THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-02746

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

PETITIONER'S REPLY TO BRIEF OF RESPONDENT

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The Respondent's arguments must be rejected because they rely upon a misinterpretation of the language of the statute and the function of notice under S.C. Code of Laws Ann. §29-5-40.

I. THE RESPONDENT'S USE OF THE PHRASE "NOTICE OF LIEN" IS MISLEADING AND IMPROPER.

The Respondent's use of the phrase "notice of lien" is misleading and improper. See Brief of Respondent, pp. 15 *et seq.* Notice under §29-5-40 is not a "notice of lien," despite Respondent's assertions to the contrary. The statute itself does not define or even use the phrase "notice of lien." A proper understanding of the function of the notice in the statutory scheme shows that §29-5-40 notice is not "notice of lien." To call notice under §29-5-40 a "notice of lien" creates the false impression that a lien has been created prior to, or by the service of, the notice. While that false impression supports the Respondent's argument, it is not correct.

The statute does not refer to §29-5-40 notice as a "notice of lien." "Notice of lien" is not a defined term in the statute. In fact, the phrase does not appear in the statute itself. The statute title accurately describes the notice as "Notice to owner ***before*** lien attaches when laborer was employed by someone other than owner." (Emphasis added). This precise description of the notice contained in the statute title should not be confused by the Respondent's misleading appellation.

The statute language states that the subcontractor shall in writing "notify the owner of the furnishing of such labor or material." The statute does not say that the subcontractor/materialman must notify the owner of a *lien*. If the drafters of the statute had

intended the notice to be a notice of lien, they would have used the word lien. Rather, the statute specifically describes the notice as notice that services or goods are being furnished. For that reason, this notice is more properly called a "notice of furnishing," just as the analogous notice for general contractors and sub-subcontractors under §29-5-20.

Notice under §29-5-40 is not a "notice of lien." It is notice that a party who does not have a direct contract with the owner is providing goods/services to the project. Because these second-tier claimants have no direct contract with the owner, the owner must be apprised of their potential claims. A contract provides notice of a potential lien by a person dealing directly with the owner. Notice under §29-5-40 provides that same notice for second-tier contractors.

Notice under §29-5-40 is notice of a potential lien, not a current lien. The Appellant's notice in this case correctly states that fact. Once the owner has notice of this potential claim, the owner has an obligation to protect the second-tier claimant under §29-5-50.

The Respondent further confuses this issue by coining the phrase "prospective lien." The Respondent equates the Notice of Furnishing with a lien, and then accuses the Appellant of seeking authority for a "prospective lien." That characterization is misleading and misconstrues the Appellant's argument. A notice of furnishing does NOT itself create a lien, and the Appellant is not asking this court to sanction a "prospective lien."

Service of a Notice of Furnishing does not create the lien because without the delivery of materials there can be no lien. It is the delivery of materials/services that creates an inchoate lien. 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 files a statement of mechanic's 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. The notice of furnishing simply triggers the payment preference provisions of §29-5-50, which limit the owner's payment defense.[1] Having received notice of furnishing an owner cannot reduce his potential lien liability by paying the general contractor. The owner has options to protect himself. Owners routinely require lien waivers from subcontractors when making payments to the general contractor. Alternately, owners can use joint checks as described in the Appellant's brief.

II. THE RESPONDENT DOES NOT RELY UPON THE PLAIN LANGUAGE OF THE STATUTE.

The Respondent waves the rhetorical banner of "plain language" interpretation, but concedes that the Court of Appeals' requirement that notice contain a demand for payment is "not directly within the terms of §29-5-40." Brief of Respondent, p. 14. If the requirement is not "directly within the terms" of the statute, one cannot reasonably argue that the "plain language" requires a demand for payment. The fact is, the statute does not reference a demand for payment, and the Court of Appeals fashioned that requirement in an attempt to hold the Appellant's proper notice was invalid. Nor can a demand for payment reasonably be implied from the language that states that the contractor "shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof." If the drafters of the statute had intended that the subcontractor make a demand for payment, they would have included that in the statute.

Respondent also slices the statute up and adds words to make the "plain language"

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[1] The service of a statement of lien under §29-5-90 serves as a notice under §29-5-40. Therefore, the lien may be perfected without a separate notice of furnishing.

of the statute fit its interpretation. Respondent argues that a lien attaches upon notice of "***'material [that] is furnished.'*** S.C. Code Ann. §29-5-40." With the clever editing and addition of the article "that," Respondent creates the illusion that the statute requires that the material must be delivered before the notice. That is not the "plain language" of the statute. That is the interpretation of the statute. When read as a whole and according to the rules of grammar, then statute says no such thing. In fact, using the same technique, the Appellant could cut and paste to argue that notice is good "whenever material is delivered." By simply focusing on a single phrase, it is easy to craft misleading arguments. However, the correct interpretation comes from reading the statute as a whole.

The statute does not say when the notice is to be given relative to the delivery of the materials. The sentence creates two prerequisites to the attachment of a lien, but the statute does not say in which order these events must occur. Before the attachment of the lien, two things have to happen (1) notice must be given and (2) material must be provided. This sentence simply does not state the sequence of these two requirements. The sentence merely requires that the two prerequisites happen before the attachment of a lien. Thus, the Lowndes court noted "There is, as we have said, no requirement that the 'notice' under Section 45-254[2] be given at any particular time." Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855, 862 (1956).

Respondent's plain language argument also ignores the title of the statute. Although the title and headings of a statute may not be construed to limit the plain language of a

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

statute, they may be used to shed light on an ambiguous word or phrase. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). The title of §29-5-40 is "Notice to owner ***before*** lien attaches when laborer was employed by someone other than owner." (Emphasis added). The Respondent argues just the opposite. Respondent claims that "Notice for material that may be furnished, *i.e.* before a lien exists, is ineffective under the statute." Brief of Respondent, p. 12. However, the title says in plain language that the notice is "Notice to owner before lien attaches." Because the lien attaches inchoate upon delivery, the statute authorizes notice before the delivery of that material and attachment of the lien.

Respectfully Submitted,

April 28, 2014

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CERTIFICATE OF COUNSEL

The unersigned certifies that this Petitioner's Reply to Brief of Respondent complies with Rule 21(b), SCACR.

April 28, 2014

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PROOF OF SERVICE OF PETITIONER'S REPLY TO BRIEF OF RESPONDENT

I certify that I have served Petitioner's Reply to Brief of Respondent Immedion, LLC by depositing a copy of same in the United States Mail, with the correct postage affixed, on April 28, 2014, addressed to Immedion, LLC's attorney of record in the above-referenced action:

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