

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc.,Respondent,

v.

Elvira Chappellear, Craig Chappellear, Premier Southern Homes, LLC, Henry G.
Beal, Jr., and First Citizens Bank and Trust Co., Inc., Defendants,

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal.....1

Statement of the Case.....2

Statement of the Facts.....2

Standard of Review.....14

Argument15

I. THE CHAPPELEAR’S CANNOT USE PAYMENTS DIRECTLY TO PREMIER’S SUBCONTRACTORS ON BEHALF OF PREMIER AS A WAY TO AVOID THE REQUIREMENTS OF S.C. CODE ANN. §29-5-50. FURTHERMORE, S.C. CODE ANN. §29-5-40 DOES NOT PROVIDE A PAYMENT DEFENSE TO OWNERS WHEN THEY HAD NOTICE OF ACTION CONCRETE’S MECHANICS LIEN PRIOR TO PAYING THE DEBTS OF PREMIER.

- A. The Owners Payments Directly To The Subcontractors Of Premier Clearly Violated §29-5-50 And Therefore The Lower Court’s Ruling Was Not An Error Of Law.*
- B. The Chappellear’s argument that the Lower Court Committed An Error of Law In Regards To The Payment defense lacks supporting authority. Under S.C. Code Ann. §29-5-40 The Chappellear’s Liability Was Limited To The Remaining Unpaid Balance On The Contract With Premier At The Time The Chappellears Received Notice Of Action Concrete’s Lien And All Payments Made On Behalf Of Premier After Notice Of The Lien Were Made At The Owner’s Peril pursuant to S.C. Code Ann. §29-5-50.*
- C. S.C. Code Ann. §§29-5-40 and §29-5-50 Must Be Read Together So As To Give Effect To The Overall Policy Of The Mechanics Lien Statute.*
- D. The Chappellear’s Interpretation Of The Mechanics Lien Laws Would Also Undermine §29-5-60 Of The Mechanic’s Lien Statute.*

II. NO ISSUES OF MATERIAL FACT EXIST AND THEREFORE THE LOWER COURT’S GRANTING OF SUMMARY JUDGEMENT WAS NOT IMPROPER.

- A. The Amount Owed By The General Contractor To The General Contractor At The Time Of Notice Of A Subcontractor’s Mechanic’s Lien Is Not A Question of Material Fact When It is Undisputed Payments Were Made In Excess Of The Lien Amount In Violation Of S.C. Code Ann. §29-5-50.*
- B. No Other Issues Of Material Fact Exist And Therefore The Lower Courts Ruling Should Not Be Reversed.*

Conclusion33

TABLE OF AUTHORITIES

Cases

Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct.App.2005).....25

Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122,542 S.E.2d 736, 740 (Ct.App.2001).....25

Charleston Lumber Co. v. GPT, 303 S.C. 350, 400 S.E. 2d 508 (Ct. App. 1991)28

Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604,503 S.E.2d 465, 468 (1998).

Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct.App.2004).....14

Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC, 397 S.C. 379, 383-84, 725 S.E.2d 495, 497-98 (Ct. App. 2012).....14

Gordon v. Phillips Utils., Inc., 362 S.C. 403,406,608 S.E.2d 425, 427 (2005).....25

Hodges v. Rainey, 341 S.C. 79, 85,533 S.E.2d 578, 581 (2000).....25

Houston v. Deloach & Deloach, 378 S.C. 543,551,663 S.E. 2d 85, 89 (Ct. App. 2008).....26

Kiriakides v. United Artists Commc'ns, Inc., 312S.c. 271, 275, 440 S.E.2d 364, 366 (1994).....26

Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)17

Maddux Supply Co v. Safhi, Inc., 40 S.E.2d 101, 105 (S.C. Ct. App. 1994).....17, 23

McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).....25

Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005).....25

Morgan, 352 S.C. at 366, 574 S.E.2d at 206.....25

Mun. Ass'n of S. C. v. AT & T Comm'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004).....25

N. Y Times Co. v. Spartanburg County Sch. Dist. No.7, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007).....26

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005)14

Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008)19

State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002).....26

State v. Landis, 362 S.C. 97, 102,606 S.E.2d 503, 505 (Ct.App.2004).....25

Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298,
302, 417 S.E.2d 634, 637 (S.C. Ct. App. 1992)
.....17, 20, 21, 22, 23, 24, 29

Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178
(S.C. Ct. App. 1990)18, 19

Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 96-97,
641 S.E.2d 459, 463 (S.C. Ct. App. 2007).....28

Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003)26

Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) 14

Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 170,
662 S.E.2d 430, 436 (Ct.App.2008).....26

Wood v. Hardy, 235 S.C. 131, 110 S.E. 2d. 157 (1959)21, 22, 29

Statutes

S.C. Code Ann. §29-5-4015, 17, 18, 19, 22, 23, 25, 26, 27

S.C. Code Ann. §29-5-50.....15, 17, 19, 20, 22, 23, 25, 26, 27, 28, 29, 34

S.C. Code Ann. §29-5-6027

S.C. Code Ann. §29-5-60 (A)28

S.C. Code Ann. §29-5-1103

Other Authorities

22 S.C. Jur. Mechanics' Liens § 11.....19

Rule 56, SCRCF14

Rule 56(c), SCRCF 14

STATEMENT OF ISSUES ON APPEAL

- I. APPELLANT OWNER CANNOT USE PAYMENTS DIRECTLY TO THE GENERAL CONTRACTOR'S SUBCONTRACTORS ON BEHALF OF THE GENERAL CONTRACTOR AS A WAY TO AVOID THE REQUIREMENTS OF S.C. CODE ANN. §29-5-50. FURTHERMORE, S.C. CODE ANN. §29-5-40 DOES NOT PROVIDE A PAYMENT DEFENSE TO OWNERS WHEN THEY HAD NOTICE OF A MECHANICS LIEN PRIOR TO PAYING THE DEBTS OF THE GENERAL CONTRACTOR, THEREFORE, THE LOWER COURT'S DECISION WAS NOT AN ERROR OF LAW.

- II. NO ISSUES OF MATERIAL FACT EXIST AND THEREFORE THE LOWER COURT'S GRANTING OF SUMMARY JUDGEMENT WAS PROPER.

STATEMENT OF THE CASE

Respondent Action Concrete Contractors, Inc. (hereinafter "Action Concrete" or "Respondent") agrees with the statement of the case as set forth by the Appellants.

STATEMENT OF THE FACTS

Respondent, Action Concrete was a subcontractor responsible for the construction of certain improvements on the property referred to as Lot 129 Tuscan located in Anderson, South Carolina (Project"). (*See Complaint*)

Appellants, Elvira Chappellear and Craig Chappellear, (hereinafter collectively "Chappellears" or "Appellants"), at all times relevant, were the owners of the above referenced Project. (*See Complaint*). Premier Southern Homes, LLC (hereinafter "Premier") was the General Contractor and was responsible for the construction and improvements on the Project. (*See Complaint*).

Appellants entered into a \$300,000.00 lump sum contract with Premier for construction of the Project on April 31, 2007. (*See Exhibit A to Complaint; see also Elvira Chappellear Depo. pg 25; line1-5*). Action Concrete entered into a subcontract agreement with Premier on May 9, 2007 whereby Action Concrete would provide labor and materials for the Project on an actual cost basis based on unit prices provided in the estimate. (*See Exhibit B to the Complaint*) Premier failed to pay Action Concrete for the work performed on the Project in the amount of Sixty-Six Thousand Eight Hundred Sixty-Two and 63/100ths (\$66,862.63) (*See Exhibit C to the Complaint accounts receivable*) (*See also December 20, 2011 Order pg. 2*).

On September 25, 2007, within 90 days from Action Concrete's last day of work, Action Concrete filed and served its notice of mechanics lien and statement of account on Owners. (*See Notice and Certificate of Mechanics Lien*). On December 27, 2007, Action Concrete filed a

Complaint and Lis Pendens to foreclose on its mechanic's lien. (See Action Concrete Complaint and Lis Pendens.) On August 18, 2008, almost a year after the lien was filed, the Owners bonded off Action Concrete's lien in the sum of \$89,128.00 pursuant to S.C. Code Ann. §29-5-110. (See December 20, 2011 Summary Judgment Order pg. 2)

As of the date Action Concrete filed and served notice of its mechanics lien on the Chappelears, there was an outstanding contract balance of \$164,260.00 on the Chappelears's contract with Premier. The Chappelears had paid Premier \$135,740.00 of the \$300,000.00 due under the contract. (See Exhibit D to the Complaint—payments to Premier) (See also December 20, 2011 Summary Judgment Order pg. 2).

No further payments were made directly to Premier after Action Concrete gave notice of its mechanics lien, however the Chappelears began making payments on behalf of Premier directly to Premier's subcontractors so the work could be completed. (See Elvira Chappelear Dep. pg. 125; lines 5-12). The record is replete with evidence that the Project was not taken over by the Chappelears but rather the Premier continued to work on the Project and coordinate the work of the subcontractors. Premier continued to work on the Project and the payments to Premier's subcontractors reduced the amount owed to Premier under the Contract. (See Elvira Chappelear Dep. pg. 132; lines 4-25 – pg. 139, lines 1-17).

In regards to payments to Premier, the following is also taken from the deposition of Elvira Chappelear.

Q. Why did you start -- then if you believe it's just a normal practice, why did you begin writing joint checks -- or not joint checks. Why did you begin paying subcontractors directly instead of continuing to pay Mr. Beal [Premier]?

MR. MCCABE: Objection to form.

WITNESS ANSWERS:

Because in my case I wanted him [Premier] to finish payment to Action Concrete before I would start writing. I didn't have a problem writing him another check with a condition that Action Concrete was going to get paid. Because I did not want him to receive his portion of the job. That's the only reason. It was I guess sort of a punishment. If you're making let's say -- I don't know what his percentage was of the total project. But he was making his income. So if it was 20 percent out of every check, he would have taken 20 percent.

I felt like there's no need to pay him for his job when he hasn't paid somebody. So my comment to him was, **"I will hold the payments to you altogether until this lien is paid off. I will pay directly to the subcontractors until you catch up with Action Concrete. Once you're done, I will be glad to turn the payments over to you like they were before."** (*emphasis added*) I had no problem with him at that point. I had no -- any knowledge of the severity of the situation at that time.

So all I thought was well, it's a large lien, you know. Surely he's not going to not pay. Plus, by the time the lien was filed, he's been doing work this whole time on the house. It's not like he has not been working. And he said, "Ayla, as far as you paying to subcontractors directly and me doing work for free until I pay it, I have no problem." He didn't back out of that. He kept working. He was there every day.

So I was like, well, surely if you wasn't going to pay somebody the balance on the property, he ain't going to show up to work and work for free for me. He did. He worked the whole time while all of those other contractors were finishing up their work. (*emphasis added*)

(See Elvira Chappellear Dep. pg. 122, lines 18-25; pg.123,ln.1-25; pg.124, ln.1-9).

I [Elvira Chappellear] could not stop the construction of the property because my construction would have rotted at this point if I didn't do something other than put it in the dry. And that is where I stopped. I've done enough of a job to be able to keep it safe and secure and protect my investment until we could figure something out.

(See Elvira Chappellear Dep. Page 187; lines 2-9)

Invoices of subcontractors were presented to Elvira Chappellear at the deposition and she repeatedly testified that the invoices were directed to Premier but paid directly by Chappellears. Elvira Chappellear testified that the payments were made to Premier's subcontractors on behalf of Premier and therefore reduced Chappellear's debt owed to Premier and likewise reduced Premier's debt owed to those

subcontractors. (See Elvira Chappelear Dep. pg. 128; lines, 12-25 to pg. 161, lines 1-3). Moreover, Elvira Chappelear testified that the subcontractors continued to work for Premier and that she only insured payment by paying subs directly. (See Elvira Chappelear Dep. pg. 124; lines 14-25 – pg. 135, lines 1-12).

The following examples of payments to Premier's subcontractors were taken from the deposition of Elvira Chappelear.

Q. And so from that point after the 9/10/07 payment to Mr. Beal, all your further payments were then made to –

A. Subcontractors directly.

Q. Directly. And you understand that those payments continued to take away from the contract balance that was owed to Mr. Beal, correct?

A. Of course.

(See Elvira Chappelear Dep. pg. 125; lines 5-12)

(PLAINTIFF'S EXHIBIT NUMBER 21 MARKED; ATTACHED)
EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. The next one I have is an invoice -- well, you tell me. Does this look familiar to you?

A. Invoice from Piedmont Plumbers for \$9,000 for rough-in plumbing at 129 -- Lot 129 Via Roma.

Q. Okay. And it's dated for -- what's the date of that invoice?

A. 8/15/07.

Q. Okay. And it's for rough-in on the home?

A. That is correct.

Q. And who is it billed to?

A. It's billed to Premier Southern Homes.

Q. Okay. And that's for a subcontractor that contracted with Mr. Beal on your project?

A. That is correct.

Q. And then what do you see on the second page, Chappelear 0048?

A. I have a payment of \$9,000 going to Piedmont Plumbers on 10/26/07.

Q. Okay. So this is work that was performed prior to a lien that was placed on your project, but paid after you received the lien; is that correct?

A. I'll be honest with you. I would not know. I just know when he brought me the bill, I paid it on 10/26.

Q. But I thought that your earlier testimony was that you get these invoices pretty quickly after the work's actually performed.

A. If they brought it directly to me. This one, if you'll notice, was sent to Henry Beal's address. So he would have brought it to me at his time.

Q. You have no reason to believe that that is an incorrect date on that invoice, do you?

A. I wouldn't think so.

Q. Okay. And so that being the case, this invoice is dated 8/15/07 which was prior to you being served with the lien, correct?

A. It was prior to me being served with the lien. Not necessarily knowing about the work done.

Q. Sure.

A. That is correct.

Q. But it was prior -- okay. And then you paid that amount -- you paid for that work after you received the lien, correct?

A. Yes.

Q. Then we have Plaintiff's Exhibit Chappellear Number 22.

(PLAINTIFF'S EXHIBIT NUMBER 22 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. Can you tell me what that is?

A. It is an invoice from J and J Electrical for electrical rough-in for Tuscany dated 10/24/07 for \$13,033.90.

Q. Okay. And this invoice is made out to Premier Southern Homes, correct?

A. That is correct.

Q. And all these subcontractors still worked for Mr. Beal at Premier Southern Homes; is that correct?

A. Yes.

Q. During the time of this construction they were still -- they're subcontractors still with Mr. Beal. They were invoicing Mr. Beal and then you were just paying these invoices directly from the contract balances; is that correct?

A. To a degree. That is correct. The principal is correct. However, if let's say I met with one of them for purposes of they wanted me to tell them exactly how this needs to be done, let's say deck -- and I don't remember. Some of them may have been billed directly to me even though Henry Beal is still the contractor. Because when I met with them at the job site and I told them, "Okay, I want to lay out a deck right here this way and this way done," a lot of them after the lien was filed have heard about that lien. So some of them asked me to make sure that when Henry called them onsite, that I was present as well. Because they wanted to make sure they heard Henry explain to them that I would be making the payment directly to them, not him. Because they were concerned about non-payment issue. So in some cases, and I don't know if there are any cases, but if you see an invoice written directly to me, that would be for that reason.

Q. But even if an invoice is written directly to you, it's your position --

A. It's still contracted --

Q. It's still --

A. -- by Henry Beal.

Q. Okay, still a contract with Premier Southern Homes?

A. That is correct.

Q. Okay. And so on this particular case there is an invoice for work done on 10/24, or at least the invoice is dated for 10/24. Do you know when the work was actually performed?

A. Usually -- date of invoice is usually pretty close to the time that the work was done. This is J and J Electrical, and he was pretty quick as far as the invoice when he was done.

Q. Okay. So you have a contractor who contracted with Premier Southern Homes for the construction of your home, and you paid him on 11/2/07 \$13,033.90?

A. That is correct.

Q. And you paid that out of contract balances that would have been owed to Mr. Beal?

A. That is correct.

Q. Okay. And you paid that to a subcontractor who subcontracted directly with Mr. Beal and not with yourself on the project?

A. That is correct. *(emphasis added)*

Q. All right. The next one we have is Walden Resources. And this is going to be Plaintiff's

Exhibit Number 23.

(PLAINTIFF'S EXHIBIT NUMBER 23 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. Can you tell me what that is?

A. That is a bill to Henry Beal for \$12,000 from Walden Resources for construction of the deck which-- the one I referenced we stood on sometime late October. And the bill was for \$12,000 which was paid by me to Walden Resources. And the check was written to Walden Resources.

Q. Okay. Same situation. This is a subcontractor who performed work on your project for Mr. Beal for Premier Southern Homes, correct?

A. That is correct. To whom I have not extended the money to Henry Beal for that service. I paid it directly to the contractor.

Q. They submitted a bill to Mr. Beal. Mr. Beal at Premier Southern Homes submitted that bill to you and you paid it out of Mr. Beal's contract balances on the project?

A. Actually that one brought it to my office directly.

Q. Okay. But still the same situation. That money was paid from funds that would have been due to Mr. Beal?

A. That is correct.

MR. MCCABE: Objection to form.

MR. CRAWFORD: What's your objection?

MR. MCCABE: The objection is are we talking about work in place or prospective work on the contract not performed?

MR. CRAWFORD: I don't think I made a difference. But this -- I'll clarify.

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. This is for work on -- work that was performed on the home, correct?

A. Yes.

Q. Okay. And this was a subcontractor who contracted directly with Mr. Beal for Premier Southern Homes, correct?

A. It is. (*emphasis added*).

Q. And you paid him out of funds that would have been due to Mr. Beal at Premier Southern Homes?

A. Yes.

Q. Okay.

A. Can I also note something on this one?

Q. Sure.

A. There's the initials you were talking about. There's Henry Beal. And I don't know what that is. I think maybe job completed or something like that. That's the same initials Dustin was referring to earlier on your bill. And -- and I don't know what that means, but that's -- you see them on all of those. That's all Henry's initials. Where he thought it was mine.

Q. Thank you. All right. Chappellear -- this will be Exhibit Number 24, Chappellear 00055.

(PLAINTIFF'S EXHIBIT NUMBER 24 MARKED; ATTACHED)
EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. Can you tell me what that is?

A. That's an invoice from MSW for Premier Southern Homes for labor for pre-wire for my residence at 129 -- Lot 129 Via Roma for \$1200 from MSW.

Q. And what is the date of that invoice?

A. 11/13/07.

Q. And what -- and then you made a -- paid them by a check?

A. I did.

Q. And what's the date of that check?

A. 12/28/07.

Q. Okay. For the full amount of the invoice?

A. Twelve thousand -- \$1200, yes.

Q. And again, this is a subcontractor for Mr. Beal [Premier] for construction of work done on your project, correct?

A. That is correct

Q. And you paid him funds that would have been due Mr. Beal on the project?

A. Yes.

(See Elvira Chappellear Dep. pg. 132; lines 4-25 -- pg. 139, lines 1-17)

Q. And Henry Beal [Premier] was still the contractor and still responsible for these folks?

A. That's correct.

Q. And so the check -- that's check number 2363 for \$36,490 is amounts that you paid to Solid Rock Construction for work performed on your home and paid it from funds that would have been due to Mr. Beal [Premier]

under his construction?

A. That is correct.

Q. And the same with Mr. Nick Farris on 11/16/07 for \$250?

A. That is correct.

Q. Okay. And again, those funds were paid from amounts that would have been due to Mr. Beal for construction on your home?

A. That is correct.

(PLAINTIFF'S EXHIBIT NUMBER 28 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. The next one I have is Exhibit Number 28. Tell me what that is.

A. That is a bill from L.R. Jacobs Enterprises for siding -- vinyl siding on the property, I guess soffits and eaves, for \$6,525.

Q. Okay.

A. **Billed to Premier Southern Homes on 12/4/2007, paid by me on 12/14/2007 for the same amount.** (*emphasis added*)

Q. Okay. All right. And so these were bills to Mr. --Mr. Beal at Premier Southern Homes from L.R. Jacobs, a subcontractor, for work performed on your home for \$6,525?

A. That is correct.

Q. And you paid L.R. Jacobs, Inc. on 12/14/07 the amount of \$6,525 out of contract funds that would have been due to Mr. Beal?

A. That is correct.

Q. I'll give you this one.

A. Love Heating and Air bill for \$10,600 for the bill -- for the rough-in on HVAC system for that same subject property on 12/6/07, and paid by me on 12/28/07 for \$10,600 to Love Heating and Air.

Q. All right. And again, this is a subcontractor for-- to Mr. Beal, Premier Southern Homes?

A. That is correct.

Q. Okay. For work performed on your home, and you paid it out of contract funds that would have been due to Mr. Beal?

A. That is correct.

(See Elvira Chappellear Dep. pg. 144; lines 17-25; pg.; pg. 145, lines 1-25; pg. 146, lines 1-13.)

The aforementioned invoices paid by the Chappellears were invoices from Premier's subcontractors that continued to work for Premier and the contracts were between Premier and the subcontractors. These were debts that Premier was responsible for. Despite having knowledge and notice that Action Concrete had not been paid, the Chappellears paid Premier's subcontractors over Action Concrete's lien.

The Chappellears informed Premier they would resume payment directly to Premier once Premier was done paying Action Concrete. (See Elvira Chappellear Dep. pg. 123, line 1-25 and page 124 line 1-25). For the next 220 days Premier continued to supervise the Project and coordinate the activities of the subcontractors. (See Exhibit E Termination Letter attached to Plaintiffs Memorandum in Support of Summary Judgment). Additionally, the Chappellears acknowledged the debt and requested that Action concrete remove its lien.

The following is taken from the deposition of Elvira Chappellear:

Q. All right. And then from that point -- well, and then from that point -- let's see. From that point on payments were made directly to the subcontractors?

A. Yes.

Q. And what was the reason for that?

A. Because once I got served with the lien, I explained to him [Premier] that I will not pay him another dime until that bill is settled with Action Concrete. Therefore, none of the management costs he would have been charging as part of the construction will be given to him unless that is satisfied and taken care of.

So I told him that I would pay directly to the vendor. And when he caught up on the bill with Action Concrete, we would settle up if there's any balance percentage-wise that still would be owed to him as his construction service. Because he didn't give me a specific percentage that he was charging. His construction, overseeing and building costs as a builder was part of the price of the house.

(See Elvira Chappellear Dep. pg. 112 ,lines 4-25; pg. 113 lines 1-2)

I asked him [Action Concrete] not to - - to not put the lien, but asked him if they would consider removing the lien. And that's the conversation he remembers. I said, "If it's at all possible, I have spoke with Henry [Premier]. You realize and you probably could tell yesterday that I had no knowledge of this not even being -- first of all, I didn't know all of this was not paid to start with prior to lien being served. But even up to yesterday I didn't even know that all of it was not paid. I thought half of it was at least paid and we were only talking about a \$30,000 something balance. You served -- you served the lien and you recorded the lien right now."

And I said, "**Is there anything -- could you please remove the lien from the property because if construction draws stop, we've got a problem. I cannot continue the construction. My house will sit. I've got a construction loan.**" (*emphasis added*).

And at this point Henry [Premier] already talked to me. I sat with him after our meeting with Dustin [Action Concrete] personally face to face and pretty much laid it all out and said, "What are we doing here?" Because he's been lying to me about the foundation. His explanation was, "I was not lying, Ayla. It was a miscommunication. I thought it was. When I looked at the records, I got --because my wife pays the bills," he indicated. "When I looked at the record, she wrote the check but it was never sent," or something along those lines. "So I didn't lie. I actually just got confused because when we realized that if she pays portion of it, there was an issue.

She wrote the check, but then she realized that I told her there was a issue with the wall pricing. So it was not correct. So she held it off until all of it was resolved." And since Dustin [Action Concrete] was working on the price --" I [Elvira Chappelear] said, "Well, Dustin [Action Concrete] is not working on the price at this point. He's telling me this is the correct price." **"Don't worry I [Premier] will pay all of it. You don't have to worry about it."** (*emphasis added*)

And he referenced to me exactly what I told Dustin [Action Concrete] in the past, "You know how in the past when somebody would put a lien on me [Premier], I never had a problem paying it off. It's just a matter of timing. Sometimes, Ayla [Elvira Chappelear], you know, it's -- there's money comes in one account, and once it comes out, sometimes it takes a while to get the draws from different jobs into one account. So as soon as I get enough money in that account, that will be paid. There's not a problem with that."

So that is why I called Dustin [Action Concrete] the next day and I said, "I have talked to Henry [Premier]. Would you please consider removing the lien? He's [Premier] saying he will pay the -- the price. I will be glad to sign something that says I acknowledge that there's a lien on the property. And I didn't know if legally that would be possible or not. My whole thing was I did not mind acknowledging that they are owed money by Henry [Premier] with Action Concrete. I did not want a lien physically on the property because I was afraid that that would stop construction draws from Wells Fargo. And that was the conversation.

(See Elvira Chappelear Dep. pg. 115, lines 3-25; pg. 116, lines 1-25; pg. 117, lines 1-14)

On **May 2, 2008**, 220 days after receiving the notice of Action Concrete's lien, the Owners sent a termination letter to Premier. (See Exhibit E Termination Letter attached to Plaintiffs Memorandum in Support of Summary Judgment). However, after receipt of Action Concrete's lien on September 25, 2007 and prior to the May 2nd, 2008 Termination, the Chappelears paid subcontractors of Premier at least \$118,931.83 as agreed to by Elvira

Chappelear in her deposition.¹

Q. That is correct. Okay. All right. Let's see. What I'd like to do now, since you've got the calculator there, is from 10/26 on -- I'm trying to determine taking all of these to be correct, because we have the backup for each one of those, and even taking the ones that we don't have the backup for in the L.R. Jacobs, could you run me a total -- and we're looking at Exhibit Number 5. Could you run me a total from 10/26, which would have been the date after you received the lien, for these amounts that were paid out to subcontractors from funds due to Mr. Beal [Premier]?

A. I'd be glad to.

Q. Thank you.

MR. MCCABE: Objection to form.

WITNESS CONTINUES:

A. \$118,931.83 without double checking it.

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. And assuming your math is correct, those are amounts that were paid to you -- paid by you directly to subcontractors from Mr. Beal's [Premier's] subcontract with them for improvements or construction done on your home?

A. Yes.

Q. And those funds were -- and those -- that amount was paid from funds that were due to Mr. Beal [Premier] under his lump sum contract with you?

A. That is correct.

Q. And at this point even down to the last one with Solid Rock, Mr. Beal was still actively working on your home, correct?

A. For most of that part. I remember we had fired him somewhere around that spring. So I'm not positive on the last payment, the 4/10/08. You should have a letter when we fired him. So if you look at the date, I can tell you if all of them have been or not.

Q. And this is -- I have several versions of this letter, so I'm just going to give them to you. And I'm not sure what -- what this is. Maybe -- let's take a look at them.

(PLAINTIFF'S EXHIBIT NUMBER 33 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. This is going to be Plaintiff's Exhibit Number 33. I have a letter from Mr. McCabe to Kyle Dillard on May 2nd, 2008 terminating --

A. Okay. **Then, yes, all of those were while Mr. Beal was still representing me as a contractor.** (*emphasis added*)

Q. Okay. So he was still the contractor representing you as a contractor on the job. He was not terminated until May 2nd, 2008. And that was after you had made the payments that we have previously discussed, that total 118 some thousand dollars?

A. That is correct.

¹ Appellants acknowledge in their brief the actual amount paid by the Chappelears to Premier's subcontractors during this time period was \$139,873.69.

(See Elvira Chappelear Dep. pg. 162, lines 15-25; pg. 163, lines 1-25; pg. 164, lines 1-17)

Premier's other subcontractors who were paid by Owners did not have valid liens on the Property. (See Elvira Chappelear Dep. pg. 167; lines 5-7) Since the Project was for a lump sum, Owners used the continued payments to Premier's subcontractors as a way to reduce the amount they owed Premier. After receipt of Action Concrete's lien, the Chappelears paid Premier's subcontractors at least \$118,931.83 thereby reducing the debt Premier owed to its subcontractors in preference to paying Action Concrete.

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), SCRCP; 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, SCRCP. 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. Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC, 397 S.C. 379, 383-84, 725 S.E.2d 495, 497-98 (Ct. App. 2012), reh'g denied (May 2, 2012).

ARGUMENT

I. THE CHAPPELEAR'S CANNOT USE PAYMENTS DIRECTLY TO PREMIER'S SUBCONTRACTORS ON BEHALF OF PREMIER AS A WAY TO AVOID THE REQUIREMENTS OF S.C. CODE ANN. §29-5-50. FURTHERMORE, S.C. CODE ANN. §29-5-40 DOES NOT PROVIDE A PAYMENT DEFENSE TO OWNERS WHEN THEY HAD NOTICE OF ACTION CONCRETE'S MECHANICS LIEN PRIOR TO PAYING THE DEBTS OF PREMIER.

In the matter at hand, the Chappelears are not entitled to a payment defense under S.C. Code Ann. §29-5-40. This case is not "simply about an owner's right to protect him or herself from a subcontractor's mechanic's lien through the statutory payment defense" as stated in Appellant's brief. (*See* Appellant's Brief pg 7.) This case is about the Chappelears using payments directly to Premier's subcontractors on behalf of Premier as a way to try and avoid the requirements of S.C. Code Ann. §29-5-50. While it is undisputed that the Chappelear's paid Premier's subcontractors directly, it is also undisputed that Premier remained on the Project and continued to coordinate and supervise their subcontractors for 220 days after Action Concrete notified the Chappelears they had not been paid. (*See* Exhibit E Termination Letter attached to Plaintiffs Memorandum in Support of Summary Judgment). Premier and the Chappelears continued to operate under the contract and Premier was paid in preference to Action Concrete in the amount of at least \$118,931.83. (*See* Elvira Chappelear Dep. pg. 163; line 5).

As cited in the deposition testimony of Elvira Chappelear, the Owners actually intended to pay Premier at the project completion if he paid off Action Concrete's lien and considered payments to Premier's subcontractors to be payments to Premier under the contract.

So I told him that I would pay directly to the vendor. And when he caught up on the bill with Action Concrete, we would settle up if there's any balance percentage-wise that still would be owed to him as his construction service. Because he didn't give me a specific percentage that he was charging. His construction, overseeing and building costs as a builder was part of the price of the house.

(See Elvira Chappelear Dep. 112 ,lines 19-25; pg 113 lines 1-2)

At the December 1st Motion Summary Judgment hearing where Judge Macaulay granted Summary Judgment to Action Concrete, part of the discussion was as follows:

[APPELLANT'S COUNSEL]: My Client, when they got the Notice, actually told Premier, the G.C., that they wouldn't pay him any more until Action Concrete got paid. They said you can work for free if you want, which is basically what he did to get back current. And what he was trying to do was put aside money so he could pay off this lien. My Client's only real hope of getting this house finished was for the G.C. to try and get back current. So they didn't pay him another penny. And what they did was they went to the subs, and the subs were working with.

THE COURT: Let me ask you, was the Notice of Mechanic's Lien filed before all of that?

[APPELLANT'S COUNSEL]: What she paid for, or the Chappelears paid for was work to finish the house.

THE COURT: No, that's not what I asked. I said was the Notice of Mechanic's Lien filed before, served and filed before the agreement of Premier and the other subs? Before any payments were made.

[APPELLANT'S COUNSEL]: Before they started paying the subs directly?

THE COURT: Uh-huh.

[APPELLANT'S COUNSEL]: Yes sir, the Mechanic's Lien had already been filed, and then—

THE COURT: I see. What's the purpose of the Notice of the Mechanic's Lien?

[APPELLANT'S COUNSEL]: Well, I believe to—they had a notice that they were due money. But again, the purpose is so that you don't pay the G.C. over the contractor. So then you don't pay other contractors for their past work over that particular contractor.

(See December 1st Hearing Transcript, pg. 12 lines. 19-25 – pg.13, lines 1-23).

In this case, the legal question that actually divides the two parties involves the

interpretation of S.C. Code Ann. §29-5-40 and §29-5-50. Section 29-5-40 and §29-5-50 apply where a subcontractor is involved. The two sections have been held to have the purposes of (1) protecting a party who provides labor or materials in the improvement of the owner's property but does not have a contract with the owner; and (2) protecting 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 Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (S.C. Ct. App. 1992); *See also* Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956).

S.C. Code Ann. § 29-5-50 states:

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.*** (*emphasis added*)

Section 29-5-50 was created as a method to protect subcontractors who do not have a contractual relationship with an owner. *See* Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956). It grants a subcontractor who has properly followed the mechanics lien statute priority over the prime contractor to any future payments. It provides that any payments made after notice of the lien by the owner to the prime contractor will not lessen the amount owed to the subcontractor giving notice. Once a property owner receives notice from a subcontractor of its right to obtain a lien against the owner's property, the subcontractor is entitled to be paid in preference to the contractor. *See* Maddux Supply Co v. Safhi, Inc., 40 S.E.2d 101, 105 (S.C. Ct. App. 1994) (“A payment by the owner to the general contractor after the owner has received notice of the lien is made at the owner's peril, it will not effect the amount recoverable by the party with the mechanic's lien.”)

S.C. Code Ann. §29-5-40 is known as the payment defense or the paid in full defense.

Section 29-5-40 states:

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)***

Section 29-5-40 provides, in pertinent part, that a mechanic's lien will not attach to the owner's property unless the owner is given notice of the claim of a materialman who contracted with a person other than the owner prior to the payment in full of the amount owed the contractor. In addition, the materialman's lien is limited to the amount the owner owes the contractor ***at the time the materialman gives notice.*** See Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (S.C. Ct. App. 1990). The following is taken from the Stovall Bldg. case;

We reverse because [the Subcontractor] did not notify the [Owners] of its mechanic's lien claim before they paid [the General Contractor] in full. S.C. Code Ann. § 29-5-40 (1976) provides, in pertinent part, that a mechanic's lien will not attach to the owner's property unless the owner is given notice of the claim of a materialman who contracted with a person other than the owner prior to the payment in full of the amount owed the contractor. In addition, the materialman's lien is limited to the amount the owner owes the contractor at the time the materialman gives notice. See *Wood v. Hardy*, 235 S.C. 131, 110 S.E.2d 157 (1959); *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956).

[The Subcontractor] last supplied materials on the [Owners] job on December 4, 1987. The [Owners] paid [the General Contractor] in full on December 31, 1987. [The Subcontractor] did not notify the [Owners] of its mechanic's lien claim until early in 1988; § 29-5-40, therefore, negates [the Subcontractors] claim of a mechanic's lien against the [Owners].

Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990)

The South Carolina Supreme Court further explained the purpose of §29-5-40 in the Sloan Const. Co. v. Southco Grassing, Inc. case. The court stated, “[t]he mechanic’s lien statute provides that when a subcontractor seeks to enforce a mechanics’ lien against the owner of the improved property due to the general contractor’s nonpayment, *the owner’s liability is limited to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice* from the subcontractor of the general contractor’s nonpayment.” *(emphasis added)* See Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008).

The statute is designed to give an owner the protection of not being subject to double payment if the owner has paid the general contractor the entire contract balance. Therefore in a situation where an owner has paid the contractor in full prior to the attachment and perfection of any lien, the owner has an absolute payment defense pursuant to §29-5-40. See 22 S.C. Jur. Mechanics’ Liens § 11.

A. The Owners Payments Directly To The Subcontractors Of Premier Clearly Violated §29-5-50 And Therefore The Lower Court’s Ruling Was Not An Error Of Law.

Under §29-5-50 any payments from the Chappelears to Premier after the Chappelears received notice of the lien were made at the owner’s peril as those payments will not effect the amount recoverable by Action Concrete. The record establishes that the contract price between Premier and the Chappelears was \$300,000.00. As of September 25, 2007 when the Chappelears were served with notice of Action Concrete’s mechanics lien, the Chappelears had paid \$135,740.00 to Premier. The total balance due to Premier from the Chappelears was \$164,260.00. (See December 20, 2011 Order pg. 2)

The record has also shown that Premier did not abandon the project and was not fired until May 2, 2008. It is undisputed that instead of terminating Premier the Chappelears moved

forward with the Project, paid Premier's invoices for them and continued to use Premier's supervision and coordination services. It was further uncontested that the Chappellears paid at least \$118,931.83 directly to subcontractors hired by Premier after receiving notice of Action Concrete's lien and prior to terminating Premier in direct violation of S.C. Code Ann. §29-5-50. (See Elvira Chappellear Dep. pg. 162, lines 15-25; pg. 163, lines 1-25; pg. 164, lines 1-17) The Chappellears' payment of Premier's debts is no different than payment directly to Premier.

B. The Chappellear's argument that the Lower Court Committed An Error of Law In Regards To The Payment defense lacks supporting authority. Under S.C. Code Ann. §29-5-40 The Chappellear's Liability Was Limited To The Remaining Unpaid Balance On The Contract With Premier At The Time The Chappellears Received Notice Of Action Concrete's Lien And All Payments Made On Behalf Of Premier After Notice Of The Lien Were Made At The Owner's Peril pursuant to S.C. Code Ann. §29-5-50.

The Chappellears relied on the Stoudenmire Heating and the Wood v. Hardy cases to support their contention that they have an absolute payment defense. Stoudenmire Heating and Air, 308 S.C. 298, 302-03, 417 S.E.2d 634, 637-38 (S.C. Ct. App. 1992); Wood v. Hardy, 235 S.C. 131, 110 S.E. 2d. 157 (1959),

In Studemire, the general contractor began experiencing financial difficulties and the owner ceased paying the general contractor and began paying the projects bills directly on March 16, 1988. The Court determined the owners liability to the subcontractor was limited to the balance due by the owner to general contractor on the contract price at the time the owner received notice from the subcontractor which the Court determined occurred when the subcontractor wrote its demand letter on April 22, 1988. Since this was a case where the general contractor abandoned the project prior to the owner receiving notice of the lien, the Court remanded the case to determine the amount the owner owed the general contractor on the date of notice, April 22, 1988.

The court stated,

Therefore, we remand this matter to master for a determination of how much if anything, [the owner] owed [the general contractor] on April 22, 1988. This amount should be determined by the receipt of evidence of the value of the labor and materials furnished by [the general contractor] to [the owner] on or before March 16, 1988. If the value of the labor and materials furnished by [general contractor] exceeds the sum paid by [the owner] to [the general contractor], then [the subcontractor] is potentially entitled to a lien up to the amount of the excess. However, the court should also consider the amount of damages, if any, [the owner] suffered as a result of the failure of [the general contractor] to complete the contract. See Wood v. Hardy, 235 S.C. at 147, 110 S.E.2d at 164. 638-639; Stoudenmire Heating and Air, 308 S.C. 298 at 303, 417 S.E.2d 634 at 637-38.

A key footnote is included in the Stoudenmire case at this point. The Court stated in Footnote 4, "**[b]ecause no work was done by [the general contractor] and no payments were made by [the owner] to [the general contractor]** after March 16, 1988, the sum owed on April 22, 1988, necessarily must be the same as the sum owed on March 16, 1988." (*emphasis added*). Based on this reasoning the Court made reference to the March 16, 1988 date since that was the date the general contractor abandoned the Project.

Based on the above cases, the Chappellears stated the following formula should be used to determine the amount owed by the Chappellears to Premier at the time of the Action Concrete's notice.

This amount should be determined by the receipt of evidence of the value of the labor and materials by [the general contractor] to [the owner] on or before [the day that the owner stopped paying the general contractor and started paying the project's bills directly]. The court should then determine the amount paid to [general contractor] by [the owner] on or before [the day the owner stopped paying the general contractor and started paying the project's bills directly]. If the value of the labor and materials furnished by the [general contractor] exceeds the sum paid by [the owner] to [general contractor], then [the subcontractor] is potentially entitled to a lien up to the amount of the excess.
(See Appellant's Brief pg. 11)

The Chappellears' position is essentially that after keeping Premier on the Project for an additional 220 days after attachment of Action Concrete's lien and paying \$118,931.83 to

Premier's subcontractors therefore paying the debts of Premier in violation of §29-5-50, they should only be responsible for the debt owed to Action Concrete if the amount paid to Premier at the time of notice was less than the value of the work. Accordingly, if it is obligated to pay Action Concrete \$66,862.63, the Owners will pay in excess of the contract price. According to the Owners position this would violate the last part of §29-5-40 which courts have read to limit the owner's liability to the contract price.

As Judge MacCauley stated,

The Chappellears reliance on these cases is misplaced. In both *Wood* and Stoudenmire, the breach by the general contractors occurred prior to the notice by the subcontractor. Stoudenmire, 308 S.C. at 303, 417 S.E. 2d at 637; *Wood*, 235 S.C. at 147, 110 S.E.2d. at 164. In the present case the Chappellears received notice of Action Concrete's lien prior to Premier's breach and ultimate discharge.

The Chappellears position would be correct if the Chappellears had fired Premier on the day they received notice from Action or Premier had abandoned the Project. Instead the two parties continued the contract and continued to derive its benefits making the undisputed facts before the Court vastly different from that of Stoudenmire and Wood.²

The Stoudenmire case is clearly not as similar to the present case as the Chappellears contend. The day that the owner stopped paying the general contractor and started paying the project's bills directly and the day notice was received were interchangeable in the Stoudenmire case because no further work was done by the general contractor and no further payments were made on the general contractor's behalf but that is certainly not a rule applicable to all cases especially when the general contractor continued to work under the Contract. The Stoudenmire Court explained this in Footnote 4 cited above.

² Not only did the Chappellears consider the payments to Premier's subcontractors to be the same as payments to Premier, additional consideration for the use of the home as a model was being paid to Premier. (See December 20, 2011 Order pgs. 7-8)

The Stoudenmire case does allow an owner to offset the damages caused by the general contractor from amounts owed under the remaining contract amount. See Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (S.C. Ct. App. 1992). However you must also consider the effect of S.C. Code Ann. §29-5-50, in which any payment made by the owner to the general contractor after receipt of the mechanic's lien notice **will not reduce or otherwise affect the amount recoverable pursuant to the lien** (*emphasis added*). S.C. Code Ann. §29-5-50, Maddux Supply Co. 450 S.E.2d at 105.

The timing of when Premier was fired is the key question in determining the effect of §29-5-40 and §29-5-50 and whether the Chappellears have the right to assert a payment defense. In Stoudenmire, the contractor abandoned the project and the owner took over work on March 16, 1988 before the subcontractor provided its notice of non-payment to the Owner on April 22, 1988. In the present case, **Action Concrete provided its notice to the Owner 220 days prior to the General Contractor being fired. The Chappellears continued to pay the debts of Premier in preference to Action Concrete in clear violation of S.C. Code Ann. §29-5-50** (*emphasis added*). Premier continued working under the contract and was still going to receive the additional consideration of using the home as a model. (*See* December 20, 2011 Order pgs. 7-8). As the Lower Court stated,

“[t]he timing of the breach is important because the determinative date for how much Action Concrete can recover is the date the Chappellears received notice. It is undisputed that the Chappellears received notice on September 25, 2007. The parties agree that the payments made by the Chappellears to the other subcontractors after Action Concrete's lien was noticed reduced the amount owed to Premier under the Contract. Thus the Chappellears' payments to the other subcontractors on Premier's behalf were no different than payments directly to Premier. This is evidence that the parties were still operating under the Contract and that they intended to continue doing so. Furthermore, it was not until May 2, 2008 that the Chappellears fired Premier.

Because the breach by Premier occurred well after Action

Concrete's lien was noticed, the fact that the home was going to cost more to construct than the amount covered under the Contract is immaterial. Premier expected value from being able to use the house as a showcase for its work. Money was only part of the consideration given to Premier by the Chappellears. (See December 20, 2011 Order pg. 7)

Clearly the key difference in the cases cited by the Owners and the reason for the way the Stoudenmire Court's ruling is stated is the fact that in the Stoudenmire case the general contractor did not continue to work on the project after notice of the lien and the owner did not continue to derive a benefit from the general contractor's presence. Based on those facts the Court in Stoudenmire properly considered the amount owed to the general contractor at the date of Notice to be the amount possibly recoverable under the lien. The exact opposite is true in the case before the Court. The Chappellears and Premier continued to operate under the Contract.

The undisputed fact that the Appellant paid \$118,931.83 as agreed to by Elvira Chappellear in her deposition, on Premier's behalf, after the lien was filed, is clear proof there was money owed to Premier.³ As such, the calculation that Appellant is seeking to have the Court require is rendered unnecessary as the amount owed to Premier clearly exceeded Action Concrete's lien amount.

The cases cited by the Chappellears would have substantially different reasoning if the general contractor had continued working on the project as are the facts presently before the Court, therefore an application of the exact calculation method stated in Stoudenmire is not applicable. If you consider the Chappellears position, a subcontractor would never get paid as long as the owner paid the current pay application. Such a position would allow a contractor to continue on the project and receive its full compensation, while also allowing the owner to have a lien free completed project. This would leave a subcontractor or supplier who properly

³ Appellants acknowledge in their brief the actual amount paid by the Chappellears to Premier's subcontractors during this time period was \$139,873.69.

followed the statutory guidelines with no protection whatsoever meanwhile unperfected potential lien claimants would be paid.

C. S.C. Code Ann. §§29-5-40 and §29-5-50 Must Be Read Together So As To Give Effect To The Overall Policy Of The Mechanics Lien Statute.

Pursuant to laws of statutory construction Section §29-5-40 and §29-5-50 must be read together. As the lower court stated in its Order,

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct.App.2005). "The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utils., Inc., 362 S.C. 403,406,608 S.E.2d 425, 427 (2005). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102,606 S.E.2d 503, 505 (Ct.App.2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S. C. v. AT & T Comm'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004);

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and the Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122,542 S.E.2d 736, 740 (Ct.App.2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604,503 S.E.2d 465, 468 (1998). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85,533 S.E.2d 578, 581 (2000).

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct.App.2008).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. N. Y Times Co. v. Spartanburg County Sch. Dist. No.7, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007); Kiriakides v. United Artists Commc'ns, Inc., 312S.c. 271, 275, 440 S.E.2d 364, 366 (1994). A Court should not consider a particular clause of the whole statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. Houston v. Deloach & Deloach, 378 S.C. 543,551,663 S.E. 2d 85, 89 (Ct. App. 2008).

(See December 20, 2011 Order pg. 4-5)

The Chappelears' decision to make payments directly to subcontractors and at the same time retain Premier allowed the work to continue and eventually the Chappelears allegedly spent more money than the contract balance. However, this fact does not allow the Chappelears to assert the payment defense under §29-5-40 because the Chappelears had knowledge that Action Concrete had not been paid prior to paying the entire contract balance. Under §29-5-40, the Chappelears liability to Action Concrete was limited to the balance due by the Chappelears to Premier on the contract price *at the time the Chappelears received notice* that Action Concrete had not been paid which was at least \$135,740.00. This was clearly more than enough to pay the debt owed to Action Concrete. The Chappelears cannot use the payment defense under §29-5-40 in such a manner without completely undermining the purpose of and legislative intent behind §29-5-50.

The purpose of the Notice is to give an owner an opportunity to make sure the properly perfected subcontractor is paid out of the remaining construction funds and the key question in a

mechanics lien case is whether there is money remaining to be paid under the contract at the time of notice and in the present case there clearly were funds remaining.

Based on the undisputed facts before the lower court and the legislative intent of S.C. Code Ann. §29-5-40 and §29-5-50, the lower court correctly determined that the Owners attempt to pay Premier's subcontractors directly and still utilize the coordination and supervision efforts of Premier cannot be used as a way to avoid the requirements of S.C. Code Ann. § 29-5-50. As the Court stated in its Order,

[t]he Chappellear's argument and course of action would vitiate this section (§29-5-50) entirely. Because this argument would lead to such an absurd result, it cannot be upheld. It is well-established that: "[a] payment by the owner to the general contractor after the owner has received notice of the lien is made at the owner's peril, **as it will not affect the amount recoverable by the party with the mechanics' lien.** (emphasis added) S.C. Code Ann. § 29-5-50 (1991)." *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 412, 450 S.E.2d 101, 106 (Ct.App. 1994). The Chappellear's argument that the payments to the other subcontractors are not subject to this rule is not supported by a reasonable reading of the statute or by the facts of this case. **Ms. Chappellear made it clear that the payments to the subcontracts were in fact treated as payments to Premier.**" (emphasis added) (See December 20, 2011 Order pg. 8)

The Chappellear's were under no legal obligation to pay Premier's subcontractors. The subcontractors worked directly for Premier, the invoices were made out to Premier and payments by the Chappellears lessened the liability of Premier to those subcontractors. This is clearly a benefit that was derived by Premier and cuts against Chappellears argument that Premier only remained on the job voluntarily. Therefore there is no dispute that payments made to Premier's subcontractors were payments made in preference to Premier in violation of §29-5-50.

D. The Chappellear's Interpretation Of The Mechanics Lien Laws Would Also Undermine §29-5-60 Of The Mechanic's Lien Statute.

Importantly, in the Stoudenmire case no preference payments were made to unperfected claimants or to the general contractor after the owner had notice of the lien. However, in the case

before the Court, the Chappellears continued to pay Premier's subcontractors who were non-perfected lien holders in preference to Action Concrete.

S.C. Code Ann. §29-5-50 clearly grants preferential payment to a party claiming a lien over the contractor if that party has given the proper notices. Additionally, the South Carolina Supreme Court has also determined that subcontractors or suppliers giving the required notice are entitled to preferential payment over non-lien creditors. All the Chappellears did by writing checks directly to subcontractors was prevent the likelihood of future liens on the property, but any payments to potential lien holders does not reduce the amount owed to Action Concrete. The Court has already addressed a similar situation in which they determined that the Mechanic's Lien statute does not credit owners who settle claims of non-perfected lien holders. Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 96-97, 641 S.E.2d 459, 463 (S.C. Ct. App. 2007).

If the amount due to Premier was insufficient to pay all lienors, the owner must "prorate among all just claims the amount due the contractor. S.C. Code Ann. §29-5-60(A). The statute requires pro rata distribution only among lien holders who have perfected their liens as set forth in the statute. An owner is not given credit for voluntarily settling the claims of contractors who have not perfected their mechanics liens.

For example in Charleston Lumber Co. v. GPT, 303 S.C. 350, 400 S.E. 2d 508 (Ct. App. 1991), the plaintiff, a subcontractor was the only contractor to perfect its lien. Before the end of the filing period for mechanics liens on the Project, the owner settled many claims with other subcontractors and suppliers who had not perfected their lien. The Court of Appeals refused to give the owner "credit" for voluntarily settling with the non-perfected lien holders. The court held that since the plaintiff was the only perfected lien holder, he was entitled to 100 percent of

his claim. The position of the Chappellears would completely undermine this provision because the Chappellears clearly made payments to unperfected lien holders over Action Concrete. If the Chappellears reasoning is accepted, Action Concrete, the one subcontractor that properly perfected its lien and followed the statutory guidelines will be the one subcontractor who was not paid on the Project. Such a result could not have been the intent of the legislature.

II. NO ISSUES OF MATERIAL FACT EXIST AND THEREFORE THE LOWER COURT'S GRANTING OF SUMMARY JUDGEMENT WAS NOT IMPROPER.

A. The Amount Owed By The General Contractor To The General Contractor At The Time Of Notice Of A Subcontractor's Mechanic's Lien Is Not A Question of Material Fact When It is Undisputed Payments Were Made In Excess Of The Lien Amount In Violation Of S.C. Code Ann. §29-5-50.

Appellants once again rely on the Wood v. Hardy and Stoudenmire cases to support their position that the court failed to make certain required factual determinations. Much of this issue has been addressed above in the analysis of the Wood and Stoudenmire cases.

As has already been discussed and as stated in Appellants brief, in Wood v. Hardy, the South Carolina Supreme Court attempted to determine whether the owner had a payment defense against the holder of a mechanic's lien. In making that determination, the court stated the following:

We likewise think that the case should be reversed and *remanded for the trial of the issue of how much, if anything, the [owner] owed [the general contractor] at the time when the [subcontractor] gave him notice of the lien*. This can be determined by the taking of testimony as to the amount of damages sustained by [the owner] due to the breach of the construction contract by [the general contractor] so as to determine what amount, if any, is due to [the general contractor] for work done and materials furnished prior to the abandonment of the contract. Whatever amount the lower Court finds to be due by the [owner] to [the general contractor] at the time he abandoned the contract, the [subcontractor] would be entitled to a mechanic's lien for such amount.
Woody, Hardy, 235 S.C. 131,147,110 S.E.2d 157,164 (1959) (emphases added).

Similarly in the Stoudenmire case, the court stated,

Therefore, we remand this matter to master for a determination of how much if anything, [the owner] owed [the general contractor] on April 22, 1988. This amount should be determined by the receipt of evidence of the value of the labor and materials furnished by [the general contractor] to [the owner] on or before March 16, 1988. If the value of the labor and materials furnished by [general contractor] exceeds the sum paid by [the owner] to [the general contractor], then [the subcontractor] is potentially entitled to a lien up to the amount of the excess. However, the court should also consider the amount of damages, if any, [the owner] suffered as a result of the failure of [the general contractor] to complete the contract. *See Wood v. Hardy*, 235 S.C. at 147, 110 S.E.2d at 164. 638-639

However, as previously noted the key distinction between the present scenario and the cited cases is Premier was not fired until, 220 days after receiving the notice of Action Concrete's lien when the Owners sent a termination letter to Premier. (*See Exhibit E Termination Letter attached to Plaintiffs Memorandum in Support of Summary Judgment*). After receipt of Action Concrete's lien and prior to the May 2nd, 2008 Termination, the Chappellears paid subcontractors of Premier at least \$118,931.83 as agreed to by Elvira Chappellear in her deposition. This fact is undisputed as stated below in Elvira Chappellear's deposition.

Q. That is correct. Okay. All right. Let's see. What I'd like to do now, since you've got the calculator there, is from 10/26 on -- I'm trying to determine taking all of these to be correct, because we have the backup for each one of those, and even taking the ones that we don't have the backup for in the L.R. Jacobs, could you run me a total -- and we're looking at Exhibit Number 5. Could you run me a total from 10/26, which would have been the date after you received the lien, for these amounts that were paid out to subcontractors from funds due to Mr. Beal [Premier]?

A. I'd be glad to.

Q. Thank you.

MR. MCCABE: Objection to form.

WITNESS CONTINUES:

A. \$118,931.83 without double checking it.

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. And assuming your math is correct, those are amounts that were paid to you -- paid by you directly to subcontractors from Mr. Beal's [Premier's] subcontract with them for improvements or construction done on your home?

A. Yes.

Q. And those funds were -- and those -- that amount was paid from funds

that were due to Mr. Beal [Premier] under his lump sum contract with you?

A. That is correct.

Q. And at this point even down to the last one with Solid Rock, Mr. Beal was still actively working on your home, correct?

A. For most of that part. I remember we had fired him somewhere around that spring. So I'm not positive on the last payment, the 4/10/08. You should have a letter when we fired him. So if you look at the date, I can tell you if all of them have been or not.

Q. And this is -- I have several versions of this letter, so I'm just going to give them to you. And I'm not sure what -- what this is. Maybe -- let's take a look at them.

(PLAINTIFF'S EXHIBIT NUMBER 33 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. This is going to be Plaintiff's Exhibit Number 33. I have a letter from Mr. McCabe to Kyle Dillard on May 2nd, 2008 terminating --

A. Okay. Then, yes, all of those were while Mr. Beal was still representing me as a contractor.

Q. Okay. So he was still the contractor representing you as a contractor on the job. He was not terminated until May 2nd, 2008. And that was after you had made the payments that we have previously discussed, that total 118 some thousand dollars?

A. That is correct.

B. No Other Issues Of Material Fact Exist And Therefore The Lower Courts Ruling Should Not Be Reversed.

Additionally, the Appellant incorrectly states other material issues of fact exist. As stated in Appellant's brief;

[t]he lower court incorrectly considered and relied upon the following disputed facts in its decision:

- The Chappellears stopped paying Premier directly but began making payments on behalf of Premier directly to Premier's subcontractors. (Order p. 7.)
- The Chappellear's payments directly to the subcontractors reduced the amount owed to Premier. (Order p. 7.)
- The Chappellears and Premier were still operating under the contract. (Order p. 7.)

See Appellant's Brief pg. 18.

None of the above cited issues are in dispute based on the clear testimony of Elvira

Chappelear in her deposition discussed above. As for the first alleged disputed issue of material of fact that the Chappelears stopped paying Premier directly but began making payments on behalf of Premier directly to Premier's subcontractors, first Elvira Chappelear makes it clear that they began making payments on behalf of Premier to Premier subcontractors. (See Elvira Chappelear Dep. pg. 122, lines 18-25; pg.123, ln.1-25; pg.124, ln.1-9).

Secondly, Elvira Chappelear repeatedly acknowledged in her deposition that the payments directly to subcontractors reduced the balance owed to Premier. For an example of this please refer to Elvira Chappelear Dep. pg.125; lines 5-12 and the deposition testimony cited in The Statement of Fact above. (See Elvira Chappelear Dep. pg. 132; line 4 – pg. 139, line 17).

Finally, Elvira Chappelear clearly states throughout the deposition that the Chappelears and Premier were still operating under the Contract. (See Statements of Fact; *see also* Elvira Chappelear Dep. pg. 132; line 4 – pg. 139, line 17); (*See also* Elvira Chappelear Dep. pg. 122, lines 18-25; pg.123,ln.1-25; pg.124, ln.1-9)

CONCLUSION

The purpose of the Notice of Mechanics Lien is to give the owner an opportunity to make sure the properly perfected subcontractor is paid out of the remaining construction funds and the key question in a mechanics lien case is whether there is money remaining to be paid under the contract at the time of notice. If the Chappelears would have fired Premier at the time of Action Concrete's Notice and hired the subcontractors directly then arguably the cases cited by the Chappelears would be applicable however the Chappelears made the decision to keep Premier on the Project and derive the benefit of using Premier to manage the project and its subcontractors to compete work on the Project.

If the Chappelear's position is accepted the protection given to subcontractors and suppliers would be completely undermined and many of the provisions of the Mechanics' Lien laws would have no use. Action Concrete followed the statutory guidelines and provided Notice to the Chappelears. Despite said Notice, the Chappelears continued to make payments under the Contract with Premier. The Chappelears did not contract directly with the subcontractors they merely paid Premier's obligations. The Chappelears were given the opportunity to protect themselves and cannot now shift their failure to do so onto a subcontractor that followed all of the statutory requirements of the lien laws.

The Chappelears still had an obligation to use the remaining construction funds to make sure Action Concrete was paid if they intended to keep Premier on the Project. The Chappelears cannot now claim that since it has paid the entire contract balance in full pursuant to the terms of the Contract, it has no responsibility to Action Concrete. The ramifications of the use of the payment defense in a case such as this would allow an owner to completely prevent the

protection provided in the mechanic's lien statute for subcontractors and suppliers. Upon receipt of a claim by a subcontractor an owner could simply begin paying its general contractor's subcontractors directly and reduce the balance owed to the general contractor. Eventually the owner will pay the entire contract price and assert a payment defense. It is clear based on the case law and a logical interpretation of the statute such a practice cannot be allowed.

The Chappellears lost their right to a payment defense because they paid Premier at least \$118,931.83 after receipt of the notice of lien in clear violation of §29-5-50. It is clear from the testimony that funds were due to Premier at the time Action Concrete's lien attached to the Property and it is clear that Chappellears made payments on behalf of Premier after attachment of Action Concrete's lien.

Viewing the evidence and all inferences there from in the light most favorable to the ruling, the findings of fact regarding the above defined issues are reasonably supported by the evidence. Moreover, the findings of law were not clearly influenced or controlled by an error of law. Therefore, the Lower Court's Ruling should not be disturbed on this appeal.

Respectfully submitted,



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