THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27410
Heard June 12, 2014 – Filed July 9, 2014

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 — Respondent,

and Immedion, LLC is — Petitioner.

Appellate Case No. 2012-212191

PETITION FOR REHEARING OF IMMEDION, LLC

Ronald G. Tate, Jr., Esq.
Zachary L. Weaver, Esq.
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 10589
Greenville, SC 29603
(864) 271-9580

Attorneys for Immedion, LLC

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Petitioner Immedion, LLC ("Immedion") requests that this Honorable Court grant rehearing as set forth herein. Immedion respectfully asserts that the below issues were misapprehended by the Court and warrant reconsideration.

STANDARD FOR A PETITION FOR REHEARING

According to Rule 221(a) of the South Carolina Appellate Court Rules, a properly drawn petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001); *see also* James A. Atkins, 16 S.C. JUR. APPEAL AND ERROR § 147 (2007). "The purpose of such a petition [for rehearing] is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

In applying the aforementioned notion of "overlooked or misapprehended," this Court has suggested that rehearing may be appropriate where the court issued a decision without keeping a material principle "fully in mind." *Green v. E.B. Gresham Co.*, 168 S.C. 395, 167 S.E. 659 (1933) (implying that decision by a court "unmindful" of legal principle may be a candidate for rehearing).

ARGUMENTS

I. The Court's opinion misapprehended the Circuit Court's ruling.

In its opinion, the Court states that the Circuit Court decided that "Ferguson Fire had failed to follow the requirements of S.C. Code Ann. § 29-5-40 because all of the materials had not yet been furnished when it issued its notice to [Immedion], and it did not identify the final amount of the supplies yet to be delivered." Advance Sheet Opinion

("Opinion") at 23. The Circuit Court's order, however, did not make those conclusions. It was the Court of Appeals' opinion that characterized these as requirements for a Notice of Furnishing. Without regard to whether the Court of Appeals committed error in imposing additional requirements for a Notice of Furnishing, the Circuit Court nevertheless properly granted Immedion summary judgment. The Circuit Court found the notice insufficient because "the Notice explicitly stated that it was not a mechanic's lien and contained no demand for payment." R. 58.

On summary judgment, Ferguson Fire argued that the Notice of Furnishing served as a notice of lien under the rationale of *Stoudenmire Heating and Air Conditioning Co. v. Craig Building Partnership*, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992). The Circuit Court found that *Stoudenmire* was distinguishable because the claimant in *Stoudenmire* made a demand for payment. *See Id.* at 300, 417 S.E.2d at 636. The Circuit Court properly held that the notice needed to contain a demand for payment to serve the purposes that Ferguson Fire asserted.

This Court has previously stated 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) (emphasis added). No demand for payment was made in the notice in question; to the contrary, Ferguson Fire's notice stated no amount was claimed to be due. R.112 ("the amount claimed to be due, if any: _____"). Without such a demand, a Notice of Furnishing cannot be effective to put an owner on notice that he or she risks double payment by paying a general contractor in the ordinary course of performance. Immedion therefore respectfully requests that the Court

reconsider its ruling in light of the Circuit Court's rationale and affirm the grant of summary judgment below.

II. The Court's opinion did not consider the effect of section 29-5-50.

Further, this Court's opinion did not discuss how section 29-5-50 applies to this case. Regardless of whether the Notice of Furnishing comported with the requirements of section 29-5-40, the outcome of the case turns on whether Immedion's payment to Preferred Fire violated the rights of Ferguson Fire to preferential payment under section 29-5-50. Under section 29-5-50, a subcontractor or supplier may overcome the payment defense of an owner by claiming a lien and issuing a proper notice:

> 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.

S.C. Code Ann. § 29-5-50 (emphasis added). The Circuit Court correctly concluded that because the statute only applies to a person "claiming a lien," a subcontractor or supplier "is not protected under this section until he has asserted his lien rights and given the necessary statutory notice of lien." R. 59.

Here, it cannot be disputed that Ferguson Fire did not ***claim*** a lien until January 8, 2008, well after Immedion had already properly made payment to Preferred Fire Protection, LLC ("Preferred Fire") for the amounts at issue in this case. R. 72-73 (filing of statement and notice of mechanic's lien dated January 8, 2008). Specifically, Immedion sent a purchase order to Preferred Fire on August 23, 2007, for a sprinkler system costing $30,973.00. Immedion made its first payment of $15,486.50 to Preferred Fire on August 30, 2007. On September 21, 2007, Ferguson Fire issued its notice and

unequivocally advised Immedion that it was not claiming a lien. R. 112 (stating "this is not a lien"). Because Ferguson Fire was not claiming a lien in its notice (and therefore did not trigger the protections of Section 29-5-50), Immedion properly issued checks totaling $15,548.93 on October 3 and 31, 2007, to Preferred Fire for the remaining balance of the purchase order. R. 95. More than two months later, on January 8, 2008, Ferguson Fire finally filed its notice of mechanic's lien and advised Immedion of its lien. Because Ferguson Fire did not claim a lien until well after Immedion made payment, its notice of mechanic's lien was too late in time to trigger Ferguson Fire's right to preferential payment under section 29-5-50. The Circuit Court's decision should therefore be affirmed.

III. The Court's interpretation of section 29-5-40 vitiates the owner's payment defense under section 29-5-50.

Statutes must be read together and courts must apply a practical, reasonable, and fair interpretation of the statutes consonant with the purpose, design, and policy of the law. *See, e.g., Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 888 (1993) (stating the requirement that "statutes, as a whole, must receive practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers"); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) ("In ascertaining this intent, statutes which are part of the same Act must be read together.").

One of the fundamental principles of mechanic's lien law in South Carolina is the "protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." *Taylor-Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 372 S.C. 89, 96, 641 S.E.2d 459, 462 (S.C. App. 2007). In finding that

Ferguson Fire properly issued a notice under section 29-5-40 in advance of delivery, the Court's decision effectively strips the payment defense from owners and has the potential to fundamentally change the way the construction industry does business. In its opinion, the Court stated that "once a party claiming a lien gives the proper notice, he is entitled to be paid in preference to the contractor who procured the labor or materials, and the owner's payment to the contractor *after* receiving the proper notice shall not diminish the amount recoverable by the party asserting a lien." Opinion at 28.

In deciding this issue, the Court misapprehends the interplay between sections 29-5-40 and 29-5-50. The text of section 29-5-40 states that the notice may be given for material that is "furnished." Specifically, it provides that "[w]henever ***work is done*** or ***material is furnished*** . . . 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). The "furnishing of such labor or material and the amount or value thereof" language modifies the previous past tense phrase which is for work "done" or material "furnished." Thus, the statute contemplates that the notice may only properly be given for furnished materials. Under section 29-5-50, a person who has properly issued a notice under 29-5-40 and who is "claiming a lien" trumps the payment defense of an owner. When read together, these statutory provisions provide that (1) a party may give notice of work done or material furnished (i.e., an existing lien); (2) such a notice causes the lien to attach to the relevant property upon delivery; and (3) a proper notice and claim for lien terminates the owner's payment defense.

The Court has concluded, however, that by sending a notice under section 29-5-40 for amounts not necessarily delivered and in an uncertain amount, even before a lien

exists, a subcontractor gets full protection from the owner's payment defense under section 29-5-50 whenever the subcontractor eventually decides to obtain and claim a lien. In short, the Court has decided that a subcontractor may issue a notice for a lien that does not exist, even though such a notice causes a lien to attach per the terms of the statute. By taking this prophylactic measure, which does not need to give notice of work actually performed or material actually delivered, the Court finds that a subcontractor destroys the payment defense of the owner prospectively, before any lien for the amount claimed is even in existence.

If the Court's interpretation of these provisions stands, it may cause a sea change in the way construction contracts in South Carolina are performed. From now on, suppliers may send notices before delivering materials in amounts that exceed any amount of material that would actually be furnished in order to destroy the payment defense prospectively. If the supplier later does deliver material and does not receive payment from a general contractor, it can then assert a claim for lien and hold the owner liable, despite the fact that it may not have had the lien when it sent its notice. In essence, the payment defense is lost before a subcontractor does any work or a supplier delivers any material.

Based on this decision, a subcontractor may hold an owner and a project hostage with a notice, despite not having a lien, not claiming a lien, and not having actually done any work or delivered any materials. This breaks down the system in place between owners and their general contractors and may result in multi-party litigation when an owner is forbidden from paying the party to whom he or she is contractually obligated. This interpretation of the statutory scheme vitiates the owner's payment defense that has

been held sacred for over a century. Immedion therefore respectfully requests that the opinion be reconsidered.[1]

IV. The Court misapprehends the requirements of section 29-5-40 in allowing a notice to cover unfurnished materials in an "estimated" value.

In its opinion, the Court acknowledges the importance of strictly complying with the requirements of the statute. *See* Opinion at 27 (noting the "importance of strictly adhering to the statutory requirements"). The Court, however, permits a deviation from the statutory text by allowing the Ferguson Fire's notice to state an "estimated" amount. Section 29-5-40 specifically states that the notice must state the furnished labor or material and "the amount or value thereof." S.C. Code 29-5-40. That indisputably was not done here. Ferguson Fire sent a notice of furnishing that "estimated" the value, and was ultimately not the same as the amount actually delivered. R. 112 ("We have provided or will provide FIRE SPRINKLER/PIPE/VALVES/FITTINGS with an ***estimated*** value of $15,000") (emphasis added). This does not comply with the strict terms of the statute, which the Court acknowledges is required. Accordingly, Immedion respectfully requests that the Court reconsider its ruling and grant rehearing before the Court.

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[1] The Court's interpretation should be further reconsidered in light of the facts of this case. When the notice was delivered, the Petitioner had delivered an amount of goods less than that claimed in the notice. *See* R. 99-102 (invoices for materials before September 20 amounting to $14,369.06). Subsequent to that, the Petitioner delivered more goods than claimed in the notice. R. 72-73 (claiming delivery of $15,548.93 in materials). Petitioner did not have a lien in the amount claimed when it issued the notice, and, per the Court's opinion, was permitted to enforce a lien in an amount greater than the notice, despite the notice not accurately advising Immedion of the amount furnished or its value. Petitioner's notice therefore did not accurately provide notice of the actual potential liability, and it should not constitute effective notice under section 29-5-40.

CONCLUSION

Based upon the foregoing authorities and arguments, Immedion respectfully requests that the Court grant this Petition.

Respectfully submitted,

July 16, 2014

Ronald G. Tate, Jr. (S. C. Bar # 5475)
Zachary L. Weaver (S.C. Bar # 101419)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
(864) 271-7502 FAX
rtate@gwblawfirm.com
zweaver@gwblawfirm.com

Attorneys for Immedion,
Immedion, LLC

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CERTIFICATE OF COUNSEL

I certify that this Brief of Immedion complies with Rule 240.

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Ronald G. Tate, Jr. (S. C. Bar # 5475)
Zachary L. Weaver (S.C. Bar # 101419)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
rtate@gwblawfirm.com
zweaver@gwblawfirm.com

Attorneys for Immedion, LLC

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Immedion, LLC by causing it to be placed in the United States Mail to be delivered to Petitioner's attorney of record as follows:

Robert E. Culver, Esq.
575 King Street, Suite A
Charleston, SC 29403

[SIGNATURE ON FOLLOWING PAGE]

July 16, 2014

Ronald G. Tate, Jr. (S. C. Bar # 5475)
Zachary L. Weaver (S.C. Bar # 101419)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
(864) 271-7502 FAX
rtate@gwblawfirm.com
zweaver@gwblawfirm.com

Attorneys for Respondent,
Immedion, LLC