

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

RECEIVED

OCT 24 2016

SC Court of Appeals

Opinion No. 5444

Appellate Case No. 2014-001633

Civil Action No. 2011-CP-32-1929

Rose Electric, Inc.,

Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services,

Defendants

Of Whom

Southern Produce, Inc. and S2P, LLC are

Respondents

RESPONDENT SOUTHERN PRODUCE, INC.'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondent Southern Produce, Inc. (hereafter "Southern Produce") respectfully files this Petition for Rehearing of the Court's Order filed on September 28, 2016. Respondent Southern Produce requests that the Court reconsider the following points that may have been overlooked or misapprehended. Respondent ask the Court, after considering these points below, to affirm the trial court's order.

1. The Court of Appeals was mistaken in applying the standard of review for an equitable case, when this case was an action at law limiting the appellate review to a determination of whether there was any evidence supporting the trial judge's factual findings and corrections of errors of law.

An action to foreclose on a filed mechanic's lien and breach of contract claims are actions at law. Where a plaintiff also pleads an alternative equitable claim, the court must look to the underlying basis of the claim to determine the correct standard of review from the appealed order. The underlying basis of the subcontractor Rose's case is to collect money owed to it under a construction contract with Cooler Erectors for electrical labor and materials provided on the Southern Produce processing facility and to collect money

due from Southern Produce for change order work. Rose filed its mechanics lien in Lexington County on March 3, 2011 alleging it had an agreement with Cooler Erectors for \$54,339.13 all of which was owed under the contract and an agreement with Southern Produce to pay for labor and materials for requested change orders in the amount of \$10,755.39. Attached to this lien was the Appellant's verified Statement of Account that was sworn to by Homer Rose and probated by Appellant's counsel, Richard Booth, alleging a total of \$65,094.52 being due under both contracts.

On May 20, 2011, Rose filed this case alleging claims for foreclosure of the mechanic's lien which is an action based on contract and a breach of contract claim seeking recovery of \$65,094.52, and an alternative cause of action for collection of the same amount based on quantum meruit. In the allegations of the complaint, Rose plead it had a contract with Cooler Erectors as of November 24, 2010 for the subcontract price and sought 65,094.52 under that contract. Please refer to paragraphs 10 – 12 and 18- 20 in Rose's Complaint at Pages 54-55 of the Record on Appeal and to the filed Mechanic's Lien at Pages 381 – 384 of the Record. Rose is bound by the allegations it pled in the mechanic's lien and complaint irrespective of not proceeding on the foreclosure of lien or breach of contract claims at trial on February 13, 2013. Respondents Southern Produced and S2P objected to the same at the start of the trial and defended the quantum meruit claims by introducing and proving the existence of the two express contracts as plead by Rose in its complaint. That is what the trial judge found from the substantial evidence at trial.

It is important for this Court to reconsider that Rose **did not dismiss** its mechanic's lien, its mechanic's lien foreclosure claim, or its contract claim at trial. It merely tried to disprove it had express agreements to try to recover the full \$65,094.52 from Southern Produce in equity rather than the contract recovery to which Rose was entitled from Southern Produce of \$ 17,703.63. Please note that on July 13, 2013, Southern Produce offered \$18,000.00 to Rose in a Rule 68 Offer of Judgment and pursuant to S.C. Code Ann. §§ 29-5-10 and 29-5-20 seven months before trial and as Judge Keesley found would be due if Rose had proceeded under its contracts claims per his appealed Order of January 30, 2014 and as this Court found due in its Order of September 28, 2016, which is 3 years and 2 months after Rose refused the \$18,000.00 payment from Southern Produce.

This case was an action a law as set forth above. Thus, the Court of Appeals is limited to applying the standard of review for legal cases, not equitable matters. Judge Keesley's findings of express contacts are supported by ample evidence and Rose's own admissions and pleadings. Respondent Southern Produce request that this Court reconsider the standard of review it applied and affirm the holding of the trial court in this case.

2. The Court of Appeals overlooked the substantial evidence proving Rose had an express contract with Cooler Erector's **including a price term** such that the contract defeats Rose's attempt to recover based on quantum meruit.

The undisputed evidence at trial showed that Cooler Erectors and Rose Electric established a course of conduct relating to Rose acting as the electrical subcontractor on construction contracts Cooler Erectors had at the new S.C. Farmers Market well before either company started the Southern Produce job. The admitted testimony of Homer Rose

showed that Rose did its subcontract work for Cooler without written contracts and based on the price for the jobs determined by the labor and material provided by Rose. The same conduct was used between these parties for the agreement on this job. The evidence showed that:

a. Homer Rose was given the October 5, 2010 plans and specifications for this job by Cooler prior to accepting the job;

b. that the building permit for the job was issued on November 2, 2010 (R.p. 379);

c. that Rose's scope of work took 5 weeks beginning November 4, 2010 and ending the end of the week of December 6, 2010 (R.p. 309);

d. that on November 24, 2010 **during the project**, Rose and Cooler agreed to the price for the job (R. p. 6, Complaint; R.p. 386, Proposal) and on the same day Rose faxed and delivered to Morris Teasley of Cooler Erectors the first invoice for the job with back up showing \$22,804.00 was due (R.p. 387);

e. that Rose continued to perform and Cooler accepted the labor and materials from Roses on the job after receipt of the November 24 proposal with the contract price until the completion of the scope of work even though Cooler did not sign the proposal;

f. that on December 9, 2010 after the work of Rose was complete, Rose sent Cooler the second and final invoice showing an additional \$41,598.72 was due on the Southern Produce job from Cooler Erectors (R.p. 388);

g. that the total of the November 24, 2010 Invoice and the December 9, 2010 to Cooler Erectors totaled \$64,402.72 which is \$691.80 less than Rose sought in its 3/3/2011 mechanic's lien and in its 5/20/2011 complaint; and

h. that the express contract between Cooler Erectors and Rose was confirmed by Homer Rose in his 2/16/2011 letter to Cooler Erectors and Southern Produce where in Rose states the "contract portion" of the job with Cooler Erector's and the "change order" job for Southern Produce (R. p. 291).

Given Cooler Erector's and Rose's course of conduct for electrical subcontractor work at the Farmers Market, that the plans and specs for the job were given to Rose in advance of it accepting and beginning work on the job, that Rose's scope of work lasted 5 weeks and the proposal with the price reflected of \$56,488.07 two and one-half weeks in to the project, which is the same date Rose pled in paragraph 10 of its Complaint that it entered into a contract with Cooler Erectors and the same day Rose delivered the first Invoice with back up to Cooler Erectors, that Cooler Erector's and Rose's agreement went forward until the conclusion of Rose's job is more than enough evidence to support the lower court's finding of an express contract between Cooler Erectors including **the price term** so as to preclude Rose from recovering on a quantum meruit theory for all or any portion of the contract amount owed to it by Cooler Erectors. Respondent Southern produce request that the Court of Appeals review the record as set out above and modify its Order to reflect that Rose is precluded from recovering under quantum meruit the \$6,948.24 from Southern Produce because of the existence of a contract and Rose's abandonment of that claim at trial.

3. The Court of Appeals overlooked that Rose's claim for \$10,755.39 from Southern Produce for the "change order work" was precluded where that was more than substantial evidence presented to the trial court supporting the existence of an express contract including a sufficient price term to preclude recovery based on quantum meruit.

The evidence includes, but is not limited to, the following:

a. Southern Produce agreed to pay for the additions and changes it requested on the job site from Rose Electric and Rose provided the labor and materials for the "change order" work charging for that work based on time and materials just as it did under the main contract with Cooler Erectors;

b. that even though a specific price was not agreed to in advance on each change order requested by Southern Produce and performed by Rose, there was a definite method for determining the price which was the cost of labor and materials;

c. that Rose and Southern Produce had already done business on this project on that basis as evidenced by Homer Rose's February 16, 2011 letter where he states Southern Produce has already paid Rose for its services in providing the facility with "Cooler Power" (R.p. 391, R.p. 401, R.p. 432);

d. that Rose Electric had maintained since its February 16, 2011 letter, followed by its March 3, 2011 filing of the mechanic's lien and verified Statement of Account and the May 20, 2011 allegations plead in its complaint that Rose had an oral agreement with Southern Produce entitling it to be paid \$10,755.39 for the change order work just as it had been paid for the cooler power work by Southern Produce on February 4, 2011;

e. that Rose maintained it had a contract with Southern Produce for 2 years during litigation until the morning of trial, February 13, 2013, when it sought to recover based solely on quantum meruit rather than the mechanic's lien and contract claims, but Rose **did not dismiss its foreclosure claim or contract claim and did not remove the mechanic's lien from the records of Lexington County** until after the June 11, 2014 Order of Judge Keesley on Rose's reconsideration motion;

f. that Respondents Southern Produce and S2P objected to Rose proceeding solely on the quantum meruit claim and defended against those claims by proving that Rose had an express contract with Cooler Erectors for the agreed upon price of \$56,488.07 of which it sought an award of \$54,319.13 and that Rose had an express contract with Southern Produce for the change order work to be paid according to labor and materials for which it sought recovery of \$10,755.39 for a total of \$65,094.52 thereby precluding an award based on quantum meruit.

As stated by the S.C. Supreme Court in *Swanson v. Stratos*, 350 S.C. at 122, 564 S.E.2d at 120 (2002), it is a defense to a claim based on quantum meruit that there is an express contract covering the issue of compensation for the services or materials furnished. Judge Keesley found and there is ample evidence in the record to sustain that even without a specific dollar amount being agreed to between Rose and Southern Produce, there was a definite method for determining the price based on labor and materials for the change order work. This constituted a sufficient price term for the trial courts finding of an express contract precluding recovery under quantum meruit. *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 331, 350 S.E. 2d 208,211(1986).

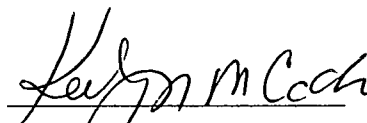
4. Last, the Court of Appeals misapprehended that Southern Produce had on three separate occasions before trial, between July 26, 2011 and July 13, 2012, made three formal offers of judgement pursuant to Rule 68, SCRPC and offers of settlement pursuant to S.C. Code Ann. §29-5-10 and §29-5-20 to Appellant Rose Electric. Copies of those Offers are attached as Exhibits A, B, and C to this motion. The last Offer of Judgment/Settlement, Exhibit C, was made on July 13, 2012 in the amount of \$18,000.00, more than was awarded by this Court on appeal. Rose rejected each of these offers countering per Rule 68 and the mechanic's lien statutes at the amount sought in its complaint of \$65,094.52. Rather than taking from Southern Produce the full amount offered for the change order work of \$10,755 plus its prorate share of the retainage held by Southern produce of \$6,948.24 which amounted to \$17,703.63 plus an extra \$296.37 to round the July 13, 2012 offer up to \$18,000, Rose refused that offer. Now, 6 years after the work was performed and 4 ½ years after being offered \$18,000.00 by Southern Produce, and after Southern Produce incurred attorney fees and cost well in excess of the \$17,703.63 the Court of Appeals has found is due to Rose, it would be inequitable to award Rose the same amount Southern Produce offered without having to incur the cost and attorney fees associated with this matter all because Rose refused to accept the offer in July, 2012. As a now retired Horry County Master-In Equity was fond of saying, "pigs get feed, but hogs get slaughtered".

That was the essence of Southern Produce's argument at trial on the third element of quantum meruit recovery, as well as the proof of the two express contracts. Since Southern Produce offered to pay \$18,000.00 in a formal offer of judgment/settlement which Rose refused and caused this litigation to move forward only to have the trial court find that even if Rose was to recover under quantum meruit, the recovery would only be \$17,703.63, less that it had been offered on July 13, 2012. But where Respondent Southern Produce had incurred attorney fees and cost in excess of the amount due Rose in equity, it was not unjust for Southern Produce to retain the benefit of the retainage and change order work because Southern had expended those funds in the defense of this action when Rose would not accept the \$18,000 offered.

Conclusion

Based on the forgoing, Respondent Southern Produce respectfully request that the Court of Appeals reconsider its Order and modify the same to affirm the lower court's rulings and remand the case back to Judge Keesley to make a determination on a supplemental award of cost and attorney fees incurred by Southern Produce in this appeal.

Respectfully submitted.

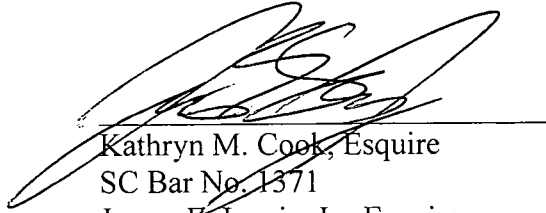


Kathryn M. Cook
306 Calhoun Road
Myrtle Beach, South Carolina 29577
(843) 222-2116
Attorney for Respondent Southern Produce, Inc.

October 22, 2016

Respectfully submitted,

COOK & ROY, LLC



Kathryn M. Cook, Esquire

SC Bar No. 1371

James E. Lewis, Jr., Esquire

SC Bar No. 77698

Cook & Roy, LLC

Post Office Box 4086

North Myrtle Beach, SC 29597

Phone: 843-663-1200

Fax: 843-663-0364

Email: kcook@cookandroy.com

Attorney for Defendant Southern Produce,
Inc.

North Myrtle Beach, South Carolina

Dated: July 25, 2011

FILED
2011 JUL 26 AM 11:43
BETH A. CANNON
CLERK OF COURT
LEXINGTON

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
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 Rose Electric, Inc.,)
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 Plaintiff)
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 v.)
)
 Cooler Erectors of Atlanta, Inc., Southern)
 Produce, Inc., S2P, LLC, Certified)
 Development Corporation of South Carolina,)
 Senn Bros., Inc., Custom Concrete of)
 Lexington, Inc., and James Dunlap d/b/a)
 Dunlap Services,)
)
 Defendants)
)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: 2011-CP-32-01929

CERTIFICATE OF SERVICE

BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

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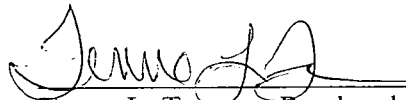
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As a paralegal with the law firm of COOK & ROY, LLC, counsel for Defendant Southern Produce, Inc., I certify that I have served counsel of record with a copy of the pleadings herein specified below, by placing a copy of the same in the United States Mail, postage prepaid, to the following:

- | | |
|-----------------|---|
| Pleadings: | 1. Offer of Judgment on behalf of Defendant Southern Produce, Inc. |
| Counsel Served: | 1. William E. Booth, III, Esq.
Booth Law Firm
3231 Sunset Boulevard, Suite A
West Columbia, SC 29169
Attorney for Plaintiff Rose Electric, Inc. |
| | 2. Michelle P. Clayton, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 1473
Columbia, SC 29202
Attorneys for Defendant S2P, LLC |
| | 3. Jake Moore, Jr., Esq.
Moore, Taylor & Thomas, P.A. |

PO Box 5709
West Columbia, SC 29171
Attorney for Cooler Erectors of Atlanta, Inc.

4. J. Robin Turner, Esq.
J. Robin Tuner, P.A.
PO Box 11646
Columbia, SC 29211
Attorney for Senn Bros., Inc.
5. Franklin J. Smith, Jr., Esq.
Richardson Plowden & Robinson, PA
PO Box 7788
Columbia, SC 29202
Attorney for Custom Concrete of Lexington, Inc.


Tenna L. Turman, Paralegal to
Kathryn M. Cook, Esquire

Date: 7/25/11

North Myrtle Beach, SC

BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

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FILED

Exh: 6.4 B

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
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 Rose Electric, Inc.,)
)
 Plaintiff)
)
 v.)
)
 Cooler Erectors of Atlanta, Inc., Southern)
 Produce, Inc., S2P, LLC, Certified)
 Development Corporation of South Carolina,)
 Senn Bros., Inc., Custom Concrete of)
 Lexington, Inc., and James Dunlap d/b/a)
 Dunlap Services,)
)
 Defendants)
)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: 2011-CP-32-01929

COPY

SECOND OFFER OF JUDGMENT ON
 BEHALF OF DEFENDANT SOUTHERN
 PRODUCE, INC.

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 CLERK OF COURT
 LEXINGTON, SC

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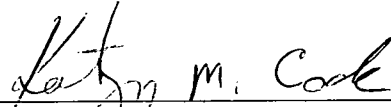
Pursuant to S.C. Code Ann. §15-35-400 (1976) and Rule 68(a) of the South Carolina Rules of Civil Procedure, Defendant Southern Produce, Inc. does hereby offer Plaintiff to take judgment against Defendant Southern Produce, Inc. in the amount of Fifteen Thousand Five Hundred Thirty Two and 52/100 Dollars (\$15,532.52) inclusive of interest, attorney's fees, and costs. This Second Offer of Judgment must be accepted within twenty (20) days of service hereof. If the Plaintiff fails to accept this Second Offer of Judgment within the aforesaid time period, this offer shall be deemed rejected. Should Defendant receive a verdict at least as favorable as the rejected offer, Defendant Southern Produce, Inc. shall be entitled to all fees and costs from the date of rejection, as permitted by S.C. Code Ann. §15-35-400 (1976) and Rule 68 S.C.R.C.P.

This Second Offer of Judgment is made for the purposes specified in S.C. Code Ann. §15-35-400 (1976) and Rule 68(a) of the South Carolina Rules of Civil Procedure, and is not to

be construed either as an admission that Defendant is liable to Plaintiff in this action, or that Plaintiff has suffered any damages.

Respectfully submitted,

COOK & ROY, LLC



Kathryn M. Cook, Esquire

SC Bar No. 1371

James E. Lewis, Jr., Esquire

SC Bar No. 77698

Cook & Roy, LLC

Post Office Box 4086

North Myrtle Beach, SC 29597

Phone: 843-663-1200

Fax: 843-663-0364

Email: kcook@cookandroy.com

Attorney for Defendant Southern Produce, Inc.

North Myrtle Beach, South Carolina

Dated: January 19, 2012

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LEXINGTON SC

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FILED

EXH: b7C
COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

Rose Electric, Inc.,)
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Plaintiff)
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v.)
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Cooler Erectors of Atlanta, Inc., Southern)
Produce, Inc., S2P, LLC, Certified)
Development Corporation of South Carolina,)
Senn Bros., Inc., Custom Concrete of)
Lexington, Inc., and James Dunlap d/b/a)
Dunlap Services,)
)
Defendants)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-32-01929

OFFER OF SETTLEMENT

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

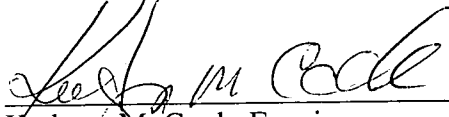
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Pursuant to S.C. Code Ann. §29-5-10(b) and §29-5-20(C), Defendant Southern Produce, Inc. does hereby offer to settle this mechanic's lien action for the sum of Eighteen Thousand and 00/100 Dollars (\$18,000.00) to be paid by Defendant to Plaintiff, exclusive of interest and costs.

This Offer of Settlement hereby supersedes and amends the earlier Offers of Judgment filed and served July 26, 2011 and January 23, 2012. This Offer of Settlement, pursuant to the mechanic's lien statutes of the State of South Carolina, should also be considered as an amended Offer of Judgment pursuant to S.C. Code Ann. §15-35-400 (1976) and Rule 68(a) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

COOK & ROY, LLC


Kathryn M. Cook, Esquire
SC Bar No. 1371

Cook & Roy, LLC
Post Office Box 4086
North Myrtle Beach, SC 29597
Phone: 843-663-1200
Fax: 843-663-0364
Email: kcook@cookandroy.com
Attorney for Defendant Southern Produce,
Inc.

North Myrtle Beach, South Carolina

Dated: July 10, 2012

2012 JUL 13 AM 11:32
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-32-01929

Rose Electric, Inc.,)
)
Plaintiff)

v.)

Cooler Erectors of Atlanta, Inc., Southern)
Produce, Inc., S2P, LLC, Certified)
Development Corporation of South Carolina,)
Senn Bros., Inc., Custom Concrete of)
Lexington, Inc., and James Dunlap d/b/a)
Dunlap Services,)
)
Defendants)

COPY

CERTIFICATE OF SERVICE

As a paralegal with the law firm of COOK & ROY, LLC, counsel for Defendant Southern Produce, Inc., I certify that I have served counsel of record with a copy of the pleadings herein specified below, by email and placing a copy of the same in the United States Mail, postage prepaid, to the following:

- | | | |
|-----------------|----|--|
| Pleadings: | 1. | Offer of Settlement |
| Counsel Served: | 1. | William E. Booth, III, Esq.
Booth Law Firm
3231 Sunset Boulevard, Suite A
West Columbia, SC 29169
Attorney for Plaintiff Rose Electric, Inc. |
| | 2. | J. Robin Turner, Esq.
J. Robin Tuner, P.A.
PO Box 11646
Columbia, SC 29211
Attorney for Senn Bros., Inc. and S2P, LLC |

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

FILED

Tenna L. Turman
Tenna L. Turman, Paralegal to
Kathryn M. Cook, Esquire

Date: July 10, 2012

North Myrtle Beach, SC

FILED

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BETH A. CARRIGG
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LEXINGTON SC

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OCT 24 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge

Opinion No. 5444

Appellate Case No. 2014-001633
Civil Action No. 2011-CP-32-1929

Rose Electric, Inc.,

Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of
Lexington, Inc., and James Dunlap d/b/a Dunlap Services, Defendants

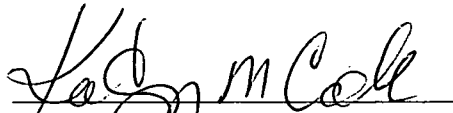
Of Whom

Southern Produce, Inc. and S2P, LLC are

Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have served the Respondent Southern Produce, Inc.'s Petition for Rehearing by depositing copies of it in the United States Mail, postage prepaid, on October 24, 2016 to William E. Booth, III, attorney for Appellant at 3231 Sunset Blvd., Suite A, West Columbia, S.C. 29169 and J. Robin Turner, attorney for Respondent S2P, LLC at P.O. Box 11646, Columbia, S.C. 29211, along with a copy of this Certificate of Service and by sending each a copy via email on October 24, 2016.



Kathryn M. Cook
306 Calhoun Road
Myrtle Beach, South Carolina 29577
(843) 222-2116
Attorney for Respondent Southern Produce, Inc.

October 24, 2016

KATHRYN M. COOK, P.A.

306 Calhoun Road
Myrtle beach, South Carolina 29577

Phone: (843) 449-1396

kifcook55@gmail.com

HAND DELIVERED

October 22, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

RECEIVED
OCT 24 2016
SC Court of Appeals

Re: Rose Electric, Inc. v. Southern Produce, Inc., et al
Appellate Case No. 2014-001633


Dear Ms. Kitchings:

Enclosed for filing are Respondent Southern Produce, Inc.'s original Petition for Rehearing and seven (7) copies of the same along with a check of \$25.00 for the filing fee. I would appreciate you filing the original and copies and returning to me a filed copy in the self-addressed stamped envelope provided.

By copy of this letter, I am likewise serving a copy of the same on the attorney for Appellant and Respondents. I have enclosed the Certificate of Service for the same.

Please let me know if you need anything further from me at this time. Thank you in advance for your assistance in this matter.

Sincerely,


Kathryn M. Cook

Cc: William E. Booth, III, Esq.

J. Robin Turner, Esq.

Enclosures as stated