

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)

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S.C. Supreme Court

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

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

Defendants,

Of Whom Ferguson Fire and Fabrication, Inc.,

Petitioner,

And Immedion, LLC is

Respondent.

Immedion, LLC,

Third-Party Plaintiff,

v.

Rescom Construction, LLC

Third-Party Defendant.

Appellate Case No. 2012-212101

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

Immedion, LLC Respondent,

v.

Preferred Fire and Fabrication, Inc. Appellant.

FINAL BRIEF OF APPELLANT

May 24, 2010

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STATEMENT OF ISSUES ON APPEAL

1. CAN A MATERIALMAN ENFORCE HIS LIEN UNDER S.C. CODE § 29-5-20 WHEN THE OWNER PAYS A GENERAL CONTRACTOR ALL SUMS OWED ON THE CONTRACT **AFTER** RECEIVING NOTICE FROM THE MATERIALMAN PURSUANT TO S.C. CODE § 29-5-40?
2. IS A MATERIALMAN'S NOTICE UNDER § 29-5-40 EFFECTIVE WHEN IT CONTAINS NO DEMAND FOR PAYMENT AND STATES "THIS IS NOT A LIEN?"
3. DOES THE LIENORS PREFERENCE STATUTE (§29-5-50) ALLOW THE OWNER TO DEFEAT A MATERIALMAN'S LIEN CLAIM BY PAYING THE GENERAL CONTRACTOR AFTER THE OWNER HAS RECEIVED NOTICE UNDER §29-5-40?
4. IS A DEFENDANT, WHO SUCCESSFULLY DEFENDS A CLAIM OF MECHANIC'S LIEN, ENTITLED TO ATTORNEYS FEES AND COSTS FOR THE DEFENDANT'S UNMERITED THIRD PARTY CLAIM AGAINST A CONTRACTOR WHO WAS NOT INVOLVED IN THE PROJECT AT ISSUE?

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).

On August 30, 2007, Respondent paid Preferred \$15,486.50 on the job. (R. pp. 53-56).

The outstanding balance on the materials, exclusive of interest and fees, is \$15,548.93. (R. p. 15).

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, Respondent paid Preferred \$14,513.50 on the job. (R. pp. 53-56).

On October 31, 2007, Respondent paid Preferred the balance of \$973 on the job. (R. pp. 53-56).

Preferred never paid the Appellant. (R. p. 41, paragraph 6).

On January 8, 2008, the Appellant filed and served notice of mechanic's lien.

On April 11, 2008, the Appellant filed a verified complaint in this action, and Respondent was served on May 6, 2007.

Appellant named Preferred as a defendant. 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.

ARGUMENT AND AUTHORITY

- I. THE COURT ERRED IN HOLDING THAT AN OWNER IS NOT LIABLE ON A MATERIALMAN'S LIEN WHEN THE OWNER PAYS ITS GENERAL CONTRACTOR IN FULL AFTER RECEIVING NOTICE FROM THE MATERIALMAN UNDER §29-5-40.**

Can a materialman enforce his lien under S.C. Code §29-5-20 when the owner pays a general contractor all sums owed on the contract after receiving notice from the materialman pursuant to S.C. Code §29-5-40?

The Trial Court erred by holding that an owner may

defeat a materialman's lien by paying the general contractor in full after receiving the materialman's notice pursuant to S.C. Code §29-5-40. Once an owner receives notice that a materialman is providing materials to the general contractor, the owner cannot reduce the materialman's lien by paying the general contractor. S.C. Code of Laws §29-5-50 (Supp. 2005). Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959); Stoudenmire Heating and Air Conditioning, Co. v. Craig Building Partnership, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992); Stovall Building Supplies, Inc. v. Mottet, 305, S.C. 28, 406 S.E.2d 176 (Ct. App.).

A materialman who provides materials to a contractor has a lien for the value of such materials on the owner's¹ interest pursuant to S.C. Code of Laws §29-5-20, which provides in 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

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."

to enforce the lien prevails.

Where the materialman is employed by a person other than the owner, the materialman must give notice to the owner in order to enforce the lien. S.C. Code of Laws §29-5-40. 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.

After an owner receives notice under § 29-5-40, the owner cannot reduce his liability on the lien by paying the 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.

A materialman's lien is limited to the amount owed by the owner to the contractor at the time that the owner receives notice under §29-5-40. Stoudenmire Heating and Air Conditioning, Co. v. Craig Building Partnership, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992). In Stoudenmire, a subcontractor gave notice under §29-5-40 on April 22, 1988, and then filed and served the notice of 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 Stoudenmire decision controls the result of this case. Just like the subcontractor in Stoudenmire, the Appellant gave notice to the owner pursuant to §29-5-40. In both Stoudenmire and this case, the subcontractor/materialman served and filed notice of mechanics lien within 90 days of the completion of work or supply. In both Stoudenmire and this case, the subcontractor/materialman timely filed suit to enforce the lien. The Stoudenmire court remanded the case to the trial court for determination of the amount owed by the owner to the contractor on the date of the notice. In this case, the court should similarly hold that the limit of the owner's liability is determined by the date the owner receives notice. Because the owner owed \$15,486.50 at the time that the notice was delivered, the court should remand this case with instructions to enter judgment in favor of the Appellant on its mechanic's lien.

The Trial Court also erred in stating that the Stoudenmire decision was overruled by the modifications to the mechanic's lien statute in 1992. The statutory provisions at issue in this appeal have remained substantively unchanged since 1916. See Lowndes Hill Realty Co. v. Greenville Concrete Co., 93 S.E.2d 855, 862 (1956). The modifications made in 1992 have no bearing whatsoever on the issues in this case. The 1992 modifications added section §29-5-20(B) which pertains only to the liability of a contractor to a sub-subcontractor or lower-tier materialman. This appeal concerns the liability of an owner to a materialman, and therefore, §29-5-20(B) is irrelevant to this appeal.

The Trial Court erred by holding that the owner's payment defense is based upon the

amount due on the date that the mechanic's lien statement is filed for record – not the date that the owner received notice under §29-5-40. The Trial Court's holding conflicts with the holding of Stoudenmire and the clear terms of the statute. The Stoudenmire Court held, "[T]he owner's liability under the lien is limited to the balance due by him to the prime contractor *at the time the owner receives the notice from the subcontractor.*" Stoudenmire Heating and Air Conditioning, Co., supra at 865. Therefore, the Trial Court must be reversed.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT'S NOTICE UNDER §29-5-40 WAS INEFFECTIVE.

Is a materialman's notice under §29-5-40 effective when it contains no demand for payment and contains a statement that "this is not a lien?"

The Court erred by holding that the notice given by Appellant was "ineffective" under §29-5-40. Under the statute and relevant case law, a notice under this section only needs to apprise the property owner that the materialman is furnishing materials and the value of the materials furnished. In this case the notice met those criteria and additionally informed the owner that the notice was being provided pursuant to §29-5-40. Therefore, the notice was sufficient, and the Trial Court must be reversed.

The statute does not limit subcontractors and materialmen to a particular form for the notice under §29-5-40. 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 45-254² 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.

In Lowndes, the court held that the service of the notice of lien under §29-5-20 is sufficient to constitute notice because it informed the owner that services were being provided and the value of those services. Similarly, the Stoudenmire court held that a letter indicating the work performed and the value of that work constituted notice under §29-5-40. Stoudenmire, *supra* at 300.

The notice provided by the Appellant complies with the requirements set forth in the statute and in Lowndes and Stoudenmire. The notice is in writing and it has apprised the owner of the furnishing of labor and material and the amount. Therefore, the notice complies with the requirements of notice under §29-5-40, and the Trial Court erred in holding otherwise.

The Trial Court erred in holding that the notice was ineffective because it does not contain a "demand for payment." The Trial Court incorrectly held that the notice was ineffective because, "It simply places the owner on notice that Ferguson is providing material to the project." The history of the statute demonstrates that the notice under §29-5-40 need not contain a demand for payment. In fact, under prior versions of the statute the notice had to be delivered BEFORE the materials or labor were provided.

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

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, supra at 861. Act of February 25, 1896 XXII Stat. At L. 197. The statute section was rewritten in 1916 to substantially its current state. Lowndes, supra at 863; citing Act of February 29, 1916, XXIX Stat. at L. 686.

The Lowndes Court noted this history and stated, "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 Appellant met these requirements, and the Trial Court's holding that the notice must contain a demand for payment is an incorrect statement of the law.

The Court was also incorrect in holding that the notice was ineffective because a portion of the notice states, "this is not a lien." This statement is surplusage and does not affect the validity of the lien. Moreover, the statement is factually accurate. The notice under §29-5-40 is not a lien, it is simply one of many steps necessary to *perfect* the lien. The lien exists, inchoate, when the material is furnished. Lowndes, supra at 860. In order to perfect the lien, the materialman must (1) provide notice under §29-5-40, (2) serve and record a notice of lien within 90 of ceasing to provide such material, and (3) bring suit to

foreclose the lien within six months of ceasing to provide such material. *Id.* The notice under §29-5-40 is simply one of three steps required to perfect the materialman's inchoate lien. Therefore, the statement in the notice is accurate and does not deflect from the effectiveness of the notice under §29-5-40.

The Appellant's notice contained the elements necessary to comply with the requirements of the statute. The Trial Court erred in holding that the notice was ineffective, and therefore, the Trial Court must be reversed.

III. THE TRIAL COURT ERRED IN HOLDING THAT §29-5-50 DOES NOT PROTECT A MATERIALMAN'S LIEN UNTIL AFTER THE MATERIALMAN RECORDS AND SERVES A STATEMENT OF MECHANIC'S LIEN.

Does the lienors preference statute (§29-5-50) allow the owner to defeat a materialman's lien claim by paying the general contractor after the owner has received notice under §29-5-40?

The Trial Court incorrectly held that a materialman is not protected by the lienor's preference statute, S.C. Code of Laws §29-5-50. This statute provides that the owner may not reduce the lien by payments to a general contractor after receiving "notice" from a materialman. That section 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.

S.C. Code of Laws §29-5-50 (emphasis added).

The plain language of the statute indicates the Trial Court erred by not applying this section to this case. The benefits of §29-5-50 are limited to a person “who shall have given the *notice* provided for herein.” The Trial Court interpreted “*notice*” to include the certified statement of mechanic’s lien that a lienor must record and serve under §29-5-90 in order to enforce the lien. Under the Trial Court’s interpretation, a lienor must serve notice under §29-5-40 **and** the statement of mechanic’s lien under §29-5-50 before the lienor is entitled to be preferred over the contractor.

The Trial Court overlooked the fact that the only “notice” in the statute is the “notice” set forth in §29-5-40. That section is entitled “Notice to owner,” and the text refers to the lienor’s duty to “notify the owner of furnishing.” On the other hand, §29-5-90 refers to its required document as a “statement” or “certified statement.” This statement must be “served” upon the owner. The word “notice” does not appear in §29-5-90. Thus, the only relevant “notice” in the statute is the notice of §29-5-40.

Section 29-5-50 protects a claimant who has given “notice.” Therefore, the statute, by its terms, becomes effective, when the owner receives the “notice” of §29-5-40. The required “statement” of lien set forth in §29-5-90 is not relevant to the application of the preference provision of §29-5-50 because the latter provision refers only to “notice” and not a “statement of lien.”

The cases of this Court support this interpretation of the statute. In Stovall Building Supplies, Inc. v. Mottet, 305, S.C. 28, 406 S.E.2d 176 (Ct.App.), this Court held that materialman’s lien is invalid where the owner paid the general contract before receiving notice under §29-5-40. Similarly, the court in Wood v. Harvey noted:

Section 45-254 specifies no time at which or within which notice of the furnishing of material is to be given to the owner. Such notice may be given at any time. Cf. Hughes v. Peel, 221 S.C. 307, 70 S.E. 353; but of course it will be ineffectual if the other requisites to the perfection and enforcement of the lien, Sections 45-259 and 45-262, are not met. Delay in giving the notice cannot operate to the detriment of the owner, because his liability under the lien is limited to the balance due by him to the prime contractor at the time he received the notice.'

Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959).

IV. THE COURT ERRED IN AWARDING ATTORNEYS FEES RELATING TO THE
RESPONDENT'S FILING AND PROSECUTION OF A MERITLESS THIRD-PARTY CLAIM.

Is a defendant, who successfully defends a claim of mechanics lien, entitled to attorneys fees and costs for the defendant's unmerited third-party claim against a contractor who was not involved in the project at issue?

The prevailing party in a mechanic's lien case is entitled to a "reasonable" attorney fee and costs of the action.

S.C. Code §29-5-20 provides:

If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the Court. The fee and the Court costs may not exceed the amount of the lien.

The party seeking an award of attorneys fees under a statute has the burden of proving entitlement to those fees. A conclusory affidavit is not sufficient to support an award of attorneys fees, and counsel must submit detailed time records to demonstrate that the fees were properly charged. Sunrise Sav. & Loan Ass'n v. Mariner's Cay Development Corp., 295 S.C. 208, 367 S.E.2d 696 (1988).

Respondent sought and received an award of attorneys fees and costs associated with a third-party complaint filed by Respondent against Rescom, a general contractor which was not involved in the work at issue in this case. (R. p. 91, line 3 - p.92, line 6).

This third-party complaint was not warranted by the facts of the case because Rescom was not involved in the work for which the Appellant sought the lien. (R. p. 92, line 10 - p.93, line 11)

Despite the fact that there was no merit to the third-party claim, Respondent and Rescom eventually agreed that Rescom would assume the defense of the case. (R. p. 92, line 10 - p.94, line 16)

Charles Barnett was Respondent's original attorney, and Ron Tate was originally attorney for Rescom. After the agreement between these parties, Mr. Tate took over defense of the action. Both attorneys filed affidavits in support of Respondent's request for fees.

Respondent seeks attorneys fees for the prosecution, defense and settlement of a third-party action that is not part of the lien claim. After Appellant served its complaint upon the Respondent, Respondent brought a third-party action against Rescom, alleging that Rescom was liable under a construction contract. The Appellant did not name Rescom in this suit. The Appellant had no control whatsoever over Respondent's decision to bring in Rescom. More importantly, Rescom had no liability in this matter because Rescom's contract with Respondent was unrelated to the contract at issue in this case.

Respondent sought \$4,072 in attorneys fees incurred by Charles Barnett. (R. pp. 32-33). Mr. Barnett's affidavit indicates this time includes the preparation of the third-party complaint, negotiations between Rescom and Respondent, and the drafting and review of

documents relating to the settlement agreement between Rescom and the Respondent. The files in this case indicate that Rescom filed a motion against Respondent to stay the third-party action. Similarly, the affidavit of Ron Tate, who took over the defense from Mr. Barnett, indicates that a portion of his 13.7 hours on May 6, 8 and July 7 and 15 was spent in working out the details of the agreement between Rescom and Respondent and obtaining the dismissal of the third-party complaint. (R. pp. 59-60).

The Defendants incurred these fees as a result of Respondent's mistaken assumptions regarding Rescom's role in this matter. It would be unreasonable to reward Respondent with an award of fees relating to a mistake on its own part. Therefore, the fees are not reasonably incurred in the defense of the lien action. Rather, they were fees mistakenly incurred in the prosecution of an indemnity claim, over which the Appellant had no control.

Mr. Barnett's affidavit make no distinction between the time spent on the Rescom matter and the lien defense. (R. p. 94, line 22 - p.95, line 8). The only action Mr. Barnett took with regard to the lien defense was the preparation of a general denial. Mr. Tate could not articulate which fees were attributable to the Rescom issues and which were attributable to the lien defense. The party seeking fees has the burden of proving his fees. Sunrise Sav. & Loan Ass'n v. Mariner's Cay Development Corp., 295 S.C. 208, 367 S.E.2d 696 (1988). Because the Barnett affidavit cannot distinguish these allowable and disallowable fees, the request must be denied. Similarly, Mr. Tate cannot distinguish which of the 13.7 hours of fees in which Rescom issues were addressed were attributable to the Rescom issues. (R. p. 95, line 9 - p.98, line 21). Therefore, Mr. Tate's request must be reduced by 13.7 hours at \$250 per hour (\$3,425).

The Trial Court erred in awarding judgment for incurred by Rescom and the Respondent in the Respondents unsupported, third-party action against Rescom. The third-party action was unsupported by facts. Additionally, the third-party action was unnecessary because a third-party claim is not compulsory, unlike a counterclaim. Therefore, Respondent could have, and should have, waited for the determination of key facts in the underlying suit before bringing a third-party claims against Rescom. The Appellant should not be charged with the costs Respondent's ill-advised third-party action, and such fees are not "reasonable" within the meaning of the fee-shifting statute. Therefore, if the Court upholds the Trial Court's ruling on the merits of the case, the Court should reduce the award of attorney's fees by \$7,497.00.

CONCLUSION

The Trial Court held that the purpose of the mechanics lien statute is the "protection of the owner by preventing his liability on the liens from exceeding the amount the owner owes on the contract price." Order, p. 5 (citing Taylor-Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 641 S.E. 2d, 459, 462 (Ct. App. 2007)). The Trial Court failed to reference the second purpose cited by that court and several other courts—the purpose of "protection through a lien of a party, who furnished labor or material but was not a party to a contract with the owner." Id. The statute balances these competing interests by requiring that the subcontractor or materialman give notice to the owner. Thereby, the owner is protected from unknown claims, and the materialman is protected once he provides notice to the owner. The

Trial Court erred by ignoring half of the statute's purpose. The Appellant is protected from the date he gives notice pursuant to §29-5-40, and the Trial Court's ruling must be reversed.

Respectfully Submitted,

May 25, 2010



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And Immedion, LLC is

Respondent.

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Third-party Plaintiff,

v.

Rescom Construction, LLC,

Third-party Defendants.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. IS A SUBCONTRACTOR'S "NOTICE OF FURNISHING" TO A PROPERTY OWNER EFFECTIVE AS A NOTICE OF FURNISHING UNDER S.C. CODE OF LAWS § 29-5-20(B) AND/OR AS A NOTICE OF LIEN UNDER S.C. CODE OF LAWS § 29-5-40, NOTWITHSTANDING THAT THE NOTICE WAS NOT PROVIDED TO THE GENERAL CONTRACTOR AS REQUIRED BY § 29-5-20(B), THE NOTICE EXPRESSLY STATES, "THIS IS NOT A LIEN," AND NO PAYMENT WAS OWED OR CLAIMED TO BE OWED AT THE TIME OF DELIVERY?
- II. UNDER S.C. CODE OF LAWS § 29-5-50, IS A PROPERTY OWNER LIABLE ON A MATERIALMAN'S LIEN ASSERTED BY A SUPPLIER WHO HAS NOT ASSERTED HIS LIEN RIGHTS OR GIVEN THE NECESSARY STATUTORY NOTICE OF LIEN?
- III. DID THE TRIAL JUDGE ABUSE HIS DISCRETION IN DETERMINING THAT, UNDER S.C. CODE OF LAWS § 29-5-20, THE PREVAILING PARTY WHO SUCCESSFULLY DEFENDED AGAINST A MECHANIC'S LIEN IS ENTITLED TO RECOVER ATTORNEYS' FEES FOR ALL WORK PERFORMED AS A DIRECT RESULT OF THE FILING OF THE MECHANIC'S LIEN ACTION?

STATEMENT OF THE CASE

Appellant, Ferguson Fire and Fabrication, Inc. ("Appellant"), 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. Appellant asserted a cause 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 did not answer the complaint and, on January 14, 2009, Appellant obtained a default judgment against it in the amount of \$21,023.44. Thomas F. Wong and Fair Forest of Greenville, LLC, whom Appellants 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, which answer included a counterclaim for statutory attorneys' fees and a third-party complaint against Rescom Construction, L.L.C. ("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. On August 12, 2009, Appellant filed a Response to Defendant Immedion, LLC's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment Against Defendant Immedion, LLC, also pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. On August 31, 2009, Respondent filed a Memorandum in Support of

Immedion's Motion for Summary Judgment. On September 10, 2009, Appellant filed Plaintiff's Reply on Its Motion for Summary Judgment. On September 14, 2009, Respondent filed its Reply to Plaintiff's Memorandum in Response to Motion for Summary Judgment.

On September 17, 2009, a hearing on the parties' cross-motions for summary judgment was held before the Honorable R. Lawton McIntosh. After hearing oral arguments, Judge McIntosh ruled in favor of Respondent and against Appellant. As a result, Respondent requested an award of reasonable attorneys' fees pursuant to S.C. Code of Laws § 29-5-20. On October 8, 2009, Judge McIntosh allowed counsel for Appellant to cross-examine Ronald G. Tate, counsel for Respondent, regarding Respondent's attorneys' fees. On October 10, 2009, Appellant filed a Memorandum in Response to Request for Attorneys Fees by Defendant Immedion, LLC, in which it argued that Respondent should not be awarded fees in connection with the prosecution, defense and settlement of the third-party claims against Rescom. By order dated October 16, 2009, Judge McIntosh granted Respondent's motion for summary judgment, dismissed and extinguished the mechanic's lien filed against Immedion, LLC, and awarded Respondent attorneys' fees and costs in the amount of \$14,522.55.

Appellant filed a Notice of Appeal from the Order Granting Summary Judgment on October 28, 2009.

STATEMENT OF FACTS

This case arises out of the performance of leasehold improvements at Respondent's data center. Specifically, the issue centers on whether a material supplier's "Notice of Furnishing" may deprive an Owner of its defense of full payment under the mechanics lien law. The trial court properly held that it did not.

Respondent, Immedion, LLC ("Immedion"), contracted with Rescom, LLC, as general contractor, to perform tenant upfit work to its data center, excluding the performance of certain fire protection work. (R. p. 38, ¶¶ 3-4). Rescom hired Preferred Fire Protection, LLC ("Preferred Fire"), a sprinkler company, as a subcontractor to perform work in connection with the upfit of the property. (R. p. 91, lines 11-22). In addition, Immedion separately contracted with Preferred Fire directly to install a pre-action dry pipe system in the data center for a contract price of \$30,973.00. (R. p. 39, ¶ 5 and R. p. 40, ¶ 3). Beginning on August 24, 2007 and continuing through October 16, 2007, Appellant, Ferguson Fire and Fabrication, Inc. ("Ferguson"), furnished materials to Preferred Fire for use in connection with the installation of the pre-action system. (R. pp. 40-41, ¶ 4).

On September 21, 2007, Ferguson sent a "Notice of Furnishing Labor and Materials" to Immedion stating that Ferguson was employed by Preferred Fire to provide "fire sprinkler/pipe/valve/fittings with an estimated value of \$15,000." (R. p. 41, ¶ 7 and R. p. 58). The Notice of Furnishing did not specify any amount actually owed for the materials and, in fact, it did not indicate when it expected delivery of the materials to be completed. Rather, it provided that materials "were actually furnished or scheduled to be furnished by [Appellant] to the Project from Sep 10, 2007 (sic) through _____" and

"[t]he amount claimed to be due, if any: _____." (R. p. 58). 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....

(R. p. 58) (emphasis added).

The total value of materials that Ferguson furnished to Preferred Fire for the pre-action system at Immedion was \$15,548.93. (R. p. 41, ¶ 5). It is undisputed that Immedion paid Preferred Fire all sums due under its contract with Preferred Fire for the pre-action system. (R. p. 39, ¶ 5). On August 30, 2007, prior to receiving Ferguson's Notice of Furnishing, Immedion issued a check to Preferred Fire in the amount of \$15,486.50. (R. p. 41, ¶ 6). On October 3, 2007, after receiving the Notice of Furnishing but prior to the date all materials were delivered by Ferguson, Immedion issued a second check to Preferred Fire in the amount of \$14,513.50. (R. p. 41, ¶ 8). Thereafter, on October 31, 2007, after the final delivery of materials but prior to receiving any notice that payment was due and owing for the same, Immedion issued a third and final check to Preferred Fire paying the contract balance of \$973.00. (R. p. 41, ¶ 9).

It is undisputed that full payment was made to Preferred Fire for the installation of the pre-action system; however, Appellant has alleged that Preferred Fire never paid Ferguson for the materials it supplied. (R. p. 41, ¶ 6 and R. p. 13, ¶ 9). On January 8, 2008, Ferguson filed and served a Notice of Mechanic's Lien. (R. p. 41, ¶ 10 and R. p. 18). Ferguson then filed the verified complaint in this case, on April 11, 2008, in which it alleged that Ferguson provided certain "materials, services and/or labor" to Immedion's

property pursuant to a contract and agreement with Preferred Fire, and that Ferguson was not paid for said "materials, services and/or labor." (R. p. 41, ¶ 11 and R. p. 13, ¶¶ 6-9).

In its complaint, Ferguson did not identify the specific "materials, services and/or labor" that were the subject of this litigation, and Immedion believed the materials, services and/or labor at issue were those provided to Preferred Fire in connection with its subcontractor work under its contract with Rescom, the general contractor hired by Immedion to perform the remainder of the upfit work on the property. (R. p. 91, lines 11-22). Therefore, Immedion filed a third-party complaint against Rescom for breach of contract and attorneys' fees. (R. pp. 23-26 and R. p. 91, line 23-p. 92, line 6). Immedion and Rescom reached an agreement whereby Rescom would assume the defense of Immedion and Immedion's claims against Rescom were dismissed. (R. p. 92, line 13-p. 93, line 11 and R. p. 34). Only later did it become apparent that Ferguson's lien covered materials provided in connection with the separate contract between Immedion and Ferguson. (R. p. 92, lines 10-18).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY RULED THAT THE "NOTICE OF FURNISHING" PROVIDED BY APPELLANT TO RESPONDENT WAS INEFFECTIVE AS A NOTICE OF FURNISHING UNDER S.C. CODE OF LAWS § 29-5-20 AND A NOTICE OF LIEN UNDER S.C. CODE OF LAWS § 29-5-40.

The Circuit Court, in granting Respondent's motion for summary judgment, properly held that the "Notice of Furnishing" document served by Appellant on September 21, 2007 "is ineffective under [S.C. Code of Laws § 29-5-20 and § 29-5-40] for the purposes asserted by Appellant," notwithstanding that the Notice specifically referenced both sections. (R. p. 3). As set forth below, this conclusion is supported by the undisputed facts of this case and is consistent with both the express language of the statutes and the case law interpreting them.

Section 29-5-20(A) allows a person furnishing material to obtain a lien on real estate, notwithstanding that the person has no contractual relationship with the owner of the property, assuming all of the statutory requirements for enforcement of the lien are satisfied. It provides in relevant part as follows:

Every...subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon...to the value of the labor or material so furnished...The lien may be enforced as herein provided.

S.C. Code Ann. § 29-5-20(A). In order for a lien to be enforceable, notice must be provided as required in other sections of the Mechanic's Lien statutes.

The "Notice of Furnishing" document at issue purports to provide notice in accordance with S.C. Code Ann. § 29-5-20(B) and § 29-5-40. In fact, the document Appellant mailed to Respondent was designated as, and presumably intended to be used

as, a "Notice of Furnishing Labor and Materials," which is a form of statutory notice described in § 29-5-20(B). That section provides in relevant part as follows:

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:

- (1) the name of the sub-subcontractor or supplier who claims payment;
- (2) the name of the person with whom the claimant contracted or by whom he was employed;
- (3) a description of the labor, services, or materials furnished and the contract price or value thereof. Materials specially fabricated by a person other than the one giving notice and the contract price or value thereof shall be separately stated in the notice;
- (4) a description of the project where labor, services, or materials were used sufficient for identification;
- (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
- (6) the amount claimed to be due, if any.

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.

S.C. Code Ann. § 29-5-20(B).

The legislative history of this section makes clear that it was enacted to provide general contractors with the same type of payment defense to a mechanic's lien that an owner enjoys under certain circumstances. See 1992 South Carolina Laws Act 368 (S.B. 371). As the Circuit Court explained, this subsection "provides a general contractor with

a payment defense where the general contractor files a Notice of Project Commencement and requires a subcontractor to overcome the general contractor's payment defense by filing a Notice of Furnishing." (R. p. 3); see also, 1992 South Carolina Laws Act 368 (S.B. 371) (indicating that "failure to file a Notice of Project Commencement shall render the provisions of [§ 29-5-20(B)] inapplicable.") This section, therefore, is completely irrelevant to the disposition of this case. The Notice of Furnishing was not provided to any contractor in response to a Notice of Project Commencement as contemplated by the statute. There was, in fact, no Notice of Project Commencement filed by anyone on this project. Therefore, Appellant's Notice has no legal effect as a notice of furnishing under § 29-5-20(B), notwithstanding that its form and substance mirror the requirements of § 29-5-20(B). Indeed, Appellant conceded that it has no rights under § 29-5-20(B). (R. p. 3).

Instead, Appellant contends that the Notice of Furnishing is really intended to be a notice of lien under § 29-5-40. See Appellant's Brief, Argument II at pp. 6-9. Appellant argues that the Circuit Court erred in holding that (1) "an owner may defeat a materialman's lien by paying the general contractor in full after receiving the materialman's notice pursuant to S.C. Code § 29-5-40" and (2) that "the Appellant's notice under § 29-5-40 was ineffective." Appellant's Brief, Argument I at 3 and Argument II at 6. (See also Appellant's Brief at 6 "The Trial Court erred by holding that the owner's payment defense is based upon the amount due on the date that the mechanic's lien statement is filed for record – not the date that the owner received notice under § 29-5-40.")

In making its first argument, Appellant misconstrues the Circuit Court's holding. The Circuit Court held that Appellant Ferguson failed to provide notice of a lien pursuant to § 29-5-40 before the Notice of Mechanic's Lien was filed on January 8, 2008 and, therefore, the question of whether a property owner could defeat a materialman's lien by paying the general contractor *after notice was properly given* was not at issue. Had Ferguson satisfied the requirements of § 29-5-40 by filing and serving a proper mechanic's lien before Immedion paid Preferred Fire, Immedion would not have the benefit of the payment defense. That is not the case, here. The Circuit Court properly concluded that the requirements of § 29-5-40 were not satisfied by the mere mailing of the Notice of Furnishing in September 2007.

In order for a lien under § 29-5-20 to attach to the property, the subcontractor or supplier must provide notice of the lien to the owner pursuant to § 29-5-40, which provides in relevant part as follows:

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 § 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.*

S.C. Code Ann. § 29-5-40¹ (emphasis added).

It is well-settled that "[w]ords used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation."

Taylor Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 97, 641 S.E.2d

¹ The remaining requirements for enforcement of a subcontractor's lien are set forth at S.C. Code Ann. § 29-5-90, but the parties do not dispute that the requirements of § 29-5-40 were satisfied in this case.

459, 462 (Ct. App. 2007). According to the plain language of § 29-5-40, the lien attaches only “[w]henever work is done or material is furnished” and the subcontractor notifies the owner in writing of the same. S.C. Code Ann. § 29-5-40. Significantly, the statute does not say a lien attaches ‘whenever a subcontractor or materialman notifies the owner of work to be done or materials to be furnished.’ Therefore, no lien attaches until the materials which are the subject of the lien have been delivered and notice of the lien (not the possibility of a future lien) is provided.

Appellant’s Notice of Furnishing advised that it would be supplying materials beginning September 10, 2007 and continuing indefinitely. The Notice did not designate an end date, but instead left that portion of the Notice blank. (R. p. 58). In addition, it listed an approximate value of the materials it planned to deliver, but contained no indication that any payment was due at that time. Indeed, when the notice was delivered, Appellant was still in the process of furnishing materials for the upfit work at Immedion’s facility. Its work was not done – all of the materials had not been furnished, and no payment was due and owing on which to base the value of a lien. As such, the first requirement for attachment of the lien was not satisfied.

In addition, once the materials are furnished, § 29-5-40 provides that no lien attaches to the property until notice of an actual claim to payment is made to the owner. See Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990) (“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 prior to the payment in full of the amount owed the contractor.”) (emphasis added). See also, Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d-

158 (2008) (owner's liability to subcontractor is not triggered until owner receives "notice from the subcontractor *of the general contractor's nonpayment.*") (emphasis added). Notice of a subcontractor's intent to provide materials to a project in the future cannot be transformed into a notice that materials have been provided for which payment is due and owing, retroactive to the date of the original Notice of Furnishing where there is no further communication or conduct by the materialman relaying an actual claim for payment.

Appellant argues that the lien attaches "once an owner receives notice that a materialman is providing materials to the general contractor" and that under the analysis set forth in Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P'ship, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992), its Notice of Furnishing is effective as a notice of lien. See Appellant's Brief at 3-6. However, Appellant's reliance on Stoudenmire is misplaced as it ignores several critical distinctions between the facts at issue in Stoudenmire and those at issue here. In Stoudenmire, the property owner argued that it was not liable to Stoudenmire, a subcontractor who filed a mechanic's lien claim, because Stoudenmire did not file his notice of mechanic's lien until after the property owner had already made full payment to the general contractor for the work performed. 308 S.C. at 302, 417 S.E.2d at 637. The Court rejected this argument and held that a letter Stoudenmire sent to the owner prior to filing the mechanic's lien provided "sufficient written notice to the owner to meet the requirements of § 29-5-40." Id. Significantly, the letter was sent after Stoudenmire's work on the project was complete, and it advised the owner that Stoudenmire had not been paid by the general contractor

and was demanding payment from the owner for its work on the project. 308 S.C. at 300, 417 S.E.2d at 636.

Unlike the letter in Stoudenmire, the Notice of Furnishing in this case was sent *before* Appellant had completed the delivery of materials for the project, and thus, before any payment was due by Preferred Fire or Respondent, and it did not include any demand for payment. ((R. p. 58) and (R. p. 3) (“the Notice contains no demand for payment and does not indicate that Preferred Fire Protection was in default of any obligation under its agreement with Ferguson.”)). Indeed, both the form and language of the notice indicate that it was not intended to serve as a notice of lien. (R. p. 58) (“[i]t is important to note that *this is not a lien.*”) (emphasis added). At best, the Notice of Furnishing merely placed Respondent on notice that Appellant would be providing materials to the project. As the Circuit Court observed, such notice “may be effective to overcome an owner’s claim that the supply of materials on its property was not ‘authorized’ as required by the other mechanic’s lien statutes[, but t]hat is not at issue in this case...” (R. p. 4).

The issue here is whether the Notice of Furnishing provided by Appellant on September 21 was sufficient to notify Respondent of a *lien* under § 29-5-20 as required by § 29-5-40. Appellant correctly notes that a materialman’s right to a lien arises, “inchoate, when the material is furnished.” Appellant’s Brief, 9; see also, Wood v. Hardy, 235 S.C. 131; 110 S.E.2d 157, 160 (1959). However, “in order to perfect and enforce it he must...give notice to the owner ‘of the furnishing of such material and the amount or value thereof...’” Id. Moreover, although “notice may be given at any time” and in any form, as Appellant notes at p. 7 of its Brief, “it will be ineffectual if the other

requisites to the perfection and enforcement of the lien...are not met.” Wood, 110 S.E.2d at 160.

Appellant suggests that the statutory history of § 29-5-40 is instructive here, highlighting the fact that prior versions of the statute required that notice be sent in advance of the furnishing of materials as one of many steps required in the process of perfecting a lien. See Appellant’s Brief at 8-9, citing Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855, 861-863 (1956). This history does not change the plain meaning of the statute that is in place now. In fact, the Lowndes court carefully noted that “these early statutes related only to liens in favor of persons furnishing labor or materials under agreement with, or by consent of, the property owner or his agent....[and] it was doubtful whether under the statute as it then stood that ‘a mere subcontractor’ could acquire a lien.” 93 S.E.2d at 861. Thus, the inclusion of a requirement that the owner be given advance notice of the furnishing of materials in order for a contractor to later enforce a lien against the owner likely relates to the requirement of consent, i.e., that the work performed or materials provided, which are to become the subject of a lien, must be performed or provided *with the owners consent*.

The *current* language of § 29-5-40 makes clear that no lien is created by a materialman’s intent to provide materials of an estimated value for some indefinite period into the future, nor is a notice of such intent to provide materials sufficient to advise an owner of a lien. While there is no prescribed time at which notice of a lien must be provided, it is impossible for notice of a lien to precede the actual performance of work which creates the lien, and the statute clearly states that the lien attaches only after the “work is performed or material is furnished.” S.C. Code Ann. § 29-5-40. To allow

otherwise would allow notice of a claim that does not yet exist to overcome an owner's defense of payment. This would discourage the prompt payment of contractors in all cases, a fact which Appellant no doubt recognized when it advised on its form that the Notice of Furnishing "is not a lien" and "should not reflect in any way on the integrity or credit standing of Preferred Fire..." (R. p. 58).

In its brief, Appellant asserts that the court should overturn the circuit court's order granting summary judgment in favor of Respondent "because the owner owed \$15,486.50 at the time that the notice was delivered, ..." Appellant's Brief, 6. This statement appears to recognize that in order for notice to be effective under § 29-5-40, payment must actually be owed and a claim exist at the time notice is delivered. Appellant's conclusory statement in its brief that payment was actually owed at that time is not supported by the evidence. To the contrary, the undisputed facts show that at the time the Notice of Furnishing was sent to Respondent, materials were still being delivered to the property and no payment was due. In fact, the Notice of Furnishing clearly indicates that *no* payment was claimed to be due at that time. Based on the fact that the Notice of Furnishing contained no demand for payment and expressly stated that it was not a lien, the Circuit Court correctly concluded that "the Notice is ineffective under § 29-5-40 as a Notice of Lien."

II. THE CIRCUIT COURT PROPERLY HELD THAT, UNDER S.C. CODE OF LAWS § 29-5-50, RESPONDENT IS NOT LIABLE ON APPELLANT'S MATERIALMAN'S LIEN WHERE APPELLANT DID NOT ASSERT HIS LIEN RIGHTS OR GIVE THE NECESSARY STATUTORY NOTICE OF LIEN UNTIL AFTER RESPONDENT HAD PAID THE GENERAL CONTRACTOR IN FULL.

The Circuit Court held that because Appellant was not "claiming a lien" at the time the Notice of Furnishing was issued, Appellant is not entitled to any preferential payment over the contractor under § 29-5-50. (R. p. 5).

Section 29-5-50 provides that:

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 the notice.

S.C. Code Ann. § 29-5-50 (emphasis added). In order for a claimant to be protected by this statute, he must be claiming a lien and he must have given statutory notice of the lien as described in § 29-5-40 before he can assert any priority over the contractor in the order of payment. Thus, until a lien was actually claimed and such notice provided, Appellant was not entitled to any protection under this statute.

Appellant again misconstrues the Circuit Court's holding in arguing that "it erred in holding that § 29-5-50 does not protect a materialman's lien until after the materialman records and serves a statement of mechanic's lien." Appellant's Brief, 9. The Circuit Court's Order does not contain any such holding. The Court merely held that Appellant failed to provide notice of a lien prior to its filing and service of the Notice of Mechanic's Lien in January 2008. The Circuit Court properly concluded that until Appellant filed and served its Notice of Mechanic's Lien in January 2008, Appellant had not provided

the requisite notice of lien under § 29-5-40 and had not actually “claim[ed] a lien” as required under § 29-5-50. (R. p. 5).

Appellant certainly was not claiming a lien at the time it delivered the Notice of Furnishing, which expressly states, “this is not a lien.” Moreover, because it was sent prior to the completion of delivery of the materials and contains no demand for payment, the Notice of Furnishing cannot be deemed a notice of lien because no lien had attached pursuant to § 29-5-40. Rather, Immedion did not receive notice of Appellant’s lien until after it had already paid Preferred Fire the full balance on its contract for installation of the pre-action system.

One of the paramount purposes of the mechanic’s lien statutes is to “protect[] the owner of the property by limiting his liability and that of his property in respect to all such liens to the amount due by the owner on the contract price of the improvement made.” Stoudenmire, 308 S.C. at 302, 417 S.E.2d at 637, citing Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956). Thus, where a property owner pays its contractor in full, without notice that payment is owed to a subcontractor, he cannot be required to also pay the subcontractor for the same work. See also, Stovall Bldg. Supplies, 305 S.C. at 34, 406 S.E.2d at 178 (“the materialman’s lien is limited to the amount the owner owes the contractor at the time the materialman gives notice.”); see also, Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008) (“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.")

Appellant seems to argue that once an owner becomes aware that a subcontractor or supplier will be performing work or providing materials for a project, the owner should not make any payment to its contractor without first verifying that all subcontractors and suppliers have been paid. To adopt this position would discourage an owner's prompt and efficient payment to its contractor which, in turn, would result in further delayed payment to all subcontractors and suppliers on the job. This position is not only unreasonable, but it is entirely inconsistent with the statutory requirements discussed above.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RESPONDENT'S ATTORNEYS' FEES INCURRED IN THE FILING OF A THIRD-PARTY CLAIM IN RESPONSE TO CLAIMS ASSERTED IN THE MECHANIC'S LIEN ACTION FILED BY APPELLANT.

After finding that Respondent was entitled to judgment as a matter of law, the Circuit Court awarded Respondent, as the prevailing party, \$14,522.55 in attorneys fees and costs pursuant to S.C. Code Ann. § 29-5-20(A). (R. pp. 6-7). Section 29-5-20(A) provides that "[i]f the party defending against the lien prevails, the defending party *must* be awarded costs of the action and a reasonable attorney's fee as determined by the court..." provided "the fee and the court costs may not exceed the amount of the lien." S.C. Code Ann. § 29-5-20(A) (emphasis added). Absent a finding that the Circuit Court abused its discretion in awarding Respondent the full amount of its attorneys' fees, the award should not be disturbed. Taylor, Cotton & Ridley, 372 S.C. at 100, 641 S.E.2d at 464.

In Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 545-546, 431 S.E.2d 565, 566-567 (1993), the Supreme Court of South Carolina held that an award of attorneys fees to a property owner who successfully defended against a mechanics' lien action was reasonable and, thus, not an abuse of discretion, where: (1) the owner's attorney "provided a detailed affidavit itemizing time and expenses, and a resume of her qualifications"; (2) the trial court reduced the amount of attorneys' fees to the amount of the underlying lien; and (3) the "trial court considered the factors requisite to an award of attorney's fees" under Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

Similarly, in this case, Respondent's attorneys submitted detailed affidavits outlining their respective experience and qualifications, and counsel provided a chart itemizing the time and expenses incurred in the defense of Respondents. (R. pp. 59-65 and R. pp. 32-33). In addition, the Circuit Court considered the testimony of Ronald G. Tate, Jr. regarding expenses incurred in connection with Respondent's third-party claim against Rescom, which claim arose out of and was a direct result of the mechanic's lien action filed by Appellant. (R. pp. 90-98). The amount of attorneys' fees awarded in this case (\$14,472.55) is less than the amount of the underlying lien, so no reduction of the award was necessary under S.C. Code Ann. § 29-5-20(A). And, finally, the Court found "the amount of attorneys fees incurred by Immedion in this action to be reasonable and in accordance with the factors set forth in Glasscock..." (R. p. 6). Specifically, the Court concluded, based on the affidavits provided by counsel and testimony by Mr. Tate, that "the attorneys fees incurred were reasonable and necessary; they resulted in benefit to Immedion; the case concerned novel legal issues; and the fees reflect the customary fees charged for similar cases by similarly qualified attorneys." (R. pp. 6-7).

Appellant argues that the Circuit Court improperly included fees related to the prosecution, defense and settlement of the third-party claim Immedion filed against Rescom in response to Appellant's complaint. Appellant's Brief, 12-14. However, as counsel for Respondent explained, counsel did not submit a request for all fees incurred by the attorneys representing Rescom and Immedion, but only those fees which were necessitated by Ferguson's filing of the mechanic's lien. For instance, the fees requested include fees for work related to the preparation of the pleadings, including the third-party complaint against Rescom, which was necessitated by the fact that Ferguson's complaint did not specifically describe the equipment that was at issue. (R. p. 93, line 21-p. 94, line 6; R. p. 94, lines 19-21; R. p. 95, lines 3-6). However, counsel was careful to "sever out...anything having to do with the kind of negotiation and the pre-agreement work" that was involved in Rescom's defense of the third-party complaint to prevent any duplication of fees resulting from similar work that was performed separately for both Rescom and Immedion while the parties were negotiating an agreement. (R. p. 96, lines 15-13 and R. p. 98, lines 2-4).

The Circuit Court considered the testimony and affidavits regarding the work performed by counsel for Respondent and the fees incurred as a result of the same and concluded that all of the fees requested, including the fees related to Immedion's third-party claim against Rescom, were reasonable and necessary. Indeed, if Appellant had not filed its mechanic's lien action, or if it had clearly identified the materials provided and/or the contract under which the materials were provided, Respondent could have avoided the costs and fees it incurred in the prosecution, defense and settlement of its third-party claim. As such, the Circuit Court's decision is supported by the evidence in

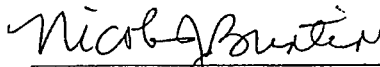
this case and was within the discretion of the Circuit Court judge. Therefore, the award of attorneys' fees should not be overturned.

CONCLUSION

Based on the foregoing authorities and arguments, and/or upon any other grounds appearing in the Record on Appeal, Respondent, Immedion, LLC, respectfully request that the Circuit Court's order granting its motion for summary judgment and awarding it attorneys' fees and costs should be affirmed.

Respectfully submitted,

May 27, 2010



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Greenville County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-2746

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 Preferred Fire Protection, LLC,

Appellant,

And Immedion, LLC is

Respondent.

Immedion, LLC,

Third-party Plaintiff,

v.

Rescom Construction, LLC,

Third-party Defendants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the attached final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Signature on following page.

May 27, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

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 Preferred Fire Protection, LLC
And Immodion, LLC is

Appellant,
Respondent.

Immedion, LLC,

Third-party Plaintiff,

Rescom Construction, LLC

v.

Third-party Defendant.

INITIAL REPLY BRIEF OF APPELLANT

April 15, 2010

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ARGUMENT

I. THE RESPONDENT'S POSITION WOULD REQUIRE THE COURT OF APPEALS TO ADD NEW REQUIREMENTS TO THE CLEAR MANDATE OF THE STATUTE.

In its Response, the Respondent has asked this court to draft two new requirements onto the Mechanics' lien statutes. The Respondent asks this court to change the S.C. Code of Laws § 29-5-40 by requiring that notice under this section (1) contain a demand for payment, and (2) contain a statement that it is a lien. Neither of these requirements are supported by the plain language of the statute, the court's interpretation of the statute, or the history of the statute. The Court of Appeals should not add new requirements to the clear mandate of the statute, and the Trial Court's order should be reversed.

As a preliminary matter, the Respondent incorrectly argues that the notice given in this case was notice under S.C. Code of Laws § 29-5-20. The Respondent speculates that the notice was "presumably" intended as a "Notice of Furnishing Labor and Materials" under §29-5-20(B). Having set up this straw man, the Respondent argues, correctly, that notice under §29-5-20(B) is irrelevant. This argument has nothing to do with the real issues in this appeal – *i.e.* the form and effect of notice under §29-5-40. The notice given in this case clearly states that it is intended as notice under S.C. Code of Laws §29-5-40, as well as section §29-5-20(B). Therefore, the only pertinent issues are whether the notice was sufficient to meet the requirements of §29-5-40 and what the effect of such notice is in this case.

The first new requirement that the Respondent would have this court add to the statute is a requirement that notice under §29-5-40 is not valid unless the notice contains a demand for payment. The Respondent claims that notice under this section is not effective unless payment is actually owed

at the time of notice and the claimant demands payment. Brief of Respondent p. 12-15. Neither the statute, nor any case interpreting this statute, have required that payment is actually owed at the time of the notice. "There is, as we have said, no requirement that the 'notice' under Section 45-254¹ 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 Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855, 862 (1956).

The Stoudenmire decision demonstrates that the notice in the case *sub judice* is sufficient to meet those statutory requirements. The Stoudenmire did not require that the §29-5-40 notice contain a demand for payment, as argued by the Respondent. The Stoudenmire decision was unaffected by the fact that the notice contained a demand for past due payment. The crucial issue was whether a letter sent by a subcontractor was sufficient notice under §29-5-40. Nowhere does the Stoudenmire court say that notice under that section *REQUIRES* a demand for payment. Rather, the Court notes that there is no required form of notice and states that the letter sent by the subcontractor met the requirements of the statute – *i.e.* a writing that informs the owner 'of the furnishing of such labor or material and the amount or value thereof.'

The second requirement that the Respondent wants this Court to add to the statute is a requirement that the notice contain a "notice of a lien." See Brief of Respondent p. 14. The statute simply provides that the lien will attach if the materialman gives notice of "furnishing of such labor or material and the amount or value thereof." There is no requirement that the notice give "notice of

¹The section cited here is the precursor to §29-5-40, S.C. Code of Laws, and the statutory sections are substantially identical.

a lien.” In fact, as set forth in the Appellant’s Initial Brief, the §29-5-40 notice is neither a lien nor notice thereof. Notice under §29-5-40 is simply one of the prerequisites to claiming a lien. The notice itself is not lien, and a materialman is not entitled to a perfected lien until the other elements of the statute are met. Therefore, the statement that the notice “is not a lien” is both accurate and appropriate for a notice under §29-5-40.

The Respondent is similarly incorrect in arguing that the §29-5-40 notice must “claim a lien” in order to be effective. Under §29-5-50 a “person claiming a lien” who gives notice under §29-5-40 is entitled to be paid the amount of lien at the time of the notice. The Respondent plucks the phrase “person claiming a lien” from the preference statute and engrafts it as a requirement of notice under §29-5-40. This tortured construction of the statute is incorrect. The phrase “person claiming a lien” in §29-5-50 simply refers to a claimant under the statute. This phrase is not a requirement of notice under §29-5-40 because it is not even contained in that section. The requirements of notice are set forth in §29-5-40, and §29-5-50 does not alter those requirements. Moreover, the phrase “person claiming a lien” is not limited in time. In other words, the phrase does not say when the person must claim the lien. It certainly does not say that the statute only applies to a person claiming a lien at the time the person gives notice under §29-5-40. Instead, the language is simply an identification of the claiming party. The Appellant claimed a lien as required by the statute, and §29-5-50 prevents the Respondent from reducing the amount of that lien by paying the contractor after receiving notice.

Finally, the Respondent argues that the historical context of the statute as cited by the Appellant in its Initial Brief, is inapplicable because “the current language of §29-5-40” requires a different result. However, the Respondent fails to note that there has been no substantive change in the language of the §29-5-40 since 1916. Lowndes, *supra* at 863; citing Act of February 29, 1916,

XXIX Stat. at L. 686. Several subsequent cases have established that there is no required form of notice under §29-5-40, that it may be given at any time, and that it simply needs to inform the owner of the furnishing of labor/materials, and the cost thereof. Prior to 1916, notice had to be sent to the owner BEFORE work began or materials were furnished. Lowndes *supra* at 860-1. The fact that the timing requirement was removed in 1916 only demonstrates that the notice can be given at any time. *Id.* The Respondent would have this Court add a new limitation to the statute by requiring that the notice be given after the materials have been furnished and the sums are due. Such a requirement is at odds with the language of the statute, the history of its codification, and this Court's many interpretations.

CONCLUSION

The Court should not add requirements for notice that are not contained in the statute. The statute does not require that the notice contain a demand for payment, nor does it require a statement that the claimant is seeking a lien. The notice in this case met the requirements of §29-5-40, and the Trial Court's order should be reversed.

Respectfully Submitted,



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April 15, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

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 Preferred Fire Protection, LLC
And Immodion, LLC is

Appellant,
Respondent.

Immedion, LLC,

Third-party Plaintiff,

v.

Rescom Construction, LLC

Third-party Defendant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
OCT 16 2009

ORDER

C.A. No.: 08-CP-23-2746

This matter is before the Court on cross-motions for summary judgment filed by both of the parties remaining in this action.¹ A hearing was conducted before me on September 17, 2009 in the Greenville County Court of Common Pleas. Present at the hearing were Robert E. Culver, counsel for the plaintiff and Ronald G. Tate, counsel for the defendant, Immedion, LLC. Based upon the arguments of counsel, the pleadings, and affidavits and attachments submitted by both parties without opposition in their motion papers, and based on the applicable law of South Carolina, I find that summary judgment should be granted in favor of Immedion, LLC. Immedion, LLC is hereby granted summary judgment and an award of attorneys' fees is entered in favor of Immedion, LLC as provided herein.

Findings of Fact

The facts material to the motions for summary judgment are not disputed. This is a mechanic's lien action that concerns a leasehold improvement project for Immedion, as lease owner. On or about August 23, 2007, Immedion provided a purchase order to a

¹ By Order dated January 14, 2009, plaintiff was awarded a default judgment against defendant Preferred Fire Protection, LLC in the amount of \$21,023.44.

sprinkler contractor known as Preferred Fire Protection, LLC for a "pre-action" fire suppression system. The purchase order amount was \$30,973.00. Sometime thereafter, Preferred Fire Protection contracted with Ferguson Fire and Fabrication, Inc., the plaintiff, to supply material. Materials were delivered to the project into the month of October 2007. On or about August 30, 2007, Immedion paid Preferred Fire Protection \$15,486.50 under its agreement. Thereafter, on October 3 and October 31, Immedion paid the balance of its contract with Preferred and it is undisputed that Immedion owed nothing further under its contract with Preferred Fire. Notwithstanding that Preferred received full payment for its work, Preferred failed to pay its supplier, Ferguson. The sum of \$15,485.50 remains owing from Preferred to Ferguson.

Immedion defends this mechanic's lien action by asserting the defense of payment, among other things. Immedion maintains that under South Carolina law, its payment to the contractor, Preferred, defeated Ferguson's mechanic's lien claim. Ferguson filed a motion for summary judgment on its behalf maintaining that its providing a "Notice of Furnishing" on September 21, 2007 to Immedion served to place the owner on notice of its claims.

Summary Judgment Standard

Summary judgment must be entered in favor of a party who shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Bishop v. S. C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). Both parties agree that there are no genuine issues as to any material fact, and both parties have moved for summary judgment. Therefore summary judgment is an appropriate vehicle for the resolution of this case.

Conclusions of Law

The issue in the case concerns the legal effect of Ferguson's September 21, 2007 Notice of Furnishing. That Notice states that Ferguson is providing materials to Preferred Fire Protection with an estimated value of \$15,000.00. The Notice also states that Ferguson is furnishing materials, that "this is not a lien" and that "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." Significantly, the Notice contains no demand for payment and does not indicate that Preferred Fire Protection was in default of any obligation under its agreement with Ferguson.

The Notice makes reference to § 29-5-20 and § 29-5-40 in the Mechanic's Lien Act. The Notice is ineffective under both of those sections for the purposes asserted by Ferguson. First, Ferguson concedes that the Notice of Furnishing gives Ferguson no rights under § 29-5-20. That statute provides a general contractor with a payment defense where the general contractor files a Notice of Project Commencement and requires a subcontractor to overcome the general contractor's payment defense by filing a Notice of Furnishing. That is not the situation at hand in this case.

Instead, Ferguson argues that its Notice of Furnishing is effective as a demand for payment under § 29-5-40 and the decision of Stoudenmire Heating and Air Conditioning Co., Inc. v. Craig Building Partnership, 417 S.E.2d 634 (S.C. App. 1992). The Court finds that Ferguson's reliance on Stoudenmire Heating is unavailing as that case is distinguishable on its facts. The Court further finds that the Notice of Furnishing is ineffective under the requirements of § 29-5-40 as a demand for payment.

Section 29-5-40 simply allows a subcontractor or supplier to place an owner on notice of its lien as provided by § 29-5-20. Specifically, that section states:

29-5-40. Notice to owner before lien attaches when laborer was employed by someone other than owner.

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 § 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).

The Notice of Furnishing in this case, however, states on its face that it is not a mechanic's lien, and it does not even contain a demand for payment. It simply places the owner on notice that Ferguson is providing material to the project. It may be effective to overcome an owner's claim that the supply of materials on its property was not "authorized" as required by other mechanic's lien statutes. That is not an issue in this case, however. The issue is whether the Notice of Furnishing was sufficient to notify the owner of the lien given by § 29-5-20. Because the Notice explicitly stated that it was not a mechanic's lien and contained no demand for payment, the Notice is ineffective under § 29-5-40 as a Notice of Lien.

Further, Stoudenmire Heating is distinguishable. Stoudenmire Heating was decided in April of 1992 before the Notice of Furnishing statute existed. Therefore, that decision is not useful in construing the effect of a Notice of Furnishing. More importantly, however, the basis for the Court's decision in Stoudenmire Heating was that the subcontractor sent a letter to the owner stating that the subcontractor had not been

paid and demanded payment. The Court held that the letter provided written notice to the owner of a claim meeting the requirements of § 29-5-40. As such, the date of the letter was established as the date by which the owner's payment obligations and payment defenses should be measured. Stoudenmire Heating is therefore distinguishable.

Nor does §29-5-50 support the Plaintiff's position. That section provides in relevant part:

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 of Laws §29-5-50. The statute applies only to any person "claiming a lien." Therefore, a contractor or materialman is not protected under this section until he has asserted his lien rights and given the necessary statutory notice of lien. In this case the notice provided by the Plaintiff states that the notice is not a lien, and the Plaintiff cannot claim the benefit of this provision based only upon the original Notice of Furnishing.

There are ample South Carolina decisions holding that one of the guiding principles of the mechanic's lien law in South Carolina is "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, 641 S.E.2d 459, 462 (S.C. App. 2007), citing Lowndes Hill Realty Co. v. Greenville Concrete Co., 93 S.E.2d 855 (S.C. 1956). South Carolina property owners who pay their contractors cannot be required to again pay a subcontractor for the same work unless the subcontractor strictly adheres to the requirements of the mechanic's lien law and serves the proper notices required by the mechanic's lien law. The Notice of Furnishing in issue

in this case is inadequate to preserve the subcontractor's remedies under South Carolina law under these circumstances.

ACCORDINGLY, Immedion's Motion for Summary Judgment is GRANTED and the mechanic's lien filed against the Immedion property is hereby EXTINGUISHED.

Attorneys Fees

The Mechanic's Lien Act provides that if the party defending against the lien prevails, the defending party must be awarded the costs of the action and a reasonable attorneys fee as to determined by the Court. The fee and the court costs may not exceed the amount of the lien. § 29-5-20(A) In this case, Immedion, LLC is the prevailing party, having successfully defended against the mechanic's lien. Accordingly, Immedion is entitled to recover its costs and attorneys fees.

Submitted to the Court are the Affidavits of Immedion's counsel, Ronald G. Tate, Jr. and Charles B. Burnette, III, the predecessor counsel for Immedion. Based on the affidavits before the Court, the Court finds that the amount of attorneys fees incurred by Immedion in this action to be reasonable in accordance with the factors set forth in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313, (S.C. 1991). Those factors include: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. The affidavits of counsel for Immedion make it clear that the attorneys fees incurred were reasonable and necessary; they resulted in benefit to Immedion; the case concerned novel legal issues; and the fees reflect customary fees charged for similar cases by similarly qualified

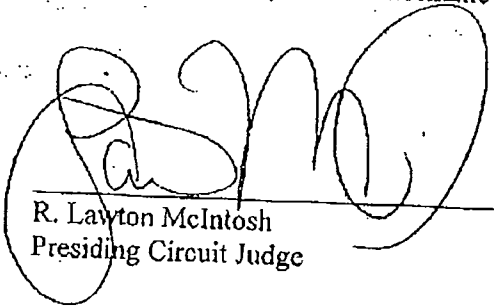
attorneys. The Court therefore awards \$14,472.55 to Immedion as its attorneys fee. Also based on the affidavit of counsel, \$50.00 in costs is appropriate.

Conclusion

The Court grants summary judgment in favor of Immedion, LLC. It orders the mechanic's lien filed by the plaintiff to be dismissed and extinguished, and it awards Immedion, LLC attorneys fees and costs, as the prevailing party in this mechanic's lien action, in the total amount of \$14,522.55.

IT IS SO ORDERED.

Anderson, SC
12-9-09


R. Layton McIntosh
Presiding Circuit Judge

A Certified Copy
Paul B. Wiseman
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 10/16/09

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No. 08-CP-23-2746

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

vs.

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

Defendants.

**DEFAULT JUDGMENT AGAINST
PREFERRED FIRE PROTECTION,
LLC**

Immodion, LLC,

Third-Party Plaintiff,

vs.

Rescom Construction, L.L.C.

Third-Party Defendant.

FILED-CLERK OF COURT
GREENVILLE CO. S.D.
PAUL B. WICKENSHER

2009 JAN 14 A 11:41

IT APPEARS from the Affidavit of counsel for Plaintiff that the Summons and Complaint were properly served upon Defendant Preferred Fire Protection LLC and that no Answer, Notice of Appearance or other pleading has been served on Plaintiff by said Defendant within the time prescribed by law.

IT FURTHER APPEARS, and I so hold, that Defendant is in default therein and Plaintiff is therefore entitled to judgment against Defendant for Breach of Contract.



IT FURTHER APPEARS from the verified Complaint that Preferred Fire Protection, LLC, owes the principal amount of \$15,548.93 to the Plaintiff.

IT FURTHER APPEARS that Preferred Fire Protection, LLC, is entitled to prejudgment at the rate of 8.75 percent pursuant to SC Code of Laws §34-31-20(A), and the prejudgment interest from October 16, 2007, to December 15, 2008, is \$1,587.28.

IT FURTHER APPEARS that Preferred Fire Protection, LLC, is entitled to judgment for attorney fees in the amount of \$3,887.23 and that the Motion for Default Judgment was served on the Defendant on December 5, 2008, pursuant to Rule 55 SCRPC. The Defendant did not file or serve any response to the Motion within ten days of service.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the Plaintiff shall have judgment in the amount of \$21,023.44 against the Defendant Preferred Fire Protection, LLC.

IT IS SO ORDERED.

Date: _____

St. John C. Few
1/12/9

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO. 2008CP2302746

Ferguson Fire And Fabrication Inc vs. Preferred Fire Protection Llc

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAID - WICKENSIMER

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 16th day of October, 2009, and a copy mailed first class this 16th day of October, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Jennifer L. Queen Knight Law Firm, PA P.O.
Box 280 Summerville, SC 29484
Robert E. Culver The Culver Law Firm, LLC
575 King Street, Suite A Charleston, SC 29403

Ronald G. Tate Jr. Gallivan White & Boyd, PA
P.O. Box 10589 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

Paul B. Wickensimer, Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO.: 08-CP-23- 2746

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

VS.

S U M M O N S

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

Defendants.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the below subscribed attorney at his office at 207 East Third North Street, Summerville, South Carolina 29483 within thirty (30) days after the service hereof exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this action.

KNIGHT LAW FIRM, LLC


JENNIFER L. QUEEN, ESQUIRE

Post Office Box 280
207 East Third North Street
Summerville, SC 29484
843-821-9700

ATTORNEY FOR PLAINTIFF

Summerville, South Carolina
This 11 day of April, 2008

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO.: 08-CP-23- 2746

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

VS.

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

Defendants.

COMPLAINT

(Breach of Contract/Mech Lien Foreclosure)
(Unjust Enrichment)

2008 APR 11 P 1:05
FILED
CLERK OF COURT
JUDICIAL CIRCUIT
GREENVILLE, SC

COMES NOW the Plaintiff complaining of Defendants and would show unto this Honorable Court as follows:

1. That the Plaintiff is a corporation organized and existing pursuant to the laws of the State of Georgia, but is authorized to do business in South Carolina.
2. That upon information and belief, the Defendant Wong is a citizen and resident of the State of South Carolina.
3. That upon information and belief, Defendants Preferred Fire Protection, LLC ("Preferred Fire"), Fair Forest of Greenville, LLC ("Fair Forest") and Immedion, LLC ("Immedion") are all South Carolina limited liability companies who maintain agents for service of process in Greenville County, South Carolina.
4. The real property that is the subject of this action is located in Greenville County ("the Property") and is more particularly described in Exhibit A, which is attached hereto and incorporated by reference and as described in the Mechanic's Lien previously filed in the records of Greenville County on or about January 9, 2008. A copy of the aforesaid Mechanic's Lien is attached hereto and incorporated by reference as Exhibit B.

5. That the parties and subject matter are subject to and are within the jurisdiction of this Court.

6. Upon information and belief, Plaintiff provided materials, services and/or labor to the improvements located on the Property pursuant to a binding contract and agreement with Preferred Fire and with the knowledge and permission of Immedion, Fair Forest, and/or Wong.

7. Upon information and belief, Plaintiff provided materials, services, and/or labor to the Property between August 24, 2007, and October 16, 2007.

8. Plaintiff performed all conditions precedent to the binding contract and agreement with Preferred Fire.

9. Preferred Fire has failed to pay Plaintiff for the materials, services, and/or labor provided to the Property pursuant to the agreement between Preferred Fire and Plaintiff.

10. Plaintiff gave all Defendants notice of this outstanding account and filed a mechanic's lien as to the Property within ninety (90) days of the last date materials, services, and/or labor were provided to the Property.

FOR A FIRST CAUSE OF ACTION

(Foreclosure of Mechanic's Lien as to all Defendants)

11. The previous allegations are realleged.

12. Upon information and belief, Defendants Fair Forest and Wong are the record owners of the Property, while Immedion leases the Property from Fair Forest and Wong.

13. Upon information and belief, Plaintiff provided materials, services, and/or labor to the Property pursuant to a binding contract and agreement with Preferred Fire and all material, services and/or labor provided benefit the owners and lessees of the Property.

14. The Plaintiff respectfully requests that the Court order the Property covered by the lien attached hereto as Exhibit B sold by the appropriate officer of the Court, as provided in S.C. Code Ann.

§29-5-140 et. seq.

15. Furthermore, the Plaintiff prays that the costs of this action, its attorney's fees, costs and all applicable interest be applied to the amount owed as provided for by the statute(s) previously referenced and any other applicable SC Law.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract as to Defendant Preferred Fire only)

16. The previous allegations are realleged.

17. Plaintiff entered into a binding contract with Preferred Fire for delivery of materials, services, and/or labor to the Property in exchange for which Preferred Fire was to remit payment to Plaintiff.

18. Preferred Fire has failed to remit payment to Plaintiff as described in their contract, and as such Preferred Fire has breached its contract with Plaintiff.

19. As a direct and proximate result of Preferred Fire's breach of contract, Plaintiff has suffered damages.

20. Plaintiff is informed and believes it is entitled to a judgment against Preferred Fire in the amount of \$15,548.93, plus prejudgment interest, attorney's fees and costs of this action.

FOR A THIRD CAUSE OF ACTION

(Unjust Enrichment as to Defendant Preferred Fire only)

21. The previous allegations are realleged.

22. That Preferred Fire has been provided by Plaintiff, at Preferred Fire's own request, materials, services, and/or labor for which Preferred Fire was to remit payment to the Plaintiff for the value of.

23. That Preferred Fire received said materials, services and/or labor and it furthermore understood the terms under which it received same and also understood the terms for payment of same.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO.: 08-CP-23- 2746

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

VS.

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

Defendants.

VERIFICATION

CLERK OF COURT
GREENVILLE CO. S.C.
CIVIL DIVISION

2008 APR 11 P 1:04

STATE OF Georgia
COUNTY OF DeKalb

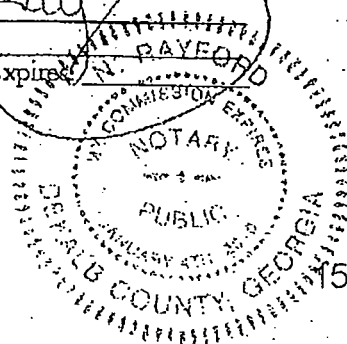
I, the undersigned Karen A. Cooper am authorized on behalf of Plaintiff Ferguson Fire and Fabrication, Inc. and do hereby verify that the allegations made in the attached Complaint are true to the best of my knowledge and hereby verify that the Defendants in this action owe to Ferguson Fire and Fabrication, Inc., the principal amount of Fifteen Thousand Five Hundred Forty-Eight and 93/100 (\$15,548.93) Dollars, plus prejudgment interest, attorney's fees, and costs of collection.

Ferguson Fire and Fabrication, Inc.

By
Its:

SWORN to before me this 4th
day of April, 2008

Notary Public for
My Commission Expires



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO.: 08-CP-23-27416

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

VS.)

L I S P E N D E N S

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

Defendants.)

NOTICE is hereby given that an action has been commenced and is now pending in the Court of Common Pleas for Greenville County, South Carolina, upon Complaint of Plaintiff Ferguson Fire and Fabrication, Inc. against the above-named Defendants for foreclosure of Mechanics Lien of the below described property.

The property covered and affected by the action at the time of the filing of this Notice is described as follows:

PARCEL 1:

ALL that certain lot of land lying within Greenville County, South Carolina containing 63.69 acres, more or less, as shown on Plat entitled "Compiled Plat Fairforest, LLC" prepared by Fant Engineering & Surveying Company, Inc dated July 24, 2003, and recorded on August 22, 2003 in Plat Book 47-F at Page 97A & B in the Office of the Greenville County Register of Deeds and having the following metes and bounds:

Beginning at an iron pin found on the right of way of Fairforest Way approximately 525 feet from the right of way of Ridge Road and running thence along the right of way of Fairforest Way S 75 43 16 W 560.71 feet to an old spike; thence S 70 45 50 W 202.37 feet to an iron pin; thence N 56 38 34 W 900.45 feet to an old concrete monument; thence N 56 33 36 W 824.82 feet to an old concrete monument; thence N 40 58 43 E 133.36 feet to an iron pin; thence S 49 14 00 E 19.65 feet to a pipe; thence N 40 41 45 E 100.53 feet to an iron pin; thence N 49 53 11 W 19.56 feet to an iron pin; thence N 40 51 06 E 399.32 feet to an iron pin; thence S 49 22 09 E 9.50 feet to an old concrete monument; thence N 40 50 42 E 536.80 feet to an iron pin; thence S 73 31 22 E 542.46 feet to an iron pin; thence N 10 14 39 E 82.27 feet to an iron pin; thence N 61 40 35 E 129.88 feet to an iron pin; thence S 90 00 00 E 83.03 feet to an iron pin; thence S 63 48 08 E 140.01 feet to an iron pin; thence S 41 05 28 W 91.86 feet to an iron pin; thence N 55 22 54 E 116.62 feet to an iron pin; thence N 50 22 17 E 76.83 feet to a nail; thence S 39 37 43 E 454.62 feet to an

iron pin; thence continuing along such right of way in a curve whose chord runs S 33 25 55 E for a distance of 527.03 feet to an iron pin; thence S 72 34 10 W 350.01 feet to an iron pin; thence S 24 38 41 W 219.96 feet to an iron pin; thence S 15 17 19 E 663.06 feet to the point of beginning.

This being the same property as conveyed unto Fair Forest of Greenville, LLC by deed of C-MAC Properties, Inc., dated August 13, 2003 recorded in the Register of Deeds Office for Greenville County, SC on August 22, 2003 in Deed Book 2051 at Page 1913

PARCEL 2:

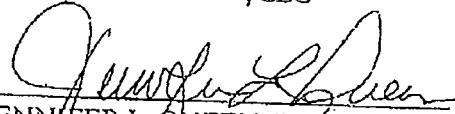
ALL that certain lot of land lying within Greenville County, South Carolina containing 9.66 acres, more or less, as shown on Plat entitled "Thomas Wong" prepared by Fant Engineering & Surveying Company, Inc., dated July 24, 2003, and recorded on August 22, 2003 in Plat Book 47-F at Page 98 A & B in the Office of the Greenville County Register of Deeds and having the following metes and bounds:

Beginning at a new pk nail on the right of way of Ridge Road and leaving the right of way of Ridge Road S 50 22 17 W 76.83 feet to an iron pin; thence S 55 22 54 W 116.62 feet to an iron pin; thence S 41 05 28 W 91.36 feet to an iron pin; thence N 63 48 08 W 140.01 feet to an iron pin; thence N 90 00 00 W 83.03 feet to an iron pin; thence S 61 40 35 W 129.88 feet to an iron pin; thence S 10 14 39 W 82.27 feet to an iron pin; thence N 73 31 22 W 542.46 feet to an iron pin; thence N 40 50 42 E 564.85 feet to an iron pin; thence S 48 53 42 E 15.10 feet to an iron pin; thence N 53 48 50 E 285.01 feet to an iron pin; thence S 70 58 38 E 73.53 feet to an iron pin; thence S 33 55 31 E 87.83 feet to an iron pin; thence N 56 16 26 E 9.94 feet to an iron pin; thence S 39 03 36 E 204.48 feet to an iron pin; thence N 52 37 56 E 15.87 feet to an iron pin; thence S 39 37 43 E 304.01 feet to the point of beginning.

This being the same property as conveyed unto Thomas K F Wong by deed of C-MAC Properties, Inc., dated August 13, 2003 recorded in the Register of Deeds Office for Greenville County, SC on August 22, 2003 in Deed Book 2051 at Page 1918.

BEING PORTIONS OF TMS NO. M11.1-1-3,7 AND M11.1-1-3.13

KNIGHT LAW FIRM, LLC


JENNIFER L. QUEEN, ESQUIRE
207 E. 3rd North Street
P.O. Box 280
Summerville, SC 29484
(843) 821-9700

ATTORNEY FOR PLAINTIFF

Summerville, South Carolina
This 11 day of April, 2008



2008002286

M/LIEN

3 PGS

Page:688-690

January 09, 2008 11:56:53 AM

Book:MI 24

Rec:\$10.00

Cnty Tax:\$0.00

State Tax:\$0.00

STATE OF SOUTH CAROLINA

FILED IN GREENVILLE COUNTY, SC

COUNTY OF GREENVILLE

STATEMENT AND NOTICE OF
MECHANIC'S LIEN

The undersigned, being duly sworn deposes and says:

The statement herein is a just and true account of the material and/or labor furnished by FERGUSON FIRE AND FABRICATION, INC. to PREFERRED FIRE PROTECTION, LLC, with the permission and authorization of IMMEDION LLC and FAIR FOREST OF GREENVILLE, LLC and THOMAS K. F. WONG for the use upon the premises described as 79 Global Drive, Greenville, Greenville County, South Carolina, and covering a portion of those tracts identified by TMS M11.1-1-3.7 and TMS M11.1-1-3.13, and the amount justly due and owing to FERGUSON FIRE AND FABRICATION, INC. by PREFERRED FIRE PROTECTION, LLC is the sum of FIFTEEN THOUSAND, FIVE HUNDRED FORTY-EIGHT AND 93/100 (\$15,548.93) DOLLARS, as may be seen by reference to Exhibit A attached hereto, plus interest, costs, and attorney's fees.

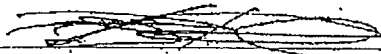
The undersigned further states that said materials and/or labor were last furnished pursuant to an agreement with PREFERRED FIRE PROTECTION, LLC with the knowledge and consent and permission and authorization of IMMEDION LLC, and FAIR FOREST OF GREENVILLE, LLC and THOMAS K. F. WONG for use upon the premises from August 24, 2007 thru October 16, 2007. The various amount are for materials and/or labor supplied and are true and correct amounts with all just credits given.

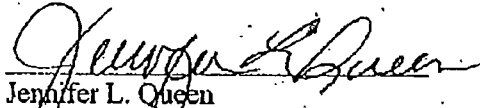
The undersigned further states that the said materials and/or labor were furnished for use in construction of or improvements to building located at 79 Global Drive, Greenville, Greenville County, South Carolina, and covering a portion of those tracts identified by TMS M11.1-1-3.7 and TMS M11.1-1-3.13.

The undersigned further states that for the amount due, i.e., the sum of FIFTEEN THOUSAND, FIVE HUNDRED FORTY-EIGHT AND 93/100 (\$15,548.93) DOLLARS, FERGUSON FIRE AND FABRICATION, INC., claims a lien upon the said premises.

Sworn and subscribed before me
this 8th day of January, 2008

FERGUSON FIRE AND FABRICATION,
INC.


Notary Public for the State of South Carolina)


Jennifer L. Queen
Its Attorney in fact

My Commission Expires: 8/18/16

EXHIBIT A

TRUE STATEMENT OF ACCOUNT

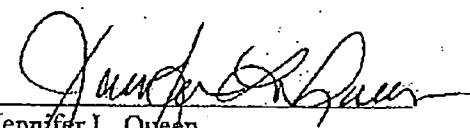
Total Amount for Material & Labor:	\$15,548.93
Payments Made:	<u>\$ 0,000.00</u>
BALANCE DUE:	\$15,548.93

Personally appeared before me, Jennifer L. Queen, who being first duly sworn, deposes and says that she is the attorney for FERGUSON FIRE AND FABRICATION, INC., that she has actual authority to execute this affidavit by and on behalf of FERGUSON FIRE AND FABRICATION, INC., that she is familiar with the status of the account of PREFERRED FIRE PROTECTION, LLC, IMMEDION LLC, and FAIR FOREST OF GREENVILLE, LLC, and THOMAS K.F. WONG and that the foregoing is true and accurate statement of account.

Sworn and subscribed before me
this 8th day of January, 2008


Notary Public for the State of South Carolina
My Commission Expires: 8/18/16

FERGUSON FIRE AND FABRICATION,
INC.


Jennifer L. Queen
Its Attorney in fact

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on January 8, 2008, (s)he served those entities named below with the Statement and Notice of Mechanic's Lien against property located at 79 Global Drive, Greenville, Greenville County, South Carolina, and covering a portion of those tracts identified by TMS M11.1-1-3.7 and TMS M11.1-1-3.13, by placing the same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, and addressed to the following:

Preferred Fire Protection LLC
c/o Sarah Ann Bumgarner, Registered Agent
416 S. Main Street, Suite I
Simpsonville, SC 29680

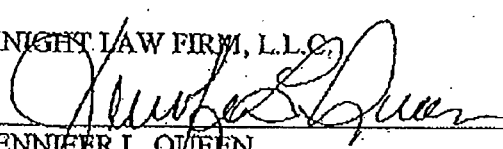
Fair Forest of Greenville, LLC
c/o Vivian A. Wong, Registered Agent
420 N. Pleasantburg Drive
Greenville, South Carolina 29607

Immedion LLC
79 Global Drive
Greenville, South Carolina 29607

Spratt White
330 E. Black Street
Rock Hill, SC 29730

Thomas K. F. Wong
420 N. Pleasantburg Drive
Greenville, SC 29607

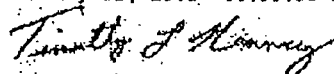
KNIGHT LAW FIRM, L.L.C.


JENNIFER L. QUEEN
207 East Third North Street
P.O. Box 280
Summerville, SC 29484
(843) 821-9700

ATTORNEYS FOR FERGUSON FIRE AND
FABRICATION, INC.

Summerville, South Carolina
January 8, 2008

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2008002285 Book: MI 24 Page: 688-690
January 09, 2008 11:56:53 AM



STATE OF SOUTH CAROLINA)

GREENVILLE COUNTY)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

v.)

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

Defendants.)

THIRD-PARTY SUMMONS

Civil Action No. 08-CP-23-2746

Immedion, LLC,)

Third-party plaintiff,)

v.)

Rescom Construction, L.L.C.,)

Third-party defendant.)

TO: RESCOM CONSTRUCTION, L.L.C.:

You are required to answer the third-party complaint in this lawsuit and to serve a copy of your answer on the subscriber of this third-party summons at 414 East Main Street (or Post Office Box 12186), Rock Hill, South Carolina, within thirty days after service of this summons, exclusive of the day of service.

If you fail to answer the third-party complaint within thirty days after service of this summons, judgment will be granted against you by default for the relief demanded in the third-party complaint.



Charles B. Burnette, III
BURNETTE & PAYNE, P.A.
Attorneys for Immedion, LLC
414 East Main Street
P.O. Box 12186
Rock Hill, SC 29731
(803) 328-1800

June 30, 2008

STATE OF SOUTH CAROLINA

GREENVILLE COUNTY

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

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

Defendants.

ANSWER, COUNTERCLAIM, AND
THIRD-PARTY COMPLAINT OF
THE DEFENDANT IMMEDIION, LLC

Civil Action NO. 08-CP-23-2746

Immedion, LLC;

Third-party plaintiff,

v.

Rescom Construction, L.L.C.,

Third-party defendant.

The defendant Immedion, LLC ("Immedion"), answers the complaint, counterclaims against the plaintiff, and asserts a third-party complaint against Rescom Construction, L.L.C., as follows:

1. The allegations of this pleading are realleged throughout, except where an allegation is inconsistent with a particular defense or claim.
2. The allegations of the complaint which are not admitted or admitted as qualified are denied.

FIRST DEFENSE: QUALIFIED GENERAL DENIAL

3. The allegations of paragraphs 1 and 2 of the complaint are admitted upon information

and belief.

4. As to the allegations of paragraph 3:

a. Immedion admits, upon information and belief, that Preferred Fire Protection, LLC ("Preferred"), and Fair Forest of Greenville, LLC ("Fair Forest"), are South Carolina domestic limited liability companies and that they maintain agents for service of process in Greenville County; and

b. Immedion admits that it is a South Carolina domestic limited liability company, but denies that it maintains agents for service of process in Greenville County.

5. Immedion admits the allegations of paragraph 4.

6. In response to paragraph 5, Immedion admits the jurisdiction of this Court as to it, but lacks sufficient information to admit or deny jurisdiction as to other defendants.

7. Immedion denies the allegations of paragraph 6 as to it, but lacks sufficient information to admit or deny them as to other defendants.

8. Immedion lacks sufficient information to admit or deny the allegations of paragraphs 7 through 9.

9. As to the allegations of paragraph 10, Immedion admits upon information and belief that the plaintiff has filed a mechanic's lien as to the described property, but lacks sufficient information to admit or deny the allegations concerning materials, services, labor, or timeliness; further, Immedion lacks sufficient information at this time to admit or deny that it received notice of the plaintiff's claimed account prior to the service of this lawsuit.

10. In response to the allegations incorporated by paragraphs 11, 16, and 21, Immedion realleges its responses to the incorporated paragraphs.

11. With regard to paragraph 12, Immedion lacks sufficient information to admit or deny the allegations as to Fair Forest and Thomas F. Wong, except the allegation that Immedion leases the described property from Fair Forest, which it admits.

12. Immedion lacks sufficient information to admit or deny the allegations of paragraph 13.

13. The allegations of paragraphs 14 and 15 are not allegations of fact and require no response; however, Immedion denies that the plaintiff is entitled to the relief sought.

14. Immedion lacks sufficient information to admit or deny the allegations of paragraphs 17 through 20 and 22 through 26.

SECOND DEFENSE:
FAILURE TO STATE A CAUSE OF ACTION

15. The plaintiff has failed to allege facts sufficient to constitute a cause of action against Immedion under S.C. Code Ann. §29-5-10 et seq.

THIRD DEFENSE: PAYMENT

16. Immedion has, prior to any notice of the plaintiff's claim, paid all funds due for any improvements claimed by the plaintiff, to the general contractor with which Immedion contracted for the improvements.

FOURTH DEFENSE AND FIRST COUNTERCLAIM:
FOR STATUTORY ATTORNEY FEES

17. The plaintiff has caused Immedion to incur attorney fees and court costs in responding to this lawsuit.

18. Pursuant to S.C. Code Ann. §29-5-20, Immedion is entitled to an award of its attorney fees and court costs against the plaintiff.

FIFTH DEFENSE AND THIRD-PARTY CLAIM:
AGAINST RESCOM CONSTRUCTION, L.L.C. FOR BREACH OF CONTRACT

19. The third-party defendant, Rescom Construction, L.L.C. ("Rescom"), is a South Carolina domestic limited liability company with its principal office in Greenville County, South Carolina.

20. Immedion is the lessee of the real property described in the plaintiff's complaint.

21. As such, Immedion contracted with Rescom for Rescom to act as a general contractor for certain improvements to the described property.

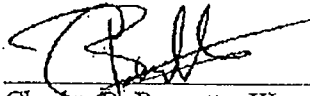
22. Rescom subsequently submitted its payment requests to Immedion and, as required by the contract with Immedion, certified that all subcontractors and suppliers providing improvements to the property had been paid in full and/or that all liens against the property had been waived.

23. As a term of the contract with Immedion, Rescom agreed to indemnify Immedion against the costs, attorney fees, and the like that Immedion incurred as a result of liens such as the one asserted by the plaintiff.

24. Immedion has attempted to tender its defense in this case to Rescom, but Rescom has breached its contract with Immedion by failing to respond and failing to provide a defense and indemnification.

25. Immedion is entitled to judgment against Rescom for the attorney fees, costs, and other damages sustained by it as a result of the plaintiff's claim.

WHEREFORE, Immedion requests that the complaint be dismissed, that it be awarded its attorney fees and court costs against the plaintiff, and that it be awarded its attorney fees, costs, and other damages against Rescom.


Charles B. Burnette, III
BURNETTE & PAYNE, P.A.
Attorneys for Immedion, LLC
414 East Main Street
P.O. Box 12186
Rock Hill, SC 29731
(803) 328-1800

June 30, 2008

STATE OF SOUTH CAROLINA)

GREENVILLE COUNTY)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

v.)

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

Defendants.)

Immedion, LLC,)

Third-party plaintiff,)

v.)

Rescom Construction, L.L.C.,)

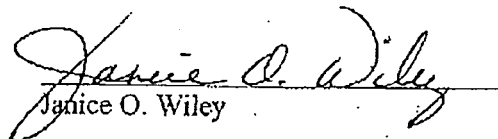
Third-party defendant.)

CERTIFICATE OF MAILING

Civil Action NO. 08-CP-23-2746

The undersigned hereby certifies that she is a paralegal to the attorney for the Defendant, Immedion, LLC in the above-entitled action and that the foregoing **Third-party Summons and Answer, Counterclaim and Third-party Complaint of the Defendant, Immedion, Inc.**, was served upon the Jennifer L. Queen, attorney for Plaintiff, by depositing same in the United States Mail with the proper postage affixed thereto, to the following addresses:

Jennifer L. Queen, Esquire
Knight Law Firm, LLC
P. O. Box 280
Summerville, SC 29484


Janice O. Wiley

This 30th day of June, 2008.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 08-CP-23-2746
2008 JUL 14 A 8:51

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

VS.)

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

Defendants.)

FILED-CLERK OF COURT
GREENVILLE
DATE: 7/14/08

FERGUSON FIRE & FABRICATION'S
REPLY TO COUNTERCLAIM
BY IMMEDIION, LLC

The Plaintiff in answering and replying to the Counterclaim asserted by the Defendant Immedion hereby alleges, states and says that:

1. Each and every allegation of the Counterclaim to the Answer, Counterclaim, and Third Party Complaint not hereinafter specifically admitted, modified, qualified or otherwise explained, is hereby denied and strict proof demanded thereof.

2. In response to Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, of the Defendant Immedion's Answer, Counterclaim and Third Party Complaint and in further responding to same, all without waiving any previously asserted claims, causes of action, or allegations, the Plaintiff hereby restates its allegations and causes of action previously set forth in its underlying Complaint, and in doing so denying any inconsistent allegations as to the Plaintiff, demanding strict proof thereof.

3. The Plaintiff denies the allegations contained in Paragraphs 17 and 18 of the Answer, Counterclaim and Third Party Complaint and demands strict proof thereof.

4. In response to the allegations contained in Paragraphs 19, 20, 21, 22, 23, 24, and 25, Plaintiff is informed and believes that these allegations are not directed to it and no response is required from Plaintiff, however, to the extent that a response is required from Plaintiff, Defendant lacks information

sufficient to either admit or deny these allegations, and therefore denies same and demands strict proof thereof.

FOR A SECOND DEFENSE

(Estoppel)

5. The preceding allegations and defenses are realleged.
6. Subject to and without waiving the above defenses, the Plaintiff alleges that by virtue of the acts and omissions on the part of the Defendants herein and arising out of their actions, the Defendants' intentional acts, omissions, negligence, recklessness and other careless conduct in regards to this transaction should act as an equitable bar to the Counterclaim and therefore the same should be barred by the equitable doctrine of estoppel.

FOR A THIRD DEFENSE

(Unclean Hands)

7. The preceding allegations and defenses are realleged.
8. Subject to and without waiving the above defenses, that in order to assert equitable remedies, one is required to have done equity and to have acted with clean hands; and as such the Plaintiff would assert that the Defendants' acts, omissions, negligence, recklessness and other careless conduct in regards to this transaction constitute a lack of equity on their part and further constitute a lack of clean hands and therefore should act as an equitable bar to the Counterclaim and therefore the same should be barred.

FOR A FOURTH DEFENSE

(Waiver)

9. The preceding allegations and defenses are realleged.
10. Subject to and without waiving the above defenses, the Plaintiff alleges that based on the acts and omissions on the part of the Defendants, this Counterclaim should be barred by the equitable doctrine of waiver.

FOR AN FIFTH DEFENSE

(Laches)

11. The preceding allegations and defenses are realleged.
12. Subject to and without waiving the above defenses, the Plaintiff alleges that the Defendants had full knowledge and notice of the matters alleged in the Counterclaim, or could have had same with minimal effort, simple inquiry and investigation, and reasonable diligence on or about the date of the alleged underlying occurrence, however the Defendants chose to wait an extended period of time prior to filing this counterclaim specifically at the time the Plaintiff filed his underlying action, as such the Defendants have negligently and wilfully failed to assert said claims within a reasonable period of time.
13. The Defendants' unreasonable delay in seeking the requested relief has resulted in substantial prejudice to the Plaintiff.
14. As such and pursuant to the doctrine of laches, the Defendants should be barred from seeking the relief requested in the Counterclaim and same should be dismissed accordingly.

FOR A SIXTH DEFENSE

(12(b)(6)-Motion to Dismiss)

(Failure to State Facts Sufficient to Constitute a Cause of Action)

15. The preceding allegations and defenses are realleged.
16. Subject to and without waiving the above defenses, the Defendants have failed to state facts sufficient to constitute a cause of action as plead in the Answer and Counterclaim; as a result, the Answer and Counterclaim along with all its causes of action, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the common law of South Carolina, and the principles of fairness, equity and justice.

FOR A SEVENTH DEFENSE

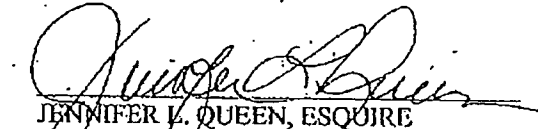
(Mitigation of Damages).

17. The preceding allegations and defenses are realleged.

18. Subject to and without waiving the above defenses, the Plaintiff would assert that the Defendant had a duty to mitigate its damages, should any be found to exist, in this matter and would further assert that the Plaintiff is informed and believes that Defendant has failed to do so, and therefore, the foregoing should act as a complete bar to all causes of action against the Plaintiff.

WHEREFORE, the Plaintiff having fully responded to and answered the allegations of the Defendant Immediations's Answer, Counterclaim and Third Party Complaint hereby prays that the same be dismissed with costs and that the Plaintiff be awarded the relief sought in its underlying Complaint as well as attorneys' fees, costs and any other and further such relief as the Court may deem appropriate.

KNIGHT LAW FIRM, LLC


JENNIFER L. QUEEN, ESQUIRE

207 East Third North Street

P.O. Box 280

Summerville, SC 29484

(843) 821-9700

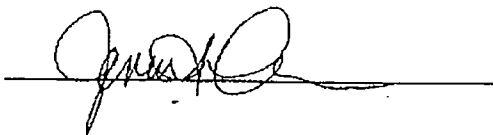
Summerville, South Carolina

July 9, 2008

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served on all parties of record through counsel or *pro se*, by mailing a copy to each at the party's or attorney's last known mailing address this 9th day of July 2008.



STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

v.)

Preferred Fire Protection, LLC, *et al.*, and)
Immedion, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS

2009 APR 20 P 4 24

AFFIDAVIT OF
CLERK OF COURT
CHARLES B. BURNETTE, III
WICKENSIMER

C.A. No.: 08-CP-23-2746

PERSONALLY APPEARED BEFORE ME Charles B. Burnette, III who, being
duly sworn, states as follows:

1. I am an attorney in Rock Hill, South Carolina practicing in the firm Burnette and Payne, P.A.
2. I have been licensed to practice law in the State of South Carolina for twenty-nine years and have experience in litigation including collections and mechanic's lien actions.
3. I was retained by my client, Immedion, LLC in connection with the above-referenced matter. This matter involved the defense of a mechanic's lien action. Part of my responsibilities to Immedion included tendering defense of the matter to Immedion's general contractor, Rescom Construction, LLC.
4. I continued to represent Immedion, LLC through April 2009 at which time Rescom Construction, LLC assumed the defense of Immedion, LLC and took an assignment of all claims Immedion had in this action, including its right to recover attorneys fees under the mechanic's lien statutes.

5. My billing rate with Immedion, LLC ranged from hourly rates of \$185 per hour to \$225 per hour. Those rates are reasonable for matters of this type and for attorneys with the undersigned's level of experience. In my opinion, the hourly rates that I charged were priced under the market for attorneys in this area.

6. As attorney for Immedion, I dealt with counsel in the case, performed appropriate legal research, drafted pleadings including an answer and cross-claim and an answer, counterclaim and third-party complaint, reviewed contract documents and pleadings of other parties and negotiated with other counsel the assignment and indemnity agreements. In connection with those tasks, I have billed Immedion, LLC \$4,072.55.

7 The attorneys fees and costs incurred to date are reasonable and necessary for the defense of Immedion to date.



Charles B. Burnette, III

Sworn to and subscribed before me
this 10th day of July, 2009.



Notary for South Carolina

My Commission Expires: 11-04-09

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

Immedion, LLC,

Third-party plaintiff,

v.

Rescom Construction, LLC,

Third-party defendant.

IN THE COURT OF COMMON PLEAS

2009 JUL 20 P 4: 24

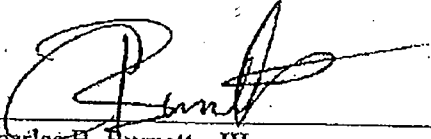
STIPULATION OF DISMISSAL

CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER

C.A. No.: 08-CP-23-2746

Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, the third-party plaintiff, Immedion, LLC, and the third-party defendant, Rescom Construction, LLC, by and through their respective undersigned attorneys, hereby stipulate and agree to dismiss the third-party complaint of Immedion, LLC against Rescom Construction, LLC action with prejudice and without costs to any party. The third-party complaint and any and all claims which could have been asserted by the third-party plaintiff against the third-party defendant are hereby dismissed with prejudice and are henceforth res judicata.

7-10-2009
Date


Charles B. Burnette, III
BURNETTE & PAYNE, P.A.
414 E. Main Street
P. O. Box 12186
Rock Hill, SC 29731

Attorney for the Defendant and Third-party
Plaintiff, Immedion, LLC

Date

7/15/09



Ronald G. Tate, Jr. (#72427) 5475
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580

Attorney for Third-Party Defendant,
Rescom Construction, LLC

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No. 08-CP-23-2746

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

vs.

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

Defendants.

STIPULATION OF DISMISSAL
WITH PREJUDICE

Immodion, LLC,

Third-Party Plaintiff,

vs.

Rescom Construction, L.L.C.

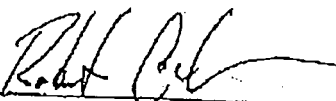
Third-Party Defendant.

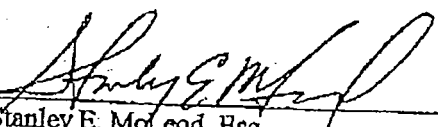
CLERK OF COURT
GREENVILLE, S.C.
ATTORNEY GENERAL

2009 AUG - 3 P 3:32

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, the undersigned parties hereby agree to the dismissal of all claims between the Plaintiff and Fair Forest of Greenville, LLC, and Thomas F. Wong with Prejudice.

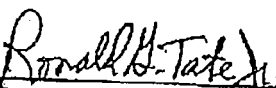
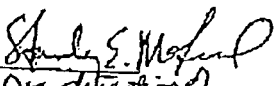
<<<< Signatures Follow on Next Page >>>>


Robert E. Culver, Esq.
The Culver Firm, P.C.
575 King Street, Suite A
Charleston, South Carolina 29403
Counsel for Ferguson Fire and Fabrication


Stanley E. McCleod, Esq.
Brown, Massey, Evans, McCleod &
Haynsworth, LLC
Post Office Box 2464
Greenville, South Carolina 29602
Counsel for Defendants Fair Forest of
Greenville, LLC, and Thomas F. Wong

Date: 7-11-09

Date: 7-27-09

 by 
Ronald G. Tate, Jr., Esq. *per direction of*
Gallivan, White & Boyd, P.A. *Ronald G. Tate*
Post Office Box 10589
Greenville, South Carolina 29603
Counsel for Rescom Construction, LLC,
and Immedion, LLC.

Date: 7-27-09

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

Immedion, LLC,

Third-party plaintiff,

v.

Rescom Construction, LLC,

Third-party defendant.

IN THE COURT OF COMMON PLEAS

AFFIDAVIT OF ROB MOSER

C.A. No.: 08-CP-23-2746

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
DAVID WICKENHUISER

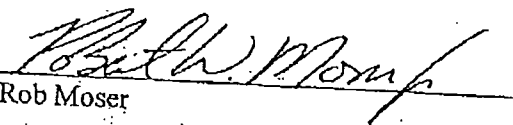
2009 JUL 10 A 11:45

PERSONALLY APPEARED BEFORE ME Rob Moser who, being duly sworn,
deposes and states as follows:

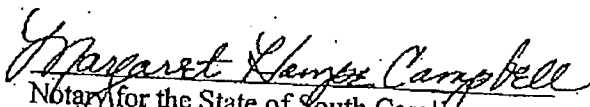
1. I am over the age of 18 years old and competent to make this affidavit.
2. I am Chief Operating Officer for Immedion, LLC.
3. Immedion, LLC leases property from Fairforest of LLC. In 2007, Immedion, LLC contracted with Rescom, LLC to perform certain tenant upfit work for the space to be occupied by Immedion as tenant.
4. Immedion's contract with Rescom specifically excluded the performance of fire protection work other than the installation of a pre-action system for the data center that was installed by others. The building owner, Fairforest, requested that all

other sprinkler work be contracted through the building owner. The undersigned does not believe that any of the plaintiff's equipment came to be located in Immedion's leasehold.

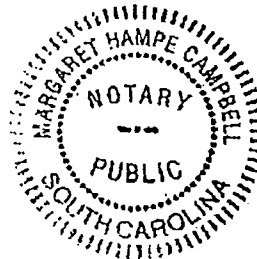
5. Immedion did contract separately with Preferred Fire Protection for what is called a preaction dry pipe system in its data center. That work was for \$30,973.00 and was fully paid for. There remain no amounts due to either Preferred Fire under that separate contract or to Rescom for other tenant upfit work.


Rob Moser

Sworn to and subscribed before me this
9th day of July, 2009.


Notary for the State of South Carolina

My Commission Expires: JUNE 3, 2018



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No. 08-CP-23-2746

Ferguson Fire and Fabrication, Inc.

Plaintiff,

vs.

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

Defendants.

AFFIDAVIT OF JAMES L. LANIER, Jr.

James L. Lanier, Jr., being first duly sworn upon oath, deposes as follows:

1. I am the credit manager for Ferguson Fire and Fabrication, Inc., the Plaintiff in this matter.

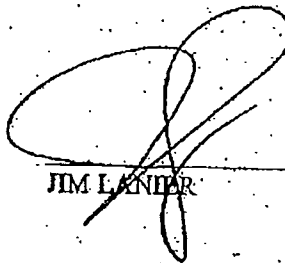
2. In that capacity, I am familiar with the books and records of the company relating to materials provided to Preferred Fire Protection and the documents produced by the Defendants in this litigation.

3. On or about August 23, 2007, Immedion, LLC, sent a purchase order to Preferred Fire Protection for a "Preacton (system) ... for Immedion Data Center Computer Room." The purchase order was for \$30,973.00. A copy of that purchase order was produced by Defendant Immedion, and a true and correct copy of that document is attached hereto as Exhibit A.

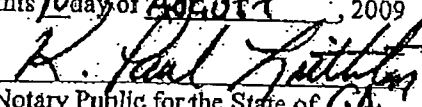
4. On August 24, 2007, the Plaintiff began delivering to Preferred materials, identified in part as "Immedion-Preact." The delivery of materials for this job continued through October 16, 2007. Attached hereto as Exhibit B are true and correct copies of the invoices from the Plaintiff to

Preferred.

5. The outstanding principal balance on the materials, exclusive of interest and fees, is \$15,548.93.
6. On August 30, 2007, Immedion issued a check to Preferred \$15,486.50 on the job. Attached as Exhibit C, are true and correct copies of checks produced by Immedion.
7. On September 21, 2007, the Plaintiff sent notice to Immedion that it was providing \$15,000 in materials for the job. Attached hereto as Exhibit D is a true and correct copy of the notice. A copy of the notice was produced by Immedion in this action.
8. On October 3, 2007, Immedion issued a check to Preferred \$14,513.50 on the job. See Exhibit C.
9. On October 31, 2007, Immedion issued a check Preferred the balance of \$973 on the job. See Exhibit C.
10. On January 8, 2008, the Plaintiff filed and served notice of mechanic's lien.
11. On April 11, 2008, the Plaintiff filed a verified complaint in this action, and Immedion, LLC, was served on May 6, 2007.


JIM LANDER

Subscribed and sworn before me
this 10th day of August, 2009


Notary Public for the State of GA
My commission expires _____



Z:\Client files\Ferguson Fire v Preferred\Pleadings\Motion.sumj.hmd\jordaning\K.Lander.spd

Page 2 of 2

EXHIBIT A

Purchase Order

Number 2007-1007

Date: 8/23/2007

Ship To:

Intelligent, LLC

78 Gbha Dc

540

Greenville, SC 29607

Please reference the above PO Number on all invoices, packing slips, and correspondence.

Vendor

Preferred Films Protection

PO Box 966

Fontaine, LA 70644

Date Required: 1/10/2010

Ship Name

PART NUMBER	DESCRIPTION	GL ACCOUNT	UNIT PRICE	EXTENDED
1	Provide necessary material, labor and equipment to install new Protection Double Interlock Protective Electrical Release and additional control valve including remote protection handle, pressure relief air valves and components for Instrument Data Center Computer Record. All work shall be performed in accordance with NFPA 70, 2002 Edition, and all local authorities having jurisdiction.		\$20,973.06	\$20,973.06
2			\$0.00	\$0.00
3			\$0.00	\$0.00
4			\$0.00	\$0.00
5			\$0.00	\$0.00
6			\$0.00	\$0.00
7			\$0.00	\$0.00
8			\$0.00	\$0.00
9			\$0.00	\$0.00
10			\$0.00	\$0.00
11			\$0.00	\$0.00
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73			\$0.00	\$0.00
74			\$0.00	\$0.00
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89			\$0.00	\$0.00
90			\$0.00	\$0.00
91			\$0.00	\$0.00
92			\$0.00	\$0.00
93			\$0.00	\$0.00
94			\$0.00	\$0.00
95			\$0.00	\$0.00
96			\$0.00	\$0.00
97			\$0.00	\$0.00
98			\$0.00	\$0.00
99			\$0.00	\$0.00
100			\$0.00	\$0.00

Subtotal 150.975.00

Sales Tax \$0.00

Total \$50,973.03

Capital Items

Is this a capital item? ☒ YES ☐ NO

Is this item budgeted in the 2007 budget? X YES NO

Which capital project is the item budget under? Datacenter construction

*Capital Items which are not budgeted must be approved by Frank Mobley

REC-424967

Originator

變性期

Date:

ਸ੍ਰੀ ਅੰਗੇਸ਼ੁ

Date _____

EXHIBIT B

Ferguson Fire & Fab

MAIN OFFICE: 18826 EAST SAN JOSE AVE. CITY OF INDUSTRY, CA 91708
TELEPHONE: (826) 964-2395 FAX#: (826) 964-1471

S
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PREFERRED FIRE PROTECTION
(JOB) IMMEDIATE
W/C BEFF
CHARLOTTE, NC 28208

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 BARLEE AVE
CHARLOTTE, NC 28208
704-398-3434

S
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EX54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE 1
MAULDIN, SC 29662

Invoice No.	Invoice Date
2376930 P 1 of 2	08/24/07
Quantity P/O	Order Date
IMMEDIATE-PREACTI	08/24/07
Notes	
NET 10TH	

Part No.	Part Description
2376930	
Special Note	

QTY	Part No.	Description	Customer Code	Ordered	Shipped	Unit Price	Extension
1	072365	FT 3.00"X 21' BLK S10 PIPE OXG-DOX		42	42	2.840	119.28
2	072364	FT 4.00"X 21' BLK S10 PIPE OXG-DOX		84	84	3.090	259.56
3	562004	VIC 801 GRV 90DEG		1	1	8.250	8.25
4	561128	VIC 407 REG COUP V/P		4	4	2.020	8.08
5	561124	VIC 005 REG COUP V/P		3	3	5.620	16.86
6	569623	VIC 420 REG COUP V/P		4	4	22.500	90.00
7	558445	DOM CI TEE 1-1/2"X 1-1/2"X 2"		4	4	9.400	37.60
8	558432	DOM CI TEE 1-1/2"X 1-1/2"X 1"		8	8	6.040	48.32
9	558332	DOM CI TEE 1-1/4"X 1-1/4"X 1"		8	8	4.480	35.84
10	557002	DOM CI 90DEG TEE		200	200	1.200	240.00
11	426020	1" X 2" BLK WIPPLE		50	50	0.916	45.80
12	426040	1" X 2" BLK WIPPLE		50	50	1.200	60.00
13	559101	DOM CI PLUG 3/4"		6	6	0.720	4.32
14	564203	VIC 106 GRV 90DEG		30	30	5.400	162.00
15	070988	FT 1.50"X 21' BLK S10 PIPE OXG-DOX		252	252	1.950	491.40
16	070987	FT 1.50"X 21' BLK S10 PIPE OXG-DOX		36	36	0.740	26.64
17	562501	VIC 106 GRV 90DEG 1-1/4"		30	30	6.700	201.00
18	578355	VIC 55 GRV 90DEG 1-1/2"		200	200	0.000	0.00
19	561121	VIC 005 REG COUP V/P 1-1/2"		100	100	3.720	372.00
20	560987	VIC 50 GRV 90DEG		1	1	110.000	110.00
21	531402	VIC 705M GRV BUTFLY W/SMITH		1	1	236.110	236.11
22	508093	VIC 200 S10 2"X 2"X 3/4" DR		200	200	0.000	0.00
23	564308	VIC 744 GRV FLG		1	1	72.720	72.72
Sales Tax based on CHECK NUMBER 10, NO. 080301							

THERE ARE IMPORTANT ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT. THESE TERMS AND CONDITIONS ARE PART OF THIS SALES AGREEMENT. PLEASE READ THEM CAREFULLY.

REMIT TO:
Ferguson Fire & Fabrication
PO BOX 8880
ROCKFORD, IL 61108-0880

Ferguson Fire & Fab

MAIN OFFICE: 18825 EAST SAN JOSE AVE, CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 964-2356 FAX#: (626) 964-1471

S
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PREFERRED FIRE PROTECTION
(JOB) IMMEDION
W/C OFF
CHARLOTTE, NC 28208

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 HARLEE AVE
CHARLOTTE, NC 28208
704-390-3434

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EX54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE 1
MAULDIN, SC 29662

Invoice #	Invoice Date
2243760 P 1 of 1	09/10/07
Customer S.O.	Order Date
IMMEDION	09/10/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2243760	WILL CALL
Special Notes	
Combo: 2240073 WILL CALL	

Contact: DONNA

Qty	Part No.	Description	Customer Part	Ordered	Shipped	Price	Extension
1	836581	1/2 X 30 GATEWAY TUBING		40	40	25.880	1035.20
2	508096	VIC 2708 SSP 156 1/2 X 1/2 OR CP		200	200	6.820	1364.00
3	508300	VIC 1/2 2-PC REC-ESCUTCH CP		244	244	1.590	387.96
4	559102	DOM CI PLUG 1"		60	60	0.720	43.20
5	561165	VIC 009 RGD COUP EZ 4		10	10	12.360	123.60
6	561126	VIC 005 RGD COUP V/P 6		10	10	13.630	136.30
7	559220	DOM CI RED CPLG 1" X 1/2"		80	80	1.160	92.80
8	558002	DOM CI TEL 1"		60	60	1.970	118.20
9	557021	DOM CI 90DEG ELL 1" X 3/4"		70	70	2.790	195.30
Sales Tax based on MECKLENBURG CO, NC CAROLINA Tax Rate of 7.25%							258.50
Total							3750.06
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THERE ARE IMPORTANT ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT. THESE TERMS AND CONDITIONS ARE PART OF THIS SALES AGREEMENT. PLEASE READ THEM CAREFULLY.

SHIP TO:
Ferguson Fire & Fabrication
P.O. BOX 880
DOWNSBORO, GA 30428-0880
46

37,750.06

INVOICE TOTAL

Ferguson Fire & Fab

MAIN OFFICE: 18828 EAST SAN JOSE AVE CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 984-2385 FAX#: (626) 984-1471

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PREFERRED FIRE PROTECTION
JOB IMMEDIATE
416 S MAIN STREET SUITE I
MAULDIN, SC 29662

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 BARLEY AVE
CHARLOTTE, NC 28208
704-398-3434

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EY64842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE I
MAULDIN, SC 29662

Invoice#	Invoice Date
2244064 P 1 of 1	09/11/07
Customer P.O.	Order Date
IMMEDION	09/10/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2244064	UPS
Special Notes	
174W05X10342702446 IMMEDION	

Contact: DONNA

Item#	Part No.	Description	Customer Qty	Ordered	Shipped	Price	Extension
1	561124	VIC 005 RGD COUP V/P	3	10	10	5.620	56.20
2	562454	VIC 750 RED GRV COUP	4X3	2	2	44.080	88.16
3	532315	AIR MAINT DEVICE-PLANT/TANK	AMD-1	1	1	258.360	258.36
4	523100	Gauge 0-300PSI 3-1/2" 1/4" MTP		1	1	9.820	9.82
Sales Tax based on GREENVILLE CO. SC Tax Rate of 6.0%							24.75
Total							437.29
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REM TO:

Ferguson Fire & Fabrication
P.O. Box 2480
Hawthorne, CA 90230-0248

437.29

INVOICE TOTAL

Ferguson Fire & Fab

MAIN OFFICE: 18825 EAST SAN JOSE AVE, CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 964-2385 FAX#: (626) 864-1471

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PREFERRED FIRE PROTECTION
(JOB) IMMEDION
416 S MAIN STREET SUITE 1
MAULDIN, SC 29662

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 HARLEE AVE
CHARLOTTE NC 28208
704-398-3434

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FY54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE 1
MAULDIN, SC 29662

Invoice#	Invoice Date
2245618 P 1 of 1	09/19/07
Customer P.O.	Order Date
IMMEDION	09/11/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2245618	
Special Notes	
U/Ship: XD42569286 TYCO INTER. -GEM	

Item	Part No.	Description	Customer Part	Ordered	Shipped	Price	Extended
1	*****	Shipper: TYCO INTER. -GEM	*****	*****	*****	*****	*****
2	*****	Packing List# 1641303	*****	*****	*****	*****	*****
3	*****	Date: 09/11/07	*****	*****	*****	*****	*****
3	817830	Shipped Via: ODFL	*****	*****	*****	*****	*****
4	838584	TYCO 3" DV-5 GKG DELUGE VA. #5247/1912	*****	1	1	680.000	680.00
5	838585	TYCO 595901030 3 RISER CHECK VALVE	*****	1	1	159.870	159.87
6	838586	TYCO 3IN D/I PREACT TRM 524762124	*****	1	1	1571.600	1571.60
7	838586	TYCO 522671024 SOLENOID VALVE	*****	1	1	358.080	358.08
8		Sales Tax based on GREENVILLE CO. SC Tax Rate of 6.0%	*****	*****	*****	*****	166.17
9		Freight	*****	*****	*****	*****	112.04
10			*****	*****	*****	Total	3048.56
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REMIT TO:
Ferguson Fire & Fabrication
P.O. Box 6580
Rowland Heights, CA 91748-0580
48

\$3,048.56
INVOICE TOTAL

Ferguson Fire & Fab

MAIN OFFICE: 18625 EAST SAN JOSE AVE, CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 964-2395 FAX#: (626) 964-1471

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PREFERRED FIRE PROTECTION
(JOB) IMMEDIATE
W/C OFF
CHARLOTTE, NC 28208

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 BARLEE AVE
CHARLOTTE, NC 28208
704-398-3434

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FX54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE Y
MAULDIN, SC 29662

Invoice #	Invoice Date
2268434 P 1 of 1	09/24/07
Customer P.O.	Order Date
TONY	09/24/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2268434	WILL CALL
Special Notes	

Contact: TONY

Item#	Part No.	Description	Customer Part#	Ordered	Shipped	Price	Extension
1	070986	FT 1.00"X 21' BLK S40 PIPE PE-DOM		525	525	0.910	477.75
2	561125	VIC 005 RGD COUP V/P 4		25	25	7.920	198.00
3	562006	VIC 001 GRV 90DEG 4		2	2	11.990	23.98
4	532815	VIC 746 DRY ACCELERATOR		1	1	440.370	440.37
5	523100	GAUGE 0-300PSI 3-1/2" 1/4" MIP		3	3	9.820	29.46
6	561126	VIC 005 RGD COUP V/P 6		10	10	13.630	136.30
Sales Tax based on MECKLENBURG CO. NO. CAROLINA Tax Rate of 7.25%							94.67
Total							1400.63
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\$1,400.63

DUPLICATE

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REMIT TO:
Ferguson Fire & Fabrication
P.O. Box 8580
Rowland Heights, CA 91248-0580

Ferguson Fire & Fab

MAIN OFFICE: 18825 EAST SAN JOSE AVE, CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 904-2395 FAX#: (626) 904-1471

SHIP TO

PREFERRED FIRE PROTECTION
(JOB) IMMEDION
W/C OFF
CHARLOTTE, NC 28208

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 HARLEE AVE
CHARLOTTE, NC 28208
704-398-3434

SOLD TO

FY54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE 1
MAULDIN, SC 29662

Contact: DONNA

Invoice #	Invoice Date
2283289 P 1 of 1	10/02/07
Customer P.O.	Order Date
IMMEDION	10/01/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2283289	WILL CALL
Special Notes	
WILL CALL IMMEDION	

Item	Part No.	Description	Customer Part	Ordered	Shipped	Price	Extension
1.	1 576403	3/8 X 1-1/2 IPS RING HANGER		100	100	0.370	37.00
2.	2 559220	DOM CI RED CPLG 1" X 1/2"		80	80	1.160	92.80
3.	3 562464	VIC 750 RED GRV COUP 4X3		5	5	44.080	220.40
4.	4 561124	VIC 005 RGD COUP V/P 3		10	10	5.620	56.20
5.	5 561122	VIC 005 RGD COUP V/P 2		10	10	4.200	42.00
6.	6 559802	MINI MECH TEE 1-1/4 RUN X1 FIP		5	5	4.690	23.45
7.	7 522800	SPRINKLER HEAD CABINET (6 HEAD)		2	2	10.400	20.80
8.	8 569683	VIC 920N MECH TEE 4 RUN X2 FIP		2	2	26.500	53.00
9.	9 569701	VIC 920 MECH TEE 4 RUN X2 GRV		2	2	26.500	53.00
10.	10 576401	3/8 X 1 IPS RING HANGER		100	100	0.340	34.00
11.		Sales Tax based on MECKLENBURG CO. NO. CAROLINA Tax Rate of 7.25%					45.87
12.						Total	678.52
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\$678.52

INVOICE TOTAL

THERE ARE IMPORTANT ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT. THOSE TERMS AND CONDITIONS ARE PART OF THIS SALES AGREEMENT. PLEASE READ THEM CAREFULLY.

REMIT TO:
Ferguson Fire & Fabrication
P.O. Box 8580
Rowland Heights, CA 91748-0580

Ferguson Fire & Fab

MAIN OFFICE: 18825 EAST SAN JOSE AVE. CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 964-2395 FAX: (626) 964-1471

SHIP TO

PREFERRED FIRE PROTECTION
(JOB) IMMEDIATE
W/C GEEF
CHARLOTTE, NC 28208

LOCATION SHIPPED FROM

Ferguson Fire & Fab
3721 HARLEY AVE
CHARLOTTE, NC 28208
704-398-3434

SOLD TO

FY54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE 1
RAOLDIN, SC 29662

Invoice#	Invoice Date
2302325 P 1 of 1	10/11/07
Customer P.O.	Order Date
IMMEDION	10/10/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2302325	WILL CALL
Special Notes	
+..	

Contact: DONNA

Item#	Part No.	Description	Customer Part#	Ordered	Shipped	Price	Ext Price
1.	1 561126	VIC 005 RGD COUP V/P 6		30	30	13.630	408.90
2.	2 562443	VIC 750 RED GRV COUP 3X2-1/2		2	2	28.450	56.90
3.	3 562486	VIC 750 RED GRV COUP 6X4		4	0	89.690	0.00
4.	4 562464	VIC 750 RED GRV COUP 4X3		5	5	44.080	220.40
5.	5 561125	VIC 005 RGD COUP V/P 4		20	20	7.920	158.40
6.	6 561124	VIC 005 RGD COUP V/P 3		20	20	5.620	112.40
7.	Sales Tax based on MECKLENBURG CO. NO. CAROLINA Tax Rate of 7.25%						69.38
8.	Total						1026.48
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REMIT TO:
Ferguson Fire & Fabrication
P.O. Box 8580
Hawthorne, CA 91746-0580

51

Ferguson Fire & Fab

MAIN OFFICE: 18425 EAST SAN JOSE AVE. CITY OF INDUSTRY, CA 91748
TELEPHONE: (626) 964-2395 FAX#: (626) 984-1471

SHIP TO

PREFERRED FIRE PROTECTION
(JOB) IMMEDION
416 S MAIN STREET SUITE I
MADLON, SC 29662

LOCATION SHIPPED FROM

Ferguson Fire & Fab
600 GREAT SOUTHWEST PARKWA
ATLANTA, GA 30336
404-214-0322

SOLD TO

FY54842
PREFERRED FIRE PROTECTION
416 SOUTH MAIN STREET
SUITE I
MADLON, SC 29662

Invoice#	Invoice Date
2308224 P 1 of 1	10/16/07
Customer P.O.	Order Date
IMMEDION	10/15/07
Terms	
NET 10TH	

Packing Slip #	How Shipped
2308224	
Special Notes	
1ZY5556A0142909663	

Contact: DONNA

Item#	Part No.	Description	Customer Part#	Ordered	Shipped	Price	Extension
1.	1	562486 VIC 750 RED GRV COUP 6X4		4	4	73.620	294.48
2.		Sales Tax based on GREENVILLE CO. SC Tax Rate of 6.0%					17.67
3.		Freight					90.85
4.						Total	483.00
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REMIT TO:
Ferguson Fire & Fabrication
P.O. Box 8980
Rowland Heights, CA 91748-0880

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483.00
INVOICE TOTAL

EXHIBIT C

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STATION 100

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HARSHMAN
 SECRET
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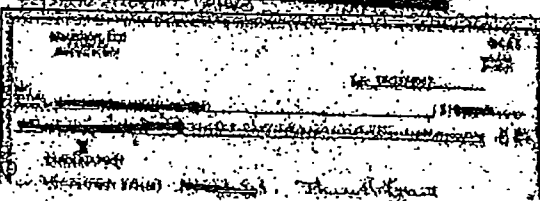
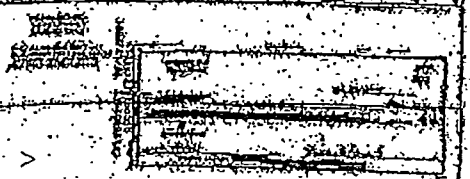
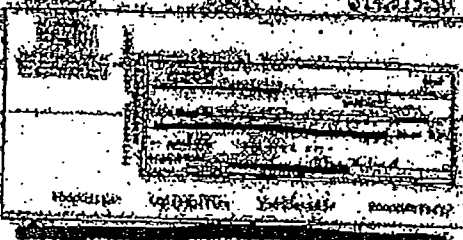
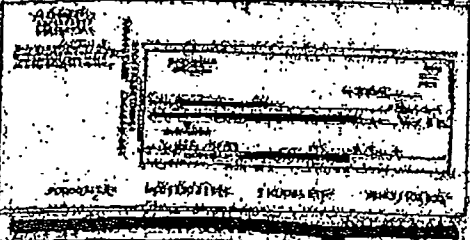
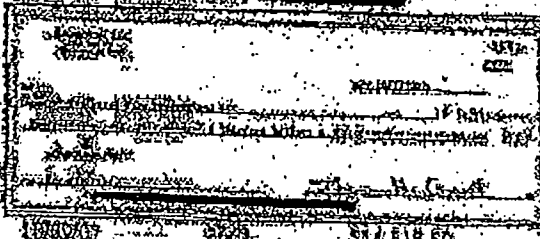
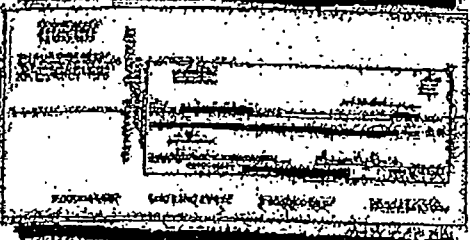
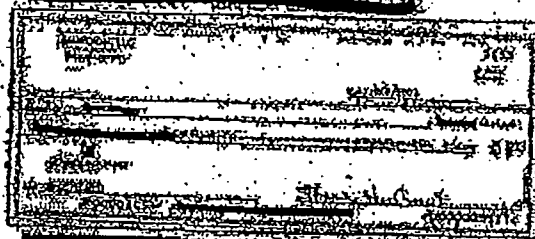
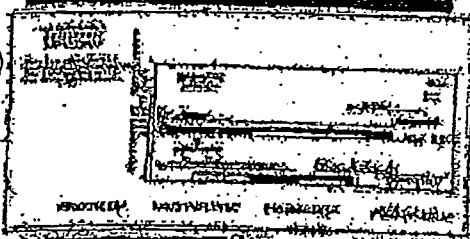
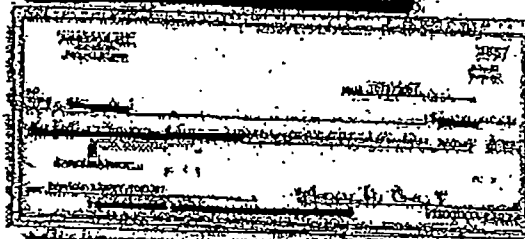
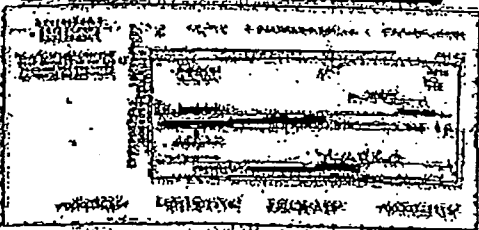
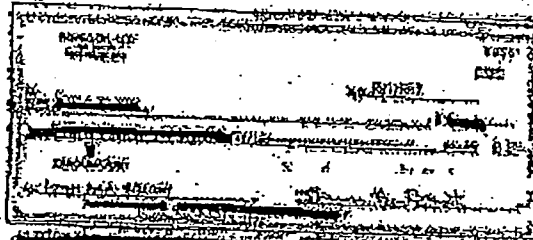
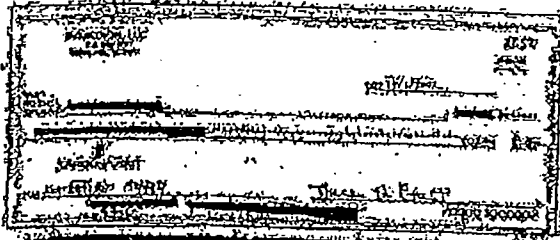
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IMMEDION LLC
330 E BLACK ST

Account Number 7101064396
Page 7 of 8

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IMMEDIATE
330 B BLACK ST

Account Number 7101084595
Page 7 of 9

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Form 1: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 2: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 3: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 4: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 5: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 6: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 7: A rectangular document with a header section and a main body containing several lines of text and a signature area.

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Form 9: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 10: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 11: A rectangular document with a header section and a main body containing several lines of text and a signature area.

Form 12: A rectangular document with a header section and a main body containing several lines of text and a signature area.

EXHIBIT D

*** MEMBER COPY ***

South Carolina
TO CONTRACTOR

NOTICE OF FURNISHING LABOR
AND MATERIALS

7104 0343 3860 0687 2299

NO RETURN RECEIPT

Bldrs No: 2381585

IMMEDION LLC
79 GLOBAL DRIVE
GREENVILLE SC 29607

Bldrs No. 2381585
7104 0343 3860 0687 2299
7104 0343 3860 0687 2305

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, FX54842/BR41.

We have been employed by/contracted with:
PREFERRED FIRE PROTECTION, FX54842/BR41, 416 S MAIN ST STE I, MAULDIN SC 29662-2260, 864-962-2320

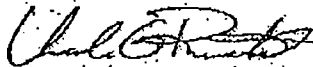
We have provided or will provide FIRE SPRINKLER/PIPE/VALVES/FITTINGS with an estimated value of \$15,000

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

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

The amount claimed to be due, if any: _____

FERGUSON FIRE & FABRICATIONS #2032
P O BOX 770
TUCKER, GA 30084-0770
770-908-2012



BICA Representative 09/21/2007
Prepared by: BICA 1-800 722-2422

Owner: IMMEDION LLC, 79 GLOBAL DRIVE, GREENVILLE SC 29607, 864-331-4530
Orig Contr: PREFERRED FIRE PROTECTION, 416 S MAIN ST STE I, MAULDIN SC 29662-2260, 864-962-2320
Customer: PREFERRED FIRE PROTECTION, FX54842/BR41, 416 S MAIN ST STE I, MAULDIN SC 29662-2260, 864-962-2320

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

AFFIDAVIT OF
RONALD G. TATE, JR.

C.A. No.: 08-CP-23-2746

Personally appeared before me Ronald G. Tate, Jr. who, being duly sworn,
deposes and states as follows:

1. I am an attorney in Greenville, South Carolina, practicing with the firm
Gallivan, White & Boyd, P.A.

2. I have been licensed to practice law in the State of South Carolina for
some 24 years and have experience in litigation including construction and mechanic's
lien law.

3. My firm was originally retained by Rescom Construction, LLC to defend
the third-party complaint filed by Immedion, LLC against Rescom. The third-party
complaint was subsequently dismissed upon agreement of Immedion and Rescom. As
part of that agreement, my firm assumed the defense of Immedion in this case.

4. The undersigned took over the defense of Immedion in April 2009, and
the undersigned has represented Immedion in all activities related to the action since that
time. Specifically, the undersigned responded to discovery requests, conducted necessary

legal research, filed a Motion for Summary Judgment and prepared briefs in connection with that Motion and prepared the case for a hearing.

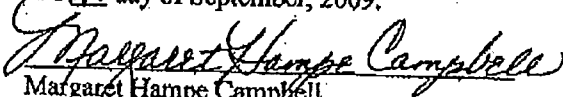
5. My billing rate in this matter is \$250.00 per hour. This rate is reasonable for matters of this type and for attorneys with the undersigned's level of experience. In connection with this matter, since assuming Immedion's defense in April 2009, I have billed or will bill \$10,652.71. Immedion's prior counsel filed his attorneys fees affidavit on July 20, 2009 attesting to \$4,072.55 in attorneys fees. Therefore the total attorneys fees expended in the defense of this lien are \$14,725.26. Chargeable costs are \$25.00 for Consent Order substituting counsel and \$25.00 for filing the Motion for Summary Judgment. Therefore total chargeable costs are \$50.00.

6. The attorneys fees and costs incurred to date are reasonable and necessary for the defense of Immedion in this mechanic's lien action.



Ronald G. Tate, Jr.

Sworn to and subscribed before me
this 21st day of September, 2009.


Margaret Hampe Campbell
Notary Public for South Carolina
My Commission Expires: June 3, 2018

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

AMENDED AND SUPPLEMENTAL
AFFIDAVIT OF
RONALD G. TATE, JR.

C.A. No.: 08-CP-23-2746

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Personally appeared before me Ronald G. Tate, Jr. who, being duly sworn,
deposes and states as follows:

1. I am an attorney in Greenville, South Carolina, practicing with the firm
Gallivan, White & Boyd, P.A.
2. I have been licensed to practice law in the State of South Carolina for
some 24 years and have experience in litigation including construction and mechanics
lien law.
3. My firm was originally retained by Rescom Construction, LLC to defend
the third-party complaint filed by Immedion, LLC against Rescom. The third-party
complaint was subsequently dismissed upon agreement of Immedion and Rescom. As
part of that agreement, my firm assumed the defense of Immedion in this case.
4. The undersigned took over the defense of Immedion in April 2009, and
the undersigned has represented Immedion in all activities related to the action since that
time.

5. Specific actions undertaken since April 2009 for which attorneys fees are claimed in this matter include the following:

Date	Description	Time/Hours
4-27-2009	Review of discovery served by plaintiff's counsel and e-mail communication with client concerning same.	0.3
5-06-2009	Review signed agreement with Immedion regarding terms of assumption of defense; review of non-jury roster for status conference on May 26; prepare attorneys fees affidavit regarding Immedion's attorneys fees to be signed by Mr. Burnette; review job cost and contract documents to support motion for summary judgment; prepare chronology of events; review of interrogatories and requests for production of documents served by plaintiff; prepare draft interrogatories and requests for production to serve on plaintiff; prepare letter to plaintiff's counsel regarding service of discovery on plaintiff; prepare two letters to client regarding case developments and status.	6.5
5-08-2009	Revision of discovery requests; prepare letter to Immedion's counsel regarding settlement agreement, stipulation, dismissing third party complaint against Rescom, affidavit of attorneys fees and substitution of counsel and draft of consent order substituting counsel.	1.5
5-21-2009	Telephone call regarding status conference; telephone conference with building owner Wayne's attorney, Stanley McLeod, regarding his payment defense and motion for summary judgment; extended telephone conference with Mr. Culver regarding payment defense, his position regarding notice of furnishing and potential for resolution.	1.3
5-21-2009	Preparation of status conference report.	.5
5-22-2009	Series of e-mails with other counsel regarding joint status report to court and revision of same.	.3
5-26-2009	Series of e-mails regarding roster meeting and continuance of case.	.3
5-27-2009	Review recent correspondence and outline of work to be done including summary judgment issues.	.5
6-01-2009	Review of package of materials from Stanley McLeod on project close out; communication with client regarding same; organization of documents in preparation for phone conference with Rob Moser of Immedion.	1.2
6-02-2009	Client conference with Immedion.	1.1
7-07-2009	Revise answers to interrogatories and request for production served by Ferguson; communication with	5.5

	production served by Ferguson; communication with clients regarding responses; finalize settlement agreement with Immedion; letter to Immedion's counsel regarding closing documents; review of Immedion documents, identify documents responsive to production requests; prepare motion for summary judgment and affidavit of support of same and phone conference with client regarding affidavit.	
7-08-2009	Review and revision of summary judgment documents and affidavit.	.7
7-09-2009	Phone call with client.	.2
7-09-2009	Phone conference with Ferguson's counsel regarding notice of furnishing and payment defense and grounds for summary judgment.	.3
7-15-2009	Review executed Immedion settlement documents and case correspondence.	.2
7-17-2009	Review dismissal papers regarding owner and communicate with client regarding same.	.1
7-21-2009	Phone conference with Ferguson's counsel regarding Ferguson's position as to dismissal of Immedion based on payment defense; phone conference with owner's counsel regarding its dismissal.	.3
7-29-2009	Review and analysis of documents produced by plaintiff per request for production.	.1
8-27-2009	Review notice of hearing of summary judgment motion and prepare e-mail to client; commenced legal research on summary judgment issues including statutory history of notice of furnishing/project commencement devices and legal authorities relied on by plaintiff and implied overruling of same by statute.	.22
8-28-2009	Prepare memorandum in support of motion for summary judgment and phone conferences with Ferguson's counsel regarding issues on summary judgment and phone conference with client.	.43
8-31-2009	Review and revision of memorandum in support of summary judgment and letters to Judge Miller, Clerk of Court and Ferguson's counsel regarding same.	.23
9-01-2009	Calls and e-mails regarding hearing.	.3
9-02-2009	Phone conference with client.	.2
9-11-2009	Review plaintiff's reply brief and prepare draft of sur-reply.	1.0
9-14-2009	Revisions of sur-reply brief and letters to court and clerk of court regarding means of presenting briefs to Judge McIntosh for hearing.	.6
9-15-2009	Phone calls and e-mails regarding change of hearing time.	.1

9-16-2009	Preparation for hearing including review of case law and briefs and outline of argument.	2.2
9-17-2009	Preparation for motion hearing including review of case law and briefs, argument outline, visual aids and attendance at hearing.	5.0
9-18-2009	Preparation of draft of proposed order granting summary judgment and affidavit of attorneys fees.	2.7
	TOTAL HOURS	41.6

My billing rate in this matter is \$250.00 per hour. This rate is reasonable for matters of this type and for attorneys with the undersigned's level of experience. In my 24 years of practicing, I have extensive experience in construction litigation and, specifically, in mechanic's liens having represented commercial and residential building owners, general contractors, subcontractors and suppliers in numerous contested and non-contested matters involving collections and mechanic's liens. In dealing directly with client referrals and referrals from other attorneys, I am familiar with the prevailing billing rates in the community and believe my billing rate is within the range of customary fees in this area.

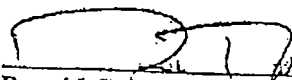
6. This particular matter involved some fairly unique and novel issues. The arguments presented by the plaintiff to oppose the payment defense were novel and required a full examination of the law as it existed before 1992, the 1992 amendments to the mechanic's lien statutes concerning notice of project commencement/notice of furnishing and the mechanic's lien notice statutes, as well. The time required to research and brief these issues was, in my opinion, reasonable and necessary. The results obtained on behalf of the client were also positive based upon the Court's ruling dismissing the action and discharging the mechanic's lien.

attorneys fees affidavit on July 20, 2009 attesting to \$4,072.55 in attorneys fees.

Therefore the total attorneys fees expended in the defense of this lien are \$14,472.55.

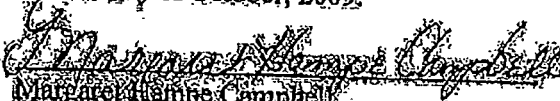
Chargeable costs are \$25.00 for Consent Order substituting counsel and \$25.00 for filing the Motion for Summary Judgment. Therefore total chargeable costs are \$50.00.

8. The attorneys fees and costs incurred to date are reasonable and necessary for the defense of Immedion in this mechanic's lien action.



Ronald G. Tate, Jr.

Sworn to and subscribed before me
this 1st day of October, 2009.


Margaret Anne Campbell
Notary Public for South Carolina
My Commission Expires: June 2, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS

2008-CP-23-2746

FERGUSON FIRE AND FABRICATION)
INC.)

PLAINTIFF)

vs.)

IMMEDION, LLC, ET AL)

DEFENDANT)

ORIGINAL

TRANSCRIPT OF RECORD

September 17, 2009

Greenville, South Carolina

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, Judge.

A P P E A R A N C E S:

ROBERT E. CULVER, ESQ.
Attorney for the Plaintiff

RONALD TATE, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

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Certificate of Reporter 24

1 MR. TATE: Your Honor, this is a mechanics lien case.
2 The only thing I guess that could bring more threat of
3 trepidation to the Court when a lawyer stands up and says
4 this is a mechanics lien case is when he comes into court
5 with a chart. I guess the only thing that could be worst
6 is if I brought a power point. I thought about doing
7 that.

8 THE COURT: Are you the one that asked about that? I
9 have a request that somebody asked me to use a power point
10 during non-jury and I said, Fine with me.

11 MR. TATE: No, I did not.

12 THE COURT: Okay.

13 MR. TATE: I didn't think it was appropriate to do
14 that. But anyway. We have here these cross motions for
15 summary judgment. We filed our initial motion on behalf
16 of the owner of this property. It's actually a lease
17 holder. If that makes any difference. A company called
18 Immedion which is a small telecom operation. Immedion has
19 a facility in Greenville County. And they hired Rescom
20 Construction to do a general tenant up-fit work. And
21 Rescom did all the work and it had some sprinkler work
22 involved with that. Separately from that there was this
23 other project that Immedion had done on its own. And
24 they -- they had a contract with this Preferred Fire
25 Protection Company. A direct contract for some kind of

1 very special specific dry disposal draft system. It's a
2 dry gas system that was used for their data stuff. You
3 didn't want to have water in the computer room. And
4 Preferred did this work and we've come to find out now
5 after some time that they obtained, Preferred obtained,
6 some of the equipment used for this dry system from Hertz
7 about \$15,000.00 worth of equipment from Hertz.

8 Now Immedion paid everything it owed to Rescom for
9 the general tenant up-fit work. It also paid everything
10 that it owed to Preferred, the contract.

11 THE COURT: Did that include the equipment price?

12 MR. TATE: Yes, sir, that included everything. So
13 they paid, they, Immedion, paid approximately \$30,000.00
14 to Preferred for all this work. That included the
15 materials that Preferred got from Ferguson.

16 Now we filed a motion not knowing a lot of what we
17 know now. About what this case is about. We filed our
18 initial motion for summary judgment in July. And that
19 motion was based on a couple of things. One is we didn't
20 think that Preferred or that Ferguson's equipment came to
21 be in this facility. We didn't know anything about it.
22 And so we said, Well you got to prove your materials
23 improved our facility. And we also said there, Well we've
24 paid Rescom everything. And by the way we've also paid
25 that little contract that we had with Preferred. So that

1 was the basis for our motion for summary judgment. We had
2 enough supported by the affidavit of Rob Moser, who is the
3 CEO of Immedion. So everything's paid. And, Your Honor,
4 there's no dispute about that.

5 THE COURT: Do you agree with that, Mr. Culver?

6 MR. CULVER: Yes, sir.

7 THE COURT: Okay.

8 MR. TATE: And so we go along and we come to find out
9 number one that these materials from Ferguson were
10 provided to Preferred under the separate agreement.
11 Sometime in September or October of 19 -- I'm sorry, 2007.
12 And we came to find out also that on September 21st, 2007,
13 Ferguson, the supplier, sent a notice of furnishing
14 materials to Immedion. And that's -- that is in essence
15 what Ferguson relies on. In saying that the fact that --
16 that Immedion has made full payment is not a defense to
17 this mechanics lien.

18 And we have filed our motion papers after learning
19 all of this and after receiving the motion, cross motion
20 from Ferguson, we filed a supplemental brief which
21 explains why the notice of furnishings are of no
22 consequence. It has no legal significance. And that, in
23 fact, there does not appear to be any factual dispute
24 whatsoever. And the issue is simply a legal question for,
25 Your Honor, to decide on the legal fact of the mechanics

1 lien law of this notice of furnishing. Again, before any
2 material was ever supplied.

3 And there's a couple of things I want to talk about
4 with regards to some of the arguments that are being
5 offered on the other side about why payment is not a
6 defense here. But interestingly enough to put all of this
7 in the proper context, I'm going to have to try to explain
8 to the Court some of the statutes that I think we all
9 agree don't apply in this case. Primarily the
10 subcontractor mechanics lien statute, 29-520. So we've
11 got to examine that statute and we've got to understand
12 why that statute doesn't apply in order to put in proper
13 context what this notice of furnishing that they gave to
14 us really meant. That's why I got the flip chart, if may,
15 Your Honor. Because what they're trying to do really is
16 to fit a square peg into a round hole. And this is not,
17 in fact, a notice of furnishing under the mechanics lien
18 law.

19 THE COURT: Who should the notice of furnishing be
20 directed to under the mechanics lien?

21 MR. TATE: The contractor, Your Honor. That's the
22 only way that a notice of furnishing, as it is envisioned
23 by the statute, would have any legal effect. We'll see if
24 this works. If it doesn't I'll just move on.

25 THE COURT: Let me ask you while you're putting that

1 together, Mr. Tate.

2 MR. TATE: Yes, sir.

3 THE COURT: What if there's a notice of furnishing to
4 the -- and it was sent to the owner on a question of
5 whether or not you furnished the labor or the materials or
6 product with their knowledge or consent? What -- would
7 they have any liability in that situation?

8 MR. TATE: It may go to that point.

9 THE COURT: But it doesn't create a lien?

10 MR. TATE: It doesn't create a lien. But it does
11 say, Okay, we're out here, I'm doing this work and you're
12 kind of consenting to what I'm doing.

13 THE COURT: It's notice.

14 MR. TATE: Maybe that's what it goes to. That's not
15 an issue in this case.

16 THE COURT: Okay.

17 MR. TATE: All right. So anyway, statutory creation.
18 Got to be strictly construed according to the statute,
19 okay. So the notice of furnishing being a preacher of the
20 statute has certain applicability but it's limited to what
21 the statute says it can do. And here, again, we all agree
22 that 29-520, I know you can't see this and I apologize.

23 THE COURT: That's okay.

24 MR. TATE: Mainly just to sort of frame the issues.
25 29-520 really has no bearing in this case. 29-520 is

1 really the statute that pertains to the relationship of
2 the general contractor and the subcontractor and what they
3 may do as between themselves to protect themselves from
4 liens. Specifically, in 1992, the legislature provided
5 that a general contractor may receive the payment defense.
6 The same payment defense an owner has under certain
7 circumstances. And to get the payment defense the general
8 contractor under this statutory scheme has to provide the
9 statutory notice of project commencement.

10 Which in essence tells subcontractors when that is
11 filed, that's when it's posted on the job site, tells the
12 subcontractors or suppliers on the job that you must
13 comply with the provisions of this statute, 29-520, in
14 order to secure a mechanics lien. And that requires them
15 in turn, it is sort of a game, you know, it requires the
16 subcontractor in turn to provide what is now referred to
17 as the notice of furnishing. And that is at least the
18 same form that Ferguson provided here. And the notice of
19 furnishing form that made specific reference to 29-520.

20 Of course, when you look at the last sentence here,
21 in no event shall the total adequate amount of liens only
22 approve and exceed the amount due by the owner. Making
23 all these changes in the mechanics lien law allowing some
24 variation in how contractors and subcontractors deal with
25 each other in the leading law. But providing at the end,

1 after all of that, owner still has his payment defense.
2 If you think about it the legislature is not about to
3 change the payment defense because there's an awful lot
4 more owners out there than there are contractors and
5 subcontractors. There's a lot of motivation to preserve
6 the rights of the owner, particularly homeowners, Your
7 Honor.

8 So in the '92 amendments -- it all goes to the
9 problem that is perceived at some point that general
10 contractors are sort of stuck in the middle when there's a
11 lower tier subcontractor lien on the property. Even
12 though the owner's made payment, the owner has a payment
13 defense, he's going to point to the contractor and say, I
14 have a lien on my property, you take care of it and I'm
15 holding the money until you pay it or take care of it
16 otherwise.

17 So this provided a general contractor with a way that
18 he can protect himself from that kind of double payment
19 and that kind of exposure. So. And here's 29-523 this is
20 a notice of project commencement statute. And again,
21 nobody says that statute applies here. But I have to
22 point it out because this is -- we're talking about a
23 notice of furnishing that would ordinarily followed the
24 filing of a notice of project commencement.

25 All right, so, it tells us -- notice of project

1 commencement tells the suppliers that they've got to
2 comply with 29-520 in order to secure their lien rights.
3 The confusion in part here, I think, is that in 1992 when
4 these amendments were made, what is now referred to as
5 notice of furnishing was all called something else. And
6 it was called a notice of intent to lien. Sort of an
7 untimely thing.

8 THE COURT: Would the timing of the notice of intent
9 to lien be subsequent to the furnishing as opposed to
10 abeyance of the furnishing?

11 MR. TATE: It generally was an advance of the
12 furnishing. And generally it was in response to that
13 notice of project commencement that the general filed. So
14 '92 called a notice of intent to lien. Then in '95 the
15 legislature softened the language of the way this thing is
16 called to a notice of furnishing. Which was a lot more
17 neutral and a lot less untimely and a lot more palatable to
18 the contractor community, frankly. An owner who sees that
19 notice of intent to lien may well be confused that there's
20 a lien on his property. But a notice to furnishing being
21 a lot more -- a lot softer language is just going to
22 create a lot less friction on the job.

23 But because the legislature changed the terminology
24 that's used in the 29-520, I believe this is why we have
25 some of the confusion in this case about what is the

1 effect of the notice of furnishing when you talk about
2 29-540. Which now is the statute that we are really
3 talking about in the case. 29-540 is the mechanics lien
4 statute. And it provides basically the mechanics of the
5 mechanics lien. How it's supposed to work. How the
6 notice is supposed to be given for a mechanics lien. Not
7 the notice of furnishing. But the confusion is this. It
8 says, Whenever work is done or material is furnished for
9 the improvement of real estate, a material man shall in
10 writing notify the owner of the furnishing of such labor
11 or material. And the amount or value thereof. So there's
12 this language here that sort of looks like the 29-520
13 language which we're not talking about with respect to the
14 statutory notice of furnishing.

15 And the fundamental argument is those are two
16 completely different concepts. And this notice of
17 furnishing here that Ferguson gave to Immedion has nothing
18 to do with 29-540.

19 THE COURT: What was the manner in which the notice
20 of furnishing was provided by Mr. Culver's client in this
21 case?

22 MR. TATE: Yes, sir, it was provided in mid
23 September. And I've got it. Here's a blow up of that.
24 Provided -- says that the labor materials were actually
25 furnished or scheduled to be furnished by us to the

1 project from September 10, 2007 through blank. And--

2 THE COURT: Certified mail.

3 MR. TATE: Yes, sir, it was -- I'm sorry, it was not
4 filed, it doesn't have to be filed.

5 THE COURT: Okay.

6 MR. TATE: It was mailed. And we don't take issue in
7 the manner in which it was given, we take issue with the
8 effect of it all.

9 THE COURT: Well I understand but if you're going
10 to -- and I'm just trying to ask this question. But if I
11 have a mechanics lien in a traditional sense that I'm
12 filing, you have a statement of account explaining the
13 mechanics lien that you filed in the courthouse and then
14 it's served on everybody, correct?

15 MR. TATE: Yes, sir, that's correct.

16 THE COURT: And this--

17 MR. TATE: And that's the way it's supposed to be
18 done under 29-520 -- I'm sorry, 29-540, the mechanics lien
19 statute.

20 THE COURT: That's what I was asking.

21 MR. TATE: That's exactly right.

22 THE COURT: That's your contention that you have to
23 do that filing and service of all interested parties, all
24 uninterested parties.

25 MR. TATE: Correct, Your Honor. And, in fact, this

1 notice of furnishing, notice of furnishing labor and
2 materials, is by no means a mechanics lien. And I think
3 everybody would agree that it was not intended to be a
4 mechanics lien. And there's several reasons I say that.
5 One is that the materials hadn't even been shipped yet I
6 don't believe. Number two, the materials weren't due to
7 be paid. The lien doesn't arise until the materials are
8 furnished to the job. And more important, it says here,
9 it is important to note that this is not a lien. This is
10 a routine procedure to comply with certain state
11 requirements that may exist. And should not reflect in
12 any way on the integrity or credit standing of Fire
13 Protection.

14 And then it goes on to say have we provided or will
15 provide fire sprinkler, pipe, valve fittings with an
16 estimated value of \$15,000.00. So it is forward looking,
17 it is perspective. As opposed to something completely
18 different which is the 29-540 lien notice.

19 And, Your Honor, they, Ferguson, rely extensively on
20 the Stoudemier Heating case which is more of kin to a
21 notice of a mechanics lien. In that case the
22 subcontractor furnished the material, was due the money
23 and informed the owner that he hadn't been paid. And the
24 Court said that's like a mechanics lien to me. And said
25 that that was a sufficient notice to the owner to put him

1 on notice that he must then protect himself. Knowing that
2 this contractor has not been paid. Knowing that the
3 supplier or subcontractor had not been paid. When he goes
4 and pays the general contractor he does that at his peril.
5 Completely different from the situation at hand, Your
6 Honor.

7 And I will also point out that Stoudemier Heating
8 decided in 1992, based on the prior law, before there was
9 any such thing as a notice of furnishing. So again, I'm
10 happy to take any questions or...

11 THE COURT: I've got your point.

12 MR. TATE: Yes, sir.

13 THE COURT: Mr. Culver.

14 MR. CULVER: Thank you, Your Honor.

15 THE COURT: Let me ask you this.

16 MR. CULVER: Yes, sir.

17 THE COURT: Do you agree with Mr. Tate's contention,
18 I'm going to let you have your say but I just want to
19 make --

20 MR. CULVER: Certainly.

21 THE COURT: That this notice of furnishing labor was
22 sent prior to the furnishing of the actual materials?

23 MR. CULVER: No, I don't agree with that completely.
24 As the invoices attached to the motion seem to indicate
25 that the delivery of the materials began before the

1 notice. And I believe the materials -- the invoice dates
2 continue after the notice as well. So apparently we have
3 some in front and some after.

4 THE COURT: What is the intent of this notice to
5 furnish and labor from your perspective as pointed out by
6 Mr. Tate that this is not a lien?

7 MR. CULVER: It is a lien, Your Honor. And I think
8 that maybe I can address one thing that the Court may
9 misunderstand about this. And that is that the notice of
10 lien was filed. This is not a notice of lien. The notice
11 of lien was subsequently filed after they didn't get paid
12 but before the 90 days, after furnishing had elapsed. A
13 notice of lien was filed. And then the lawsuit was
14 started within six months. So we have three things here.
15 We have the notice that was sent on September 21st. We
16 have the lien and notice of the lien that was filed later
17 by Jennifer Queen. And then we have the filing of the
18 lawsuit. Those three things together constitute a lien.
19 I believe a lien is inchoate until all the statutory
20 requirements are met.

21 So in this case, what the section five -- section 40
22 does, this notice, it fixes the date on which the owner's
23 liability is determined. And I didn't say that correctly.
24 The owner's got a payment defense. If the owner never
25 receives this notice and he pays the general contractor,

1 he's got a absolute defense. But 29-540 provides that if
2 the owner receives this notice and he still hasn't paid
3 everything that's due under the contract, that he can't
4 just go ahead and pay the general contractor. He's got to
5 protect the sub sub who's now the subcontractor who's
6 giving him notice. And that's what the Stoudemier case is
7 about. And that's why I cited it. And also cited the
8 Lownde's decision, Lownde's Hill Realty Company. Both of
9 those dealt with situations where the Court said
10 specifically that an owner has the payment defense but not
11 after he receives this notice under 29-540. In this case,
12 the owner had a approximately a \$30,000.00 contract. He
13 paid \$15,000.00 right up front.

14 THE COURT: When? The date of your notice is -- I'm
15 looking -- I can't see it from here.

16 MR. CULVER: August 23rd is the contract date.

17 THE COURT: Okay.

18 MR. CULVER: On August 30th, Immedion, that is the
19 owner in this case, paid Preferred \$15,486.50.

20 THE COURT: What's the date of this notice of furnish
21 and labor?

22 MR. TATE: On September 21st, 2007. So at the
23 date --

24 THE COURT: 2007?

25 MR. CULVER: Yes, sir. When we--

1 THE COURT: Okay, I had written '09, excuse me.

2 MR. CULVER: The date that the notice was received
3 there's still a balance owed of approximately \$15,500.00
4 to the general contractor. On October 3rd, after
5 receiving the notice by certified mail, Immedion paid
6 \$14,500.00. And then on October 31st, paid another 1000
7 or so.

8 THE COURT: Did you get a return receipt on that?

9 MR. CULVER: I do not have a return receipt. I don't
10 believe I do, I haven't checked my file, it's not part of
11 the record.

12 THE COURT: You say there's not a question they
13 received the notice.

14 MR. TATE: There's no question they received it. It
15 says, No return received on the face of the form.
16 Apparently that's how they chose to send it.

17 THE COURT: Well I'm going to stop you right there.
18 I want to ask Mr. Tate, you made a comment a minute ago, I
19 thought, that a contractor orally notified the owner that
20 he had been paid and that was sufficient notice for them
21 to be on notice to protect themselves before they paid the
22 contractor.

23 MR. TATE: In Stoudemier?

24 THE COURT: Right.
25

1 MR. TATE: Your Honor, I believe that was a written
2 notice to the owner in that case.

3 THE COURT: So even if this might fall under the
4 notice of furnishing, it still would -- wouldn't it still
5 not fall under the notice to the owner that they have
6 provided this -- these goods?

7 MR. TATE: Yes, sir. It only tells the owner that,
8 in fact, I'm providing materials to your job.

9 THE COURT: So in effect in your position -- your
10 position is it doesn't say we haven't been paid that?

11 MR. TATE: That's correct. It's not a demand for
12 payment. Stoudemier Heating is a demand for payment.
13 Where there is a past due invoice. And that's completely
14 different.

15 THE COURT: All right, thank you.

16 Go ahead, I'm sorry, Mr. Culver.

17 MR. CULVER: No problem, Your Honor. Both the
18 Stoudemier Heating case and the Lowndes's Hill Realty case,
19 I believe I'm not confusing these, said that the form of
20 notice under 29-540 is immaterial. And what the defendant
21 appears to be arguing is that this is in the form of a
22 notice under 29-520(b). Which doesn't apply to this case.
23 I disagree with that on two points. One, 29-540
24 references specifically in the notice. And two, of the
25 Stoudemier Court, I believe, and I have to go back to

1 check, is the one that said it's not the form of notice
2 that matters.

3 THE COURT: Well, let me ask you this, how do you get
4 around the fact that there's nothing in there that says we
5 haven't been paid? There's nothing to put that owner on
6 notice that they need to be weary about the fact that
7 before you pay this contractor, you need to take care of
8 the subcontractor and make sure that they've been taken
9 care of? I mean, I think that's the point that I'm
10 hearing being made by Mr. Tate regardless of the
11 formalities used and notice used, this just says, Hey,
12 we're furnishing you guy's stuff. It's almost like the
13 example of the question I asked Mr. Tate. And he told me
14 it's almost like you're giving them notice that you're
15 doing it so later on they couldn't claim that, you know,
16 we didn't have our expressed or implied permission to do
17 this so you're able to lien the property. But if you
18 don't have a demand or saying that we hadn't been paid,
19 how do you get around that?

20 MR. CULVER: Well I don't think that notice under
21 29-540 is a demand for payment. So.

22 THE COURT: It is a demand for payment.

23 MR. CULVER: It's a notice of providing materials.
24 At that time the materials -- it's not necessary to even
25 have provided the materials. The statute doesn't really

1 reference whether the materials were provided before or
2 after. And the allowance specifically says that the
3 29-540 notice can be included with the ultimate notice of
4 lien. So in that case it would be after. But it can also
5 be before.

6 THE COURT: But the question I'm asking you, I
7 understand that's just the technical notice of
8 requirements. I'm looking more in terms of you have the
9 contract that was entered into in August. You have
10 payment seven days later of 15,000, your notice came in
11 between that time and then there was a subsequent notice
12 and not a payment brought on October 3rd and you're
13 saying, and I understand your argument, that subsequent
14 payment should have been made to us and they don't get the
15 pull payment defense.

16 MR. CULVER: That's correct, Judge.

17 THE COURT: And my question to you is if they're not
18 notifying the owner that we have not been paid, in fact,
19 by filing that notice that's been given, you're in the
20 process of beginning the process. How does that ever put
21 them on notice that they need to be looking out for their
22 own interest to make sure that everybody has been taken
23 care of. I don't see that gives them any kind of notice.

24 MR. CULVER: I think the very purpose of the notice
25 under section five sub section 40 is to provide that. To

1 give them, look we're going to provide some materials
2 here, you still owe money on this contract. You can't pay
3 the contractor without making sure that we've been paid.

4 THE COURT: So your position is once I know that
5 you're on the job, I'm a owner, I have a duty to go to you
6 to make sure you've been paid before I pay the contractor,
7 right?

8 MR. CULVER: And this only applies to the
9 subcontractor for first level of subcontractor material.

10 THE COURT: I understand your argument.

11 MR. CULVER: And it could be notified as a practical
12 matter by just sending a joint check. I mean, it's as
13 easy as that.

14 THE COURT: Anything further?

15 MR. CULVER: No, sir.

16 MR. TATE: Your Honor, if I may, just two things.

17 THE COURT: Sometimes it's better not to say
18 anything.

19 MR. TATE: Sometimes it is.

20 THE COURT: Yes, sir.

21 MR. TATE: What they're proposing with joint checks
22 would be extreme disruption on a construction project.
23 And that can't possibly be what the intent of these
24 sections was.

25 THE COURT: I agree with your position. But I'm

1 going to agree with Mr. Tate. I think that your notice
2 doesn't give -- put the burden on a homeowner or a owner
3 of a piece of property to get a check on a job in
4 progress. If it's a opposite saying, Look we haven't been
5 paid on this project, I think that's a different story. I
6 may be wrong on that but I'm going to ask Mr. Tate to draw
7 me a proposed Order, send it to Mr. Culver, please.

8 You can get that in about 10 days?

9 MR. TATE: Certainly, Your Honor.

10 THE COURT: Okay, thank you, gentlemen.

11 MR. TATE: Thank you, Your Honor. If I may ask,
12 there's going to be an issue of attorneys fees and we'll
13 need to take up the issue of attorney's fees at some
14 point. Presumably sent through a separate motion if
15 that's acceptable to you.

16 THE COURT: Of course.

17 MR. TATE: I can give you the information now.

18 THE COURT: Whatever you want to do. If you want to
19 turn it into me now.

20 MR. CULVER: If I might suggest, if he can send a
21 affidavit, when he sends the proposed Order, then I can
22 review and if I have any objection then I can raise it
23 with the Court.

24 THE COURT: Okay, let's do that.

25 MR. TATE: Thank you, Your Honor.

1 THE COURT: Yes, sir, thank you.

2 MR. CULVER: Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Culver.

4 (WHEREUPON, the proceedings were concluded.)

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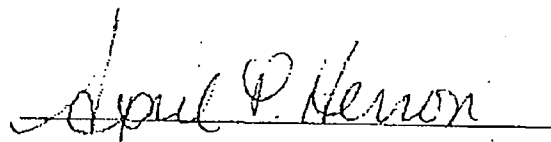
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 17th day of September, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 13, 2009



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

FERGUSON FIRE AND
FABRICATION, INC.,

PLAINTIFF,

-VS-

IMMEDION, LLC, et al.,

DEFENDANT.

2008-CP-23-2746

TRANSCRIPT OF RECORD

OCTOBER 8, 2009
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE R. LAWTON McINTOSH

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

ROBERT E. CULVER, ESQUIRE
(BY PHONE)

ATTORNEY FOR DEFENDANT:

RONALD G. TATE, JR., ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

1 FOR RESCOM, IS THAT RIGHT?

2 A. THAT'S CORRECT.

3 Q. AND CAN YOU TELL THE JUDGE HOW RESCOM CAME TO BE IN
4 THIS ACTION?

5 A. SURE. RESCOM WAS THE -- WAS JOINED IN THE ACTION AS
6 A THIRD PARTY DEFENDANT PURSUANT TO A THIRD PARTY
7 COMPLAINT FILED BY IMMEDION. THE THIRD PARTY COMPLAINT
8 ALLEGED THAT THE MECHANIC'S LIEN ACTION AROSE FROM
9 RESCOM'S WORK ON THE PROJECT. RESCOM AT FIRST WAS THE
10 GENERAL CONTRACTOR.

11 NOW RESCOM, AS THE GENERAL CONTRACTOR, SUBMITTED PAY
12 APPLICATIONS. AND IN THOSE PAY APPLICATIONS RESCOM
13 AFFIRMED AS IS THE CUSTOM, AND I GUESS, AS A CONTRACT
14 REQUIREMENT HERE, RESCOM AFFIRMED THAT IT HAD MADE
15 PAYMENT TO ALL SUBCONTRACTORS AND SUPPLIERS FOR MATERIALS
16 AND LABOR BROUGHT ON THE JOB BY RESCOM.

17 AND, IN FACT, THEY SUBMITTED A PAY APPLICATION
18 ASSERTING THAT THE SCOPE OF FIRE PROTECTION EQUIPMENT,
19 FIRE PROTECTION SERVICES HAD, IN FACT, BEEN PAID FOR BY
20 RESCOM. AND, IN FACT, RESCOM HAD A CONTRACT WITH
21 PREFERRED FIRE, THE SUBCONTRACTOR WHO IS IN ISSUE IN THIS
22 PARTICULAR LAWSUIT..

23 AS A RESULT OF THAT PAY APPLICATION IMMEDION ALLEGED
24 IN ITS THIRD PARTY COMPLAINT THAT RESCOM WAS REQUIRED TO
25 BASICALLY ASSUME THE DEFENSE, TAKE OVER AND HOLD IMMEDION

1 HARMLESS FOR ANY CLAIMS IF, IN FACT, IT TURNED OUT THAT
2 RESCOM EITHER DIDN'T PAY PREFERRED OR IF PREFERRED IN
3 TURN DID NOT MAKE PAYMENT UNDER ITS SUBCONTRACTS OR SUB-
4 SUBCONTRACTS. SO THAT'S KIND OF A LONG ANSWER TO SAY
5 RESCOM WAS JOINED AS A THIRD PARTY DEFENDANT UNDER THIS
6 SORT OF INDEMNITY THEORY.

7 Q. IT WASN'T THE PLAINTIFF THAT BROUGHT RESCOM IN, IT
8 WAS IMMEDION, RIGHT?

9 A. THAT'S CORRECT.

10 Q. AND IT WAS LATER DETERMINED THAT THE JOB, THE
11 SUBJECT MATTER OF THE PLAINTIFF'S ACTION, DIDN'T INVOLVE
12 RESCOM, IS THAT RIGHT?

13 A. THAT'S RIGHT. IT WAS DETERMINED, IF YOU DON'T MIND
14 ME JUST SAYING, IT WAS DETERMINED THAT THE SEPARATE
15 CONTRACT THAT IMMEDION HAD WITH PREFERRED FIRE ACTUALLY
16 GAVE RISE TO THE PROCUREMENT OF EQUIPMENT FROM YOUR
17 CLIENT, FERGUSON. AND THAT'S HOW WE CAME TO RESOLVE THE
18 ISSUE NOW.

19 AND THIS IS TO -- AND THAT IS -- WHAT I'M SAYING IS
20 THE INITIAL THIRD PARTY COMPLAINT THAT IMMEDION FILED
21 AGAINST RESCOM REALLY WAS INCORRECT. AND THE REASON FOR
22 THAT IS THAT THE SPECIFIC MATERIALS THAT FERGUSON HAD
23 SUPPLIED TO THE JOB AND THAT IT DIDN'T GET PAID FOR WERE
24 NOT SPECIFICALLY IDENTIFIED IN THE ORIGINAL COMPLAINT.

25 AND SO THE ASSUMPTION ON THE DEFENSE SIDE BETWEEN,

1 AT LEAST AS FAR AS MY CLIENT IS CONCERNED AND AS FAR AS
2 IMMEDIATION WAS CONCERNED, WAS THAT THIS MATERIAL THAT WAS
3 FURNISHED WAS FURNISHED PURSUANT TO BASICALLY RESCOM'S
4 CONTRACT.

5 AND RESCOM, OF COURSE, HAD PAID PREFERRED ALL THAT
6 IT OWED. AND SO RESCOM DETERMINED THAT IT WAS WITHIN ITS
7 RIGHTS, IN FACT, IT WAS APPROPRIATE FOR RESCOM TO SIMPLY
8 ASSUME IMMEDIATION'S DEFENSE WORKING UNDER THE ASSUMPTION,
9 AS ALL ASSUMED, THAT THE MATERIALS WERE SUPPLIED TO
10 PREFERRED UNDER THAT -- UNDER THE UMBRELLA OF THAT
11 GENERAL CONTRACT.

12 Q. AND MR. -- IT WAS A CHARLES BRUNETTE, MR. BRUNETTE
13 REPRESENTED IMMEDIATION ORIGINALLY, ISN'T THAT CORRECT?

14 A. THAT'S CORRECT.

15 Q. AND WHEN HE -- WHEN YOU SUBSTITUTED HIM IN FOR HIM
16 YOU PREPARED OR HE PREPARED AN AFFIDAVIT OF ATTORNEY'S
17 FEES, IS THAT CORRECT?

18 A. THAT IS CORRECT. HE PROVIDED THE BILLING STATEMENT
19 TO ME. AND I ACTUALLY DRAFTED THE FEES AFFIDAVIT FOR HIM
20 TO SIGN.

21 Q. I DON'T KNOW IF YOU HAVE IT IN FRONT OF YOU, BUT IF
22 YOU DON'T, DO YOU RECALL WHETHER MR. BRUNETTE'S AFFIDAVIT
23 INCLUDED TIME FOR THE PREPARATION OF THE THIRD PARTY
24 COMPLAINT ---

25 A. IT DID.

1 Q. --- RESCOM?

2 A. YES, IT DID. IT INCLUDED HIS DRAFTING OF THE ANSWER
3 AND COUNTER-CLAIM AND THIRD PARTY COMPLAINT. AND
4 ACCORDING TO THE DETAIL THAT I HAVE HERE IN FRONT OF ME,
5 WHICH WAS NOT PART OF THE AFFIDAVIT, HE CHARGED 1.33
6 HOURS OF TIME TO DO THAT.

7 Q. AND HE ALSO, WHEN WORKING FOR IMMEDION WITH RESCOM,
8 WAS NEGOTIATING WITH, I GUESS, YOU ON BEHALF OF RESCOM TO
9 DETERMINE THE PARTIES' VARIOUS LIABILITIES, VIS-A-VIS,
10 WHAT THEY BELIEVED TO BE RESCOM'S ROLE IN THE PROJECT,
11 ISN'T THAT CORRECT?

12 A. SURE. AND, I MEAN, PART OF THE AGREEMENT THAT WE
13 ULTIMATELY REACHED WITH IMMEDION FOR RESCOM WAS THAT
14 RESCOM WOULD HOLD IT HARMLESS, WHICH IT'S REQUIRED TO DO
15 UNDER THE CONTRACT. AND THAT INCLUDED TO PAY IMMEDION
16 FOR ALL OF ITS ATTORNEY'S FEES.

17 Q. BUT THAT CONTRACT, OF COURSE, DIDN'T APPLY TO THE
18 CLAIM BROUGHT BY THE PLAINTIFF?

19 A. AS WE ULTIMATELY TURNED OUT. BUT, OF COURSE, WE
20 DIDN'T KNOW THAT AT THE TIME BECAUSE THE COMPLAINT WAS
21 NOT SPECIFIC ON THE EQUIPMENT THAT WAS IN ISSUE.

22 Q. IS THERE ANY WAY TO TELL FROM MR. BRUNETTE'S
23 AFFIDAVIT HOW MUCH TIME HE SPENT WITH REGARD TO DEALING
24 WITH RESCOM AND HOW MUCH TIME HE SPENT IN DEFENDING THE
25 LIEN CLAIM?

1 A. NO. THE AFFIDAVIT DIDN'T BREAK IT DOWN THAT WAY.
2 BUT I DON'T THINK IT WOULD BE NECESSARY FOR IT TO BREAK
3 IT DOWN THAT WAY UNDER, I MEAN, AGAIN, THE -- WHAT
4 CHARLIE BRUNETTE DID WAS NECESSARY AND BROUGHT ABOUT
5 BECAUSE OF THE FACT THAT THERE WAS A MECHANIC'S LIEN
6 FILED. AND WE PAID, YOU KNOW, WE BEING MY CLIENT, MY
7 INITIAL CLIENT, RESCOM, PAID THE FULL AMOUNT OF THOSE --
8 OF THAT BILL.

9 Q. IN YOUR OWN AFFIDAVIT I NOTICED A FEW ENTRIES THAT
10 SEEMED TO BE RELATED TO THE NEGOTIATION BETWEEN RESCOM
11 AND IMMEDION FOR INDEMNITY UNDER THIS CONTRACT. WOULD
12 YOU AGREE WITH THAT?

13 A. LET ME JUST LOOK AT THE TIME DETAIL, AND I CAN TELL
14 YOU.

15 Q. I CAN POINT YOU TO A FEW DAYS ---

16 A. SURE, IF YOU WOULD.

17 Q. --- WHERE I FOUND WHAT LOOKED LIKE THAT'S THE TYPE
18 OF WORK. AND WHAT I'M JUST TRYING TO DO IS GET AN IDEA
19 FOR HOW MANY HOURS ON YOUR AFFIDAVIT WERE SPENT WITH
20 REGARD TO NEGOTIATING AND PAPERING THE DEAL WITH RESCOM
21 AND THEN SUBSTITUTING COUNSEL.

22 AND I SEE ON 5/6 IT LOOKS LIKE YOU REVIEWED THE
23 SIGNED AGREEMENT WITH IMMEDION AND THEN PREPARED ATTORNEY
24 FEES AFFIDAVIT REGARDING IMMEDION'S ATTORNEY'S FEES ---

25 A. THAT'S RIGHT.

1 Q. --- BY MR. BRUNETTE.

2 A. YOU KNOW, WHAT I -- IF YOU DON'T MIND ME JUST
3 SAYING.

4 Q. SURE.

5 A. WHAT I UNDERTOOK TO DO IN PREPARING THE AFFIDAVIT
6 WAS TO SEVER OUT FROM MY FEES, YOU KNOW, ANYTHING HAVING
7 TO DO WITH THE KIND OF NEGOTIATION AND THE PRE-AGREEMENT
8 WORK THAT I DID IN DEFENDING THE THIRD PARTY COMPLAINT
9 BECAUSE, AGAIN, I DID NOT WANT TO DOUBLE DIP. I DIDN'T
10 WANT TO MAKE A CLAIM FOR ATTORNEY'S FEES, YOU KNOW, FOR
11 BOTH IMMEDION AND RESCOM WHILE THEY WERE BASICALLY DOING
12 THE SAME THING AND HAGGLING OVER WHAT THE TERMS OF THE
13 AGREEMENT WOULD BE.

14 SO YOU SEE HERE ON 5/6/09 THERE WAS AT LEAST A
15 LETTER AGREEMENT IN PLACE BETWEEN IMMEDION AND RESCOM AT
16 THAT TIME. AND I THINK WE DID SOME WORK TO DEVELOP THAT
17 INTO LIKE A MORE FORMAL ASSIGNMENT AGREEMENT SO IT WOULD
18 BE CLEAR THAT THE CLAIMS THAT EITHER IMMEDION OR RESCOM
19 HAD WOULD BE PROPERLY ASSIGNED HERE AS ---

20 Q. AND ON 5/8, THE NEXT ENTRY, I DON'T KNOW IF YOU HAVE
21 IT IN FRONT OF YOU.

22 A. I DO.

23 Q. THAT'S WHAT YOU'RE DOING IS YOU'RE PREPARING LETTERS
24 REGARDING THE SETTLEMENT AGREEMENT ---

25 A. UM-HUM (AFFIRMATIVE).

1 Q. --- STIPULATION, THE DISMISSAL AND SUCH THINGS?

2 A. RIGHT.

3 Q. AND THEN ON PAGE 3 OF MY AFFIDAVIT, IT'S THE
4 CONTINUATION OF A JULY 7TH ENTRY. YOU'RE TALKING ABOUT
5 FINALIZING THE SETTLEMENT AGREEMENT WITH IMMEDION; ---

6 A. YEAH.

7 Q. --- LETTER TO IMMEDION'S COUNSEL REGARDING CLOSING
8 DOCUMENTS. AND THAT'S WITH REGARD TO THAT SAME
9 SETTLEMENT AGREEMENT, IS THAT CORRECT?

10 A. RIGHT. THAT'S THE SETTLEMENT AGREEMENT. WE HAD THE
11 LETTER AGREEMENT IN PLACE. AND THEN WE REDUCED IT TO A
12 MORE FORMAL SETTLEMENT AND ASSIGNMENT AGREEMENT.

13 Q. AND THEN ON 7/15 IS A SMALL ADMINISTRATIVE ENTRY
14 REGARDING THE SAME THING, IS THAT CORRECT?

15 A. RIGHT.

16 Q. IS THERE ANY WAY TO TELL OR DO YOU KNOW -- YOU BLOCK
17 ENTRY TIME AS I DO, AND YOU'RE VERY DETAILED, BUT IS
18 THERE ANY WAY TO DETERMINE WHAT TIME IS SPENT NEGOTIATING
19 WITH IMMEDION AS OPPOSED TO THE OTHER THINGS WHICH ARE,
20 YOU KNOW, DRAFTING DISCOVERY DOCUMENTS AND WHATNOT?

21 A. YEAH. IT COULD BE POSSIBLE TO LOOK AT THE ORIGINAL
22 BILLING AND TELL YOU THAT. BUT YOU SAID IS IT POSSIBLE
23 TO FIND OUT HOW MUCH OF THE TIME WAS IN NEGOTIATING WITH
24 IMMEDION? AND REALLY, BY THE TIME WE HAD THE LETTER
25 AGREEMENT IN PLACE, YOU KNOW, THE DEAL IS KIND OF DONE.

1 IT WAS JUST BASICALLY ADMINISTRATIVELY REDUCING THE
2 AGREEMENT TO WRITING. AND I REALLY DID NOT WANT TO MAKE
3 A CLAIM IN THIS ATTORNEY'S FEES PETITION FOR THE
4 NEGOTIATION TIME AS BETWEEN MY CLIENT AND IMMEDION.

5 Q. I GUESS I'M JUST TRYING TO GET SOME SORT OF NUMBER
6 THAT WE CAN, AND MAYBE IT'S IMPOSSIBLE, THAT WE CAN SAY
7 TO THE JUDGE, THIS WAS INVOLVED IN NEGOTIATING AND/OR
8 DRAFTING THE AGREEMENT BETWEEN RESCOM AND IMMEDION, WHICH
9 RESOLVED THE THIRD PARTY COMPLAINT.

10 A. WELL, IT'S -- I THINK IT WOULD BE MY POSITION, AND I
11 DON'T WANT TO GO FROM TESTIFYING TO ARGUING HERE
12 NECESSARILY, ---

13 Q. I UNDERSTAND.

14 A. --- BUT I THINK MY POSITION WOULD BE THAT THE
15 AGREEMENT WAS BASICALLY REACHED, YOU KNOW, BY MAY, WE HAD
16 A LETTER AGREEMENT, WE THEN, YOU KNOW, DID SOME FURTHER
17 WORK ADMINISTRATIVELY TO MAKE A MORE FORMAL ASSIGNMENT
18 AGREEMENT AND THAT ALL OF THAT WORK WAS NECESSARY AND
19 APPROPRIATE UNDER THE CIRCUMSTANCES TO FURTHER BOTH
20 RESCOM AND IMMEDION'S INTEREST IN DEFENDING THE
21 MECHANIC'S LIEN ACTION.

22 MR. CULVER: WELL, YOUR HONOR, I DON'T HAVE ANYMORE
23 QUESTIONS ABOUT THE AFFIDAVITS.

24 THE COURT: OKAY. I TELL YOU WHAT, IF YOU HAVE
25 ANYTHING FURTHER YOU WANT TO SUBMIT TO ME, MR. CULVER,

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Ferguson Fire and Fabrication, Inc.,)

Plaintiff,)

v.)

Preferred Fire Protection, LLC, *et al.*, and)
Immedion, LLC,)

Defendants.)

Immedion, LLC,)

Third-party plaintiff,)

v.)

Rescom Construction, LLC,)

Third-party defendant.)

IN THE COURT OF COMMON PLEAS

2009 JUL 10 AM 11:45

FILED-CLERK OF COURT
NOTICE OF MOTION AND
MOTION FOR
SUMMARY JUDGMENT OF
IMMEDION, LLC

C.A. No.: 08-CP-23-2746

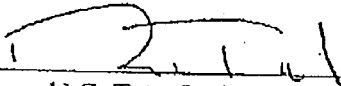
TO: FERGUSON FIRE AND FABRICATION, INC., PLAINTIFF AND
ROBERT E. CULVER, ITS COUNSEL

PLEASE TAKE NOTICE that the defendant Immedion, LLC will move, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting it summary judgment as to the plaintiff's complaint within ten days of service hereof or as soon thereafter as counsel may be heard. This motion is made upon the following grounds:

1. There is no evidence the plaintiff furnished any materials for the benefit of any property owned by Immedion, LLC. Immedion, LLC is a mere leaseholder. Further, there is no evidence that any contractual relationship existed between the plaintiff and Immedion giving rise to any liability.

2. Immedion as owner of the leasehold paid in full all work performed by its contractors as demonstrated by cancelled checks and the affidavit of Rob Moser. Accordingly it has no further liability pursuant to § 29-5-20(B) of the Code of Laws of South Carolina.

3. This motion is based upon the pleadings, the Affidavit of Rob Moser and upon applicable statutory case law.



Ronald G. Tate, Jr. (S.C. Bar No. 5475)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200 (29601)
Post Office Box 10589
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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No. 08-CP-23-2746

Ferguson Fire and Fabrication, Inc.

Plaintiff,

vs.

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

Defendants.

PLAINTIFF'S RESPONSE TO
DEFENDANT IMMEDIION, LLC'S
MOTION FOR SUMMARY
JUDGMENT AND PLAINTIFF'S
CROSS MOTION FOR SUMMARY
JUDGMENT AGAINST DEFENDANT
IMMEDIION, LLC.

The Plaintiff, by and through undersigned counsel, hereby responds to Defendant Immedion, LLC's Motion for Summary Judgment and submits Plaintiff's Cross Motion for Summary Judgment Against Defendant Immedion, LLC pursuant to Rule 56 SCRPC. The Plaintiff's Cross Motion for Summary Judgment is based upon the pleadings and records filed in this matter together with the Affidavit of Jim Lanier and Affidavit of Rob Moser.

I. Background Facts

Immedion leases property at the Global Gateway Center in Greenville. See Affidavit of Rob Moser.

On or about August 23, 2007, Immedion, LLC., sent a purchase order to Preferred Fire Protection for a "Preaction (system) ... for Immedion Data Center Computer Room." The purchase order was for \$30,973.00. See Exhibit A to Affidavit of Jim Lanier.

On August 24, 2007, the Plaintiff began delivering to Preferred materials, identified in part as "Immedion-Preacti." The delivery of materials for this job continued through October 16, 2007.

See Affidavit of Jim Lanier.

The outstanding balance on the materials, exclusive of interest and fees, is \$15,548.93. Verification of Ferguson Fire & Fabrication, attached as exhibit to the Complaint.

On August 30, 2007, Immedion paid Preferred \$15,486.50 on the job. See Exhibit C to Affidavit of Jim Lanier.

On September 21, 2007, the Plaintiff sent notice to Immedion that it was providing \$15,000 in materials for the job. See Exhibit D to Affidavit of Jim Lanier.

On October 3, 2007, Immedion paid Preferred \$14,513.50 on the job. See Exhibit C to Affidavit of Jim Lanier.

On October 31, 2007, Immedion paid Preferred the balance of \$973 on the job. See Exhibit C to Affidavit of Jim Lanier.

On January 8, 2008, the Plaintiff filed and served notice of mechanic's lien.

On April 11, 2008, the Plaintiff filed a verified complaint in this action, and Immedion, LLC was served on May 6, 2007.

II. Argument and Authority

The Plaintiff is entitled to a judgment on its claim for a materialman's lien against the leasehold of Defendant Immedion.

A materialman who provides materials to a contractor has a lien for the value of such materials on the leaseholder's interest pursuant to S.C. Code of Laws §29-5-20. The value of that lien is limited to the amount due to the contractor by the owner/leaseholder, unless the materialman provides notice as provided by §29-5-20 and §29-5-40.

If a materialman provides notice pursuant to these sections, the amount of the lien is limited

to the amount due on the contract at the time the owner receives notice. *Stoudenmire Heating and Air Conditioning, Co. v. Craig Building Partnership*, 308 S.C. 298, 417 S.E.2d 634 (SC App. 1992).

A leasehold interest in the property can be subject to a materialman's lien under South Carolina law. 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."

Immedion still owed \$15,485.50 to the contractor, Preferred Fire, when Immedion received the notice on September 21, 2007. The amount of materials provided is greater than the lien. Therefore, the amount of the lien is the unpaid balance on the job as of September 21, 2007 -- \$15,485.50. Immedion's leasehold interest can be subject to this lien under South Carolina law. Therefore, the Plaintiff has a lien for \$15,485.50, plus attorneys fees and interest as provided by law against the leasehold of Immedion.

There is no dispute of material fact, and the Plaintiff is entitled to judgment as a matter of law against Immedion in the amount of \$15,485.50 plus attorneys fees and prejudgment interest as provided by statute.

THE CULVER FIRM, P.C.


Robert E. Culver, Esq.
575 King Street, Ste. A
Charleston, SC 29403
Email: bob@culverlaw.net
Phone: 843-853-9816
Facsimile: 843-853-9838

Date: August 12, 2009

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Ferguson Fire and Fabrication, Inc.,

Plaintiff,

v.

Preferred Fire Protection, LLC, *et al.*, and
Immedion, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

DEFENDANT IMMEDIION, LLC'S
REPLY TO PLAINTIFF'S
MEMORANDUM IN RESPONSE
TO MOTION FOR SUMMARY
JUDGMENT

C.A. No.: 08-CP-23-2746.

Defendant, Immedion, LLC offers this memorandum in reply to plaintiff's brief dated September 10, 2009.

The critical issue in this case appears to be the effect of plaintiff's "Notice of Furnishing" pursuant to § 29-5-20(b). Plaintiff fundamentally misconstrues the statutory origin of the Notice of Furnishing and has confused the Notice of Furnishing with the Mechanic's Lien allowed by a separate code section, § 29-5-40. It appears that plaintiff tries to somehow transform a statutorily-created Notice of Furnishing into a Notice of Mechanic's Lien. These are two completely different statutory notices.

The Notice of Furnishing did not exist before the 1992 statute and, as demonstrated in Immedion's main brief, and as agreed in Ferguson's reply, the Notice of Furnishing only pertains to the liability of a contractor to a sub-subcontractor or lower tier materialmen. (Plaintiff's Reply, p. 1) Plaintiff is absolutely correct that the Notice of Furnishing has no bearing whatsoever on the issue of this case. That being the case, the Notice of Furnishing that was served by Ferguson has no legal consequence.

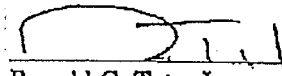
The only argument offered by the plaintiff is that a different statute, § 29-5-40, allows a supplier to give an owner notice in advance of furnishing material and thereby prospectively lien the property. That argument misconstrues § 29-5-40. That section in fact provides subcontractors and suppliers to give notice to the owner of the lien provided by § 29-5-20. At the time Ferguson gave its Notice of Furnishing, it had not furnished any material to the project. Accordingly, it had no lien rights. In fact, the Notice of Furnishing explicitly stated that it was not a lien document.

The source of the confusion by Ferguson might be the terminology that was used in both statutes refers to "furnishing." It is helpful to recall that the original 1992 statute that allowed subcontractors and suppliers to file what is now referred to as the "Notice of Furnishing" used different terminology. The original 1992 statute referred to a "Notice of Intent to Lien." That language better distinguished the pre-furnishing notice of 29-5-20 from the standard mechanic's lien that is referred to in § 29-5-40.

In conclusion, the Notice of Furnishing document that Ferguson provided to Immedion before shipping the materials to the job has no legal consequence. It was not served on the general contractor as contemplated by 29-5-20 and, as plaintiff concedes, 29-5-20 does not apply to give any legal effect to the Notice of Furnishing. Likewise, the Notice of Furnishing is not a Notice of Mechanic's Lien under 29-5-40. It simply has no legal significance and did nothing to defeat the owner's payment defense in this case. Finally, and more importantly, plaintiff failed to demonstrate in its reply why *Stoudenmire Heating* applies to the facts at hand. As demonstrated in Immedion's main brief, *Stoudenmire* is completely distinguishable on its facts. Immedion, having paid the

sprinkler contractor for its work and for Ferguson's materials, may not be required to pay twice for the same materials.

Respectfully submitted,



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September 14, 2009

Attorneys for Defendant, Immedion, LLC

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action system. The total value of materials that Ferguson furnished to Preferred for the Immedion pre-action system was \$15,548.93.

It is likewise uncontradicted that Immedion paid Preferred all sums that were owed under its contract, a total of \$30,973.00. As stated in the Affidavit of Rob Moser of Immedion, there were no amounts due to either Preferred Fire under the direct contract between Immedion and Preferred Fire, or to Rescom Construction, the general contractor for the overall tenant upfit contract.

It is likewise uncontradicted that on or about September 21, 2007, Ferguson sent a Notice of Furnishing to Immedion stating that Ferguson was providing materials to Preferred Fire Protection with an estimated value of \$15,000.00. That Notice of Furnishing is attached to Ferguson's motion papers. The Notice of Furnishing states that Ferguson is furnishing materials, that "this is not a lien" and "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." At that time, no payments were due, and Preferred was not in default in its payment obligations.

Discussion

The issue in this case is whether the mere mailing of a Notice of Furnishing pursuant to § 29-5-20 deprives the owner of the defense of payment under the mechanic's lien statutes. The statutes explicitly and clearly state that the owner continues to enjoy the defense of payment as an absolute defense to a mechanic's lien.

Under South Carolina law, a mechanic's lien is strictly a creation of statute. Mechanic's liens exist "only by virtue of statute; therefore, one's right to a mechanic's lien is wholly dependant upon the language of the statute creating it." *Skiba v. Gessner*;

648 S.E.2d 605, 606 (S.C. 2007). Courts are not at liberty to depart from the plain meaning of the statutory language governing mechanic's liens, *id.* at 607, and lien rights are only acquired and enforced in accordance with the conditions of the statute creating them. *Shelley Construction Co., Inc. v. Sea Garden Homes, Inc.*, 336 S.E.2d 488 (S.C. App. 1985). Under the circumstances of this case, the lien rights of the plaintiff are expressly barred by statute.

Section 29-5-20 was amended by Act 368 enacted in May 1992 to add to the mechanic's lien statute the following provision:

(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). A full copy of Act 368 is attached hereto as Exhibit A.

The language of Act 368 was modified slightly by Act 140 of 1995 to substitute the phrase "Notice of Furnishing Labor or Materials" in place of the language "Notice of Intent to Lien." That is the language contained in the current version of the statute.

To be properly understood, the Notice of Furnishing provision needs to be read along with § 3 of Act 368 which introduced to South Carolina mechanic's lien law the "Notice of Project Commencement." The Notice of Project Commencement is likewise a statutory creature that now exists in § 29-5-23 of the Code of Laws.

A Notice of Project Commencement may be filed by a general contractor (one having a direct contract with a property owner) and requires sub-subcontractors and suppliers to subcontractors to comply with § 29-5-20 when filing liens in connection with the project. Section 29-5-20(B) provides a general contractor with the same payment defense that the owner has always enjoyed under South Carolina law. In order to enjoy that statutory payment protection, a general contractor must file the Notice of Project Commencement. If the general contractor files the Notice of Project Commencement, subcontractors and suppliers are instructed to comply with § 29-5-20 by filing a Notice of Furnishing. When the subcontractor or supplier serves a Notice of Furnishing on the Contractor, 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 defense of payment. The general contractor has the payment defense only when he files a Notice of Project Commencement and subcontractors fail to provide Notice of Furnishing.

Conspicuously absent from this statutory analysis is any effect or impact of this Notice of Furnishing on the owner. That is because the statutes authorizing the Notice of Project Commencement and the Notice of Furnishing only concern general contractors, lower-tier subcontractors and suppliers. In all cases, the owner always has the payment defense. "In no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner." § 29-5-20(B). Similarly, § 29-5-40 allows subcontractors and suppliers to notify the owner in writing of the furnishing of labor or material but expressly states that "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." Thus, South Carolina statutes hold firmly to the rule that a property owner should not be required to pay twice for the same work or materials.

Plaintiff relies on *Stoudenmire Heating and Air Conditioning Co., Inc. v. Craig Building Partnership*, 417 S.E.2d 634 (S.C. App. 1992) in arguing that a notice of furnishing defeats the owner's payment defense. Plaintiff's argument is misplaced, and *Stoudenmire* is wholly distinguishable. Fundamentally, plaintiff's argument is unavailing because *Stoudenmire* was decided in April 1992 under the prior code section that did not even contain the Notice of Furnishing provision. The Notice of Furnishing did not even exist at the time that *Stoudenmire* was decided. Further, the basis for the Court's decision was that the subcontractor, *Stoudenmire*, sent a letter to the owner, who was functioning as the contractor for the project, stating that the subcontractor had not been paid and demanded payment. The Court held that the letter provided written notice to the owner of a claim meeting the requirements of § 29-5-40, which is the statute that provides a subcontractor's lien notice, not to be confused with the 29-5-20 Notice of Furnishing. Accepting the date of the demand letter as the date by which the owner's payment obligations should be measured, the Court remanded to determine how much the owner owed the contractor as of that date.

Nothing in *Stoudenmire* touches on the effect of the Notice of Furnishing because that statutory device did not exist at the time *Stoudenmire* was decided. *Stoudenmire* is also distinguishable on its facts because the notice that the subcontractor sent was a demand for payment, rather than, as here, a simple notice that the supplier has furnished or will furnish materials in the future.

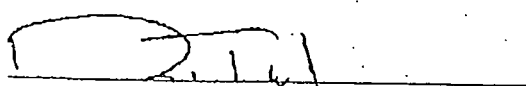
Immedion's reading of the mechanic's lien law is consistent with fifty years of South Carolina decisions in mechanic's lien cases that hold that one of the main purposes of the mechanic's lien law is "protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 641 S.E.2d 459, 462 (S.C. App. 2007), citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 93 S.E.2d 855 (S.C. 1956). Similarly, the Supreme Court recently noted the strength of an owner's payment defense limiting recovery to a subcontractor under bonding statutes to the amount due at the time that the subcontractor gives notice to the owner of the general contractor's non-payment.

The subcontractor's lien...is not intended to create a windfall to the subcontractor. 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 non-payment, 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 non-payment. (emphasis added)

Sloan Construction Co., Inc. v. Southco Grassing, Inc., 659 S.E.2d 158, 165 (S.C. 2008)

In summary, South Carolina property owners who pay their contractors cannot be required to again pay a subcontractor for the same work. The owner's payment protection is sacrosanct under South Carolina law. The only exception is where the subcontractor files a Notice of Lien making an express demand for payment as in *Stoudenmire*. The fact that the subcontractor mailed a Notice of Furnishing prior to furnishing the materials is of no consequence and does not deprive the owner of the payment defense. Accordingly, Immedion's motion for summary judgment should be granted and the mechanic's lien dismissed.

Respectfully submitted,



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August 31, 2009

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SC LEGIS 368 (1992)

1992 South Carolina Laws Act 368 (S.B. 371)

(Publication page references are not available for this document.)

Page 1

SOUTH CAROLINA 1992 SESSION LAW SERVICE
REGULAR SESSION

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Additions and deletions are not identified in this document.

Act 368

S.B. No. 371

MECHANICS LIENS--AGGREGATE AMOUNT OF LIENS--NOTICE OF PROJECT COMMENCEMENT

AN ACT TO AMEND SECTION 29-5-20, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO MECHANICS LIENS, SO AS TO PROVIDE THAT THE AGGREGATE AMOUNT OF LIENS FILED BY A SUB-SUBCONTRACTOR OR SUPPLIER MAY NOT EXCEED THE AMOUNT DUE THEM EXCEPT UNDER CERTAIN CONDITIONS; TO PROVIDE THAT IN NO EVENT SHALL THE TOTAL AGGREGATE AMOUNT OF LIENS EXCEED THE AMOUNT DUE BY THE OWNER, AND TO PROVIDE EXCEPTIONS; TO AMEND SECTION 29-5-60, RELATING TO MECHANICS LIENS, SO AS TO PROVIDE THAT IN THE EVENT THE AMOUNT DUE A SUBCONTRACTOR BY A CONTRACTOR IS INSUFFICIENT TO PAY ALL THE LIENORS OF THAT SUBCONTRACTOR, ALL JUST LIENS MUST BE PRORATED BY THE CONTRACTOR AMONG THE SUB-SUBCONTRACTORS AND SUPPLIERS TO THAT SUBCONTRACTOR; AND TO AMEND THE 1976 CODE BY ADDING SECTION 29-5-23 SO AS TO PROVIDE THAT ANY PERSON ENTERING INTO AN AGREEMENT WITH AN OWNER FOR THE IMPROVEMENT OF REAL PROPERTY MUST FILE A NOTICE OF PROJECT COMMENCEMENT, TO PROVIDE FOR THE CONTENTS OF THIS NOTICE OF PROJECT COMMENCEMENT, AND TO PROVIDE THAT FAILURE TO FILE SUCH A NOTICE SHALL RENDER CERTAIN OF THE ABOVE PROVISIONS INAPPLICABLE.

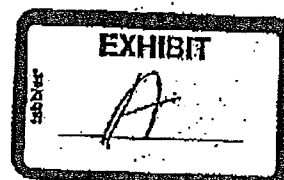
Be it enacted by the General Assembly of the State of South Carolina:
Liens of sub-subcontractors and suppliers

SECTION 1. Section 29-5-20 of the 1976 Code is amended to read:

<< SC ST § 29-5-20 >>

"Section 29-5-20. (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. If the party defending against the

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SC LEGIS 368 (1992)

1992 South Carolina Laws Act 368 (S.B. 371)

Page 2

(Publication page references are not available for this document.)

lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien. The lien may be enforced as herein provided.

(B) In no event shall the aggregate amount of any liens filed by a subsubcontractor 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. Such notice of intent to lien shall include:

- (1) the name of the subsubcontractor or supplier who claims payment;
- (2) the name of the person with whom the claimant contracted or by whom he was employed;
- (3) a description of the labor, services, or materials furnished and the contract price or value thereof. Materials specially fabricated by a person other than the one giving notice and the contract price or value thereof shall be separately stated in the notice;
- (4) a description of the project where labor, services, or materials were used sufficient for identification;
- (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
- (6) the amount claimed to be due, if any.

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.

(C) Not less than fifteen days before the first term of court at which the trial is set, either party may file and serve on the other party an offer of settlement, and within ten days thereafter the party served may respond by filing and serving his offer of settlement. The offer shall state that it is made under this section and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree constitutes a settlement of the lien. The offer supersedes any offer previously made under this section by the same party.

An offer of settlement is considered rejected unless an acceptance in writing is filed and served on the party making the offer five days before the commencement of the term.

If the offer is rejected, it may not be referred to for any purpose at the trial, but may be considered solely for the purpose of awarding costs and litigation expenses under this section.

If a written offer of settlement is made by both parties, the party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees. If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement for purposes of this section.

If the defendant makes no written offer of settlement, his offer of settlement is considered to be zero.

(D) Subsection (B) does not apply to individual laborers when the amount of their lien is less than two thousand dollars."

Proration of liens of sub-subcontractors and suppliers

SECTION 2. Section 29-5-60 of the 1976 Code is amended to read:

<< SC ST § 29-5-60 >>

"Section 29-5-60. (A) In the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens as herein provided it is the duty of the owner to prorate among all just claims the amount due the contractor.

(B) In the event the amount due a subcontractor by the contractor is insufficient to pay all the lienors acquiring liens under Section 29-5-20 as a result of supplying labor, materials, or services to that subcontractor, all just liens must be prorated by the contractor among sub-subcontractors and suppliers to that subcontractor."

Notice of project commencement

SECTION 3. The 1976 Code is amended by adding:

<< SC ST § 29-5-23 >>

"Section 29-5-23. Any person entering into a direct agreement with, or with the consent of, an owner for the improvement of real property may file with the Clerk of Court or Register of Mesne Conveyances in the county or counties where the real property is situate a Notice of Project Commencement. The Notice of Project Commencement shall contain the following information:

- (1) the name and address of the person filing the Notice of Commencement;
- (2) the name and address of the owner or developer;
- (3) a general description of the improvement; and
- (4) the location of the project.

The notice must be filed within fifteen days of the commencement of work and must be accompanied by a filing fee of fifteen dollars to be deposited in that county's general fund. The name and address of the contractor must be posted at the job site. A location notice also must be posted at the job site. The location notice must contain the following statement: 'The contractor on the project has filed a Notice of Project Commencement at the County Courthouse. Sub-subcontractors and suppliers to subcontractors shall comply with Section 29-5-20 when filing liens in connection with this project.' The failure to file a Notice of Project Commencement shall render the provisions of Sections 29-5-20(B) and 29-5-60(B) inapplicable. The filing of a Notice of Project Commencement shall not constitute a cloud, lien, or encumbrance upon, or defect to, the title of the real property described in the notice, nor shall it alter the aggregate amounts of liens allowable under Section 29-5-40, nor shall it affect the priority of any mortgage filed before or after the notice, nor shall it affect any future advances under any mortgage. The Clerk of Court or Register of Mesne Conveyances in each county shall maintain a separate book and index of all notices of project commencements."

Time effective

SECTION 4. This act takes effect upon approval by the Governor.

Approved the 15th day of May, 1992.

SC LEGIS 368 (1992)

END OF DOCUMENT

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

2009 SEP 15 A 10:01

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No. 08-CP-23-2746

Ferguson Fire and Fabrication, Inc.

Plaintiff,

vs.

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

Defendants.

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS IMMER

**PLAINTIFF'S REPLY ON ITS
MOTION FOR SUMMARY
JUDGMENT**

The Plaintiff, by and through undersigned counsel, submits this Reply Memorandum on its Motion for Summary Judgment pursuant to Rule 56 SCRPC. The Defendant, Immedion, LLC, filed a Motion for Summary Judgment and a Memorandum in Support. The Plaintiff filed a Cross-Motion for Summary Judgment and Memorandum in Support. Immedion subsequently filed a supplemental Memorandum in Support of its motion, which raises additional legal arguments. This memorandum addresses the issues raised by Immedion's supplemental Memorandum in Support.

The statutory changes in 1992 did not overrule the *Stoudenmire* decision (*Stoudenmire Heating and Air Conditioning, Co. v. Craig Building Partnership*, 308 S.C. 298, 417 S.E.2d 634 (SC App. 1992)), as argued by Defendant Immedion. The 1992 modification specifically added S.C. Code §29-5-20(b), which pertains only to the liability of a contractor to a sub-subcontractor or lower-tier materialman. This part of the statute has no bearing whatsoever on the case at issue.

The Plaintiff relies upon S.C.Code §29-5-40, which was unchanged by the 1992 amendments. In fact, the substantive portions of this statute have remained unchanged since 1869. See *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 93 S.E.2d 855, 862 (1956). That provision 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.

S.C.Code of Laws Ann. §29-5-40.

In this case, the Plaintiff provided notice of furnishing to the owner prior to the time the owner paid the contractor in full. In both the *Stoudenmire* case and in *Lowndes*, the Courts held that the materialman who provides notice to the owner under S.C.Code §29-5-40 (or its predecessor statute) is entitled to a lien in amounts up to the amount due on the owner's contract at the time the notice is received. The *Lowndes* court states unequivocally that, "The owner's liability under the lien is limited to the balance due by him to the prime contractor at the time the owner receives the notice from the subcontractor." *Stoudenmire*, 417 S.E.2d 637.

In order to avoid the lien, the owner can simply issue a joint check in payment to the contractor and the Plaintiff for the amounts set forth in the notice. Instead, the Defendant/owner paid the contractor in full, thus allowing the contractor to abscond with all the proceeds. The South Carolina Supreme Court noted this point in *Lowndes*: "Since the security of such lien was

limited to the balance due by the owner to the contractor at the time of such notice, it would reasonably follow that the notice would be promptly given to the owner, who could thereupon protect himself." *Lowndes*, 93 S.E.2d at 862.

The Plaintiff provided notice pursuant to §29-5-40 at a time that Immedion still owed the general contractor \$15,485.50 to the contractor. The notice specifically references this section of the statute and the amount of materials to be provided. Therefore, the Plaintiff has complied with the statutory requirements of the lien, and the Plaintiff is entitled to judgment as a matter of law. The Plaintiff is entitled to judgment as a matter of law in the amount of \$15,485.50 plus attorneys fees and prejudgment interest as provided by statute, and to foreclosure of the lien against the leasehold of Immedion.

THE CULVER FIRM, P.C.



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Phone: 843-853-9816
Facsimile: 843-853-9838

September 10, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

2009 NOV -3 A 9:27

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

Immedion, LLC Respondent,

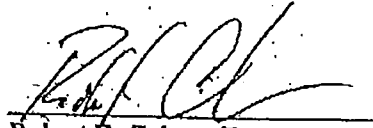
v.

Preferred Fire and Fabrication, Inc. Appellant.

NOTICE OF APPEAL

Preferred Fire and Fabrication, Inc., appeals the Judgment of the Honorable R. Lawton McIntosh dated October 16, 2009. Appellant received a written notice of entry of the Judgment on October 20, 2009.

October 28, 2009


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OTHER COUNSEL OF RECORD:

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ATTORNEY FOR THE RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

Immedion, LLC Respondent,

v.

Preferred Fire and Fabrication, Inc. Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Immedion, LLC, by depositing a copy of same in the United States Mail, with the correct postage affixed, on October 28, 2009, addressed to Immedion, LLC's attorney of record in the above-referenced civil action:

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



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ATTORNEY FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

Immedion, LLC Respondent,

v.

Preferred Fire and Fabrication, Inc. Appellant.

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 7, 2010



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ATTORNEY FOR THE RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Appellant,

and Immedion, LLC, is Respondent.

Immedion, LLC, Third-Party Plaintiff,

v.

Rescom Construction, LLC, Third-Party Defendant.

Appeal From Greenville County
R. L. McIntosh, Circuit Court Judge

Opinion No. 4947
Heard November 15, 2011 – Filed February 29, 2012

AFFIRMED

Robert E. Culver, of Charleston, for Appellant.

Ronald G. Tate, Jr., and Nicole J. Buntin, both of
Greenville, for Respondent.

WILLIAMS, J.: On appeal, Ferguson Fire and Fabrication, Inc. (Ferguson Fire) argues the circuit court erred in holding Immedion, LLC (Immedion) was not liable on the materialman's lien when Immedion paid its general contractor in full after receiving notice from Ferguson Fire. Ferguson Fire also contends the circuit court erred in holding its notice to Immedion was ineffective under South Carolina law. In addition, Ferguson Fire claims the circuit court erred in determining South Carolina law does not protect a materialman's lien until after the materialman records and serves a statement of the lien. Finally, Ferguson Fire argues the circuit court erred in awarding Immedion attorney's fees related to the filing and prosecution of a third-party claim. We affirm.

FACTS/PROCEDURAL HISTORY

The facts in this appeal are not in dispute. Immedion contracted with Rescom, LLC (Rescom) to serve as general contractor in performing upfit work to Immedion's data center. Rescom, in turn, hired Preferred Fire Protection, LLC (Preferred Fire) as a subcontractor to perform work in

connection with the upfit of the property. In addition, Immedion separately contracted with Preferred Fire to install a pre-action fire suppression system in the data center for a contract price of \$30,973. Preferred Fire subsequently hired Ferguson Fire and Fabrication, Inc. (Ferguson Fire) to provide the materials necessary for installation of the pre-action fire suppression system.

Beginning on August 24, 2007, and continuing through October 16, 2007, Ferguson Fire delivered the materials for the pre-action system. On September 21, 2007, Ferguson Fire sent a "Notice of Furnishing Labor and Materials" (Notice) to Immedion stating Ferguson Fire was employed by Preferred Fire and "ha[s] provided or will provide fire sprinkler/pipe/valve/fittings with an estimated value of \$15,000." The Notice did not specify an "amount claimed to be due" and did not indicate when it expected delivery of the materials to be completed. Instead, the Notice provided that materials "were actually furnished or scheduled to be furnished by [Ferguson Fire] to the Project from Sep 10, 2007 [sic] through _____." The Notice further stated:

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 ¹

On August 30, 2007, prior to receiving Ferguson Fire's Notice, Immedion issued a check to Preferred Fire for \$15,486.50, according to their agreement. After receiving Ferguson Fire's Notice, but prior to the date all materials were delivered by Ferguson Fire, Immedion issued a second check to Preferred Fire on October 3, 2007, in the amount of \$14,513.50. On

¹ Both parties concede the Notice gives Ferguson Fire no rights under section 29-5-20(B) of the South Carolina Code (Supp. 2011).

October 31, 2007, Immedion issued a third and final check to Preferred Fire for the remaining contract balance of \$973. Although Immedion made full payment to Preferred Fire for the installation of the pre-action system, Preferred Fire failed to pay Ferguson Fire \$15,548.93 for the materials it furnished.

On January 8, 2008, Ferguson Fire filed and served a notice of mechanic's lien to Preferred Fire and Immedion. Ferguson Fire subsequently filed a summons and complaint against Preferred Fire and Immedion alleging Ferguson Fire provided certain "materials, services, and/or labor to the improvements located on the Property pursuant to a binding contract and agreement with Preferred Fire and with the knowledge and permission of Immedion . . ." and sought to foreclose its mechanic's lien. Preferred Fire did not answer Ferguson Fire's complaint, and on January 14, 2009, Ferguson Fire obtained a default judgment against Preferred Fire that it has been unable to collect. Immedion answered, asserting Ferguson Fire's complaint should be dismissed because Immedion paid Preferred Fire all sums due to Preferred Fire on the contract prior to receiving Ferguson Fire's Notice. In addition, Immedion filed a third-party complaint against Rescom for breach of contract and attorney's fees. Immedion and Rescom subsequently settled the third-party claims and dismissed that action on July 20, 2009.

In the present action, Immedion filed a motion for summary judgment, contending it paid in full all work performed by its contractors. Ferguson Fire filed a cross-motion for summary judgment, arguing Immedion should have been on notice of its claim because Ferguson Fire provided Immedion the Notice prior to Immedion's full payment to Preferred Fire. The circuit court issued an order granting Immedion's motion for summary judgment, holding the Notice that Ferguson Fire provided was ineffective under section 29-5-40 of the South Carolina Code (Supp. 2011) as a notice of lien. The circuit court's order also awarded Immedion attorney's fees for successfully defending against the mechanic's lien. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRPC; Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

When reviewing the grant of summary judgment, this court applies the same standard that governs the circuit court under Rule 56, SCRPC. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) (internal citations omitted). "On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." Id. at 536, 611 S.E.2d at 925.

In addition, "the award of attorney's fees is left undisturbed absent abuse of the [circuit] court's discretion." Taylor, Cotton, & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 100, 641 S.E.2d 459, 464 (Ct. App. 2007) (internal citation omitted).

LAW/ANALYSIS

I. Ferguson Fire's Notice²

Ferguson Fire asserts the circuit court erred in holding its Notice was ineffective as a notice of lien under section 29-5-40. We disagree.

"A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate, by virtue of an agreement with or

² We combine Ferguson Fire's first and second arguments.

with the consent of the owner or his agent, shall have a mechanic's lien upon the real property to secure payment of the debt." See S.C. Code Ann. § 29-5-10(a) (Supp. 2011). "The right to a lien arises, inchoate, when labor is performed or material furnished." Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 3, 389 S.E.2d 853, 854 (1990) (emphasis added); see also Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959); Williamson v. Hotel Melrose, 110 S.C. 1, 30, 96 S.E. 407, 409 (1918). When the person claiming the lien was employed by someone other than the owner, he must notify the owner of the furnishing of labor or material in order for the lien to attach to the property. S.C. Code Ann. § 29-5-40 (Supp. 2011).

A mechanic's lien is purely statutory. Therefore, 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) (holding mechanic's liens are purely statutory and issues concerning them must be decided in accordance with the terms of the statute). Section 29-5-40 allows a subcontractor or supplier to place an owner on notice of a lien as provided by section 29-5-20(a) of the South Carolina Code (Supp. 2011).³ Section 29-5-40 provides, in pertinent part:

Whenever work is done or material is furnished for the improvement of real estate upon the employment

³ Section 29-5-20(a) provides, in pertinent part:

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.

of a contractor or some other person than the owner and such . . . 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 § 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). According to the plain language of the statute, a lien attaches to the real estate against the owner of the real estate for the value of the material furnished. The lien must be for "the amount of the work done or material furnished" and the materialman must notify the owner in writing of the same. § 29-5-40. Therefore, no lien attaches until the materials, which are the subject of the lien, have been delivered, and the written notice, including the value of those materials, is provided to the owner.

Ferguson Fire's Notice is insufficient under the statute, and has no legal effect. The September 21, 2007 Notice stated that Ferguson Fire would be supplying materials beginning September 10, 2007, but the Notice never provided a project completion date. Ferguson Fire's final delivery of materials to Preferred Fire was on October 16, 2007, yet it failed to provide notice after this date to Immedion that the material was furnished and its job was completed. In addition, the Notice listed an approximate value of the materials it planned to deliver, but the Notice contained no indication that any payment was due at the time. Accordingly, Ferguson Fire failed to follow the requirements of the statute because all of the materials had not been furnished, and it did not identify the final amount of the supplies yet to be delivered when it notified Immedion. See § 29-5-40 ("Whenever work is done or material is furnished . . . [the] materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof . . .") (emphasis added).

In addition to failing to effectively notify Immedion pursuant to section 29-5-40, our jurisprudence also provides that no lien attaches to the property until notice of an actual demand for payment is made to the owner. See Sloan Constr. Co., v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008) ("[T]he 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.") (emphasis added). It is axiomatic that compliance with the notice provision of section 29-5-40, including a demand for payment, would be a prerequisite to recovery. Because Ferguson Fire's Notice was sent prior to furnishing all the material, failed to identify the final amount of the goods delivered, and never made a demand for payment, we find the notice was inadequate.

Ferguson Fire argues that our court's opinion in Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P'ship, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992), controls this case. In Stoudenmire, we reversed a master's finding that Stoudenmire's notice of mechanic's lien was filed after the owner exceeded the amount due on the contract price. Id. at 302, 417 S.E.2d at 637. Our court found that a letter Stoudenmire wrote to the owner "provide[d] sufficient written notice to the owner to meet the requirements of § 29-5-40." Id. (citing Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 635, 93 S.E.2d 855, 863 (1956) (stating the statute does not prescribe the form of the notice)).

While we agree the statute does not prescribe the specific format of the notice, we find Stoudenmire distinguishable from the instant case. The letter that provided notice to the owner in Stoudenmire was sent after Stoudenmire's work on the project was complete, and it advised the owner that Stoudenmire had not been paid by the general contractor. Id. at 300, 417 S.E.2d at 636. Moreover, Stoudenmire demand[ed] payment from the owner for its work on the project. Id. Here, on the other hand, Ferguson Fire's Notice was sent before it had completed the delivery of materials for the project and before any payment was due by Preferred Fire or Immedion. Although section 29-5-40 does not contain a time limit for providing written

notice to the owner, it is impossible for a notice of a lien to precede the actual performance of work that creates the lien. See § 29-5-40 (stating the lien attaches only after "work is performed or material is furnished"); cf. Wood, 235 S.C. at 138, 110 S.E.2d at 160 (holding although notice may be given at any time, it will be ineffective if the other prerequisites to the perfection and enforcement of the lien are not met). In addition, Ferguson Fire's Notice did not include a demand for payment. See Sloan Constr. Co., 377 S.C. at 121, 659 S.E.2d at 165. Accordingly, Ferguson Fire's reliance on Stoudenmire is misguided, and the circuit court did not err in finding the Notice was insufficient to notify Immedion of a lien.

Ferguson Fire also places great weight on Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 635, 93 S.E.2d 855, 863 (1956), arguing our supreme court held a materialman can provide a notice of furnishing material to an owner at anytime—even prior to completing the task. Such a reading misconstrues the holding in Lowndes.

Lowndes, the owner of the property, entered into a contract with Builders Lumber Company (Builders) for the construction of a building. Id. at 623, 93 S.E.2d at 856. Greenville Concrete Company (Greenville Concrete) furnished supplies to Builders between May 11 and August 12, 1953, and Builders failed to pay Greenville Concrete \$2,800.46 for the materials utilized in the erection of the building. Id. at 623, 93 S.E.2d at 857. After all the material was furnished and the work was completed, Greenville Concrete filed a mechanic's lien on October 9, 1953, and served Lowndes the same day. Id. Several months later, Greenville Concrete sought to foreclose their mechanic's lien and served the petition upon Lowndes on January 28, 1954. Id. The master held, in pertinent part:

[S]uch service did not comply with the requirement of Section 45-254⁴ as to notice to the owner, for the

⁴ Section 45-254 is the precursor to section 29-5-40 of the South Carolina Code (Supp. 2010), and the statutory sections are substantially identical.

reason that Section 45-259⁵ relates only to the dissolution of the lien obtained under Section 45-254, to which lien the notice under Section 45-254 is a condition precedent, and consequently, since the notice required by Section 45-254 had not been given prior to the recording and service of the certificate, no lien had ever been obtained.

Id. at 628-29, 93 S.E.2d at 859. Upon review from the circuit court, our supreme court concluded this finding was erroneous and stated the requirement that the materialman provide notice twice was simply that—needless duplication. Id. at 630, 93 S.E.2d at 860. In so holding, our supreme court stated:

Section 45-254 specifies no time at which or within which notice of the furnishing of material is to be given to the owner. [Because a] delay in giving the notice cannot operate to the detriment of the owner, [the owner's] liability under the lien is limited to the balance due by [the owner] to the prime contractor at the time [the owner] receives the notice.

Id. at 629-30, 93 S.E.2d at 860. Because Greenville Concrete complied with the requirements of the statute by delivering all of the materials, detailing a specific amount for those materials, and subsequently sending notice, it was irrelevant that Greenville Concrete notified Lowndes in the process of perfecting its lien as Lowndes's liability was limited to the balance due at the time it received notice. Id. at 636, 93 S.E.2d at 863. Thus, the holding in Lowndes stands only for the proposition that notice can be sent anytime after a lienor completely furnishes the material. Accordingly, Ferguson Fire's reliance on Lowndes is misplaced, and the circuit court did not err in finding the Notice was insufficient to notify Immedion of a lien.

⁵ Section 45-259 is the precursor to section 29-5-90 of the South Carolina Code (Supp. 2010), and the statutory sections are substantially identical.

In light of our determination that the circuit court properly found Ferguson Fire's Notice was insufficient to notify Immedion of a lien, we need not reach Ferguson Fire's issue relating to the lienor's preference under section 29-5-50 of the South Carolina Code (2007). See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Attorney's Fees

Ferguson Fire next argues that, even if Immedion was entitled to summary judgment, the circuit court abused its discretion in granting attorney's fees relating to Immedion's filing and prosecution of a third-party claim. We disagree.

Section 29-5-20(A) of the South Carolina Code (Supp. 2011) provides that "[i]f the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court." In addition, the amount of attorney's fees that should be awarded under the mechanic's lien statute is within the sound discretion of the circuit court. D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 419, 315 S.E.2d 370, 372 (1984). The circuit court's decision regarding such a matter will not be disturbed absent an abuse of discretion. Id. An abuse of discretion occurs when, *inter alia*, the circuit court's ruling is based upon an error of law. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001).

In Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), our supreme court held the following six factors should be considered when determining reasonable attorney's fees: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id. at 308, 486 S.E.2d at 760 (internal citations omitted). "[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." Id.

In the instant case, the circuit court considered each of the requisite factors, and the record supports the circuit court's finding. Initially, we note the circuit court reviewed detailed affidavits of Immedion's counsel outlining their respective experience and qualifications, and counsel provided a chart itemizing the time and expenses incurred in defense of Immedion. In addition, the circuit court conducted a separate hearing and considered the testimony of Immedion's counsel regarding expenses incurred in connection with Immedion's third-party complaint against Rescom. At the hearing, Immedion's counsel testified that he only submitted a request for fees which were necessitated by Ferguson Fire's filing of the mechanic's lien and he severed out "anything having to do with the kind of negotiation and the pre-agreement work" that was involved in Rescom's defense of the third-party complaint to prevent any duplication of fees. We agree with the circuit court's determination the attorney's fees incurred were reasonable in light of the nature of the work performed, particularly when counsel was required to research and address novel legal issues with regard to the mechanic's lien. Moreover, Immedion obtained a beneficial result when the circuit court granted summary judgment and dissolved the lien. Finally, we find the fee and the court costs did not exceed the amount of the lien as required by the statute. See § 29-5-20(A). We therefore find the circuit court did not abuse its discretion in awarding Immedion attorney's fees and costs in the amount of \$14,472.55.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

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 Preferred Fire Protection, LLC

Appellant,

And Immodion, LLC is

Respondent.

Immedion, LLC,

Third-party Plaintiff,

v.

Rescom Construction, LLC

Third-party Defendant.

PETITION FOR REHEARING

March 13, 2012

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ATTORNEY FOR THE APPELLANT

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ARGUMENT AND AUTHORITY

The Appellant submits this Petition for Rehearing on the grounds that:

1. The Court's ruling has dramatically altered the statutory scheme by creating lien prerequisites which do not exist in the statute or this Court's jurisprudence;
 2. The Court's misreads the statute to require that materials be provided prior to a Notice of Furnishing under S.C. Code Ann. §29-5-40;
 3. Requiring a remote claimant to wait until after the entire contract or project is completed before sending a Notice of Furnishing is not contained in the statute or the Court's jurisprudence;
 4. 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) to add a new requirement that a Notice of Furnishing make a demand for payment;
 5. The addition of the new requirements for the Notice of Furnishing eviscerates the remedy for remote claimants and runs counter to the policies behind the statute;
 6. The Court overlooked analogous sections of the mechanics' lien statute, which do not require that the materials be completely delivered and past due prior to serving the Notice of Furnishing.
- I. THE COURT'S RULING MATERIALLY ALTERS THE MECHANICS' LIEN STATUTE BY ADDING NEW, UNWRITTEN REQUIREMENTS FOR NOTICE UNDER §29-5-40.

The Court's ruling changes the statutory scheme by creating mechanics' lien prerequisites which do not exist in the statute. The Court held that there are four new requirements to the Notice of Furnishing under S.C. Code Ann. §29-5-40 which are not written in the statute. The Court holds

that a §29-5-40 ("Notice of Furnishing") is invalid unless:

1. Materials have been delivered;
2. Payment for the materials is past due;
3. Final delivery of all materials for the Project has been completed;
4. The notice contains a demand for payment.

None of these requirements are part of §29-5-40, which 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.

Adding these requirements to the statute undermines the statutory balance between the interests of the owner and remote claimants. These additional requirements make it virtually impossible for a remote claimant like Ferguson Fire to protect itself with a lien.

II. THE COURT MISREADS THE LANGUAGE OF THE STATUTE IN CONCLUDING THAT MATERIALS MUST BE DELIVERED PRIOR TO NOTICE OF FURNISHING.

The Court misreads the statutory language in concluding that materials must be delivered prior to the service of a Notice of Furnishing. The verb tense and structure of the sentence indicate 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 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 in the past. However, the use of the past participle of the verbs ("done" and "furnished") does not indicate action in the past. These are passive verbs. In passive verb forms, the past participle of the verb is always used.¹ In fact, these verbs are in the 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 is not in the past tense and does not refer to work performed or materials delivered in the past.

Rather, the structure of 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 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.

¹See *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" <http://www.englishpage.com/verbpage/activepassive.html>.

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. 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 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 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 is forced to construct other additions to the Notice of Furnishing. The Court add the requirement 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 a lien, but to extend them to a Notice of Furnishing defeats the purpose of the Notice.

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

The Court's 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,” the Court’s ruling 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 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.

IV. THE COURT MISTAKENLY ADDS THE REQUIREMENT THAT THE NOTICE OF FURNISHING DEMAND PAYMENT.

The Court 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.

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

The real 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 would have been paid in full prior to the completion of delivery. Thus, the Court’s additional requirements remove, as a practical matter, any remedy for the remote claimant. The court should not interpret the statute in a way that renders the remedy meaningless. By adding new requirements to the statute, the Court 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.

VI. 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 nearly identical 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.

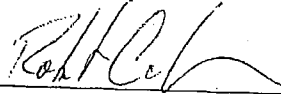
Similarly, there is no requirement that the payment be due at the time of a notice of furnishing under §29-5-20(B)(6). That section requires the claimant to state the amount due, "if any." Thus, the notice of furnishing can be sent prior to the time that payment is actually due. The rule should be similar 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 identical to the policies at play in the relationship between general contractors and 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 subcontractor/suppliers.

CONCLUSION

The Court's ruling in this matter improperly adds four new elements to a Notice of Furnishing under §29-5-40. These additional elements are based upon the Court's failure to distinguish between a Notice of Furnishing and a lien. By adding these new elements the Court has upset the balance of interests that the Legislature intended in drafting the statute. The Court should rehear the matter, and reconsider its ruling.

Respectfully Submitted,



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ATTORNEY FOR THE APPELLANT

March 13, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

C.A. No. 2008-CP-23-2746

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 Appellant,

and Immedion, LLC is Respondent.

Immedion, LLC, Third-Party Plaintiff,

v.

Rescom Construction, LLC, Third-party Defendant.

RETURN OF IMMEDIION, LLC
OPPOSING PETITION FOR REHEARING

Ronald G. Tate, Jr.
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P O Box 10589
Greenville, South Carolina 29603

Attorney for the Respondent

March 26, 2012

Respondent, Immedion, LLC, submits this return in opposition to Appellant's Petition for Rehearing. For the reasons stated herein, the Petition should be denied.

A. The Appellant Fails to Satisfy the Requirements for Granting a Petition for Rehearing

A petition for Rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the Court," Rule 221(a), SCACR, and may not be used simply to have the case "tried in the Court of Appeals a second time." Checker Yellow Cab Co., v. Checker Cab and Parcel Service, Inc., 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App.1986). Appellant fails to meet this stringent standard. Instead, it seeks to simply re-litigate its prior arguments, which were considered and rejected.

B. Appellant's Petition Presents no Grounds for Rehearing

1. The Court of Appeals' Opinion correctly applied existing law and imposed no additional burden on mechanic's lien claimants.

In its argument for rehearing, Appellant continues to misconstrue the effect of a Notice of Furnishing. Appellant persistently confuses the statutory concepts of (1) the Notice of Furnishing that is permitted to be served within fifteen days of delivery of materials pursuant to § 29-5-20(B) of the South Carolina Code with (2) the Notice of Mechanic's Lien provided by § 29-5-40. As Appellant conceded and this Court noted, the Notice of Furnishing provided to Immedion did not afford Ferguson Fire any rights under § 29-5-20(B). Ferguson Fire v. Preferred Fire Protection, Op. No. 4947, at 2, n.1 (S. C. Ct. App. filed Feb. 29, 2012) (hereinafter, "Opinion"). Therefore, the question governing this case is whether the Notice of Furnishing in issue satisfied the requirements of § 29-5-40. The Court of Appeals correctly determined that the Notice, served before the material delivery was complete, before any sums were due, which contained no demand for payment and which in fact, expressly stated that it was "not a lien," could not

be transformed into a valid mechanic's lien notice that would defeat the owner's payment defense and entitle the material supplier to preference under § 29-5-50.

By stating that the Court of Appeals' Opinion imposes four new requirements on mechanic's lien claimants which are not contained in § 29-5-40, Appellant misconstrues the notice of furnishing. The Opinion imposed no additional requirements on mechanic's lien claimants; rather, the Court correctly held that Appellant's Notice, provided prior to or contemporaneous with the delivery of materials, did not (and could not) function as a Mechanic's Lien Notice under § 29-5-40. *Id.* Appellant's four "new" requirements are not new and have always been requirements to create a valid Mechanic's Lien Notice. While Appellant did not provide a proper Mechanic's Lien Notice (and in fact its notice expressly stated that it was *not* a lien), it now asks the Court to transform its Notice of Furnishing into a Mechanic's Lien Notice. Asserting that the Court of Appeals' "additional requirements" make it virtually impossible for a remote claimant such as Appellant to protect itself, Appellant engages in hyperbole and attempts to have this Court rectify Appellant's error in misusing the Notice of Furnishing and misunderstanding its legal effect. In fact, it can hardly be impossible when both the circuit court and appellate court discussed the statutory procedures for a remote claimant to protect itself. Nothing in the record supports the assertion that material suppliers such as Ferguson will be impaired in their mechanic's lien rights.

2. The Court of Appeals correctly read the language of § 29-5-40 to require delivery of materials prior to the attachment of a mechanic's lien noticed thereby.

In Argument II of the Petition, Appellant continues to conflate the statutes in question and asks this Court to torture the language of § 29-5-40 in a futile attempt to transform its premature and incomplete Notice of Furnishing into a fully viable

Mechanic's Lien Notice. Appellant states "the lien is not the same as the Notice of Furnishing.... A Notice of Furnishing does not create a lien." Those statements are completely true. That being the case, Appellant fails to articulate exactly what the Notice in question is, or where it fits within the statutory scheme. It is indeed not a Notice of a Mechanic's Lien. Appellant could hardly argue that it is, because Appellant filed a proper Notice of Mechanic's Lien months after delivery that conformed to the requirements of § 29-5-40. If it is not a § 29-5-40 lien notice, and if it is not, as Appellant concedes, a Notice of Furnishing pursuant to § 29-5-20(B), then what is it? The Court of Appeals properly found that it was without legal effect. Opinion at 6.

Appellant's argument seeks to turn the mechanic's lien laws upside down. In what can only be characterized as an exercise in absurdity, Appellant argues that a paper that says on its face "this is not a lien," is indeed the equivalent of a lien. Such a super lien does not exist in the South Carolina statutes. Appellant's argument, if accepted, would present owners and contractors in South Carolina with great uncertainty and would expose them to potential double liability for payment contrary to the express protections of the mechanic's lien law.

3. The Court did not hold that the entire project must be complete for mechanic's lien rights to attach.

Argument III reads far too much into the Court's discussion of the facts recited and misreads the Court's opinion. Appellant accuses the Court of creating a new requirement, that delivery of material be "complete" prior to the Notice of Furnishing. Appellant misconstrues the Court's holding. Indeed, a lien cannot attach prior to performance. However the Court's use of the phrase "completed project" indicates the completion of the scope of performance undertaken by a supplier. The opinion does not extend so far as to require the entire project to be completed. The opinion did correctly

note that the Notice of Furnishing here failed to inform Immedion of the date of furnishing or provide an ending date. The Court noted that § 29-5-40 requires the supplier to notify the owner of the furnishing of such labor or material and the amount or value thereof. The holding went no further than the requirements of the statute.

4. The Court correctly determined that a demand for payment is necessary if this Notice should be considered a Mechanic's Lien Notice.

Appellant's Fourth Argument again misconstrues the Court's holding. Addressing the argument that the Notice of Furnishing served as a Notice of Lien rights, the Court correctly found that Appellant failed to include a demand for payment in the Notice that it relied upon to support its claimed lien rights. Appellant criticizes the Supreme Court's decision in Sloan Construction Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E. 2d 158, 165 (2008). See Appellant's Pet. for Rehearing, p. 6. Appellant asserts that the Supreme Court mis-cited § 29-5-40 in discussing a payment bond claim and disagreed with the proposition that a subcontractor's lien is limited to the amount due the general contractor at the time the owner received a demand for payment. That was the crux of Appellant's position in this case, a position that the Sloan court rejected and that contravenes the mechanic's lien statute. The owner's payment defense is firmly protected by South Carolina statutes, a fact the Supreme Court recognized in Sloan. Likewise, the Court in this case correctly stated that it is axiomatic that a demand for payment is a prerequisite to recovery under the mechanic's lien law. Opinion at 7.

5. The Court of Appeals properly decided that the Appellant's argument under § 29-5-50 need not be addressed.

Because the Court decided that Ferguson's Notice was insufficient to notify Immedion of a lien, it need not reach Ferguson's issues relating to the lienor's preference under § 29-5-50. Opinion at 10. Indeed, the determination of the issues relating to the

characterization of the Notice of Furnishing was dispositive of the appeal and discussion of § 29-5-50 was unnecessary.

In any event, § 29-5-50 only applies to provide that persons who claim a lien and who shall have given notice provided for herein shall be entitled to preference. In order for a claimant to be protected by § 29-5-50, he or she must be claiming a lien and he or she must have given the statutory notice of the lien as described in § 29-5-40. Until a lien is actually claimed and such notice is actually provided, Ferguson was not entitled to any protection under this statute. It must also be noted that Ferguson has misstated the terms of the statute stating that "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.'" Appellant's Pet. for Rehearing, p. 7. The quoted sentence is misleading and misstates the requirements of the statute, which 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 the notice.

S.C. Code Ann. § 29-5-50.

Accordingly, even if construction of this statute is necessary to the determination of the issues on appeal, Ferguson is entitled to no remedies because it is indeed not a person who had claimed a lien under the mechanic's lien law nor given the notice provided for in § 29-5-40.

6. Appellant's discussion of § 29-5-20(B) is irrelevant to this appeal.

Appellant's Notice stated on its face that it was being provided pursuant to both §§ 29-5-20(B) and 29-5-40. Ferguson has conceded, however, that § 29-5-20(B) does not

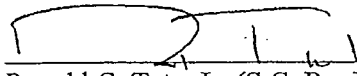
govern its rights, here. Ferguson conceded in its main brief, that § 29-5-20(B) was irrelevant to the appeal and the Court of Appeals noted that the parties concede that the Notice gives Ferguson no rights under that statute. Appellant's Final Brief, p. 6; Opinion at 2, n. 1.

Ferguson argues that §§29-5-20(B) and 29-5-40 are analogous, but this argument is irrelevant. Section 29-5-20(B) applies only where a sub-subcontractor or supplier provides notice of furnishing labor and materials to a general contractor. A sub-subcontractor or supplier properly serves this notice where a general contractor has filed a Notice of Project Commencement, in order to obtain the benefit of a payment defense allowed by § 29-5-20(B). Notice given under Section 29-5-20(B) has a completely distinct legal function and is not intended to act as a Mechanic's Lien Notice. Even the Appellate talks at length about the differences between the two statutes. However, the law provides two separate remedies for two separate parties and where the two statutes differ, it is not for this Court to read the provision of one to apply to the other.

Conclusion

Because the Notice in issue is neither a Notice of Furnishing labor and materials recognized by § 29-5-20(B) nor a proper notice of mechanic's lien rights recognized by § 29-5-40, the Court of Appeals correctly determined that it afforded Ferguson no protections where Immedion had properly paid its subcontractor for the materials in question. The Notice did not meet the requirements of the mechanic's lien law, as the Court properly determined. Appellant's motion for rehearing should be denied as the Court did not overlook or misapprehend any of the Appellant's arguments below, and

Appellant simply seeks to re-litigate the arguments that the Court had previously, and properly, rejected.



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Attorneys for Respondent, Immedion, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. L. McIntosh, Circuit Court Judge

Case No. 2008-CP-23-2746

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

Appellant,

and Immedion, LLC is

Respondent.

Immedion, LLC,

Third-Party Plaintiff,

v.

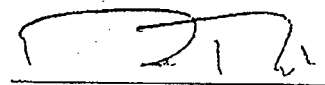
Rescom Construction, LLC,

Third-Party Defendant.

PROOF OF SERVICE

I certify that I have served the Return of Immedion, LLC Opposing Petition for Re-hearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on March 26, 2012, addressed as follows:

Mr. Robert E. Culver
The Culver Law Firm, P.C.
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Charleston, SC 29403



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Attorneys for Respondent
Immedion, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

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

Appellant,

And Immedion, LLC is

Respondent.

Immedion, LLC,

Third-party Plaintiff,

v.

Rescom Construction, LLC

Third-party Defendant.

REPLY OF FERGUSON FIRE AND FABRICATION, INC.,
TO RETURN OF IMMEDIION, LLC OPPOSING PETITION FOR REHEARING

March 29, 2012

Robert E. Culver, Esq.
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ATTORNEY FOR THE APPELLANT

The Appellant submits this Reply to the Return of Respondent:

The Appellant and Respondent agree that the Notice of Furnishing is not a lien and does not, in and of itself, create a lien. The Respondent then claims that the "Appellant fails to articulate exactly what the Notice in question is, or where it fits within the statutory scheme." (Return of Immedion, p. 4). If not already clear, the Appellant will articulate exactly what the notice is and where it fits in the statutory scheme.

Notice under §29-5-40 is notice to the owner that the supplier is furnishing material to the job and may have lien rights if the general contractor does not pay. It fits into the statutory scheme by triggering §29-5-50, which provides that the owner cannot defeat the supplier's potential lien rights by paying the general contractor. Once the owner receives notice under §29-5-40, he has the obligation to protect the supplier with a joint check or otherwise. If the owner protects the supplier for his work, then the owner will be free from any later lien claims. That is why owners and their lenders commonly request lien releases from all sub-contractors and suppliers before issuing payment to the general contractor.

The Court's ruling turns the statutory scheme upside down by requiring that the product be delivered and payment be past due before the supplier can provide notice under §29-5-40. If the supplier cannot protect himself prior to delivery of the materials, he's not likely to extend the credit which is so important to construction transactions.

The Mechanics lien statute is a crucial tool in facilitating credit transactions in construction. The statute facilitates credit transactions by providing protections to contractors, tradesmen and suppliers who perform prior to being paid. Because of they have lien rights, suppliers can provide the materials to the project with increased certainty that they will be justly compensated. These

credit transactions are crucial to the operation of the construction industry.

In simple construction contracts – where the only parties in construction are an owner and a contractor – the owner does not generally need protection from the operation of mechanics liens because the owner directly pays the contractor. The contractor has no right to a lien if he's been paid.

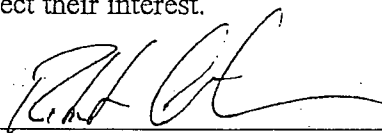
However, the statutory sections at issue in this case are about remote claimants – those who do not have a contract directly with the owner. Where there are remote claimants, the statute balances the protection of these claimants and the protection of the owner's interest in limiting his liability to the contract price. The statute protects the owner by limiting his liability to the amount due under the general contract. This protection is the "payment defense" that is embodied in §29-5-40 and elsewhere.

However, the owner's payment defense is not absolute. An owner cannot claim the payment defense where a remote claimant has given the owner notice of furnishing. For remote claimants – those who do not have a direct contract with the owner – sections §29-5-40 and 50 create an exception to the owner's payment defense, by requiring the owner to protect the remote claimant in order to avoid later lien claims.

By adding the requirement that the §29-5-40 notice is only valid after delivery of the materials, the Court has removed a key protection for the remote claimants. The Court's ruling requires the remote claimant to complete the work, wait for payment to become past due, and demand payment before he can give notice of his potential lien to the owner. Because of the Court's ruling the remote claimant cannot protect his lien rights until after the completion of delivery or work. At that point in the transaction, there is really no point in providing the owner notice of

furnishing, because the remote claimant can simply file and serve the lien. Also, at that point in the transaction, the general contractor is likely to have been paid for the completed work, and so the remote claimant cannot overcome the owners' payment defense. Thus, the court rendered the notice of furnishing a nullity. The notice provides little practical protection for the remote claimant and the notice has no real function.

Sections 29-5-40 and 50 are designed to protect the remote claimant at the time he provides the work/services – not at some later time, when the work is complete and the payment past due. The notice of furnishing prevents the owner from ignoring the supplier's rights and handing the money to the general contractor. The notice triggers the owner's obligation to insure that the supplier is paid. The Court's ruling overthrows this statutory scheme by inserting new requirements in the statute, and these requirements undermine the very purpose of the statute by virtually insuring that remote claimants will not be able to obtain liens to protect their interest.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Circuit Court Judge

Case No. 08-CP-23-2746

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Plaintiff,

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Third-party Plaintiff,

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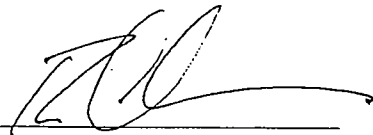
Rescom Construction, LLC

Third-party Defendant.

PROOF OF SERVICE

I certify that I have served the Reply of Ferguson Fire and Fabrication, Inc., to Return of Immedion, LLC Opposing Petition for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid on March 29, 2012, addressed as follows:

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ATTORNEY FOR THE APPELLANT

The South Carolina Court of Appeals

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 Preferred Fire Protection,
LLC, Appellant,

and Immedion, LLC is Respondent.

Immedion, LLC, Third-Party Plaintiff,

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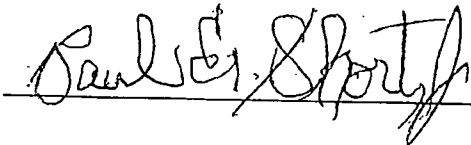
Rescom Construction, LLC, Third-Party Defendant.

The Honorable R. L. McIntosh
Greenville County
Trial Court Case No. 2008-CP-23-02746

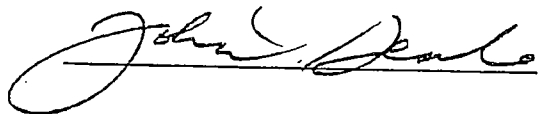
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Short

 J. Williams

 J. Geathers

Columbia, South Carolina

cc: Robert E. Culver, Esquire
Ronald G. Tate, Jr, Esquire

FILED
2 May 2012