2012-21219

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R Lawton McIntosh, Presiding Circuit 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 , Petitioner,

And Immedion, LLC is Respondent

PETITION FOR WRIT OF CERTIORARI

Robert E Culver, Esq
575 King Street, Suite A
Charleston, South Carolina 29403
Phone (843) 853-9816
Fax (843) 853-9838
ATTORNEY FOR THE PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for the petitioner, Ferguson Fire & Fabrication, Inc ("Ferguson"), certifies that Ferguson's petition for rehearing was timely made and finally ruled upon by the Court of Appeals on May 2, 2012

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 which are not set forth in the statute?

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

Respondent (Immedion, LLC) leases property at the Global Gateway Center in Greenville (R pp 38-39)

On or about August 23, 2007, Respondent sent a purchase order to Preferred Fire Protection for the installation of a fire protection system The purchase order was for $30,973 00 (R pp 42-43)

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

Preferred never paid 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 August 30, 2007, Respondent paid Preferred $15,486 50 of the $30,973 00 due under the contract (R pp 53-56)

On September 21, 2007, Appellant sent notice to Respondent 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 "
- "We have provided or will provided fire sprinkler/pipe/valves/fittings with an estimated value of $15,000 "
- The notice identifies the contractor and the address of the project

(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)

On January 8, 2008, Ferguson filed and served a Statement of Mechanic's 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 Greeville, LLC and Thomas Wong

The Complaint sought to foreclose a mechanics lien against the real property interest of Immedion, which leases commercial real property

Preferred Fire Protection, LLC was 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

ARGUMENT

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

A THE SERVICE OF A NOTICE OF FURNISHING UNDER §29-5-40 TRIGGERS THE PREFERENCE PROVISIONS OF §29-5-50 WHICH REQUIRE AN OWNER TO PROTECT THE CLAIMS OF MATERIALMEN AND SUB-CONTRACTORS

The critical issue in this case concerns the required form and timing of a Notice of Furnishing under §29-5-40 of the mechanic's lien statute This Notice of Furnishing triggers the payment preference provision of §29-5-50 which prevents owners from discharging the liens of materialmen and sub-contractors by paying general contractors The rulings by the Court of Appeals and the Trial Court have added new requirements to the statutory Notice of Furnishing under § 29-5-40 These requirements are not written in the mechanic's lien statute, nor are they part of the Courts' jurisprudence In adding these new requirements, the Court of Appeals undermines the statutory protections for claimants who do not have direct contracts with the owners, and virtually assure that such claimants will not be able to protect their interests This Court should grant this Petition for Certiorari and reverse the Court of Appeals and the Trial Court in order to insure the proper operation of the mechanic's lien statute

A materialman who provides materials to a contractor has a lien for the value of such materials on the owner's[1] interest pursuant to S C Code of Laws §29-5-20, which provides in

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[1] 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 "

relevant part

> (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 right to this lien arises inchoate upon the delivery of the materials 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

An owner is not liable on the lien if the owner pays a general contractor in full before the materialman's lien is perfected Section 29-5-40 provides in relevant part 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 payment defense prevents the owner from becoming liable for more than the contract price by having to pay the general contractor and a subcontractor or materialman for the same work Thus, in the period of time between the delivery of the materials and the perfection of the lien by filing/serving a statement of lien, the owner may pay the general contractor for the work and thereby defeat the materialman's lien

The owner's payment defense is not absolute, however The owner may not raise the payment defense where he receives notice that the materialman is furnishing materials to the project before the owner pays the general contractor Two sections of the mechanic's lien statute set up this limitation on the payment defense First, S C Code of Laws §29-5-40 provides that a materialman

must provide Notice of Furnishing to the owner 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

Once the owner receives this Notice, the owner cannot reduce his liability on the 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

Thus, a materialman's lien is limited to the amount owed by the owner to the contractor at the time that the owner receives Notice of Furnishing 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 mechanic's 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 mechanic's lien was recorded The Court held that the proper date for determining the amount owed by owner 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

The form of the Notice of Furnishing is not prescribed by statute The required form of

notice was 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[2] 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, (2) inform the owner that such material/labor is being furnished, and (3) state the amount or value of material provided

The statute does not require that the Notice of Furnishing be delivered at any particular time Lowndes Hill Realty Co v Greenville Concrete Co , 229 S C 619, 93 S E 2d 855, 862 (1956) Under prior versions of the statute, a materialman was required to provide Notice of Furnishing ***before*** the delivery of the goods [3] Prior to 1896, subcontractors and persons contract with the general contractor were not protected by the statute In 1896, the Legislature amended the mechanic's lien statute to provided 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,

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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

[3] 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 "

supra at 861 (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 863, 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 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 The notice provided by Ferguson in this case meets those requirements

B THE COURT OF APPEALS ERRED BY HOLDING THAT A NOTICE OF FURNISHING CANNOT BE DELIVERED PRIOR TO THE FURNISHING OF THE MATERIALS

The decision by the Court of Appeals has altered the statutory mechanics lien scheme The Court of Appeals states that the notice is "insufficient under the statute, and has no legal effect " The deficiencies noted are

4 "the Notice never provided a project completion date,"

5 The Notice never said the project was completed,

6 The Notice was sent prior to the completion date and prior to the furnishing of "all

of the materials, '

7 The Notice failed to state that payment was due,

8 The Notice fails to contain a demand for payment

None of these elements are required by the language of the statute, and none of these deficiencies part of the Court's jurisprudence

The Court of Appeals misreads the statutory language in concluding that materials must be delivered prior to the service of a Notice of Furnishing The statute provides that the materials must be delivered prior to the attachment of a *lien* – not prior to the service of a Notice of Furnishing The Court mistakenly equates "attachment of a lien" with the service of Notice of Furnishing By confusing these distinct actions, the Court undermines the purpose of the mechanics lien statute and eviscerates the statute's protections for remote claimants

The Court of Appeals misinterprets the following sentence

> 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

S C Code of Laws Ann 29-5-40

The main clause of the sentence is "the ***lien*** shall attach upon the real estate ' The introductory clause sets forth two requirements for the attachment of a lien by a materialman to a contractor Those requirements are (1) that material is furnished, and (2) that the materialman shall in writing notify the owner of the furnishing and the value This sentence means that the notice must be given and materials delivered prior to the attachment of a ***lien*** Nowhere does the sentence

say that such notice must be given after the delivery of materials The sentence simply does not address when the notice must be given except to say that the lien will not attach until after the notice is delivered

The Court of Appeals misreads the introductory clause by stating that Ferguson's Notice was invalid 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 " However, these are statutory requirements of a lien – not of a Notice of Furnishing

The Court of Appeals misreads in the introductory clause as requiring that the two prerequisites to a lien be performed in order Under the Court's interpretation of the language, the material must be furnished first because the furnishing material comes before written notice in the introductory clause However, the Court's reading is incorrect because the sentence says nothing about the timing of the two prerequisites The sentence simply says that these two things must happen prior to the attachment of a lien With respect to one another, the timing of the prerequisites (furnishing materials and giving notice) is interchangeable

The Court reaches its conclusion by misreading the tense of the introductory phrase "*Whenever work is done or material is furnished*" The Court emphasizes this phrase and indicates that this language means that the work or materials must have been provided prior to the right to send a Notice of Furnishing However, the use of the past participle of the verbs ("done ' and "furnished") in the introductory clause, does not indicate action in the past These are passive verbs In passive verb forms, the past participle of the verb is always used [4] In fact, these verbs are in the

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[4]See *e g* [online] "The Passive Form," http //www edufind com/english/grammar/Pass1 cfm, "The Passive Voice" http //www englishclub com/grammar/verbs-voice_passive htm, "Active Passive Verb Forms"

present passive voice, which does not indicate that the action is past or future, but refers to work or materials "whenever" done or furnished The language of this qualifying clause in the statute does is not in the past tense and does not refer to work performed or materials delivered in the past

Rather the sentence indicates that the materials must be provided prior to the *attachment of a lien* – not prior to the service of the Notice of Furnishing The main clause of the sentence is, "the lien shall attach for the amount of the material furnished " The *lien* will attach after the materials are furnished and the Notice of Furnishing is given However, the Notice of Furnishing is not a lien, and the requirement of prior delivery is not applicable to the Notice of Furnishing

The Court's analysis equates a lien with Notice of Furnishing under §29-5-40 and misapprehends crucial differences between the two The Court of Appeals correctly states that a lien attaches, inchoate, upon delivery of the materials Preferred Sav & Loan Ass'n Inc v Royal Garden Resort Inc , 301 S C 1, 3, 389 S E 2d 853, 854 (1990) The lien is perfected by the filing and service of a Statement of Lien under §29-5-90

The lien is not the same as the Notice of Furnishing which simply gives notice to the owner that a materialman is providing materials to the project A Notice of Furnishing does not create a lien If a materialman gives Notice of Furnishing and fails to deliver the materials or the file and serve the Statement of a Lien, there is no lien In fact, a separate Notice of Furnishing is not even a prerequisite to a lien, and the service of a Statement of Lien may qualify as a Notice of Furnishing A Statement of Lien necessarily contains all the information required in a Notice of Furnishing, and the Statement of Lien under §29-5-90 is sufficient to comply with the requirement of a Notice of

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http //www englishpage com/verbpage/activepassive html

Furnishing Lowndes Hill Realty Co v Greenville Concrete Co , 229 S C 619, 93 S E 2d 855, 862 (1956)

In equating the lien 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 Furnish is tantamount to a lien, then the Notice must come after the delivery of the materials However, if 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 filing of a Statement of a lien, but to extend them to a Notice of Furnishing defeats the purpose of the Notice

C THE COURT'S ADDITIONAL REQUIREMENT THAT THE PROJECT BE COMPLETE HAS NO BASIS IN STATUTE OR THE COURT'S JURISPRUDENCE

The Court of Appeals' ruling can be read as requiring that the final delivery of all materials due under a contract be complete at the time of 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 "project" be "complete" prior to Notice of Furnishing In this respect, the Court is not equating the Notice of Furnishing with 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

Aside from the difficulty in defining what constitutes a 'complete project," this rule 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 files for bankruptcy 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 lien the project and insist on 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

D THE COURT MISTAKENLY ADDS THE REQUIREMENT THAT THE NOTICE OF FURNISHING DEMAND PAYMENT

The Court of Appeals also adds a requirement that the remote claimant actually make a demand for payment, and in doing so 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) The Court cites this case for the proposition that no lien attaches until an actual demand for payment is made to the owner However, the Sloan case does not even involve a mechanics lien Sloan Constr Co involved a bond claim The issue 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 mistakenly 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 receives a "demand" for payment But as outlined herein, neither the statute nor Lowndes stand for the proposition that a remote claimant must demand payment in their notice under §29-5-40

E BY ADDING THE NEW REQUIREMENTS, THE COURT UPSETS THE STATUTORY BALANCE BETWEEN OWNERS AND REMOTE CLAIMANTS

The main function of the Notice of Furnishing is not to create a lien but serves to trigger the provisions of §29-5-50, which provide that an owner may not reduce his potential lien liability to the materialman by paying the general contractor Together, sections §29-5-40 and §29-5-50 create the protections for remote lien claimants, and are the keystone's to the statutory balance between the interests of owners and remote lien claimants

The primary function of §29-5-40 is to serve as a limitation on such lien "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 " This section's purpose to protect the owner from paying more than is due on the contract This is the only place in the statute where the remote claimant's lien is limited If it weren't for section §29-5-40, a general contractor's failure to pay a subcontractor could increase the owner's liability over the contract price Preventing the owner from overpaying is one of the core policies of the lien statute

While section §29-5-40 limits the lien, §29-5-50 provides protection for the remote claimant Section 29-5-50 provides that where the supplier gives notice that he is furnishing materials, "no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice "

These sections read together provide the statutory frame work that serves the essential purpose of the statute That purpose is the balance the interests of remote claimants with the interest of the owner As quoted by the Lowndes Court, the purpose is two-fold, "(1) The protection of one, not a party to a contract with the owner, who furnishes labor or material in the improvement of the owner's property, by giving him a lien for such labor or material, and (2) the protections of the property owner by limiting his liability and that of his property in respect of all such liens to "the amount due by the owner on the contract price of the improvement made " Snipes v Horton, 129 S C 1, 123 S E 321

When the Court creates new requirements for the Notice of Furnishing, the Court upsets the statutory balance between the owner and the remote claimants For example, 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 In many cases the general contractor will have been paid in full prior to the completion of delivery Thus, the additional notice requirements remove, as a practical matter, any remedy for the remote claimant 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 should note Ferguson Fire met the first two new requirements – that the product be delivered and that the payment be past due The Notice of Furnishing was dated September 21, 2007 As shown by the invoices in the Record, the Appellant had delivered $12,040 50 in materials at the time it sent the Notice Subsequent to the Notice, Appellant delivered $3,508 43 Moreover, payment was due on the majority of the invoices The invoices provided for payment within 10 days of the date of the invoice That means that $8,991 94 was past due at the time of the Notice Thus,

if the statute only required that the material be delivered and payment past due, the Appellant would be entitled to a lien of $8,991 94

F THE STATUTORY FRAME WORK DEMONSTRATES THAT THE COURT'S ADDITIONAL REQUIREMENTS ARE NOT PROPER

This statutory frame work outlined by §29-5-40/50 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

Similarly, there is an exception to the limitation on the general contractor's liability where the sub-subcontractor/supplier gives Notice of Furnishing pursuant to §29-5-20(B) This exception is identical 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

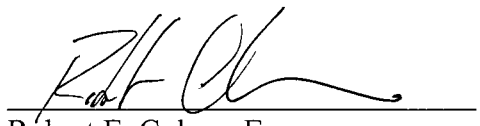
Similarly, there is no requirement that the payment be due at the time of a Notice of Furnishing under §29-5-20(B)(6) That section requires the claimant to state the amount due, "if any " Thus, the Notice of Furnishing can be sent prior to the time that payment is actually due The rule should be similar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

Respectfully Submitted,



May 30, 2012

Robert E Culver, Esq
575 King Street, Suite A
Charleston, South Carolina 29403
Phone (843) 853-9816
Fax (843) 853-9838
ATTORNEY FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

I certify that I have served the Petition for Writ of Certiorari on Immedion, LLC by depositing a copy of same in the United States Mail, with the correct postage affixed, on May 30, 2012, addressed to Immedion, LLC's attorney of record in the above-referenced action

Ronald G Tate, Esq
Gallivan, White & Boyd, P A
Post Office Box 10589
Greenville, South Carolina 29603

Robert E Culver, Esq
575 King Street, Suite A
Charleston, South Carolina 29403
Phone (843) 853-9816
Fax (843) 853-9838
ATTORNEY FOR THE PETITIONER

THE CULVER FIRM, P C

ATTORNEY AT LAW

575 KING STREET SUITE A
CHARLESTON SC 29403
PHONE 843 853 9816
FACSIMILE 843 853 9838

ROBERT E CULVER ESQ

BOB@CULVERLAW NET

June 15, 2012

The Honorable Daniel E Shearouse, Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
1231 Gervais Street (29201)
Columbia, South Carolina 29211

RE Ferguson Fire v Preferred Fire - Appellate Case No 2012-212101

Opinion No 4947 (S C Ct App Filed February 29, 2012),
Greenville County Trial Court Case No 2008-CP-23-02746

Dear Mr Shearouse,

In accordance with your letter of June 11, 2012 in which you advised us that the title in the above matter has been changed, enclosed please find following documents reflecting the corrected case title

1 Original and six (6) copies of Petition for Writ of Certiorari and Proof of Service
2 Two copies of Appendix, one copy bound and one copy unbound

Please call with any questions you might have

With Kindest Regards,

Robert E Culver

Robert E Culver, Esq lae
The Culver Firm, P C

Dictated but not Read
REC/lae
Enclosures
cc Ronald G Tate, Jr , Esq (w/Petition and Proof of Service)