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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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SC Court of Appeals

Case No. 2007-CP-04-4113

Action Concrete Contractors, Inc. Respondent,

v.

Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., of
whom Elvira Chappellear and Craig Chappellear, Appellants.

SUPPLEMENTAL RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
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 COUNTY OF ANDERSON)
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 Action Concrete Contractors, Inc.,)
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 Plaintiff,)
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 vs.)
)
 Elvira Chappellear, Craig Chappellear,)
 Premier Southern Homes, LLC, Henry)
 G. Beal, Jr., and First Citizens Bank and)
 Trust Co., Inc.)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 C.A. NO: 2007-CP-04-4113
 MEMORANDUM IN SUPPORT OF
 MOTION FOR SUMMARY JUDGMENT
 AS TO DEFENDANTS ELVIRA AND
 CRAIG CHAPPELEAR

TO: Defendants, Elvira Chappellear and Craig Chappellear, by and through their counsel of record, Ryan McCabe :

Plaintiff Action Concrete Contractors, Inc. (hereinafter "Action Concrete") submits this memorandum in support of its Motion for Summary Judgment as to Defendants Elvira Chappellear and Craig Chappellear ("Owners") in the above-captioned matter.

I. FACTUAL BACKGROUND

This matter is before the court upon the Plaintiff's motion for summary judgment as to Defendant Elvira Chappellear and Craig Chappellear. The relevant parties and facts are as follows:

- a) The Plaintiff, Action Concrete Contractors, Inc. (hereinafter "Action Concrete") was a subcontractor on the project responsible for the construction of certain improvements on the property referred to as Lot 129 Tuscany located in Anderson, South Carolina.
- b) The Defendants, Elvira Chappellear and Craig Chappellear, (hereinafter collectively "Owners"), at all times relevant, were the owners of the above referenced property.
- c) The Defendant, Premier Southern Homes, LLC (hereinafter "Premier") was the General Contractor and was responsible for the construction and improvements on the property.

d) Defendant Henry Beal ("Beal") is the owner of Premier and was made a Defendant due to the personal guarantee made to Action Concrete.

This action arises out of a contract for the construction of a home in Anderson, South Carolina (the "Project"). Defendant Owners entered into a \$300,000.00 lump sum contract with Defendant Premier for construction of the home on April 31, 2007. (See Exhibit A contract; see also Deposition transcript pg 25; line1-5). Action Concrete entered into a subcontract agreement with Defendant Premier on May 9, 2007 whereby Action would provide labor and materials for the Project on an actual cost basis based on unit prices provided in the estimate. (See Exhibit B) Premier failed to pay Action Concrete the final contract balance of Sixty-Six Thousand Eight Hundred Sixty-Two and 63/100ths (\$66,862.63) (See Exhibit C accounts receivable).

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 Defendant Owners. Said lien was recorded on September 25, 2007 in Book 31 at page 270 of the Anderson county RMC office. On December 27, 2007 Action filed its lis pendens and complaint to foreclose on its mechanics lien.

As of the date Action Concrete filed and served notice of its mechanics lien on Owners, there was an outstanding contract balance of \$164,260.00 owed to Premier from Owners. This number is based on the \$300,000.00 lump sum contract the parties agreed to at the beginning of the construction. As of the date the Owner received notice that Action Concrete had not been paid, Owners had paid Premier \$135,740.00. (See Exhibit D—payments to Premier) (See also Deposition Transcript Page 166-172).

On April 13, 2010 Elvira Chappelle, was deposed and among other things, testified to the details of the alleged contractual arrangements between Owners and Premier, payments made to Premier and payments made directly to subcontractors who had contracted with Premier. After

the mechanics lien was filed Defendant Owners informed Premier they would not pay anymore directly to Premier without the condition that Action would be paid. Owners stopped paying Premier directly but began making payments on behalf of Premier directly to Premier's subcontractors so the work could be completed thereby reducing the amount owed to Premier under the Contract. Owners informed Premier they would resume payment directly to Premier once Premier was done paying Action. (See Deposition transcript pg 123 line 1-25 and page 124 line 1-25).

The invoices paid by Owners were invoices from Premier's subcontractors that were directed to 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 Owners paid Premier's subcontractors so the work could continue. The other subcontractors of Premier who were paid by Owners did not have valid liens on the Property. (See Deposition transcript pg 167; line5-7) Since the Project was for a lump sum, Owners used the continued payments to subcontractors of Premier as a way to reduce the amount they owed Premier. The last direct payment made directly from the Owners to Premier occurred on 9/10/07 but payments to Premier's subcontractors continued for an additional 220 days after Owners had Notice of Action's lien.

The following was taken from the deposition of Elvira Chappellear. (See Deposition transcript Page 125; lines 5-12)

- 5 Q. And so from that point after the 9/10 payment to
6 Mr. Beal, all your further payments were then made
7 to --
8 A. Subcontractors directly.
9 Q. Directly. And you understand that those payments
10 continued to take away from the contract balance
11 that was owed to Mr. Beal, correct?
12 A. Of course.

Owners continued to pay Premier's subcontractors directly and continued to reduce the amount owed to Premier. Premier agreed to these terms and continued to work to complete the Project.

At the deposition invoices of subcontractors were presented to Elvira Chappellear and she repeatedly testified that the invoices were directed to Premier but paid directly by Owners. Chappellear testified that the payments were made to Premier's subcontractors on behalf of Premier reducing the debt owed to Premier and likewise reducing Premier's debt owed to those subcontractors. The Owners took the position they were preventing Premier from making any more money on the Project but what they failed to realize is by allowing Action to go unpaid Premier had already made its profit through the unpaid Action invoices. Each invoice paid directly to subcontractors was discussed in the deposition and Chappellear's testimony remained the same, stating that all payments to subcontractors of Premier reduced the debt Owners owed Premier. *See* Deposition Transcript Pages 132-146.

As an example, the following was taken from the deposition of Elvira Chappellear. (*See* Deposition transcript Page 132, lines 6-25 to Page 133, lines 1-24 and Page 138, lines 22-25 to Page 139; lines 1-17)

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- 6 Q. The next one I have is an invoice -- well, you tell
7 me. Does this look familiar to you?
8 A. Invoice from Piedmont Plumbers for \$9,000 for
9 rough-in plumbing at 129 -- Lot 129 Via Roma.
10 Q. Okay. And it's dated for -- what's the date of
11 that invoice?
12 A. 8/15/07.
13 Q. Okay. And it's for rough-in on the home?
14 A. That is correct.
15 Q. And who is it billed to?
16 A. It's billed to Premier Southern Homes.
17 Q. Okay. And that's for a subcontractor that
18 contracted with Mr. Beal on your project?

- 19 A. That is correct.
20 Q. And then what do you see on the second page,
21 Chappellear 0048?
22 A. I have a payment of \$9,000 going to Piedmont
23 Plumbers on 10/26/07.
24 Q. Okay. So this is work that was performed prior to
25 a lien that was placed on your project, but paid

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- 1 after you received the lien; is that correct?
2 A. I'll be honest with you. I would not know. I just
3 know when he brought me the bill, I paid it on
4 10/26.
5 Q. But I thought that your earlier testimony was that
6 you get these invoices pretty quickly after the
7 work's actually performed.
8 A. If they brought it directly to me. This one, if
9 you'll notice, was sent to Henry Beal's address.
10 So he would have brought it to me at his time.
11 Q. You have no reason to believe that that is an
12 incorrect date on that invoice, do you?
13 A. I wouldn't think so.
14 Q. Okay. And so that being the case, this invoice is
15 dated 8/15/07 which was prior to you being served
16 with the lien, correct?
17 A. It was prior to me being served with the lien. Not
18 necessarily knowing about the work done.
19 Q. Sure.
20 A. That is correct.
21 Q. But it was prior -- okay. And then you paid that
22 amount -- you paid for that work after you received
23 the lien, correct?
24 A. Yes.

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- 22 (PLAINTIFF'S EXHIBIT NUMBER 24 MARKED; ATTACHED)
23 EXAMINATION BY MR. CRAWFORD CONTINUES:
24 Q. Can you tell me what that is?
25 A. That's an invoice from MSW for Premier Southern

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- 1 Homes for labor for pre-wire for my residence at
2 129 -- Lot 129 Via Roma for \$1200 from MSW.
3 Q. And what is the date of that invoice?
4 A. 11/13/07.
5 Q. And what -- and then you made a -- paid them by a
6 check?

- 7 A. I did.
8 Q. And what's the date of that check?
9 A. 12/28/07.
10 Q. Okay. For the full amount of the invoice?
11 A. Twelve thousand -- \$1200, yes.
12 Q. And again, this is a subcontractor for Mr. Beal for
13 construction of work done on your project, correct?
14 A. That is correct
15 Q. And you paid him funds that would have been due Mr.
16 Beal on the project?
17 A. Yes.

After adding up the invoices at the deposition, Chappellear determined that she made \$118,931.83 in payments directly to the subcontractors of Premier after having received Action's lien. These were debts that Premier was responsible for and payment directly to the subcontractors was no different than payment directly to Premier. The following can be found in the deposition on Page 162 lines 15-25 to page 163, lines 1-16.

Page 162

- 15 Okay. All right. Let's see. What I'd like to do
16 now, since you've got the calculator there, is from
17 10/26 on -- I'm trying to determine taking all of
18 these to be correct, because we have the backup for
19 each one of those, and even taking the ones that we
20 don't have the backup for in the L.R. Jacobs, could
21 you run me a total -- and we're looking at Exhibit
22 Number 5. Could you run me a total from 10/26,
23 which would have been the date after you received
24 the lien, for these amounts that were paid out to
25 subcontractors from funds due to Mr. Beal?

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- 1 A. I'd be glad to.
2 Q. Thank you.
3 MR. MCCABE: Objection to form.
4 WITNESS CONTINUES:
5 A. \$118,931.83 without double checking it.
6 EXAMINATION BY MR. CRAWFORD CONTINUES:
7 Q. And assuming your math is correct, those are
8 amounts that were paid to you -- paid by you
9 directly to subcontractors from Mr. Beal's
10 subcontract with them for improvements or

- 11 construction done on your home?
12 A. Yes.
13 Q. And those funds were -- and those -- that amount
14 was paid from funds that were due to Mr. Beal under
15 his lump sum contract with you?
16 A. That is correct.

Finally on May 2, 2008, 220 days after receiving the notice of Action Concrete's lien, the Owners fired Premier. (See Exhibit E) At that point the house was 68% complete and Owners had paid subcontractors at least \$118,931.83 directly since the lien was filed by Action Concrete despite having notice that Action's invoices remained unpaid. (See Deposition transcript pg 163; line 5). Owners believed at all times that the funds paid to Premier's subcontractors were funds due to Premier under the lump sum contract. Therefore the payments made to subcontractors reduced the amount they owed to Premier. (See Deposition transcript pg 163; line7-16)

II. STANDARD

Granting a motion for summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

III. ARGUMENT

In the matter at hand, it is undisputed that:

(A) Action expended labor, services, or materials under contract for the improvement of real property. (See Exhibit B);

(B) Action properly filed its notice of mechanics lien and served Defendant Owners on September 25, 2007 after not being paid by Premier. (See Exhibit F)

(C) After receiving notice that Action Concrete was not paid Owners began paying Premier's subcontractors directly for the work invoiced to Premier but never terminated Premier and never contracted directly with subcontractors.

(D) At the time Owners received notice of Action Concrete's mechanics lien there was at least \$164,260.00 owed to Premier from Owners pursuant to their lump sum contract.

(E) Owners considered the payments they made on behalf of Premier directly to Premier's subcontractors to be a reduction in the amount of money they owed Premier under the \$300,000.00 lump sum contract, therefore being no different than a payment directly to Premier.

(F) Premier was not fired by Owners until May 2, 2008. From the time Owners received notice of Action Concrete's lien until the time Premier was fired by the Owners, the Owners paid at a minimum \$118,931.83 directly to subcontractors on behalf of Premier. (See Deposition transcript pg 162; line5)

1. Defendant Owner 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.

The legal question that 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 did 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. 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.")

Thus, to the extent the owner receives notice of non payment and continues to pay funds otherwise due and owing to the general contractor, the owner may be subject to paying twice for the same labor and materials.

S.C. Code Ann. § 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 is known as the payment defense or the paid in full defense. The South Carolina Supreme Court 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)* Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008). } 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.* Stovali Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (S.C. Ct. App. 1990)

The statute is designed to give an owner the protection of not being subject to double payment at the end of a project if the owner has paid the general contractor the entire contract balance. The defense is used when the owner has made full payment to the contractor prior to the attachment of the mechanics lien without prior notice of the subcontractors claim. The aggregate amount of all such liens cannot exceed the outstanding balance or amount due by the owner on the contract price to the general contractor. Therefore in a situation where an owner has paid the contractor in full prior to the attachment of any lien, the owner has an absolute payment defense pursuant to §29-5-40. *See* 22 S.C. Jur. Mechanics' Liens § 11.

Under §29-5-40 Defendant Owners liability to Action Concrete was limited to the balance due by Owners to Premier on the contract price *at the time Owners received notice* that Action Concrete had not been paid. The record establishes that the contract price between Premier and Owners was \$300,000.00. As of September 25, 2007 when the Owners were served with notice of Action Concrete's mechanics lien, the Owners had paid \$135,740.00 to Premier. The total balance due to Premier from the Owner was \$164,260.00. The record has also shown that the Premier did not abandon the project and was not fired until May 2, 2008. Instead of ceasing the Project or terminating Premier the Owners moved forward and paid Premier's invoices for them. The Owners payment of Premier's debts is no different than payment directly to Premier. The Owners decision to make payments directly to subcontractors and at the same time retain Premier allowed the work to continue and eventually the Owners allegedly spent more money than the contract balance.¹ However, this fact does not allow the Owners to assert the payment defense under §29-5-40 because the Owners had knowledge that Action concrete had not been paid prior to paying the entire contract balance.

¹ Though not relevant to this motion, there is a question as to whether the contract price indicated by the Owner is for less than the full value of the home.

Defendant Owners attempted to make all payments directly to the subcontractors of Premier who continued to perform work as a way to avoid violating §29-5-50 and subjecting themselves to double payment. However, if an owner was allowed to avoid the requirements of §29-5-50 simply by paying the debts of the general contractor directly to subcontractors after a lien has been filed the entire purpose of the mechanics lien statute would be undermined. Premier was not fired on the Project until after over \$118,000.00 dollars had been paid to its subcontractors directly by Owners. Elvira Chappelle testified in her deposition that all payments were considered to lower the amount owed to Premier. The Owners simply paid the invoices, made out to Premier directly, to the subcontractors instead of paying Premier first and then letting Premier pay the subcontractors. This is no different than a payment directly to Premier. Owners were selectively paying the debts of Premier that continued to arise but failed to pay the debt owed to Action which they had full knowledge of. Action Concrete was entitled to be paid in preference to Premier pursuant to §29-5-50. The non-perfected potential lien holders should have not have received payment in preference to Action.

All the Owner 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).

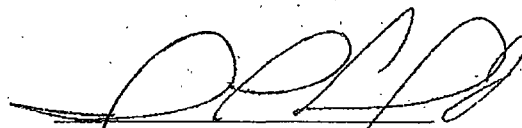
The Owners still had an obligation to use the construction funds to make sure Action Concrete was paid. The Owners cannot now, claim that since it has paid the entire contract balance in full pursuant to the terms of the Contract, it has no responsibility to Action Concrete.

The ramifications of such a 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 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. Receipt of Action Concrete's notice should have effectively ceased all payments on the project until the dispute was resolved.

CONCLUSION

Action Concrete held a perfected lien under the statute and as the only perfected lien holder, it is entitled to the protection which the statute provides. Action Concrete, Inc. should be granted summary judgment in its favor against the Owners in the amount of Sixty-Six Thousand Eight Hundred Sixty-Two and 63/100ths (\$66,862.63), which represents the balance owed for labor and materials, plus attorney's fees, interest and costs to be determined.

Respectfully submitted this 29th day of November 2010.



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07/30/2007 1:35PM

PREMIER SOUTHERN HOMES

CONSTRUCTION MANAGEMENT CONTRACT - FIXED FEE THIS AGREEMENT, Made as of (Current Date), In the Year of (Current Year),

Between the Owner: Contact Name *Craig and Elira Chappellear*
 Street Address *316 KINGSTON WAY*
 City, State Postal Code *ANDERSON SC 29625*
 Contact Telephone *(864) 374-9346*

And the Contractor: Company Name *PREMIER SOUTHERN HOMES*
 License Number *BBB 00710*
 Company Address
 Company Phone *(864) 444-8864*

For the Project: Project Name *TUSCOMM*
 Project Address *LOT 189, 115 VIKAROMA DR AND, SC 29621*

Construction Lender: Lender Name *Wells Fargo*
 Lender Address

ARTICLE 1. CONTRACT DOCUMENTS

1.1 The contract documents consist of this agreement, general conditions, construction documents, specifications, allowances, finish schedules, construction draw schedule, information disclosure statement, all addenda issued prior to execution of this agreement and all change orders or modifications issued and agreed to by both parties. All documents noted herein shall be provided to the Contractor by the Owner. These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement.

ARTICLE 2. SCOPE OF WORK

2.1 The Contractor agrees to function as an agent of the Owner to provide Management and Supervision services to construct the above mentioned structure and fixtures attached thereto in *(Anderson SC)* according to the construction documents, allowances, finish schedules, all addenda, change orders, modifications and specifications set forth in the specification booklet.

ARTICLE 3. TIME OF COMPLETION

3.1 The approximate commencement date of the project shall be *6/31/07*. The approximate completion date of the project shall be *12-31-2007*, however any change orders and/or unusual weather might delay or otherwise affect the completion date. Barring inclement weather or owner related delays, the Contractor shall pay liquidated damages of *\$60* per day if the project is not completed within *18* months. The contract execution date shall be (date).

ARTICLE 4. CONSTRUCTION MANAGEMENT FEES

4.1 The fees for construction management and supervision services shall be a fixed amount of *(300,000: total construction cost*

Initialed by: Owner *[Signature]* Contractor *[Signature]*

06/27/2007 10:58AM



PREMIER SOUTHERN HOMES

Construction Management Contract - Fixed Fee
Project Name
Page 2 of 4

- 4.2 Pre-construction estimates for construction costs and coordination are approximately *(300,000)*
- 4.3 The Owner and the Contractor acknowledge that the Owner will pay a sum of *10,000* upon signing of this contract and before construction management and supervision begins as a deposit and part of the total fees of this contract.

ARTICLE 5: PROGRESS PAYMENTS

- 5.1 The Owner will make payments to the contractor for construction management and supervision services every two weeks. Owner shall make payments to contractor within *(7)* after request by contractor. Should the owner fail to make payment, contractor may charge a penalty of *(10%)* annually upon the unpaid amount until paid.
- 5.2 If payment is not received by the Contractor within *(10)* days after delivery of payment demand for services satisfactorily completed, contractor shall have the right to stop construction management and supervision or terminate the contract at his option. Termination by Contractor under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the services performed prior to such termination. Termination by Owner under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the services performed prior to such termination.

ARTICLE 6. DUTIES OF THE CONTRACTOR

- 6.1 All construction shall be in accordance to the provisions of the plans and specifications. All systems shall be in good working order.
- 6.2 All construction shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.
- 6.3 All construction shall be performed by appropriately licensed individuals to perform their said work, as outlined by law.
- 6.4 Contractor shall obtain all permits necessary for the work to be completed.

ARTICLE 7. CHANGE ORDERS AND FINISH SCHEDULES

- 7.1 A Change Order is any change to the original plans and/or specifications. All change orders need to be agreed upon in writing, including cost, additional time considerations, approximate dates when the work will begin and be completed, a legal description of the location where the work will be done and signed by both parties. Additional time needed to complete change orders shall be taken into consideration in the project completion date.
- 7.2 Completed Finish Selection Schedules shall be submitted to the Contractor as follows:
 - 7.2.1 Schedule #1 within four weeks after site clearing begins.
 - 7.2.2 Schedule #2 within eight weeks after site clearing begins.
- 7.3 Any delays or changes in finish selection schedules will delay the projected completion date.

Initialed by: Owner *[Signature]* Contractor *[Signature]*

06/27/2007 10:58AM

PREMIER SOUTHERN HOMES

Construction Management Contract - Fixed Fee
Project Name *Tuscony*
Page 3 of 4

ARTICLE 8. INSURANCE

8.1 The Owner will keep in force a Builder's Risk Insurance Policy on the said property to protect both owner's and contractor's interests until construction is completed.

8.2 The Owner will purchase and maintain property insurance to the full and insurable value of the project, in case of a fire, vandalism, malicious mischief or other instances that may occur.

8.3 The Contractor shall purchase and maintain needed Workman's Compensation and Liability insurance coverage as required by law and deemed necessary for his own protection.

ARTICLE 9. GENERAL PROVISIONS

9.1 If conditions are encountered at the construction site which are subsurface or otherwise concealed physical conditions or unknown physical conditions of an unusual nature, which differ naturally from those ordinarily found to exist and generally recognized as inherent in construction activities, the Owner will promptly investigate such conditions and, if they differ materially, and cause an increase or decrease in the Contractor's cost of, and/or time required for, performance of any part of the work, will negotiate with the Contractor an equitable adjustment in the contract sum, contract time or both.

ARTICLE 10. HAZARDOUS MATERIALS, WASTE AND ASBESTOS

10.1 Both parties agree that dealing with hazardous materials, waste or asbestos requires specialized training, processes, precautions and licenses. Therefore, unless the scope of this agreement includes the specific handling, disturbance, removal or transportation of hazardous materials, waste or asbestos, upon discovery of such hazardous materials the Contractor shall notify the Owner immediately and allow the Owner/Contractor to contract with a properly licensed and qualified hazardous material contractor. Any such work shall be treated as a Change Order resulting in additional costs and time considerations.

ARTICLE 11. ARBITRATION OF DISPUTES

11.1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

ARTICLE 12. WARRANTY

12.1 Warranty of the construction project against defects in workmanship or materials utilized shall be handled between the Owner and Subcontractors and/or Suppliers directly without involving the Contractor. The manufacturer's warranty will prevail. No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after *3* years beyond the completion of the project or cessation of work.

ARTICLE 13. TERMINATION OF THE CONTRACT

Owner *[Signature]* Contractor *[Signature]*

PREMIER SOUTHERN HOMES

Construction Management Contract - Fixed Fee
Project Name
Page 4 of 4

13.1 Should the Owner or Contractor fail to carry out this contract, with all of its provisions, the following options and stipulations shall apply:

13.1.1 If the Owner or the Contractor shall default on the contract, the non-defaulting party may declare the contract in default and proceed against the defaulting party for the recovery of all damages incurred as a result of said breach of contract, including a reasonable attorney's fee. In the case of a defaulting Owner, the Earnest money herein mentioned shall be applied to the legally ascertained damages.

13.1.2 In the event of a default by the Owner or Contractor, the non-defaulting party may state his intention to comply with the contract and proceed for specific performance.

13.1.3 In the case of a defaulting Owner, the Contractor may accept, at his option the earnest money as shown herein as liquidated damages, should earnest money not cover the expenses to date, the Contractor may make claim to the Owner for all work executed and for proven loss with respect to equipment, materials, tools, construction equipment and machinery, including reasonable overhead, profit and damages applicable to the property less the earnest money.

ARTICLE 14. ATTORNEY FEES

14.1 In the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses.

ARTICLE 15. ACCEPTANCE AND OCCUPANCY

15.1 Upon completion, the project shall be inspected by the Owner and the Contractor, and any repairs necessary to comply with the contract documents shall be made by the Contractor.

15.2 The Owner shall not occupy the property until final payment has been received by the Contractor and a Certificate of Occupancy has been obtained.

15.3 Occupancy of the project by the Owner in violation of Article 15.2, shall constitute unconditional acceptance of the project and a waiver of any defects or uncompleted work.

WITNESS our hand and seal on this 31st day of April, 2007

Signed in the presence of:

[Signature]
Witness

[Signature] 5-2-07
Contractor Signature

Witness
[Signature]
Owner Signature

[Signature]

Initialed by: Owner [Initials] Contractor [Initials]

06/27/2007 10:58AM

**ACTION
 CONCRETE
 CONTRACTORS, INC.**

Estimate

15 BEVERLY ROAD
 GREENVILLE, SC 29609
 (864) 292-6781
 (864) 292-6782 FAX

JOB
 MODEL HOME
 0
 0
 0
 0

NAME
 PREMIER SOUTHERN HOMES
 0
 PHONE:
 444-8864 0
 FAX:
 336-8440 0

5/7/2007

THIS IS NOT A LUMP-SUM QUOTE. INVOICING
 WILL REFLECT ACTUAL WORK PERFORMED,
 ACCORDING TO UNIT PRICES. VERBAL
 QUOTING IS NOT ACCEPTED. RE-QUOTING
 AVAILABLE BY REQUEST ONLY.

Initial

ITEM	QUANTITY	UNIT PRICE	TOTAL
WALL PRICES INCLUDE 8" x 18" FOOTING			
6" x 3' WALL	46 LF	\$27.39	\$1,259.98
10" x 4' WALL	80 LF	\$35.88	\$2,870.80
10" x 6' WALL	30 LF	\$46.72	\$1,401.81
10" x 8' WALL	127 LF	\$64.47	\$8,188.10
EXTRA FOOTINGS	177 LF	\$10.27	\$1,818.57
STEP FOOTINGS	8 VF	\$13.49	\$107.96
PIER PADS 24" x 24" x 8"	5 EA	\$65.00	\$325.00
FIREPLACE PADS	0 CY	\$135.00	\$0.00
FOOTING CONCRETE ALLOWED 8" x 18" FOOTING	19.2 CY		
EXTRA CONCRETE FOR OUT-OF-LEVEL GRADE	0.0 CY	\$135.00	\$0.00
EXTRA CONCRETE TO CHANGE TO ENGINEERED FOOTING SIZE	5.5 CY	\$135.00	\$742.50
BRICK LEDGE	600 SF	\$2.20	\$1,100.00
#4 REBAR	1225 LF	\$0.77	\$943.25
ANCHOR BOLTS - NO NUTS	71 EA	\$1.66	\$116.74
CORNERS OR TEES OVER FIVE 45 DEGREE CORNERS	7 EA	\$65.00	\$455.00
2x4 / 2x8 SLAB LEDGE	38 VF	\$7.00	\$266.00
PUMP / CONVEYOR TRIPS	37 LF	\$2.20	\$81.40
BACKHOE / NEW HOLLAND (\$500 MIN)	2 EA	\$600.00	\$1,200.00
4" SLAB WITH 4" GRAVEL	8 HR	\$65.00	\$520.00
THICKENED SLAB	3874 SF	\$3.75	\$14,527.50
EXTRA UNDER SLAB GRAVEL	107 LF	\$9.38	\$1,003.66
	67.00 TON	\$23.00	\$1,541.00
TOTAL ESTIMATE AMOUNT BASEMENT WALLS			\$21,382.80
TOTAL ESTIMATE AMOUNT WATERPROOFING			\$0.00
TOTAL ESTIMATE AMOUNT SLABS			\$17,072.16
GRAND TOTAL			\$38,455.06

* Re-Quote

* Re-Quote

Prepared by Dustin P

PREMIER SOUTHERN HOMES MODEL

PLAINTIFF'S
 EXHIBIT
 B

Contract For Services

Page 2 of 2

FOUNDATION CONTRACTOR RESPONSIBILITIES

A. GENERAL

- 1. Layout of our work from your rough corners.
- 2. Provide workers' compensation and liability insurance certificates.
- 3. Install all work within poured wall industry specifications.
- 4. Generic engineered wall designs; site specific wall designs are extra.
- 5. Third party inspections will be at the discretion of Action Concrete and billed as an extra.

B. CONCRETE FOUNDATIONS

- 1. Form and pour wall footings and other footings as requested.
- 2. Furnish and install wall rebar in accordance with 2000 International Residential Code.
- 3. Form and pour concrete walls in accordance with 2000 International Residential Code.
- 4. Point any honeycomb which might occur.
- 5. Provide dimensioned shop drawings.

C. WATERPROOFING (IF REQUESTED)

- 1. Install lifetime guaranteed waterproofing system.
- 2. Install foundation drain at footing.
- 3. Install drainage material at wall.

D. CONCRETE SLAB (IF REQUESTED)

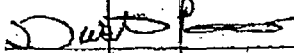
- 1. Slab prep to include allowance for 4" of stone (extra stone will be billed by the ton).
- 2. Install Vapor Barrier under slab.
- 3. Install edge forming as needed.
- 4. Pump, pour and finish 4" concrete basement slab (3000psi. with fiber).

BUILDER/OWNER RESPONSIBILITIES

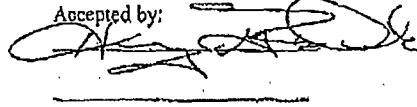
- 1. Excavate basement to within 2" level and 3'-0" beyond outside of walls. Banks to be safe from cave-in.
 - 2. Provide access to basement for Contractor's equipment and material deliveries. Builder / Owner assume responsibility for added labor, equipment and rental charges if access is not properly prepared and maintained.
 - 3. Rock excavation and footings on rock are extra and will be billed at an additional \$45/MH plus additional equipment rental.
 - 4. Where additional excavation and concrete are required to achieve adequate soil bearing, additional concrete will be charged at quoted price.
 - 5. Special concrete chemicals such as calcium chloride or plasticizer will be used only as required based on temperature and site conditions and billed as an extra.
 - 6. Measurements and quantities are based on outside-to-outside dimensions.
 - 7. Basement will be constructed from shop drawings approved by owner/contractor.
 - 8. Rubbed finish is not included.
 - 9. This proposal is based on "average" site conditions. Should poor access be encountered, extra charges will be required.
 - 10. Action Concrete Contractors assumes NO responsibility for backfill in excess of building code allowances.
- THIS IS NOT A LUMP-SUM QUOTE. INVOICING WILL REFLECT ACTUAL WORK PERFORMED, ACCORDING TO UNIT PRICES ON ATTACHED ESTIMATE.**

TERMS: NET 7 DAYS AFTER INVOICE 1 1/2% PER MONTH FINANCE CHARGE THEREAFTER. ALL COLLECTION COSTS, INCLUDING ATTORNEY'S FEES TO BE PAID BY CUSTOMER.

Offered by:
Action Concrete Contractors


 Keith Herring/Slaw
 Dustin Palleter
 Date: 5/9/2007

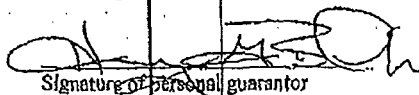
Accepted by:



Date: 5/9/07

Project: PREMIER SOUTHERN HOMES / TUSCANY SD MODEL

I hereby personally guaranty the payment of the account as stated in above terms.


 Signature of personal guarantor

Henry C. Best Jr. 5/9/07
 Print name of guarantor Date

*will payed
1st of 15th
OK
Let me know
if this is OK.*

Accounts Receivable Open Invoices

Page 1 of 1

<u>Dlv</u>	<u>Invoice Number / PO Number</u>	<u>Date</u>	<u>Due Date</u>	<u>Amount</u>	<u>Amt Paid</u>	<u>Balance</u>
Customer 989 PREMIER SOUTHERN HOMES						
1	R704801 / TUSCANY MODEL	05/31/07	06/07/07	\$20,702.42	\$0.00	\$20,702.42
1	R704802 / TUSCANY MADEL	06/18/07	06/25/07	\$13,011.16	\$0.00	\$13,011.16
1	R704803 / TUSCANY MODEL	06/26/07	07/02/07	\$1,882.60	\$0.00	\$1,882.60
1	R704804 / TUSCANY MODEL RET WA	07/06/07	07/12/07	\$29,429.30	\$0.00	\$29,429.30
1	R704801-JUL-INT / TUSCANY MODEL	07/07/07	07/07/07	\$310.54	\$0.00	\$310.54
1	R704802-JUL-INT / TUSCANY MODEL	07/26/07	07/26/07	\$196.17	\$0.00	\$196.17
1	R704803-AUG-INT / TUSCANY MODEL	08/02/07	08/02/07	\$28.24	\$0.00	\$28.24
1	R704801-AUG-INT / TUSCANY MODEL	08/07/07	08/07/07	\$315.19	\$0.00	\$315.19
1	R704804-AUG-INT / TUSCANY MODEL	08/12/07	08/12/07	\$441.44	\$0.00	\$441.44
1	R704802-AUG-INT / TUSCANY MODEL	08/25/07	08/25/07	\$198.09	\$0.00	\$198.09
1	R704803-SEP-INT / TUSCANY MODEL	09/02/07	09/02/07	\$28.66	\$0.00	\$28.66
1	R704801-SEP-INT / TUSCANY MODEL	09/07/07	09/07/07	\$319.92	\$0.00	\$319.92
Customer Totals				\$66,862.63	\$0.00	\$66,862.63
Grand Totals				<u>\$66,862.63</u>	<u>\$0.00</u>	<u>\$66,862.63</u>



ACC 036

LOT 129-100 Ashwood Lane (2007-CP-04-4113)

Action Concrete v. Chappellear

File no.: 013977.1

PREMIER SOUTHERN HOMES, LLC

DATE	AMOUNT	CHECK NO.
05/24/07	\$27,467 (Sun Bank)	2532
07/19/07	\$5,000 (CB)	106
07/19/07	\$30,000 (CB)	2302
07/19/07	\$15,000 (Sun Bank)	2541
08/03/07	\$12,398 (CB)	107
09/10/07	\$25,000 (CB)	3123
06/21/07	\$20,875	

TOTAL MONEY DISBURSED.....\$239,831.83

Filed: 9/25/07



ACC 002



ROGERS TOWNSEND & THOMAS, PC

ATTORNEYS AND COUNSELLORS AT LAW

Ryan McCabe
RMcCabe@rtt-law.com
Direct (803) 744-1826

Tel 803-771-7900
Fax 803-343-7017
220 Executive Center Dr., # 109
Columbia, SC 29210

MAIL:
PO Box 100200
Columbia, South Carolina 29202
www.rtt-law.com

May 2, 2008

VIA FACSIMILE, US MAIL, AND EMAIL

W. Kyle Dillard
Ogletree, Deakins, Nash, Smoak & Stewart
300 North Main Street
Greenville, SC 29601

Re: Termination of Contracts
Your Clients: Premier Southern Homes, LLC, and Henry G. Beal, Jr.
RTT Clients: Elvira and Craig Chappellear, James and Pamela
Chappellear, Myeah, Inc.
RTT #: 013977, 014082

Dear Kyle:

This firm represents Elvira and Craig Chappellear, James and Pamela Chappellear, and Myeah, Inc.


Please consider this letter as notice that your client Premier Southern Homes, LLC is hereby immediately terminated under its agreements with my clients for the numerous breaches that your client has made including, but not limited to, abandonment of work, failure to complete work as agreed, failure to pay subcontractors and material suppliers, failure to abide by the lenders policies, delays, improper management, failure to resolve mechanic's liens, and others.

My clients will take steps necessary to complete the work. Please have your client deliver all keys to your office today. Once you have the keys in your possession please let me know so that I can have someone pick them up.

My clients regret that it has become necessary to take these steps. However, under the circumstances my clients have no options but to terminate the contracts.

With kind regards, I remain

Sincerely,


D. Ryan McCabe

cc: Ala & Craig Chappellear

2297050



STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

NOTICE AND CERTIFICATE
OF MECHANIC'S LIEN

TO: ELVIRA CHAPPELEAR AND CRAIG CHAPPELEAR, WELLS
FARGO BANK, N.A. -- Construction Lending:


NOTICE IS HEREBY GIVEN that Action Concrete Contractors, Inc. ("Claimant"), is due to the sum of **Sixty-six Thousand Eight Hundred Sixty-Two and 63/100 (\$66,862.63) Dollars**, plus interest as applicable, by virtue of the attached Affidavit and Statement of Account, and hereby claims and holds a Mechanic's Lien upon the building and structures and upon the interest of Owners Elvira Chappelear and Craig Chappelear in the real property hereinafter described. This lien is in the amount set fort above is for labor performed or furnished, and/or for materials furnished in connection with the construction of improvements located on the real estate described in Exhibit "A" attached hereto and incorporated herein. Said labor and/or material was furnished pursuant to the authorization of Elvira Chappelear and Craig Chappelear, or a person or persons having authority from or rightfully acting for said owners for the below described real estate and the improvements thereon.

FURTHER NOTICE IS HEREBY GIVEN that the labor and/or material was last furnished within ninety (90) days of the date hereof; that Claimant has and claims a lien on the stated improvements pursuant to the Code of Laws of South Carolina, 1976, as amended, to secure the payment of the debt, an itemized and verified statement of which is attached hereto and incorporated herein by reference; that the said Claimant has a claim on said interest of Elvira Chappelear and Craig Chappelear to secure payments of an additional sum to cover the costs and



disbursements of any action to foreclose the aforementioned lien, including reasonable attorney's fees, all pursuant to the provisions of the statutes applicable to such cases.

Action Concrete Contractors, Inc.



By: Keith Herringshaw
Its: Vice President

Dated: 9/25/, 2007.

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

VERIFIED
STATEMENT OF ACCOUNT

PERSONALLY appeared before me one Keith Herringshaw, who being first
duly sworn, deposes and says:

1. That I am Keith Herringshaw and I am the Vice President of Action Concrete Contractors, Inc. and have been authorized by the corporation to make this affidavit
2. That the sum of **Sixty-six Thousand Eight Hundred Sixty-Two and 63/100 (\$66,862.63) Dollars**, is past due and owed to Action Concrete Contractors, Inc. for labor performed or furnished, and/or materials supplied, in connection with the construction of certain improvements located on the property described as shown on Exhibit A, as shown on statement and invoices attached as Exhibit B attached hereto. Said amount reflects all payments made by Premier Southern Homes, LLC or the Owners and other credits and no part is subject to offsets or credits of any kind.
3. Such sums bear interest at the contractual rate, plus cost costs and reasonable attorney's fees.
4. Upon information and belief, Elvira Chappellear and Craig Chappellear have a fee simple interest in the property described in Exhibit A.

FURTHER HE SAITH NOT.

Action Concrete Contractors, Inc.

SWORN to before me this 25th
day of Sept., 2007.
Yvonne R. Williams Sr.
Notary Public for South Carolina
My Commission Expires: My Commission
Expires 7-18-2011

Keith Herringshaw
By: Keith Herringshaw
Its: Vice President

**EXHIBIT A
PROPERTY DESCRIPTION**

All that piece, parcel, or lot of land, situate, lying and being in Anderson County, State of South Carolina, being known and designated as Lot 129 of Tuscany, Phase 1 & 2, being more fully described on the plat prepared by Azmuth Control, Inc. dated 01/22/2007, recorded in the Register of Deeds Office for Anderson County, in Plat Slide/Book 1681, at Page 1, 2, 3 & 4. Reference is hereby made to said plat for a more complete description of the metes and bounds thereof.

The being the identical property conveyed to Elvira Chappellear and Craig Chappellear by Deed from Tuscany, LLC, dated March 15, 2007 and recorded in the Office of the Register of Deeds for Anderson County on March 20, 2007 in Book 7913 at Page 237.

Tax Map #: po 144-00-02-006-001/051



Printed: 9/5/2007 10:10:47AM
 ACTION CONCRETE CONTRACTORS

Accounts Receivable Open Invoices

Page 1 of 1

<u>Div</u>	<u>Invoice Number / PO Number</u>	<u>Date</u>	<u>Due Date</u>	<u>Amount</u>	<u>Amt Paid</u>	<u>Balance</u>
Customer 989 PREMIER SOUTHERN HOMES						
1	R704801 / TUSCANY MODEL	05/31/07	08/07/07	\$20,702.42	\$.00	\$20,702.42
1	R704802 / TUSCANY MADEL	06/18/07	06/25/07	\$13,011.16	\$.00	\$13,011.16
1	R704803 / TUSCANY MODEL	06/25/07	07/02/07	\$1,882.60	\$.00	\$1,882.50
1	R704804 / TUSCANY MODEL RET WA	07/05/07	07/12/07	\$29,429.30	\$.00	\$29,429.30
1	R704801-JUL-INT / TUSCANY MODEL	07/07/07	07/07/07	\$310.64	\$.00	\$310.64
1	R704802-JUL-INT / TUSCANY MODEL	07/26/07	07/26/07	\$195.17	\$.00	\$195.17
1	R704803-AUG-INT / TUSCANY MODEL	08/02/07	08/02/07	\$28.24	\$.00	\$28.24
1	R704801-AUG-INT / TUSCANY MODEL	08/07/07	08/07/07	\$315.19	\$.00	\$315.19
1	R704804-AUG-INT / TUSCANY MODEL	08/12/07	08/12/07	\$441.44	\$.00	\$441.44
1	R704802-AUG-INT / TUSCANY MODEL	08/26/07	08/26/07	\$198.09	\$.00	\$198.09
1	R704803-SEP-INT / TUSCANY MODEL	09/02/07	09/02/07	\$28.66	\$.00	\$28.66
1	R704801-SEP-INT / TUSCANY MODEL	09/07/07	09/07/07	\$319.92	\$.00	\$319.92
Customer Totals				\$66,862.63	\$.00	\$66,862.63
Grand Totals				\$66,862.63	\$.00	\$66,862.63

B-2

030000715 9/25/2007 Bk: 00031 P#: 00275

PREMIER SOUTHERN HOMES
209 DEER TROT AVENUE
BENTON SC 29627

Invoice Date: 07/05/2007
Invoice No: R704804
Due Date: 07/12/2007

HENRY BEAL

Project: TUSCANY MODEL RET WA

FOUNDATION WALL (Detail)
CONCRETE PUMP

1.00	EA	\$28,229.30	\$28,229.30
2.00	TRIP	\$600.00	\$1,200.00
		Total	\$29,429.30

B-3

**ACTION
CONCRETE
CONTRACTORS, INC.**

15 BEVERLY ROAD
GREENVILLE, SC 29609
(864) 292-6781
(864) 292-6782 FAX

JOB
MODEL HOME
RETAINING WALL

NAME
PREMIER SOUTHERN HOMES

0
0
0
0

PHONE:
444-8864 0
FAX:
338-8440 0

7/5/2007

ITEM	QUANTITY	UNIT PRICE	TOTAL
WALL PRICES INCLUDE 8" x 18" FOOTING			
10" x 5' WALL	15 LF	\$41.30	\$619.54
10" x 6' WALL	18 LF	\$46.72	\$840.96
10" x 7' WALL	9 LF	\$51.14	\$460.24
10" x 8' WALL	17 LF	\$54.56	\$927.44
10" x 9' WALL	16 LF	\$64.47	\$1,031.57
10" x 10' WALL	35 LF	\$73.89	\$2,586.18
10" x 12' WALL	119 LF	\$83.73	\$9,963.41
STEP FOOTINGS	10 VF	\$13.49	\$134.94
FOOTING CONCRETE ALLOWED 8" x 18" FOOTING	9.8 CY		
EXTRA CONCRETE FOR OUT-OF-LEVEL GRADE	0.0 CY	\$135.00	\$0.00
EXTRA CONCRETE TO CHANGE TO ENGINEERED FOOTING SIZE	11.5 CY	\$135.00	\$1,552.50
RADIUS WALL	1625 SF	\$2.20	\$3,575.00
#4 REBAR	350 LF	\$0.77	\$269.50
#5 REBAR	3950 LF	\$0.84	\$3,318.00
TIE WALL REBAR	1800 SF	\$0.50	\$900.00
CORNERS OR TEES OVER FIVE	20 EA	\$65.00	\$1,300.00
PUMP / CONVEYOR TRIPS	2 EA	\$600.00	\$1,200.00
DRILL AND DOWEL	1 EA	\$100.00	\$100.00
BACKHOE / NEW HOLLAND (\$500 MIN)	10 HR	\$65.00	\$650.00
TOTAL AMOUNT BASEMENT WALLS			\$29,429.30

PREMIER SOUTHERN HOMES MODEL HOME RET WALL 7/5/2007

B-4

036900715 9/25/2007 Bk: 00031 Ps: 00277

PREMIER SOUTHERN HOMES
209 DEER TROT AVENUE
BENTON SC 29627

Invoice Date: 06/25/2007
Invoice No: R704803
Due Date: 07/02/2007

HENRY BEAL

Project: TUSCANY MODEL

SLAB - RES (See Detail)	1.00 EA	\$1,882.50	\$1,882.50
		Total	\$1,882.50

B-5

ACTION CONCRETE CONTRACTORS, INC.

15 BEVERLY ROAD
GREENVILLE, SC 29609
(864) 292-6781
(864) 292-6782 FAX

JOB
MODEL HOME

NAME
PREMIER SOUTHERN HOMES

0
0
0
0
0

PHONE:
444-8884 0
FAX:
338-8440 0

6/25/2007

ITEM	QUANTITY	UNIT PRICE	TOTAL
4" SLAB WITH 4" GRAVEL LOWER GARAGE SLAB	502 SF	\$3.75	\$1,882.50
TOTAL AMOUNT SLABS			\$1,882.50

B-6

PREMIER SOUTHERN HOMES
209 DEER TROT AVENUE
BENTON SC 29627

Invoice Date: 06/18/2007
Invoice No: R704802
Due Date: 06/25/2007

HENRY BEAL

Project: TUSCANY MADEL

SLAB - RES (See Detail)	1.00	EA	\$13,011.16	\$13,011.16
INVENTORY ADJUSTMENT	1.00	EA	(\$600.00)	(\$600.00)
INVENTORY ADJUSTMENT	1.00	EA	(\$1,155.98)	(\$1,155.98)
CONCRETE PUMP	1.00	TRIP	\$600.00	\$600.00
GRAVEL PLACEMENT	50.26	TON	\$23.00	\$1,155.98
			Total..	\$13,011.16

B-7

ACTION CONCRETE CONTRACTORS, INC.

16 BEVERLY ROAD
GREENVILLE, SC 29609
(864) 292-6781
(864) 292-6782 FAX

JOB
MODEL HOME

NAME
PREMIER SOUTHERN HOMES

0		0
0	PHONE:	
0	444-8864	0
0	FAX:	
0	338-8440	0

PRICE \$33,713.58

6/18/2007

ITEM	QUANTITY	UNIT PRICE	TOTAL
4" SLAB WITH 4" GRAVEL	3202 SF	\$3.75	\$12,007.50
4" SLAB WITH NO GRAVEL	0 SF	\$3.75	\$0.00
THICKENED SLAB	107 LF	\$9.38	\$1,003.66
EXTRA UNDER SLAB GRAVEL	0.00 TON	\$23.00	\$0.00
SAWED CONTROL JOINT	0 LF	\$1.00	\$0.00
TOTAL AMOUNT SLABS			\$13,011.16

PREMIER SOUTHERN HOMES MODEL HOME 6/18/2007

B-8

PREMIER SOUTHERN HOMES
209 DEER TROT AVENUE
BENTON SC 29627

Invoice Date: 05/31/2007
Invoice No: R704801
Due Date: 06/07/2007

HENRY BEAL

Project: TUSCANY MODEL

FOUNDATION WALL (Detail)
CONCRETE PUMP

1.00	EA	\$19,502.42	\$19,502.42
2.00	TRIP	\$600.00	\$1,200.00
Total			\$20,702.42

B-9

**ACTION
CONCRETE
CONTRACTORS, INC.**

15 BEVERLY ROAD
GREENVILLE, SC 29609
(864) 292-6781
(864) 292-6782 FAX

JOB
MODEL HOME

NAME
PREMIER SOUTHERN HOMES

0
0
0
0
0

PHONE:
444-8864 0
FAX:
338-8440 0

PRICE \$20,702.42

5/30/2007

ITEM	QUANTITY	UNIT PRICE	TOTAL
WALL PRICES INCLUDE 8" x 18" FOOTING			
6" x 1' WALL	202 LF	\$22.27	\$4,499.19
6" x 4' WALL	3 LF	\$30.45	\$91.35
6" x 5' WALL	3 LF	\$34.51	\$103.53
6" x 9' WALL	7 LF	\$52.24	\$366.71
6" x 10' WALL	3 LF	\$60.30	\$180.91
10" x 6' WALL	6 LF	\$46.72	\$280.32
10" x 9' WALL	136 LF	\$64.47	\$8,768.36
EXTRA FOOTINGS	54 LF	\$10.27	\$554.82
STEP FOOTINGS	10 VF	\$13.49	\$134.94
PIER PADS 24" x 24" x 8"	3 EA	\$66.00	\$196.00
FOOTING CONCRETE ALLOWED 8" x 18" FOOTING	17.4 CY		
EXTRA CONCRETE TO CHANGE TO ENGINEERED FOOTING SIZE	2.6 CY	\$135.00	\$351.00
BRICK LEDGE	186 SF	\$2.20	\$429.00
#4 REBAR	1600 LF	\$0.77	\$1,232.00
ANCHOR BOLTS - NO NUTS	90 EA	\$1.65	\$148.50
CORNERS OR TEES OVER FIVE	21 EA	\$65.00	\$1,365.00
45 DEGREE CORNERS	36 VF	\$7.00	\$252.00
2x4 / 2x6 SLAB LEDGE	14 LF	\$2.20	\$30.80
PUMP / CONVEYOR TRIPS	2 EA	\$600.00	\$1,200.00
BACKHOE / NEW HOLLAND (\$500 MIN)	8 HR	\$65.00	\$520.00
TOTAL AMOUNT BASEMENT WALLS			\$20,702.42

RECORDED & INDEXED
FILED
BK: 00631 Ps: 00270 Pages: 013
Rec Fee: 19.00 St Fee:
Co Fee:
REGISTER OF DEEDS, ANDERSON CO., SC
SHIRLEY McELHANNON

PREMIER SOUTHERN HOMES MODEL HOME 5/30/2007

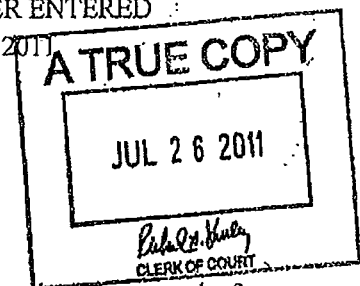
STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Action Concrete Contractors, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Elvira Chappellear, Craig Chappellear,)
 Premier Southern Homes, LLC, Henry)
 G. Beal, Jr., and First Citizens Bank and)
 Trust Co., Inc.)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. NO: 2007-CP-04-4113

MEMORANDUM IN OPPOSITION OF
 ELVIRA AND CRAIG CHAPPELEARS
 MOTION TO ALTER OR AMEND THE
 COURT'S ORDER ENTERED

APRIL 28, 2011



TO: Defendants, Elvira Chappellear and Craig Chappellear, by and through their counsel of record, Ryan McCabe :

Plaintiff Action Concrete Contractors, Inc. (hereinafter "Action Concrete") submits this Memorandum in Opposition to Defendants Elvira Chappellear and Craig Chappellears (hereinafter Chappellears" or "Owners") Motion to Alter or Amend this Court's Order entered on April 28, 2011 ("Order") in the above-captioned matter. Action Concrete argues that this Court properly granted summary judgment to Action Concrete after carefully considering the arguments and submissions of counsel and that there were no issues raised by the Chappellears which the Court failed to rule upon in its Order.

PROCEDURAL HISTORY

This matter came before the Court upon Action Concrete's Motion for Summary Judgment as to Defendants Elvira Chappellear and Craig Chappellear. A hearing on the Motion

provides for a payment defense based upon a comparison of the labor and materials furnished by the general contractor and the sum paid by the Owner to the general contractor." (See Motion to Alter or Amend pg. 5)

The last sentence of Section 29-5-40 states that "in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made." S.C. Code Ann. §§ 29-5-40 (2010). This sentence creates what is known as a "payment defense," which limits the owner's liability to the amount owed to the general contractor at the time notice of the subcontractors lien is noticed to the owners.

The Chappellears state they are entitled to a payment defense under S.C. Code Ann. §29-5-40 because at the time the Chappellears received notice of Action Concrete's lien, estimates to complete the Project were higher than the remaining balance due under the contract thereby using up the funds which were available to pay Action Concrete. However this misstates the facts. Once again the key to remember here is Premier was not fired until 220 days after attachment of Action Concrete's lien. The Chappellears continued to pay the debts of Premier and kept Premier on the Project. Premier was fired on May 2, 2008 and it was not until June 8, 2008 that the Owners received an estimate regarding the cost of completion.

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 the debts of Premier in violation of §29-5-50 before finally firing Premier, they should be able to offset the cost to complete estimate. Accordingly, if it is obligated to pay Action \$66,862.63, the Chappellears will pay in excess of the contract price. According to the Chappellears 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. The Chappellears relied on two cases for their contention that they have an absolute payment

defense. The first is *Wood v. Hardy*, 235 S.C. 131, 110 S.E. 2d. 157 (1959), and the second is *Stoudenmire Heating and Air*, 308 S.C. 298, 302-03, 417 S.E.2d 634, 637-38 (S.C. Ct. App. 1992). However, the key distinction in those cases is the general contractor abandoned the project prior to the Owner receiving notice.

As the Court stated in its Order, the Chappellears reliance on these cases is misplaced. In the case before us the General Contractor remained on the Project well after the Chappellears had notice of Action Concrete's lien. As the 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 Chappellear's 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 Order pg. 7)

In *Stoudenmire*, 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

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." 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.

The Chappellears cite the same language from the case but change the interpretation stating,

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 *the day that the owner stopped paying the general contractor and started paying the project's bills directly*¹....

The Chappellears footnote states,

¹ The court noted that the values on the day that the owner stopped paying the general contractor and started paying the projects bills directly

necessarily must be the same as the day the owner received notice because no work was done by [the general contractor] and no payments were made by [the owner] to [the general contractor] after [that day]," *Stoudenmire Heating & Air Conditioning Co*" 308 S,C, at 303 n.4, 417 S,E,2d at 638 n.4, Thus, in *Stoudenmire*, the day that the owner stopped paying the general contractor and started paying the project's bills directly and the day that notice was received can be used interchangeably for the purpose of a defense of payment calculation. (See Motion to Alter or Amend pg. 4)

The *Stoudenmire* case is 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 but that is certainly not a rule applicable to cases especially when the general contractor continued to work under the Contract. The *Stoudenmire* Court explained this in Footnote 4 cited above.

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. Premier continued working under the contract and was still going to receive the additional consideration of using the home as a model. (See Order pg. 8). As the Court stated,

[t]he 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 Order pg. 7)

Based on the undisputed facts, the arguments of counsel, the relevant caselaw and the analysis by the Court it is clear the Chappellears are not entitled to set-off damages incurred when Premier breached the contract 220 days after the Chappellears had notice of Action Concrete's lien and had paid \$118,931.83 to subcontractors on behalf of Premier in preference to Action Concrete's perfected lien. As the Court has already ruled, the Chappellears have no right to assert the payment defense in the present case.

B. THE CHAPPELEAR'S ARGUMENT THAT THE COURT COMMITTED AND ERROR OF LAW IN REGARDS TO DETERMINGIG THE CHAPPELEAR'S VIOLATED S.C.CODE ANN. §29-5-50 LACKS SUPPORTING AUTHORITY

By paying the other subcontractors directly instead of through Premier, the Chappellears attempted to avoid the operation of S.C. Code Ann. § 29-5-50, which provides that:

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.

There is simply no basis for the Chappellears assertion that the Court misunderstood the mechanics laws of this State. 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 effect the amount recoverable by the party with the mechanics' lien. 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 Order pg. 8)

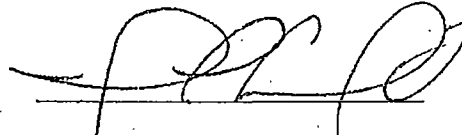
The Court correctly noted that in construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.c. 162, 166, 573 S.E.2d 783, 785 (2002). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Wieters v. Bon-Secours-St. Francis Xavier Hasp., 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). (See Order pg 3).

Action Concrete believes the Court properly considered the applicability of the mechanics lien statute and relevant case law to the present case and correctly granted its Motion for Summary Judgment.

CONCLUSION

For the reasons stated above, Action Concrete Contractors, Inc. respectfully requests that this Court deny the Elvira and Craig Chappellear's Motion to Alter or Amend the Judgment.

Respectfully submitted this 25 day of July 2011.



John T. Crawford, Jr. (SC Bar# 69682)
F. Lee Prickett III (SC Bar# 76178)
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704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844
Attorneys for Plaintiff, Action Concrete
Contractors, Inc.

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Action Concrete Contractors, Inc.,)

Plaintiff,)

vs.)

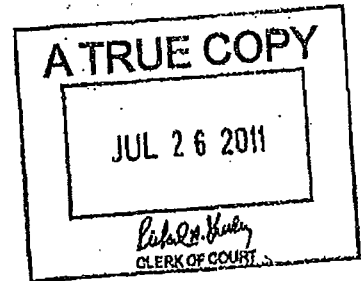
Elvira Chappellear, Craig Chappellear,)
Premier Southern Homes, LLC, Henry)
G. Beal, Jr., Wells Fargo Bank, N.A.,)
First Citizens Bank and Trust Co., Inc.)

Defendants.)

IN THE COURT OF COMMON PLEAS

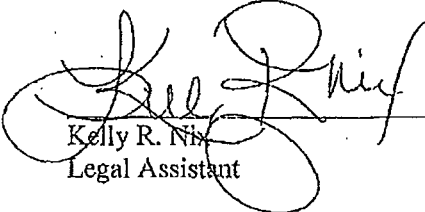
C.A. NO: 2007-CP-04-4113

CERTIFICATE OF SERVICE



This is to certify that I have served Plaintiff's Memorandum in Opposition of Elvira and Craig Chappellear's Motion to Alter or Amend the Court's Order Entered April 28, 2011 in the above-captioned action upon the below named person on this 25 day of July, 2011 via United States Mail, postage prepaid and affixed thereto, addressed as follows:

D. Ryan McCabe, Esq.
Rogers, Townsend & Thomas, P.C.
P. O. Box 100200
Columbia, SC 29202
Fax (803) 343-7017


Kelly R. Nix
Legal Assistant

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ANDERSON)	C.A. NO: 2007-CP-04-4113
)	
Action Concrete Contractors, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM OF LAW IN
)	REPLY TO DEFENDANTS
)	MEMORANDUM
Elvira Chappelear, Craig Chappelear,)	
Premier Southern Homes, LLC, Henry)	
G. Beal, Jr., and First Citizens Bank and)	
Trust Co., Inc.)	
)	
<u>Defendants.</u>)	

TO: Defendants, Elvira Chappelear and Craig Chappelear, by and through their counsel of record, Franklin H. Turner, III :

Plaintiff Action Concrete Contractors, Inc. (hereinafter "Action Concrete") submits this Memorandum of Law in response to the memorandum submitted by Elvira and Craig Chappelear (hereinafter Chappelears" or "Owners"). Once again Action Concrete reiterates its position that this Court properly granted summary judgment to Action Concrete after carefully considering the arguments and submissions of counsel and that there were no issues raised by the Chappelears which the Court failed to rule upon in its original Order. Action Concrete takes this opportunity to address the Chappelears version of the law as it relates to the undisputed facts before the Court based on the issues raised at the hearing held on October 25, 2011. Furthermore, Action Concrete respectfully requests the Court review the previous memorandums submitted by Action concrete which also address the issues raised by the Chappelears.

While the Chappellears have stated they are submitting their brief strictly to explain their view of the Mechanics Lien law certain undisputed facts stated below are crucial to an understanding of the Court's ruling.

- 1) On September 25, 2007, Action Concrete filed and served its notice of mechanics lien and statement of account on Defendant Owners.
- 2) As of the date Action Concrete filed and served notice of its mechanics lien on Owners, there was an outstanding contract balance of \$164,260.00 owed to Premier from Owners. This number is based on the \$300,000.00 lump sum contract the parties agreed to at the beginning of the construction.
- 3) Owners stopped paying the General Contractor, Premier directly but began making payments on behalf of Premier directly to Premier's subcontractors so the work could be completed thereby reducing the amount owed to Premier under the Contract.
- 4) Owners continued to pay Premier's subcontractors directly and continued to reduce the amount owed to Premier. Premier agreed to these terms and continued to work to complete the Project.
- 5) Finally on May 2, 2008, 220 days after receiving the notice of Action Concrete's lien, the Owners fired Premier. At that point the Owners had paid Premier's subcontractors at least \$118,931.83 since the lien was filed by Action Concrete despite having notice that Action's invoices remained unpaid.

MEMORANDUM OF LAW

Action Concrete agrees with the Chappellears that Sections 29-5-40 and §29-5-20 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). However, the Chappellears then state,

“[t]he absolute payment defense is the issue in question in this matter, and not the language of 29-5-50 addressing payments in preference to the lien holder. If the factual determination is made that the Chappelears had paid the general contractor, Premier, in full at the time of notice, then the Chappelears have an absolute payment defense. If, on the other hand, the factual determination is made that the Chappelears had not paid Premier in full for the work Premier had performed at the time the lien was noticed, then they do not have an absolute payment defense and Plaintiff would be entitled to a lien up to the amount the Chappelears owed Premier for work performed at the time the lien was noticed.” (See Chappelear Memo pg 2)

The Chappelears relied on two cases for their contention that they have an absolute payment defense. The first is *Wood v. Hardy*, 235 S.C. 131, 110 S.E. 2d. 157 (1959), and the second is *Stoudenmire Heating and Air*, 308 S.C. 298, 302-03, 417 S.E.2d 634, 637-38 (S.C. Ct. App. 1992). However, the key distinction in those cases is the general contractor abandoned the project prior to the Owner receiving notice that the subcontractor had not been paid. Based on those facts the Court properly considered the amount owed to the general contractor at the date of Notice to be the amount possibly recoverable under the lien.

The Chappelears state,

“[w]hat the *Stoudenmire* Court finds is that there need to be two determinations made when considering the absolute payment defense. One is the determination of what if anything, the owner owes the general contractor for work performed up until the time of notice. The second prong, is what damage did the owner suffer as a result of the general contractors failure to complete the contract.”

All of this would be correct if the Chappelears 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*.

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. 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. Importantly, in the *Stoudenmire* case no preference payments were made after the Owner had notice to unperfected claimants or to the general contractor.

In the present case Action Concrete provided its notice to the Owner 220 days prior to the General Contractor being fired. It is undisputed that the Chappellears continued to operate under the contract and considered payments to Premier's subcontractors to be payments to Premier. The cases cited by the Chappellears would have substantially different reasoning if the 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 current pay application to the Owner included the subcontractors work and the owner was not behind on payments. 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 followed the statutory guidelines with no protection whatsoever.

The South Carolina Supreme Court 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) *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008).

Under §29-5-40 Defendant Owners liability to Action Concrete was limited to the balance due by Owners to Premier on the contract price *at the time Owners received notice* that Action Concrete had not been paid. As stated by the Court in its Order the last key issue is a determination of “the owner’s liability to the prime contractor at the time the owner receives notice of the lien because that is the limit for what the subcontractor can receive.” (See Order pg 6). The record establishes that the contract price between Premier and Owners was \$300,000.00. As of September 25, 2007 when the Owners were served with notice of Action Concrete’s mechanics lien, the Owners had paid \$135,740.00 to Premier. The total balance due to Premier from the Owner was \$164,260.00. The record has also shown that the Premier did not abandon the project and was not fired until May 2, 2008. Prior to Premier being fired yet after the Owners received Notice of Action Concrete’s lien the Owners paid at least \$118,931.83 towards the contract balance by paying Premier’s subcontractors directly, more than enough to satisfy Action Concrete’s lien.

Clearly the key difference in the cases cited by the Chappellears and the reason for the way the *Stoudenmire* Court’s ruling is stated is the fact that in that case the general contractor did not continue on the project after notice of the lien and the owner did not continue to derive a benefit from the general contractor’s presence. The exact opposite is true in the case before the Court. The Owners and Premier continued to operate under the Contract.

The timing of the breach is critical. The Chappellears have now attempted to argue the breach was Premier’s failure to pay Action Concrete but clearly even if this were a breach the Chappellears clearly waived any such breach by continuing to operate under the Contract. This is

not a situation where an owner took over the Project and began dealing with subcontractors directly. Premier continued to run the Project for 220 days after Action Concrete provided notice to the Owners that they were not paid. Receipt of Action Concrete's notice should have effectively ceased all payments on the project until the dispute was resolved.

The purpose of the Notice 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 Chappellears would have fired Premier at the time of Actions Notice and hired the subcontractors directly the cited cases would be applicable however the Chappellears made the decision to keep Premier on the Project and derive the benefit of using Premier to manage the project.

The Chappellears go on to state "[a]ccording to the language of the statute , the court should determine what is owed by looking at the amount due the general contractor, not the subcontractor, based in the work that was in place at the time of notice, and not on any work to be completed in the future." (*See* Chappellear memo pg 3). Once again such a rationale is applicable in a situation where the general contractor is no longer on the Project. Otherwise you clearly look to the amount owed under the contract in the future. The fact that there are future funds due is exactly what the supplier or subcontractor is supposed to use to protect itself from non-payment and furthermore allows the owner to avoid paying twice.

As the Court stated in its Order, the Chappellears reliance on these cases is misplaced. In the case before us the General Contractor remained on the Project well after the Chappellears had notice of Action Concrete's lien. As the 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 Chappellear's 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 Order pg. 7)

It is undisputed that the Chappellear's considered payments to Premier's subcontractors to be a reduction in the contract balance. The Chappellears continued to pay the debts of Premier in preference to Action Concrete. Premier continued working under the contract and was still going to receive the additional consideration of using the home as a model. This fact alone makes the Chappellears interpretation of the cited cases inapplicable. The undisputed facts simply are not the same therefore the Chappellears attempt to place the facts before the Court within the framework of *Stoudenmire* are misplaced.

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 effect the amount recoverable by the party with the mechanics' lien. 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 Order pg. 8)

Once again we refer to the Court's Order which stated,

[i]n 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 Order pg 5).

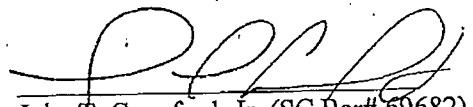
If the Chappellear's position was accepted the protection given to subcontractors and suppliers would be completely undermined and many of the provisions of the Mechanics' Lien laws would have no use. Action Concrete followed the statutory guidelines and provided Notice to the Owner. Despite said Notice the Chappellear's continued to make payments under the Contract with Premier and therefore opened themselves up to the prospect of paying twice. The Owners 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.

CONCLUSION

For the reasons stated above and the arguments made by Counsel for Action Concrete at the prior hearings and within the prior memorandums, Action Concrete Contractors, Inc. respectfully requests that this Court deny Elvira and Craig Chappellear's Motion to Alter or

Amend the Judgment and refer the case to the special referee to address the amount of attorneys fees recoverable by Action Concrete.

Respectfully submitted this 14th day of November 2011.

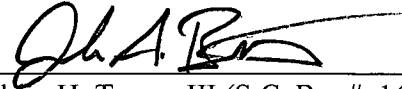


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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 8, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2007-CP-04-4113


Action Concrete Contractors, Inc. Respondent,

v.

Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., of
whom Elvira Chappellear and Craig Chappellear, Appellants.

PROOF OF SERVICE

I certify that I have served the Supplemental Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2012, addressed to its attorney of record as listed below.


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SC Court of Appeals

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