-5-40?**

STATEMENT OF THE CASE

Petitioner Ferguson Fire and Fabrication, Inc. ("Petitioner"), initiated this action against Preferred Fire Protection, LLC ("Preferred Fire"), Fair Forest of Greenville, LLC, Thomas F. Wong and Respondent Immedion, LLC ("Respondent"), by filing a summons and complaint in the Greenville County Court of Common Pleas on April 11, 2008. The

complaint asserted causes of action for foreclosure of a mechanic's lien as to all defendants and for breach of contract and unjust enrichment as to Preferred Fire only. Preferred Fire failed to answer the complaint, and on January 14, 2009, Petitioner obtained a default judgment against it in the amount of $21,023.44. Thomas F. Wong and Fair Forest of Greenville, LLC, whom Petitioner originally believed to be the owners of the property at issue, were dismissed on August 3, 2009.

Respondent timely filed an answer to the summons and complaint, including a counterclaim for statutory attorneys' fees and a third-party complaint against Rescom Construction, LLC ("Rescom") for breach of contract. Rescom timely filed an answer to the third-party complaint in which it also asserted a counterclaim for statutory attorneys' fees. Respondent and Rescom reached a settlement agreement and, on July 20, 2009, the third-party claim against Rescom was dismissed.

On July 10, 2009, Respondent filed a Notice of Motion and Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Respondent's motion for summary judgment was made on the grounds that Respondent, as owner of the leasehold, paid in full all work performed by its contractors and therefore had no further liability. On August 12, 2009, Petitioner filed a Response and Cross Motion for Summary Judgment Against Immedion, LLC.

On September 17, 2009, a hearing on the parties' cross-motions for summary judgment was held before the Honorable R. Lawton McIntosh. By order dated October 16, 2009, Judge McIntosh granted Respondent's motion for summary judgment, dismissed and extinguished the mechanic's lien filed against Respondent, and, pursuant to S.C. Code Annotated § 29-5-20, awarded Respondent's attorneys' fees and costs in the

amount of $14,522.55.[1]

Petitioner filed and served a notice of appeal on October 28, 2009. Oral argument was held before the South Carolina Court of Appeals, pursuant to which it issued an opinion affirming the decision of the Circuit Court. In the unanimous opinion, the Court of Appeals affirmed the Circuit Court's order granting summary judgment to Respondent as a matter of law on the grounds that Petitioner's purported "Notice of Furnishing" was ineffective as a notice of lien under S.C. Code Annotated § 29-5-40. On May 2, 2012, the Court of Appeals denied Petitioner's petition for rehearing.

Petitioner filed a petition for writ of certiorari on May 30, 2012. This Court granted that petition on February 6, 2014.

STATEMENT OF FACTS

This case arose out of leasehold improvements at Respondent's data center. The issue presently before the Court centers on whether Petitioner's "Notice of Furnishing," which was sent prior to delivery of all materials the notice purportedly covered, failed to state the amount or value of materials actually delivered at the time of the notice, failed to demand payment, and stated it was not a lien, may deprive Respondent of its payment defense under the mechanic's lien law. Both the Circuit Court and the Court of Appeals properly held that it cannot.

Respondent initially contracted with Rescom, as general contractor, to perform upfit work on its data center, excluding the performance of certain fire protection work.

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[1] Petitioner's brief does not claim error or address the award of attorney's fees by the Circuit Court. As such, Respondent will not address that issue in this brief. If Petitioner attempts to later raise or argue the issue, to the extent it has not been waived, Respondent refers to the argument addressing the issue in its response to Petitioner's petition for writ of certiorari.

(R. p. 92, ¶¶ 3-4). Rescom then hired Preferred Fire, a sprinkler company, as a subcontractor to perform work in connection with the upfit of the property. (R. p. 145, lines 11-22). In addition, Respondent contracted with directly with Preferred Fire for the installation of a pre-action dry pipe system for a contract price of $30,973.00. (R. p. 93, ¶ 5 and p. 94, ¶ 3). Beginning on August 24, 2007, Petitioner furnished materials to Preferred Fire for use in connection with the installation of the pre-action dry pipe system. (R. pp. 94-95, ¶ 4). On August 30, 2007, Respondent issued a check to Preferred Fire in the amount of $15,486.50. (R. p. 95, ¶ 5).

On September 21, 2007, Petitioner sent a "Notice of Furnishing Labor and Materials" ("Notice of Furnishing") to Respondent stating that Petitioner was employed by Preferred Fire to provide "fire sprinkler/pipe/valve/fittings with an estimated value of $15,000." (R. p. 95, ¶ 7 and p. 112). The Notice of Furnishing indicated that it was intended to be "TO CONTRACTOR." (R. p. 112). The Notice of Furnishing did not indicate when the materials would be delivered, did not indicate an amount owed, and made no demand for payment. *Id.* Rather, it plainly stated that the materials mentioned "were actually furnished or scheduled to be furnished by [Petitioner] to the Project from Sep 10, 2007 (sic) through _____" and "[t]he amount claimed to be due, if any: _____ _____." *Id.* The Notice of Furnishing further provided:

> 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. It 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 . . . .

Id. (emphasis added).[2]

On October 3, 2007, after receiving the Notice of Furnishing but prior to Petitioner's final delivery, Respondent issued a second payment to Preferred Fire in the amount of $14,513.50. (R. p. 95, ¶ 8). Petitioner completed delivery of the materials for the project on October 16, 2007. (R. pp. 94-95, ¶ 4). Subsequently, on October 31, 2007, Respondent issued a final payment to Preferred in the amount of $973.00. (R. p. 95, ¶ 9). At no time prior to the final payment did Respondent receive any notice from Petitioner that payment was due and owing for the materials provided.

Petitioner concedes that full payment was made to Preferred Fire for the installation of the pre-action system; however, Petitioner alleges that Preferred Fire never paid for the materials it supplied. (R. p. 95, ¶ 6 and p. 67, ¶ 9). On January 8, 2008, Petitioner filed and served a proper Notice of Mechanic's Lien. (R. p. 95, ¶ 10). On April 11, 2008, Petitioner filed the verified complaint in this case seeking to foreclose its mechanic's lien. (R. p. 95, ¶ 11). Because Petitioner's complaint did not clearly identify the "materials, services, and/or labor" that were the subject of this litigation, and Respondent believed the materials at issue were those provided to Preferred Fire in connection with its subcontractor work under its contract with Rescom, Respondent filed a third-party complaint against Rescom for breach of contract and attorneys' fees. (R. p. 77-80 and R. p. 145, line 23 – 146, line 6). Respondent and Rescom reached an agreement whereby Rescom would assume the defense of Immedion and Immedion's claims against Rescom were dismissed. (R. p. 146, line 13 – 147, line 11, and p. 88).

[2] Noticeably absent from Petitioner's statement of the facts is the unequivocal statement in the notice that it "is not a lien." As discussed below, this key fact alone establishes that the notice to Respondent was ineffective.

Only later did it become apparent that Petitioner's lien covered materials provided in connection with the separate contract between Immedion and Preferred Fire. (R. p. 146, lines 10-18).

ARGUMENT

The Court of Appeals held that the Notice of Furnishing issued by the Petitioner in this case was ineffective under S.C. Code Annotated § 29-5-40 because it "was sent prior to furnishing all the material, failed to identify the final amounts of the goods delivered, and never made a demand for payment." *Ferguson Fire & Fabrication v. Preferred Fire Protection, LLC*, 397 S.C. 379, 386, 725 S.E.2d 495, 499 (Ct. App. 2012). As discussed below and contrary to Petitioner's arguments, the appellate court did not add any requirements to the statutes and instead simply applied the requirements set forth in section 29-5-40 and case law. Furthermore, the appellate court's ruling is consistent with logic, policy, and the specific facts of this case. Accordingly, the ruling below should be affirmed.

I. The Court of Appeals correctly affirmed the Circuit Court's ruling that the Notice of Furnishing provided to Respondent was ineffective as a notice of lien under S.C. Code Annotated § 29-5-40.

Petitioner contends that (1) a notice of lien under section 29-5-40 only requires notice in writing that apprises the owner of the value of goods or services to be provided; (2) its Notice of Furnishing issued to Respondent met all the requirements of a notice of lien under section 29-5-40; and (3) the Court of Appeals improperly added requirements that were not in section 29-5-40. The contentions fail upon analysis of the terms of the statute and the facts of this case.

A. Section 29-5-40 requires more than Petitioner contends.

As an initial matter, the requirements of section 29-5-40 are more stringent and substantive than Petitioner argues. Section 29-5-40 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 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***. But in 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.

(emphasis added). It is well-established that "[w]ords used in a statute should be given their plain and ordinary meaning . . . ." *Taylor Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 372 S.C. 89, 97, 641 S.E.2d 459, 462 (Ct. App. 2007). The plain language of section 29-5-40 provides three requirements:

(1) that notice be given for work that "is done" or material that "is furnished";

(2) that the notice provide the value of the "work . . . done" or "material . . . furnished"; and

(3) that a lien "for the amount of work done or material furnished" exist at the time of issuing the notice so that the lien in that amount attaches.

These requirements are explicit in the statute and mandate more than the notice simply being in writing and providing notice of materials to be delivered and their value. As discussed below, the Notice of Furnishing issued to the Respondent did not meet these statutory requirements. Accordingly, the Notice of Furnishing was ineffective under section 29-5-40.

B. Petitioner's Notice of Furnishing failed to state the materials actually furnished or the value thereof as required by section 29-5-40.

A mechanic's lien is purely statutory, and the requirements of the statute must be strictly followed. *See Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985). Petitioner's standardized Notice of Furnishing did not comply with the terms of section 29-5-40 because it failed to state the materials actually furnished and their value. Instead, the Notice of Furnishing stated that the materials "were actually furnished or scheduled to be furnished by [Petitioner] to the Project from Sep 10, 2007 (sic) through _____" and that Petitioner "ha[s] provided or will provide FIRE SPRINKLER/PIPE/VALVES/ FITTINGS with an estimated value of $15,000." (R. p. 112). Thus, the Notice of Furnishing from Petitioner makes clear that there were materials that were scheduled to be furnished from September 10, 2007, through an indefinite date in the future and that the aggregate amount of materials that were scheduled furnished would equal $15,000. It is undisputed that at the time of the notice, Petitioner had not delivered all of the materials for which the notice supposedly covered and that the value of the materials furnished did not equal $15,000. Thus, the Notice of Furnishing did not provide notice of the "material . . . furnished" and the amount thereof at the time issued, but instead for materials to be provided in the future. Accordingly, Petitioner's Notice of Furnishing failed to satisfy the explicit requirements of section 29-5-40, and the Court of Appeals' decision should be affirmed.

Petitioner argues at length that the Court of Appeals erred by finding that the notice was insufficient because all of the materials had not been furnished at the time of the notice. But the Court of Appeals' decision is consistent with the express terms of the statute. Unlike in other parts of the statutory scheme, section 29-5-40 requires that notice

be given for "material . . . furnished," not those expected to be or partially furnished. *Compare* S.C. Code Ann. § 29-5-20(B)(6) (providing that a notice of furnishing shall include "the date when ***the first and last item of labor or service or materials was*** actually furnished or ***scheduled to be furnished***") (emphasis added) *with* § 29-5-40 (referring only to "material [that] is furnished"). The Court of Appeals thus properly held that all materials covered by the notice be delivered per the terms of section 29-5-40.[3]

C. Notice of a prospective lien is legally ineffective under section 29-5-40.

i. A lien for the amount in the notice must exist at the time the notice is given.

The Court of Appeals properly held that the notice issued by Petitioner was insufficient because it failed to identify the final amount of goods delivered because section 29-5-40 does not permit notice of a prospective lien. Per the terms of the statute and case law, a notice of lien must be for an ***existing*** lien. S.C. Code Ann. § 29-5-40 (providing that an existing lien "shall attach" for "material [that] is furnished" in "the amount of the work done or material furnished" upon written notification of "the furnishing of such . . . material and the amount or value thereof"); *also Stovall Bldg. Supplies, Inc. v. Mottet*, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990) (stating that "a mechanic's lien will not attach to the owner's property unless the owner is given notice ***of the claim*** of a materialman who contracted with a person other than the owner") (emphasis added); *Action Concrete Contractors v. Chappelear*, 404 S.C. 312, 315, 745 S.E.2d 77, 78 (2013) (stating that "payment by the owner to the general contractor after the owner has received ***notice of the lien*** is made at the owner's peril") (quoting *Maddux*

[3] Petitioner could have complied with the statute by issuing a proper notice for the materials actually delivered and their value and then a subsequent notice for the additional materials delivered. It did not do that, however, rendering the notice invalid.

Supply Co. v. Safhi, Inc., 316 S.C. 404, 412, 450 S.E.2d 101, 106 (Ct. App. 1994)) (emphasis added) (internal quotations omitted).

The Notice of Furnishing in this case, however, was for a lien Petitioner expected but did not yet have. It is axiomatic that a lien only arises for material already furnished. *Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc.*, 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990) ("A mechanic's lien arises, inchoate, when labor is performed or material furnished."). It cannot be disputed Petitioner did not have an ***existing*** lien in the amount indicated in the Notice of Furnishing, as it had not in fact delivered that amount of materials. Rather, the notice was for a prospective lien in an amount of materials and value Petitioner intended but had not yet delivered.

Petitioner argues that because a notice of lien is one of a few steps in perfecting a lien, the timing of the delivery of the notice is irrelevant. This fails on two levels. First, this reading runs contrary to the express terms of the statute which require an existing lien be present in the amount stated in the notice. Second, this argument lacks common sense. It defies logic to allow a subcontractor to give notice of a lien under section 29-5-40 when the subcontractor does not actually have a lien in the amount of the notice. Allowing that to occur could cause owners to make payments for work not actually performed. Accordingly, the Notice of Furnishing provided to Respondent was ineffective.

ii. *Lowndes* and the statutory history of section 29-5-40 do not provide that a notice of lien may be given prior to delivery of all materials.

To argue that a notice of lien can be given at any time, including for a lien that does not yet exist, Petitioner relies heavily on *Lowndes Hill Realty Company v.*

Greenville Concrete Company, 229 S.C. 619, 93 S.E.2d 855 (1956) and the prior legislative history for section 29-5-40. This reliance is misplaced.

The Court in *Lowndes* analyzed a situation where notice was given ***after*** delivery of material for a project was completed. The subcontractor in that case furnished materials and then filed a certificate of mechanic's lien and served it on the owner. *Id.* at 623, 93 S.E.2d at 856. The subcontractor did not file a notice of lien. *Id.* The Court nonetheless found that the filing of the certificate of mechanic's lien was sufficient notice for a lien to attach under the precursor statute to section 29-5-40[4] because notification "***of the amount or value of the material furnished***" two times would be "needless duplication." *Id.* at 630, 93 S.E.2d at 860 (emphasis added). Placed in the context of the facts of the case, this Court's pronouncement that the precursor to section 29-5-40 "specifies no time at which or within which notice of the furnishing of material is to be given" makes sense and does not violate the terms of the statute, as it is referring to a situation where the notice refers to material already furnished. *Id.* at 629, 93 S.E. 2d at 860.

Unlike in *Lowndes*, the Notice of Furnishing in this case was not for materials already furnished and the value thereof, but was instead for an unspecified amount of materials scheduled to be furnished that purportedly would equal $15,000. Respondent was not given notice of the material actually furnished and its value by the Notice of Furnishing. The analysis in *Lowndes* is therefore inapplicable to the facts of this case as it concerned a situation where all materials had been furnished at the time of the notice.

Petitioner also claims that because prior versions of section 29-5-40 required a

[4] The precursor statute analyzed in *Lowndes* is substantially identical to the section 29-5-40 and also requires notice be given for "material . . . furnished."

materialman to provide notice of a lien[5] prior to delivery of the goods, the current statutory scheme not having such a requirement expands the time for delivery. Comparing the statutes, however, it is clear that the time for delivery under the current statute is after all materials covered by the notice have been furnished. Under the prior statute, "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." Act of February 25, 1896 XXII Stat. at L. 197 (emphasis added). As discussed above, however, the current statute only provides for attachment of a lien upon notice of "***material [that] is furnished***." S.C. Code Ann. § 29-5-40. The change in the statute did not expand the time for delivery of the notice. Rather, the terms of the current statute make clear that delivery of the notice can only be given for material actually furnished.

Petitioner's arguments ignore the express terms of section 29-5-40. Notice for material that may be furnished, *i.e.*, before a lien exists, is ineffective under the statute. Petitioner did not possess a lien for the materials and amount stated in the Notice of Furnishing at the time the notice was delivered, and section 29-5-40 does not protect Petitioner's prospective and unenforceable claims. Petitioner's notice was therefore ineffective.

D. The Court of Appeal's application of section 29-5-40 is consistent with the plain language of section 29-5-50.

The fact that all material must be furnished and that a lien in the amount claimed

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[5] Petitioner actually states that prior versions of the statute required a "Notice of Furnishing" rather than a notice of lien. As discussed below, Petitioner improperly conflates the meaning of a notice of furnishing and a notice of lien, which are distinct statutory creatures.

must exist at the time of the notice under section 29-5-40 is supported by the terms of section 29-5-50. That section provides:

> Any person ***claiming a lien*** under the provisions of this chapter ***who shall have given 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 notice.

S.C. Code Ann. § 29-5-50 (emphasis added). According to this provision, an individual is only entitled to priority if he is claiming an existing lien and has given proper notice under the mechanic's lien statute for "material furnished." The terms of this provision thus confirm the proper interpretation of section 29-5-40.

Furthermore, it is well settled that a materialman's lien is limited by section 29-5-50 to the amount owed by the owner to the contractor at the time that the owner receives notice under section 29-5-40. *Stoudenmire Heating and Air Conditioning, Co. v. Craig Building P'ship*, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992).[6] Under Petitioner's proposed application of section 29-5-40 permitting prospective liens, it would be impossible to measure the owner's true liability at the time of delivery if a notice of lien is only required to provide an "estimated value" of the materials to be provided, as was

[6] It should be noted that in prior briefing, including that before the Court of Appeals, Petitioner relied extensively on *Stoudenmire* for the proposition that its Notice of Furnishing constituted adequate notice under section 29-5-40. Its reliance is notably diminished in its Initial Brief filed with this Court. This makes sense given the fact that the notice in that case differed from the Notice of Furnishing issued by Petitioner on two of the most crucial and contested issues - - *i.e.*, the subcontractor in *Stoudenmire* case demanded payment from the owner and had completed its work on the project at the time it gave notice. *See Id.* at 300, 417 S.E.2d at 636; *Ferguson Fire & Fabrication v. Preferred Fire Protection, LLC*, 397 S.C. 379, 387, 725 S.E.2d 495, 499 (Ct. App. 2012) (finding reliance upon *Stoudenmire* "misguided" given that Petitioner's Notice of Furnishing was sent prior to completion of delivery of materials and did not make a demand for payment).

the case here. While the amount due from the owner to the contractor may be readily available when such notice is received, the amount due to the subcontractor would be unclear. This scenario would create several unintended problems and delays in determining the owner's payment duties under section 29-5-50, and the accompanying proration provisions of section 29-5-60. The Court of Appeal's interpretation of section 29-5-40 is consistent with the terms and purpose of section 29-5-50, and its ruling should be affirmed.

II. The Court of Appeals properly held that a demand for payment is a prerequisite to a notice of lien.

Petitioner asserts that the Court of Appeals improperly concluded that a demand for payment was required in order for notice to be effective under section 29-5-40. While this requirement is not directly within the terms of section 29-5-40, this is an implicit, fundamental principle in giving effective notice. To be sure, a notice of lien that does not demand payment does not apprise the owner of any obligation. If anything, a notice without a demand causes confusion, as an owner does not know whether he or she is obligated to make payment or if the costs have been or will be covered by the general contractor with whom the subcontractor has a contractual relationship.

This Court has previously indicated that this is the proper way to interpret section 29-5-40, stating that the purpose of section 29-5-40 is not to create a windfall for a subcontractor but instead to allow it to pursue a lien "due to the general contractor's nonpayment." *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008).[7] Thus, an owner's liability is not triggered, and cannot be measured,

[7] Petitioner contends that this Court's statements in *Sloan* constitute dicta that should be ignored because that case did not concern the actual application of the mechanic's lien

until the owner receives notice of nonpayment, *i.e.*, a demand for payment from the subcontractor.[8]

In its argument, Ferguson suggests a joint check arrangement to remedy the inevitable confusion and creation of payment issues should a demand for payment not be made. But joint checks will create further administrative and accounting problems for owners and will no doubt result in disputes and, possibly, litigation. They will foster uncertainty and create distrust among general contractors, trade contractors, and suppliers. Such joint checks may even violate section 29-5-50, as an owner would not be paying a subcontractor with preference as required by the statute. *See* S.C. Code Ann. § 29-5-50 (providing that a person with a lien is entitled to be paid in preference to another upon proper issuance of notice under the mechanic's lien law).

III. A notice of lien is different from a notice of furnishing and must be treated differently.

As a fundamental matter, while the form of a notice of lien does not matter so long as it complies with the statutory requirements, Petitioner's attempt to convert a notice of furnishing, which is authorized under section 29-5-20, into a notice of lien, which is authorized by section 29-5-40, is improper. A notice of furnishing and a notice of lien are creatures of statute with different requirements and purposes. Petitioner's attempt to conflate the two and use a notice of furnishing as a notice of lien should be

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statutes. Whether the statement is dicta or not is irrelevant under the circumstances. The Court specifically interpreted the purpose of section 29-5-40, which does not change regardless of the facts.

[8] Petitioner's argument that a notice of nonpayment is different from a demand for payment should be rejected. Any notice of nonpayment from a subcontractor to an owner will at least implicitly demand payment. Otherwise, there is no purpose of notifying an owner of nonpayment.

rejected.

A. Legislative history and the construction of the mechanic's lien statutes establish that a notice of lien differs from a notice of furnishing.

To understand the distinction between a notice of furnishing and notice of lien, one must look to the statutory history of the mechanic's lien law as well as the provisions of the respective statutes. In May 1992, Act 368 added the following provision to section 29-5-20 of the mechanic's lien statute:

> (B) In no event shall the aggregate amount of any liens filed by a sub-subcontractor or supplier exceed the amount due by the contractor to the subcontractor to whom the sub-subcontractor or supplier has supplied labor, material, or services unless the sub-subcontractor or supplier has provided ***notice of intent to lien*** by certified or registered mail to the contractor. . . . ***After receiving such notice, no payment by the contractor to the subcontractor will lessen the amount recoverable by the person so giving notice.*** However, in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner.

Act 368 amending § 29-5-20 of the 1976 Code (emphasis added). The language of Act 368 was modified slightly by Act 140 of 1995 to substitute "notice of furnishing labor or materials" in place of the language "notice of intent to lien." This is how the statute continues to read today.

Per the terms of the amendments in 1995, the notice of furnishing provision under section 29-5-20(B) must be read in conjunction with the notice of project commencement provision created by section 3 of Act 368 and codified at section 29-5-23. Under section 29-5-23, a notice of project commencement may be filed by a general contractor, which provides the general contractor a payment defense under section 29-5-20(B). If subcontractors and suppliers in turn file a proper notice of furnishing under section 29-5-20(B), however, the general contractor is put on notice that the lower-tier subcontractor or supplier is on the job and the contractor no longer enjoys the payment defense. S.C.

Code Ann. § 29-5-20(B).

These provisions do not affect an ***owner***. They only concern general contractors and their lower-tier subcontractors and suppliers. The owner's obligations are instead dealt with under section 29-5-40 with a notice of lien. Under that section a subcontractor is permitted to give notice of an existing lien to an owner, and if properly done, the owner's payment defense is lost. S.C. Code Ann. § 29-5-40. This provision is intended to protect subcontractors when a general contractor fails to make payment on an existing lien. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E. 2d 158, 165 (2008) ("The mechanic's lien statute provides that when a subcontractor seeks to enforce a mechanics' lien against the owner of the improved property due to the general contractor's nonpayment, the owner's liability is limited to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's nonpayment.").

Based on the legislative history and the structure of the statutory code, the notice of furnishing and notice of lien are entirely different statutory creatures serving different purposes. A notice of furnishing is intended to work in conjunction with a notice of project commencement to establish rights that a subcontractor may have to payment against a contractor holding a direct contract with the owner. A notice of lien, on the other hand, is intended to attach an existing lien against an owner following a general contractor's nonpayment. As such it is improper for Petitioner to try to convert its Notice of Furnishing into a notice of lien even if there is no required form for a notice of lien.

B. The statutory requirements of a notice of furnishing and notice of lien are different.

In addition to being wholly different statutory creatures concerning different sets

of construction participants, the distinction between the notice of furnishing and notice of intent to lien is clear from the requirements of the respective statutes. S.C. Code Annotated § 29-5-20(B) provides, in relevant part:

> In no event shall the aggregate amount of any liens filed by a sub-subcontractor or supplier exceed the amount due by the contractor to the subcontractor to whom the sub-subcontractor or supplier has supplied labor, material, or services unless the sub-subcontractor or supplier has provided notice of furnishing labor or materials by certified or registered mail to the contractor. Such notice of furnishing labor or materials shall include:
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> . . .
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> (5) the date when the first and the last item of labor or service or materials was actually furnished ***or scheduled to be furnished***; and
>
> . . .
>
> After receiving such notice, no payment by the contractor to the subcontractor will lessen the amount recoverable by the person so giving notice. However, in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner.

(emphasis added).

In contrast, S.C. Code Annotated § 29-5-40, in relevant part, 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 writing ***notify the owner of the furnishing of such labor or material and the amount or value thereof*** . . . .

S.C. Code Ann. § 29-5-40 (emphasis added). Thus, notice under section 29-5-40 is solely for work done or material furnished, whereas a notice of furnishing can be given for work not yet done and materials not yet delivered.

In short, the notices required under sections 29-5-20(B) and 29-5-40 have different requirements and serve different purposes. Petitioner's attempt to conflate the two concepts for its own purposes will result in confusion to owners, general contractors,

and subcontractors and contradicts the established statutory scheme. Accordingly, the Notice of Furnishing issued by Petitioner should be found to be ineffective to serve as a notice of lien.

IV. As a matter of public policy the Notice of Furnishing in this case should fail to constitute a notice of lien under section 20-5-40 because the Notice of Furnishing failed to advise Respondent of an existing lien.

Lost in the legal wrangling over whether the Notice of Furnishing issued by Petitioner can satisfy the requirements for a notice of lien under section 29-5-40 is that the entire purpose of that section is to provide actual notice of a lien to an owner. The Notice of Furnishing issued by Petitioner did not do that. In fact, the Notice of Furnishing specifically said that it was ***not*** a lien. It even highlighted the importance of this fact. (R. p. 112) ("It is important to note that this is not a lien."). Additionally, it did not state that a lien existed, and did not state that it was attaching a lien. Rather than provide actual notice of a lien, the Notice of Furnishing issued by Petitioner actually advised Respondent the opposite - - it told Respondent that no lien existed, indicating that Respondent had no obligation at the time. Because the "notice" specifically advised Respondent that it was not a lien, did not state that a lien existed, and did not state that Respondent had any obligation under the notice, Respondent had no reason to believe it was obligated to pay Petitioner as opposed to its general contractor. Enforcing this purported "Notice of Furnishing" against Respondent is therefore fundamentally unfair and directly contrary to the statement in the notice. Petitioner's argument that the notice was adequate should therefore be rejected.

CONCLUSION

Based upon the foregoing authorities and arguments, Respondent respectfully

requests that the ruling of the South Carolina Court of Appeals be affirmed.

Respectfully submitted,

April 18, 2013

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Court Judge

Opinion No. 4947 (S.C. Ct. App. Filed February 29, 2012)

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. is — Petitioner,

and Immedion, LLC is — Respondent.

Appellate Case No. 2012-212191

CERTIFICATE OF COUNSEL

I certify that this Brief of Respondent complies with Rule 211(b)

April 18, 2013

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent by causing it to be placed in the United States Mail to be delivered to Petitioner's attorney of record as follows:

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[SIGNATURE ON FOLLOWING PAGE]

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