

The Supreme Court of South Carolina

Action Concrete Contractors, Inc., Respondent,

v.

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

Of whom Elvira Chappelear and Craig Chappelear are
Appellants.

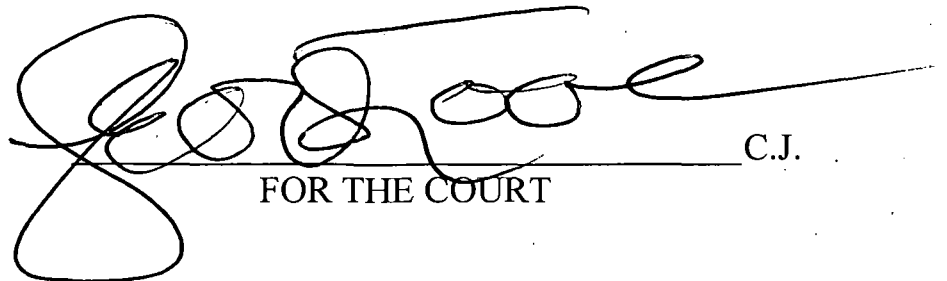
Appellate Case No. 2012-207526

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward
the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

December 21, 2012

cc:

John T. Crawford, Jr.

Joshua Allan Bennett

Franklin H. Turner, III

F. Lee Prickett, III

The Honorable Jenny Kitchings

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

RECEIVED

OCT 29 2012

SC Court of Appeals

Action Concrete Contractors, Inc., ...Respondent,

v.

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

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

AMENDED DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following be included in the Record on Appeal:

1. Notice and Certificate of Mechanic's Lien
2. Complaint and Lis Pendens of Action Concrete
3. Answer of Elvira Chappellear and Craig Chappellear
4. Release of Lien Bond
5. Action Concrete's Motion for Summary Judgment
6. Chappellears' Memorandum in Opposition to Motion for Summary Judgment
7. Motion for Summary Judgment Hearing Transcript
8. Order of April 21, 2011
9. Chappellears' Motion to Alter or Amend
10. Chappellears' Memorandum of Law in Support of Motion to Alter or Amend
11. Chappellears' Reply to Action Concrete's Memorandum of Law in Reply
12. December 20, 2011 Order
13. Notice of Appeal

14. Construction Management Contract—Fixed Fee
15. Action Concrete Subcontract Agreement
16. Action Concrete Open Invoices
17. Termination Letter
18. Summary of Money Disbursed
19. Russ Vickery Estimate
20. Plaintiff's Exhibit Number 8
21. Plaintiff's Exhibit Number 10
22. Elvira Chappellear Deposition
23. Plaintiff's Memorandum in Support of Motion for Summary Judgment as to Defendants Elvira and Craig Chappellear, dated November 29, 2010
24. Memorandum in Opposition of Elvira and Craig Chappellears Motion to Alter or Amend The Court's Order Entered April 28, 2011, dated July 25, 2011
25. Memorandum of Law in Reply to Defendant's Memorandum, dated November 14, 2011

I certify that this designation contains no matter which is irrelevant to this appeal.



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October 26, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

RECEIVED

OCT 29 2012

SC Court of Appeals

Action Concrete Contractors, Inc., ...Respondent,

v.

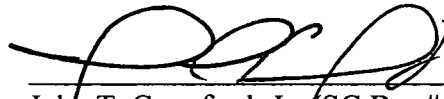
Elvira Chappellear, Craig Chappellear, Premier Southern Homes, LLC, Henry G.
Beal, Jr., and First Citizens Bank and Trust Co., Inc., Defendants,

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

PROOF OF SERVICE

Comes now John T. Crawford, Jr., and certifies that a copy of his Amended Designation of Matter to be Included in the Record on Appeal was served on the opposing party on this 26 day of October 2012, by placing the same in the U. S. Mail with sufficient postage affixed to Appellant's Counsel of Record, Franklin H. Turner, III and Joshua A. Bennett, at the following address: Post Office Box 100200, Columbia, SC 29202.



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October 26, 2012

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OCT 29 2012

SC Court of Appeals

The Honorable Tanya A. Gee
Clerk of the Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Action Concrete Contractors, Inc. v. Elvira Chappelle, Craig Chappelle, et. al.
Case No.: 2007-CP-04-4113
Case Tracking No.:

Dear Ms. Gee:

Enclosed please find an original and one (1) copy of the Respondent's Amended Designation of Matter to be Included in the Record on Appeal with Proof of Service for same. Please file the originals and return the clocked copy to our firm in the enclosed self-addressed stamped envelope.

By copy of this letter, we are serving same upon counsel for the Appellants, Elvira Chappelle and Craig Chappelle. Thank you for your time and attention to this matter. Feel free to contact our office if you have any questions.

Sincerely,

KENISON, DUDLEY & CRAWFORD, LLC



Erica Hawthorne,
Paralegal to John T. Crawford, Jr.

Enclosures

cc: Franklin H. Turner, III

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October 19, 2012

RECEIVED
OCT 22 2012
SC Court of Appeals

The Honorable Richard A. Shirley
Anderson County Clerk of Court
Post Office Box 8002
Anderson, South Carolina 29622

Re: Action Concrete Contractors, Inc. 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.
C/A Number: 07-CP-04-4113
RTT Number: 13977.1

I am in receipt of your October 10, 2012 Notice of Case Scheduling, which notice was mailed to D. Ryan McCabe, Esquire.

This letter is to advise you that attorney D. Ryan McCabe left Rogers Townsend Thomas, PC earlier this year to start up his own firm and Elvira Chappellear and Craig Chappellear are now represented by the undersigned.

Please update your records to reflect the following:

Franklin H. Turner III, Esquire
Rogers Townsend Thomas, P.C.
220 Executive Center Drive
P.O. Box 100200 (29202)
Columbia, SC 29210

Thank you for your attention to this matter. If you have any questions please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "F. H. Turner III", is written over a horizontal line.

Franklin H. Turner III

FHT/tmg

cc: Counsel of Record (via email)
D. Ryan McCabe, Esquire (via email)
South Carolina Court of Appeals

6240327-1

The South Carolina Court of Appeals

Action Concrete Contractors, Inc., Respondent,

v.

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

Of whom Elvira Chappelear and Craig Chappelear are
Appellants.

Appellate Case No. 2012-207526

ORDER

Respondent has filed a motion requesting to amend its designation of matter previously filed August 22, 2012. Appellants have verbally consented to the motion. Therefore, Respondent's motion is granted.

Respondent is requested to serve and file an amended designation of matter within ten days. Counsel for Appellants is requested to serve and file a supplemental record on appeal to include the additional designated items no more than fifteen days from the date of service of the amended designation of matter. All final briefs must be served and filed no more than twenty days from the date of service of the supplemental record on appeal.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

John T. Crawford, Jr.
Joshua Allan Bennett
Franklin H. Turner, III

FILED
EC 10/23/12

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.

REPLY BRIEF OF APPELLANTS

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Craig Chappellear*

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SC Court of Appeals

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ARGUMENT

Based on the Chappelears' prior brief and the following points, the Chappelears respectfully request that this Court reverse the holding of the trial court.

I. BECAUSE THE CHAPPELEARs PAID SUBCONTRACTORS DIRECTLY AND OWED NOTHING TO ACTION CONCRETE, THE CHAPPELEARs DID NOT VIOLATE S.C. CODE ANN. § 29-5-50 OR § 29-5-60

In its brief, Action Concrete consistently relies on its assertion that the Chappelears made payments to subcontractors on behalf of Premier in violation of S.C. Code Ann. § 29-5-50.¹ However, it is imperative to note that § 29-5-50 does not prohibit payments made to parties other than the general contractor.

It is true that *if* the Chappelears' did not possess an absolute payment defense (i.e. the value of the labor and materials furnished by Premier at the time of notice exceeded the sum paid by the Chappelears to Premier at the time of notice), then the Chappelears would be responsible for the difference. At that point, pursuant to § 29-5-50, any funds paid to Premier (which is denied and a question of fact) would not decrease the amount recoverable by Action Concrete. *See* S.C. CODE ANN. § 29-5-50 (2009).

However, leaving out for a moment the point that the Chappelears possessed an absolute payment defense at the time of notice, § 29-5-50 does not prohibit the Chappelears from finishing their home by paying subcontractors directly. Specifically, S.C. Code Ann. § 29-5-50 states that any person claiming a mechanic's lien who has given notice "shall be entitled to be paid in preference *to the contractor at whose instance the labor was performed. . .*" S.C. CODE ANN. § 29-5-50 (2009) (emphases added). Thus, by the plain language of the statute, an owner is not prohibited from

¹ Whether funds paid to subcontractors were made on behalf of Premier is a disputed issue of material fact that is addressed below as well as in the Chappelears' prior brief.

continuing work on the project if a lien exists as long as no funds are paid directly to the general contractor. As evidenced by the deposition testimony of Elvira Chappelear, the only payments made after notice was received were made directly to the subcontractors, with no funds going through Premier.² (See Elvira Chappelear Dep. 125:17–20.)

Action Concrete inserts further confusion by including an analysis of § 29-5-60 and arguing that the “position of the Chappelears would completely undermine this provision because the Chappelears clearly made payments to unperfected lien holders over Action Concrete.” (Brief of Respondents, 29.)

Under § 29-5-60, “[i]n the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens . . . it is the duty of the owner to prorate among all just claims the amount due the contractor.” S.C. CODE ANN. § 29-5-60 (2009). However, there has been no evidence presented that any subcontractors paid directly by the Chappelears were lienholders at the time of payment. Additionally, because of the Chappelears’ absolute payment defense, Action Concrete was owed nothing by the Chappelears, thus rendering § 29-5-60 irrelevant.³

Therefore, Action Concrete’s reliance upon § 29-5-50 and § 29-5-60 is misplaced and does not negate the Chappelears’ payment defense and the fact that the Chappelears

² It is important to note that the circumstances in this case are extremely similar to the facts of *Stoudenmire*. In that case, when the issue arose regarding who the subcontractors were performing work for, the court found that the subcontractor’s work was done directly for the owner because, at the time the work was performed, “[the general contractor] had encountered financial problems and [the owner] was paying the bills.” *Stoudenmire*, at 300, 417 S.E.2d at 636.

³ Further, Action Concrete seems to insinuate that payments made to an unperfected claimant after notice was received would be a distinguishing factor between this case and *Stoudenmire*. (Brief of Respondents, 27–28.) However, the payment defense calculation set forth in *Stoudenmire* is in no way effected by the actions of the parties after notice is received; instead, the court compares the value of the work received by the owner to the value paid to the general contractor at the time of notice in order to determine whether a payment defense exists. *Stoudenmire*, at 303, 417 S.E.2d at 637–38.

were free to finish construction of their home by paying subcontractors directly pursuant to the plain language of § 29-5-50 and the *Stoudenmire* opinion.

II. ACTION CONCRETE UNSUCCESSFULLY ATTEMPTS TO DISTINGUISH BINDING ON POINT CASE LAW REGARDING THE METHOD OF CALCULATING A PAYMENT DEFENSE

As fully explained in the Chappelears' prior brief, the prevailing authorities support a calculation of the Chappelears' payment defense as follows:

This amount should be determined by the receipt of evidence of the value of the labor and materials by [the general contractor] to [the owner] on or before [the day the owner received notice]. The court should then determine the amount paid to [the general contractor] by [the owner] on or before [the day the owner received notice]. If the value of the labor and materials furnished by [the 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.

See Stoudenmire at 303, 417 S.E.2d at 637–38.

In addition to looking at whether the value of the labor and materials furnished by the general contractor at the time of notice exceeds the sum paid by the owner to the general contractor at the time of notice, this Court held in *Stoudenmire* that the trial court should also consider the amount of damages the owner suffered as a result of the failure of the general contractor to complete the contract. *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 303, 417 S.E.2d at 638; *see also Pond Cove Millwork Co. v. Steeves*, 598 A.2d 1181, 1182–83 (Me. 1991) (“The amount of compensation to which a builder is entitled may be subject to deductions or setoffs in favor of the homeowner for expenses incurred or damages sustained, because the builder did not perform in accordance with the terms of the contract.” (citing 17A C.J.S. Contracts § 368 (1963))).⁴

⁴ As to the Chappelears' right to offset, Action Concrete actually admits that, under *Stoudenmire*, an owner is allowed to offset the damages caused by the general contractor from amounts owed to the general contractor, but attempts to mitigate the rule by arguing the application of § 29-5-50. (Brief of Respondents,

In its brief, Action Concrete attempts to distinguish *Stoudenmire* from the present case by arguing that, in *Stoudenmire*, “the general contractor did not continue to work on the project after notice of the lien and the owner did not continue to derive a benefit from the general contractor’s presence.” (Brief of Respondents, 24.) Instead, Action Concrete asserts that *Stoudenmire* was “a case where the general contractor abandoned the project prior to the owner receiving notice of the lien.” (Brief of Respondents, 20.) In essence, Action Concrete asserts that a general contractor’s termination or abandonment of the project is a prerequisite to application of the *Stoudenmire* payment defense calculation. However, faced with binding, on-point precedent directly adverse to its position, Action Concrete is attempting to make a distinction that simply does not exist.

As to the events that transpired between the owner and general contractor, the *Stoudenmire* opinion clearly states the following:

Pierpoint Inc. had financial difficulties during March of 1988. On or about March 16, Pierpoint became unable to pay its bills and Craig Building Partnership began paying bills directly for Pierpoint. After that date no further payments were made by Craig to Pierpoint. Individuals who had worked on the job for Pierpoint were kept on the job and paid directly by Craig.

Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P’ship, 308 S.C. 298, 300, 417 S.E.2d 634, 636 (Ct. App. 1992).

There is simply no evidence presented in the *Stoudenmire* opinion from which a determination can be made that the general contractor abandoned the project in that case. Instead, the events that occurred between Pierpoint, Inc. and Craig Building Partnership are exactly the same as the events that occurred between the Chappelears and Premier—namely, the general contractor became unable to pay its bills and so the owner stopped all

23.) However, as argued extensively above and in the Chappelears’ prior brief, any direct payments to subcontractors by the Chappelears were not a violation of § 29-5-50 as exemplified in *Stoudenmire*. (See Brief of Appellant, Section III.)

payments to the general contractor and began to pay the subcontractors directly. Action Concrete's position that Pierpoint Inc. abandoned the project in *Stoudenmire* means that Premier must have abandoned the Project in this case. In short, Action Concrete is mistaken in its analysis that there exists a key distinction between *Stoudenmire* and the case at bar.

Action Concrete attempts to support its position by citing to footnote 4 of the *Stoudenmire* opinion. In that footnote, the Court noted that the values on the day that the owner stopped paying the general contractor and started paying the project's 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*, 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.

In that footnote, the court was merely noting that the dates were interchangeable because the calculation for the payment defense would have been the same on either day. The footnote does not state, or even infer, that abandonment by the general contractor is a prerequisite for application of the payment defense calculation as set forth in the opinion. Instead, the *Stoudenmire* court was merely stating that the payment defense calculation would be the same on and between the two stated dates. As a result, Action Concrete fails at its attempt at distinguishing *Stoudenmire* from the present case.

Furthermore, even if the general contractor abandoned the project in *Stoudenmire*, that does not make abandonment a prerequisite to application of the payment defense

calculation as set forth in that case. Action Concrete fails to address the fact that, according to the plain statutory language, the court should determine what is owed by looking at the amount due the general contractor for work that has been completed, not the work that should be completed in the future. *See* S.C. CODE ANN. § 29-5-40 (2009) (“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*.”).⁵

Not only does Action Concrete ignore the plain language of the statute, but it fails to cite one case that supports its position regarding the calculation of the payment defense. In short, Action Concrete fails to offer any authority that supports its position or contradicts application of the calculation set forth by *Stoudenmire*.⁶

III. ACTION CONCRETE’S ENTIRE ARGUMENT RESTS ON MULTIPLE GENUINE ISSUES OF MATERIAL FACT THAT WARRANT REVERSAL

In its brief, Action Concrete argues that there are no issues of material fact in the case. However, the majority of Action Concrete’s argument is based on issues of material fact that warrant reversal of the trial court’s order.

For example, Action Concrete argues that whether the Chappelears suffered any damages from the breach of the general contractor and whether the Chappelears owed

⁵ The Chappelears’ interpretation of the payment defense statute is not only in keeping with the plain language of the statute and binding case law, but is in line with the policy of the Mechanic’s Lien statute. *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P’ship*, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992) (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956)) (stating that § 29-5-40 has 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.”); *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008) (“The subcontractor’s lien, however, is not intended to create a windfall to the subcontractor.”).

⁶ Although it is not clear, but to the extent that Action Concrete cites *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008) in support of their argument, the Chappelears note that *Sloan* does not support any calculation contradictory to the plain language of the statute or the *Stoudenmire* case.

anything to Premier at the time of notice is not an issue of fact where “it is undisputed payments were made in excess of the lien amount in violation of S.C. Code Ann. §29-5-50.” (Brief of Respondents, 29.) This statement could not be farther from the truth. It is certainly disputed that payments the Chappelears made directly to subcontractors were made on behalf of Premier in violation of § 29-5-50. (*See* Brief of Appellants, Section II.) Furthermore, this assertion by Action Concrete is based upon an inaccurate reading of *Stoudenmire* coupled with the failure to accept the plain language of § 29-5-40 and § 29-5-50, as fully explained above and in the Chappelears’ prior brief. In short, whether the Chappelears owed anything to Premier at the time of notice and whether the Chappelears had suffered any damages as a result of Premier’s breach are questions of material fact that warrant reversal.

Additionally, Action Concrete attempts to mitigate the issues of material fact regarding the contractual relationship between the Chappelears and Premier by citing testimony from Mrs. Chappelear. (Brief of Respondents, 31–32.) Specifically, Action Concrete attempts to take statements from Mrs. Chappelear’s deposition, where she states that she considered payments to the subcontractors to reduce any amount owing to Premier, as a legal conclusion and uncontested fact that the Chappelears considered themselves paying the subcontractors on behalf of Premier. However, reliance on these statements is misplaced. These statements were made by a non-lawyer and made in a deposition that was not concluded, but rather held open. The opinion of Premier itself on this issue is unknown. Further, Mrs. Chappelear testified that once Premier defaulted, they did not pay any more money to Premier and only paid for new work on her house directly to the subcontractors. (*See* Elvira Chappelear Dep. 124:9–10; 125:5–20.) In fact,

the subcontractors began to submit bills directly to the Chappelears. (See Elvira Chappelear Dep. 134:23–25.)

Indeed, Mrs. Chappelear’s imperfect knowledge of the law is not sufficient grounds upon which to base a grant of summary judgment. All reasonable inferences are to be made on behalf of the non-moving party. *Bloom v. Ravoir*, 339 S.C. 417, 421–22, 529 S.E.2d 710, 712 (2000) (“In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.”). In this case, the inference is that Mrs. Chappelear interpreted the question to mean that *if* Premier were to get its financial house in order (including paying Action Concrete in full) and return to actively take over the Project, *then* the direct payments to the subcontractors would reduce the amount that would be due to Premier because Premier had not performed that work, either under the contract or otherwise. In other words, the inference viewed in the light most favorable to the Chappelears is that Premier would only be paid for any work it performed on the Project *after* it had paid Action Concrete in full and returned to a sound financial footing. Thus, not only were the Chappelears not paying Premier for the work the subcontractors were doing, but Mrs. Chappelear was testifying that they would never pay Premier for the work that was being done directly for the Chappelears, which is the exact opposite of the *inference* Action Concrete would have the Court draw.⁷ That

⁷ Action Concrete cites Mrs. Chappelears’ testimony for the assertion that payments made directly to subcontractors “reduced the Chappelear’s debt owed to Premier.” (See Respondent’s Brief, 4.) However, the deposition testimony evidences on multiple occasions that Mrs. Chappelear was speaking to debts that “would have been due” to Premier if it ever returned to a proper financial state. (See Elvira Chappelear Dep. 138:6–8; 139:15–17.) At times during the deposition, Action Concrete’s counsel began to switch to the phrase “were due” instead of “would be due” without Mrs. Chappelear picking up on this change; however, the Chappelears’ counsel objected. (See Elvira Chappelear Dep. 162:15–163:3; 163:13–16.) Thus, there exists a disputed issue of material fact whether payments made directly to subcontractors reduced the amount owed to Premier.

inference is to be decided in favor of the non-movant, and, as such, it creates a genuine issue of material fact.

As a result of the numerous genuine issues of material fact in this case, the trial court's order should be reversed.

CONCLUSION

Based on the foregoing reasons and those stated in Appellants' prior brief, Appellants respectfully requests that this Court reverse the decision of the trial court.

Respectfully submitted,



Franklin H. Turner III (S.C. Bar #: 16583)

Joshua A. Bennett (S.C. Bar #: 100023)

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Attorneys for Appellants, Elvira

Chappellear and Craig Chappellear

September 4, 2012

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

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SC Court of Appeals

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.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants propose the following be included in the Record on Appeal:

1. Notice and Certificate of Mechanic's Lien
2. Complaint and Lis Pendens of Action Concrete
3. Answer of Elvira Chappellear and Craig Chappellear
4. Release of Lien Bond
5. Action Concrete's Motion for Summary Judgment
6. Chappellears' Memorandum in Opposition to Motion for Summary Judgment
7. Motion for Summary Judgment Hearing Transcript
8. Order of April 21, 2011
9. Chappellears' Motion to Alter or Amend
10. Chappellears' Memorandum of Law in Support of Motion to Alter or Amend
11. Chappellears' Reply to Action Concrete's Memorandum of Law in Reply
12. Motion to Alter or Amend Hearing Transcript
13. December 20, 2011 Order
14. Notice of Appeal
15. Construction Management Contract—Fixed Fee
16. Action Concrete Subcontract Agreement

17. Action Concrete Open Invoices
18. Termination Letter
19. Summary of Money Disbursed
20. Russ Vickery Estimate
21. Plaintiff's Exhibit Number 8
22. Plaintiff's Exhibit Number 10
23. Elvira Chappellear Deposition Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.



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September 4, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Case No. 2007-CP-04-4113

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SC Court of Appeals

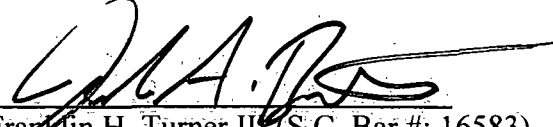
Action Concrete Contractors, Inc. Respondent,

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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 are, ... Appellants.

PROOF OF SERVICE

I certify that I have served the **Reply Brief of Appellants** in this case on Action Concrete Contractors, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on September 4, 2012 addressed to the attorney of record, John T. Crawford, Jr., Kenison, Dudley & Crawford, LLC, 704 East McBee Avenue, Greenville, S.C. 29601.


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September 4, 2012

Counsel for Respondent:

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Kenison, Dudley & Crawford, LLC

704 East McBee Avenue

Greenville, SC 29601

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

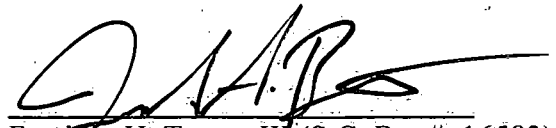
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Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., of
whom Elvira Chappellear and Craig Chappellear are, ... Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' **Designation of Matter to be Included in the Record on Appeal** in this case on Action Concrete Contractors, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on September 4, 2012 addressed to the attorney of record, John T. Crawford, Jr., Kenison, Dudley & Crawford, LLC, 704 East McBee Avenue, Greenville, S.C. 29601.



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*Attorneys for Appellants, Elvira
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September 4, 2012

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SC Court of Appeals

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September 4, 2012

The Honorable Tanya A. Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et al.
Case No.: 2007-CP-04-4113
Case Tracking No.: 2012207526
RTT File No.: 13977.1

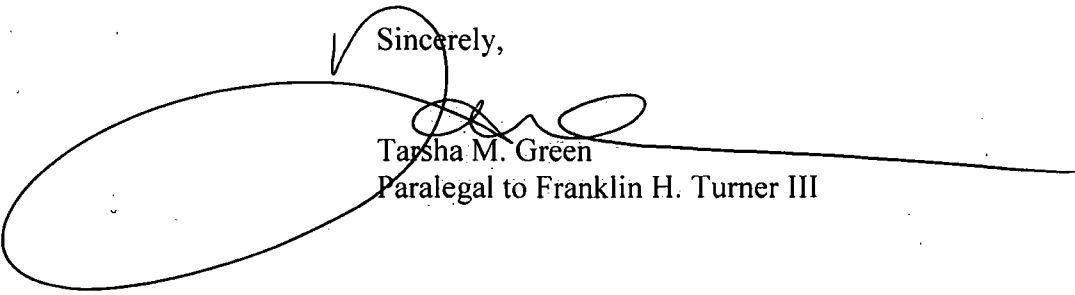
Dear Ms. Gee:

Enclosed for filing please find the original and one copy of the Appellants' Elvira Chappellear and Craig Chappellear Reply Brief, Designation of Matters to Be Included in the Record on Appeal and Proof of Service. Please file the originals and return the clocked copy to our firm in the self-addressed, stamped envelope enclosed.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact us.

By copy of this letter, I am serving a copy on all counsel of record.

Sincerely,


Tarsha M. Green
Paralegal to Franklin H. Turner III

/tmg

Enclosure(s)

cc: All counsel of record

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

v.

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

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

MOTION FOR AMENDMENT OF RESPONDENT'S
DESIGNATION OF MATTER

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SC Court of Appeals

COMES NOW, the undersigned attorney, counsel for Respondent, hereby moves this Honorable Court for leave of Court to amend its Designation of Matter filed August 22, 2012. The Respondent would show that the following documents are relevant to this appeal and should be included in the Record of Appeal.

1. Memorandum in Support of Summary Judgment;
2. Memorandum in Opposition of Defendant's Motion to Alter or Amend; and
3. Memorandum of Law in Reply to Defendant's Memorandum.

The Respondent would further show that the Appellants would suffer no prejudice in these documents being included in the Designation of Matter. Accordingly, Respondent now

requests that the Court grant an order for leave of the Respondent to amend its Designation of Matter to include those foregoing items.

Respectfully submitted this 29 day of August 2012,



John T. Crawford, Jr. (SC Bar# 69682)

F. Lee Prickett, III (SC Bar# 76178)

KENISON, DUDLEY & CRAWFORD, LLC

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*Attorneys for Respondent Action Concrete
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Greenville, South Carolina

Other Counsel of Record:

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Joshua A. Bennett

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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

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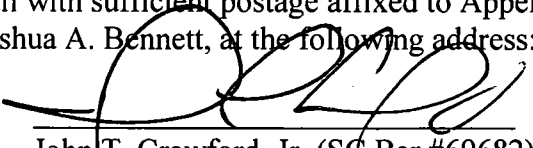
Elvira Chappellear, Craig Chappellear, Premier Southern Homes, LLC, Henry G.
Beal, Jr., and First Citizens Bank and Trust Co., Inc., Defendants,

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

PROOF OF SERVICE

Comes now John T. Crawford, Jr., and certifies that a copy of his Motion for Amendment of Respondent's Designation of Matter was served on the opposing party on this 30th day of August 2012, by placing the same in the U. S. Mail with sufficient postage affixed to Appellant's Counsel of Record, Franklin H. Turner, III and Joshua A. Bennett, at the following address: Post Office Box 100200, Columbia, SC 29202.



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TOWNES B. JOHNSON, III

Practicing Attorney in South Carolina

F. LEE PRICKETT, III

Practicing Attorney in South Carolina

August 30, 2012

The Honorable Tanya A. Gee
Clerk of the Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et. al.
Case No.: 2007-CP-04-4113

Dear Ms. Gee:

Enclosed please find the original and six (6) copies of the Respondent, Action Concrete Contractor's, Inc.'s, Motion for Amendment of Respondent's Designation of Matter, Proof of Service, and our check in the amount of \$25.00.

By copy of this correspondence, I am forwarding a copy of same for service upon opposing counsel. Thank you for your consideration. If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,

KENISON, DUDLEY & CRAWFORD, LLC



Erica Hawthorne,
Paralegal to John T. Crawford, Jr.

Enclosures

cc: Franklin H. Turner, III

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

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

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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

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

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

- I. APPELLANT OWNER CANNOT USE PAYMENTS DIRECTLY TO THE GENERAL CONTRACTOR'S SUBCONTRACTORS ON BEHALF OF THE GENERAL CONTRACTOR AS A WAY TO AVOID THE REQUIREMENTS OF S.C. CODE ANN. §29-5-50. FURTHERMORE, S.C. CODE ANN. §29-5-40 DOES NOT PROVIDE A PAYMENT DEFENSE TO OWNERS WHEN THEY HAD NOTICE OF A MECHANICS LIEN PRIOR TO PAYING THE DEBTS OF THE GENERAL CONTRACTOR, THEREFORE, THE LOWER COURT'S DECISION WAS NOT AN ERROR OF LAW.
- II. NO ISSUES OF MATERIAL FACT EXIST AND THEREFORE THE LOWER COURT'S GRANTING OF SUMMARY JUDGEMENT WAS PROPER.

STATEMENT OF THE CASE

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

MR. MCCABE: Objection to form.

WITNESS ANSWERS:

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

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

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

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

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

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

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

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

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

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

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

A. Subcontractors directly.

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

A. Of course.

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

(PLAINTIFF'S EXHIBIT NUMBER 21 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

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

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

A. 8/15/07.

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

A. That is correct.

Q. And who is it billed to?

A. It's billed to Premier Southern Homes.

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

A. That is correct.

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

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

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

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

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

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

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

A. I wouldn't think so.

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

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

Q. Sure.

A. That is correct.

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

A. Yes.

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

(PLAINTIFF'S EXHIBIT NUMBER 22 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. Can you tell me what that is?

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

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

A. That is correct.

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

A. Yes.

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

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

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

A. It's still contracted --

Q. It's still --

A. -- by Henry Beal.

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

A. That is correct.

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

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

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

A. That is correct.

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

A. That is correct.

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

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

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

Exhibit Number 23.

(PLAINTIFF'S EXHIBIT NUMBER 23 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

Q. Can you tell me what that is?

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

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

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

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

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

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

A. That is correct.

MR. MCCABE: Objection to form.

MR. CRAWFORD: What's your objection?

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

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

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

A. Yes.

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

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

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

A. Yes.

Q. Okay.

A. Can I also note something on this one?

Q. Sure.

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

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

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

Q. Can you tell me what that is?

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

Q. And what is the date of that invoice?

A. 11/13/07.

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

A. I did.

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

A. 12/28/07.

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

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

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

A. That is correct

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

A. Yes.

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

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

A. That's correct.

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

under his construction?

A. That is correct.

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

A. That is correct.

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

A. That is correct.

(PLAINTIFF'S EXHIBIT NUMBER 28 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

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

Q. Okay.

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

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

A. That is correct.

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

A. That is correct.

Q. I'll give you this one.

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

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

A. That is correct.

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

A. That is correct.

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

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

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

The following is taken from the deposition of Elvira Chappelear:

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

A. Yes.

Q. And what was the reason for that?

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

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

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

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

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

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

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

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

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

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

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

Chappelear in her deposition.¹

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

A. I'd be glad to.

Q. Thank you.

MR. MCCABE: Objection to form.

WITNESS CONTINUES:

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

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

A. Yes.

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

A. That is correct.

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

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

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

(PLAINTIFF'S EXHIBIT NUMBER 33 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

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

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

A. That is correct.

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

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

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

STANDARD OF REVIEW

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

When reviewing the grant of summary judgment, this court applies the same standard that governs the circuit court under Rule 56, SCRCP. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) (internal citations omitted). “On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party.” *Id.* at 536, 611 S.E.2d at 925. Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC, 397 S.C. 379, 383-84, 725 S.E.2d 495, 497-98 (Ct. App. 2012), reh'g denied (May 2, 2012).

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Uh-huh.

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

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

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

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

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

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

S.C. Code Ann. § 29-5-50 states:

Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be ***paid in preference to the contractor*** at whose instance the labor was performed or material furnished and ***no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.*** (emphasis added)

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

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

Section 29-5-40 states:

Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by § 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. ***But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made. (emphasis added)***

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

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

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

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

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

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

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

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

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

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

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

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

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

The court stated,

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

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

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

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

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

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

As Judge MacCauley stated,

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

The Chappelears position 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* and *Wood*.²

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

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

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

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

“[t]he timing of the breach is important because the determinative date for how much Action Concrete can recover is the date the Chappelears received notice. It is undisputed that the Chappelears received notice on September 25, 2007. The parties agree that the payments made by the Chappelears to the other subcontractors after Action Concrete's lien was noticed reduced the amount owed to Premier under the Contract. Thus the Chappelears' 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 Chappelears 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 Chappelears. (See December 20, 2011 Order pg. 7)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly in the Stoudenmire case, the court stated,

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

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

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

A. I'd be glad to.

Q. Thank you.

MR. MCCABE: Objection to form.

WITNESS CONTINUES:

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

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

A. Yes.

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

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

A. That is correct.

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

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

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

(PLAINTIFF'S EXHIBIT NUMBER 33 MARKED; ATTACHED)

EXAMINATION BY MR. CRAWFORD CONTINUES:

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

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

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

A. That is correct.

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

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

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

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

See Appellant's Brief pg. 18.

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

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

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

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

CONCLUSION

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

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

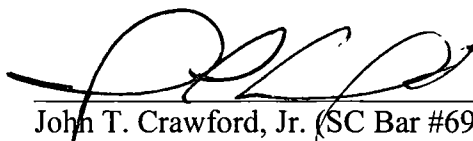
The Chappelears still had an obligation to use the remaining construction funds to make sure Action Concrete was paid if they intended to keep Premier on the Project. The Chappelears cannot now claim that since it has paid the entire contract balance in full pursuant to the terms of the Contract, it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

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

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

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

Respectfully submitted,



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August 22, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

v.

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

of whom:

Elvira Chappelear and Craig Chappelear are Appellants,

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

SC Court of Appeals

AUG 24 2012

RECEIVED

Respondent proposes the following be included in the Record on Appeal:

1. Notice and Certificate of Mechanic's Lien
2. Complaint and Lis Pendens of Action Concrete
3. Answer of Elvira Chappelear and Craig Chappelear
4. Release of Lien Bond
5. Action Concrete's Motion for Summary Judgment
6. Chappelears' Memorandum in Opposition to Motion for Summary Judgment
7. Motion for Summary Judgment Hearing Transcript
8. Order of April 21, 2011
9. Chappelears' Motion to Alter or Amend
10. Chappelears' Memorandum of Law in Support of Motion to Alter or Amend
11. Chappelears' Reply to Action Concrete's Memorandum of Law in Reply
12. December 20, 2011 Order
13. Notice of Appeal

14. Construction Management Contract—Fixed Fee
15. Action Concrete Subcontract Agreement
16. Action Concrete Open Invoices
17. Termination Letter
18. Summary of Money Disbursed
19. Russ Vickery Estimate
20. Plaintiff's Exhibit Number 8
21. Plaintiffs Exhibit Number 10
22. Elvira Chappellear Deposition

I certify that this designation contains no matter which is irrelevant to this appeal.



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Attorneys for the Respondent

August 22, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

v.

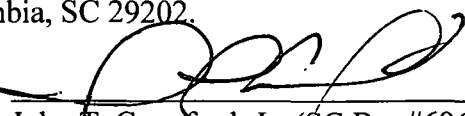
Elvira Chappellear, Craig Chappellear, Premier Southern Homes, LLC, Henry G.
Beal, Jr., and First Citizens Bank and Trust Co., Inc., Defendants,

of whom:

Elvira Chappellear and Craig Chappellear are Appellants,

PROOF OF SERVICE

Comes now John T. Crawford, Jr., and certifies that a copy of his Designation of Matter to be Included in the Record on Appeal was served on the opposing party on this 22nd day of August 2012, via email and by placing the same in the U. S. Mail with sufficient postage affixed to Appellant's Counsel of Record, Franklin H. Turner, III and Joshua A. Bennett, at the following address: Post Office Box 100200, Columbia, SC 29202.



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Case No.: 2007-CP-04-4113

Action Concrete Contractors, Inc., ...Respondent,

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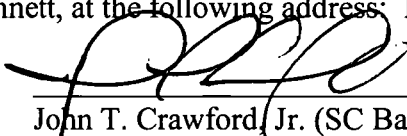
Elvira Chappelear, Craig Chappelear, Premier Southern Homes, LLC, Henry G.
Beal, Jr., and First Citizens Bank and Trust Co., Inc., Defendants,

of whom:

Elvira Chappelear and Craig Chappelear are Appellants,

PROOF OF SERVICE

Comes now John T. Crawford, Jr., and certifies that a copy of his Initial Brief of Respondents was served on the opposing party on this 22nd day of August 2012, via email and by placing the same in the U. S. Mail with sufficient postage affixed to Appellant's Counsel of Record, Franklin H. Turner, III and Joshua A. Bennett, at the following address: Post Office Box 100200, Columbia, SC 29202.



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August 22, 2012

The Honorable Tanya A. Gee
Clerk of the Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et. al.
Case No.: 2007-CP-04-4113

Dear Ms. Gee:

Enclosed please find an original and one (1) copy of the Respondent's Initial Brief and Respondent's Designation of Matter with Proof of Service for same. Please file the originals and return the clocked copy to our firm in the enclosed self-addressed stamped envelope.

By copy of this letter, we are serving same upon counsel for the Appellants, Elvira Chappellear and Craig Chappellear. Thank you for your time and attention to this matter. Feel free to contact our office if you have any questions.

Sincerely,

KENISON, DUDLEY & CRAWFORD, LLC

Erica Hawthorne
Erica Hawthorne,
Paralegal to John T. Crawford, Jr.

Enclosures

cc: Franklin H. Turner, III

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August 2, 2012

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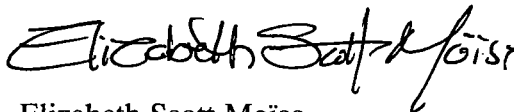
Franklin H. Turner, III, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

RE: Action Concrete Contractors, Inc. v. Elvira Chappalear, Craig Chappalear,
Premier Southern Homes, LLC, Henry G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc.
Wells Fargo Matter No.: 0348841-01
Civil Action No.: 2007-CP-04-4113
NMRS File No.: 10275/01519

Dear Trey:

We have received a copy of Appellant's brief in the appeal of the above-referenced case. Wells Fargo Bank, N.A. was dismissed from the case on November 18, 2008, so we do not need to be copied on the filings in this case. Please let me know if you have any questions.

Very truly yours,



Elizabeth Scott Moise

ESM:cfg

cc: The Honorable Jenny Abbott Kitchings ✓
John T. Crawford, Jr., Esq.
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July 31, 2012

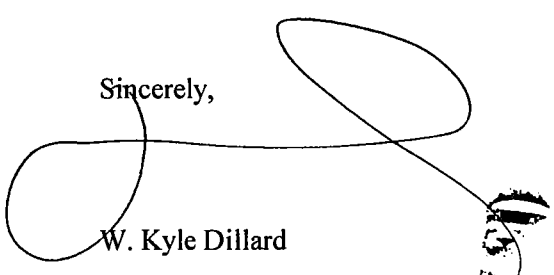
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RE: Action Concrete Contractors, Inc. v. Elvira Chappelle, et al.
Case No.: 2007-CP-04-4113

Dear Trey:

I am writing in response to having been copied on your filing of the Appellants' brief in the above matter, which includes a proof of service purporting to serve me as counsel for Premier Southern Homes, LLC and Henry Beal. As I have informed your office in writing repeatedly, this firm no longer represents Premier Southern Homes, LLC or Mr. Beal. We were relieved as counsel by order of Anderson County Court of Common Pleas in 2009. We once again request that you please remove this firm from your records as counsel for these parties and take note that we do not and cannot accept service of any paper or pleading on behalf of Premier Southern Homes, LLC or Mr. Beal. As stated in previous correspondence to your office, any documents that need to be served on either of those parties should be served upon them pursuant to the instructions contained in the Circuit Court's order of which we assume you already have a copy. By copy of this letter, we are advising the Office of the Clerk of Court for the Court of Appeals of this communication and requesting that our firm be removed from its roster of counsel of record in this matter.

Sincerely,


W. Kyle Dillard

WKD/gep

cc: The Honorable Tanya A. Gee
John T. Crawford, Jr., Esq.
Elizabeth Scott Moise, Esq.
Reid T. Sherard, Esq.

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AUG 02 2012

SC Court of Appeals

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.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN HOLDING THAT OWNERS WERE NOT ENTITLED TO A PAYMENT DEFENSE TO A SUBCONTRACTOR'S MECHANIC'S LIEN WHERE THE OWNERS HAD NOT PAID THE GENERAL CONTRACTOR THE ENTIRE CONTRACT PRICE, BUT WHERE THE VALUE OF THE LABOR AND MATERIALS FURNISHED BY THE GENERAL CONTRACTOR DID NOT EXCEED THE SUM PAID BY THE OWNERS TO THE GENERAL CONTRACTOR AT THE TIME THE SUBCONTRACTOR GAVE NOTICE TO THE OWNERS AND WHERE THE OWNERS SUFFERED DAMAGES BECAUSE THE GENERAL CONTRACTOR FAILED TO COMPLETE THE CONTRACT?
- II. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT WHERE MULTIPLE GENUINE ISSUES OF MATERIAL FACT EXIST?
- III. DID THE LOWER COURT ERR IN HOLDING THAT OWNERS VIOLATED S.C. CODE ANN. § 29-5-50 WHERE THE OWNERS HAD NOT PAID THE GENERAL CONTRACTOR THE ENTIRE CONTRACT PRICE, BUT WHERE THE VALUE OF THE LABOR AND MATERIALS FURNISHED BY THE GENERAL CONTRACTOR DID NOT EXCEED THE SUM PAID BY THE OWNERS TO THE GENERAL CONTRACTOR AT THE TIME THE SUBCONTRACTOR GAVE NOTICE AND WHERE THE OWNERS BEGAN TO PAY SUBCONTRACTORS DIRECTLY TO COMPLETE THE PROJECT?

STATEMENT OF THE CASE

On September 25, 2007, Action Concrete Contractors, Inc. ("Action Concrete") filed and served its Notice and Certificate of Mechanic's Lien and Verified Statement of Account on Elvira Chappelear and Craig Chappelear ("the Chappelears"). (*See* Notice and Certificate of Mechanic's Lien.) On December 27, 2007, Action Concrete filed a Complaint and Lis Pendens to foreclose on its mechanic's lien. (*See* Action Concrete Complaint and Lis Pendens.) The Chappelears filed their Answer on March 7, 2008. (*See* Answer.) On August 18, 2008, Action Concrete's lien was bonded off. (*See* Release of Lien Bond.)

On June 8, 2010, Action Concrete filed its Motion for Summary Judgment as to the Chappelears. (*See* Action Concrete's Mot. for Sum. J.) A hearing on the Motion took place before the lower court on December 1, 2010. (*See* Mot. For Sum. J. Hearing Transcript.) Thereafter, the Honorable Alexander S. Macaulay issued his Order on April 21, 2011, granting Action Concrete's Motion for Summary Judgment. (Order of April 21, 2011.) That Order states that Action Concrete is entitled to \$66,862.63 plus interest, costs, and reasonable attorney's fees. (*See id.*)

On May 13, 2011, the Chappelears filed their Motion to Alter or Amend the Order. (*See* Mot. to Alter or Amend.) On October 25, 2011, a hearing was held before Judge Macaulay on that Motion. (*See* Mot. to Alter or Amend Hearing Transcript.) The Motion was denied by Order of the Honorable Alexander S. Macaulay dated December 20, 2011. (*See* December 20, 2011 Order.) Appellants received written notice of entry of the December 20, 2011 Order on January 10, 2012.

The Chappelears served their Notice of Appeal on Action Concrete on February

3, 2012. (*See* Notice of Appeal.)

STATEMENT OF FACTS

This case arises out of the construction of a home in Anderson, South Carolina (“the Project”) and a general contractor’s failure to pay a subcontractor, even though the general contractor had been paid in full by the owner for the subcontractors’ work.

On April 31, 2007, the Chappelears entered into a \$300,000 lump sum contract with Premier. (*See Construction Management Contract—Fixed Fee.*) Henry G. Beal, Jr. (“Beal”), the owner of Premier, told the Chappelears that by constructing the project as a model home, he would be able to build it for a lower price and still be able to showcase his work. (*See Elvira Chappelear Dep. 14:25–15:9.*)

On May 9, 2007, Premier entered into a subcontract agreement with Action Concrete. (*See Action Concrete Subcontract Agreement.*) Under that subcontract, Action Concrete would provide material and labor for the Project on an actual cost basis based on the unit prices provided in an estimate. (*See id.*) Premier failed to submit final payment to Action Concrete in the amount of \$66,862.63. (*See Action Concrete Open Invoices.*)

As a result of non-payment, on September 25, 2007, Action Concrete filed and served its Notice and Certificate of Mechanic’s Lien and Verified Statement of Account on the Chappelears. (*See Notice and Certificate of Mechanic’s Lien.*) The Chappelears made no further payments to Premier after that day; in fact, the last payment was made on September 10, 2007. (*See Elvira Chappelear Dep. 111:15–112:8; 125:5–8.*)

Before receiving notice of Action Concrete’s lien, the Chappelears made \$135,740.00 in total payments to Premier for work under the contract. (*See Summary of Money Disbursed.*) However, the value of the work performed by Premier was less than

that amount. (See Elvira Chappelear Dep. 185:7-11; Plaintiff's Ex. 8, 10.) In fact, the Chappelears had overpaid Premier for the work that had been performed up until the date of receiving notice of Action Concrete's lien. (See Elvira Chappelear Dep. 185:7-11; Plaintiff's Ex. 8, 10.) In her deposition, Elvira Chappelear stated the following in regards to her payments to Premier:

However, I have no ability nor I have I feel like the obligation to pay that bill twice when I have paid that amount and above that amount on this property, which included the foundation and everything else with my contractor.

(Elvira Chappelear Dep. 185:7-11.)

In order to continue the construction of their home, the Chappelears began to submit payments to subcontractors directly. (*Id.*) As evidenced by the deposition testimony of Elvira Chappelear, these payments were made directly to the subcontractors, with no funds going through Premier:

In this case I was paying the actual cost of the work that was done to make sure that none of the money went back to [Beal].

(See Elvira Chappelear Dep. 125:17-20.)

Additionally, during the period after the Chappelears received notice of Action Concrete's lien, it was the understanding of both the Chappelears and Beal that any work performed by Premier was done voluntarily and without payment. (See Elvira Chappelear Dep. 123:24-124:2.) By letter dated May 2, 2008, the Chappelears formally terminated the contract with Premier. (See Termination Letter.)

The amount the Chappelears paid to the subcontractors directly after notice of Action Concrete's lien was received totals to at least \$118,931.83.¹ (See Elvira

¹ This is the amount stated by Mrs. Chappelear in her deposition; however, the sum of the invoices summarized by the Chappelears shows that the Chappelears expended up to \$139,873.69 in paying

Chappelear Dep. 163:5.) However, even though all the before mentioned funds have been disbursed on the Project, a total of at least \$254,671.83, the estimated amount of money to complete the Project as existed was between \$290,000 – \$320,000 plus a 10% allowance. (See Russ Vickery Estimate.) Thus, as a result of Premier's failure to complete the contract properly, the Chappelears were not able to complete the home for the contract price of \$300,000. (See *id.*)

subcontractors directly. (See Summary of Money Disbursed.) This would bring the total amount spent by the Chappelears on the Property up to \$275,613.69.

ARGUMENT

This case is simply about an owner's right to protect him or herself from a subcontractor's mechanic's lien through the statutory payment defense. Based on the following arguments, the Chappelears respectfully request that this Court reverse the holding of the trial court.

I. BECAUSE THE VALUE OF THE LABOR AND MATERIALS FURNISHED BY PREMIER DID NOT EXCEED THE SUM PAID BY THE CHAPPELEARS TO PREMIER AT THE TIME ACTION CONCRETE GAVE NOTICE TO THE CHAPPELEARS AND BECAUSE THE CHAPPELEARS SUFFERED DAMAGES AS A RESULT OF PREMIER'S FAILURE TO COMPLETE THE CONTRACT, THE HOLDING OF THE LOWER COURT THAT THE CHAPPELEARS ARE NOT ENTITLED TO A PAYMENT DEFENSE WAS REVERSIBLE ERROR

A. Because The Value Of The Labor And Materials Furnished By Premier Did Not Exceed The Sum Paid By The Chappelears To Premier At The Time Action Concrete Gave Notice To The Chappelears, The Chappelears Are Entitled To A Payment Defense

The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation. *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 372 S.C. 89, 96–97, 641 S.E. 2d 459, 463 (Ct. App. 2007) (citing *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 387, 483 S.E.2d 775, 777 (Ct. App. 1997)).

The South Carolina Mechanic's Lien Statute recognizes two types of liens: § 29-5-10 affords a lien to the mechanic or supplier who deals directly with the owner, while § 29-5-20 is designed to protect the mechanic or supplier who deals with a general contractor or some person other than the owner or his agent. *T.W. Morton Builders v. Von Buedingen*, 316 S.C. 388, 400, 450 S.E.2d 87, 94 (Ct. App. 1994). Thus, § 29-5-20, and companion § 29-5-40, apply where a subcontractor is involved. *Stoudenmire Heating &*

Air Conditioning Co. v. Craig Bldg. P'ship, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992). Those 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.” *Id.* (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956)).

Specifically, § 29-5-20(A) states the following in regards to subcontractor liens:

Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney’s fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails. If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney’s fee as determined by the court. The fee and the court costs may not exceed the amount of the lien. The lien may be enforced as herein provided.

S.C. CODE ANN. § 29-5-20(A) (2009).

To assert its lien against the property of the owner under S.C. Code Ann. § 29-5-20, a subcontractor is required to give written notice to the owner, pursuant to S.C. Code Ann. § 29-5-40:

Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by § 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made.

S.C. CODE ANN. § 29-5-40 (2009) (emphasis added).

In addition to its notice requirement, the last sentence of § 29-5-40 provides 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.” *Id.* Thus, “if an owner has paid the contractor in full prior to the attachment of any such liens, the owner has an **absolute payment defense**.” 22 S.C. JUR. *Mechanics’ Liens* § 11 (emphases added). In other words, “an owner’s liability under a mechanic’s lien is limited to the **balance due by him to the prime contractor at the time he receives the notice**.” *Wood v. Hardy*, 235 S.C. 131, 145, 110 S.E.2d 157, 164 (1959) (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956)) (emphasis added).

The lower court rejected the Chappellear’s assertion of a payment defense based on the fact that they owed \$164,260 to Premier on the entire contract price of \$300,000. (Order p. 9.) The lower court’s consideration of the entire contract price for purposes of a payment defense constitutes reversible error. A subcontractor is potentially entitled to a lien only when the value of the labor and materials furnished by the general contractor at the time of notice exceeds the sum paid by the owner to the general contractor at the time of notice and that lien is limited to the amount of value supplied the owner by the general contractor in excess of the amount paid by the owner.

By the plain language of the statute, the payment defense does not mandate consideration of the entire contract price to determine the existence of a payment defense. The statute 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 (2009) (emphasis added). According to the statutory language,

the court should determine what is owed by looking at the amount due the general contractor for work that has been completed, not the work that should be completed in the future.

Moreover, this Court has addressed the payment defense and provided a clear and explicit calculation method. In *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P'ship*, this Court noted that “[t]he owner’s liability under the lien is limited to the balance due by him to the prime contractor ***at the time the owner receives the notice from the subcontractor.***” *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 302, 417 S.E.2d at 637 (citing *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956) (emphasis added)). In *Stoudenmire*, the owner contracted with a general contractor to renovate an office building. *Id.* at 299, 417 S.E.2d at 635. The general contractor then entered into an agreement with a subcontractor for heating and air conditioning work on the building. *Id.* After the general contractor began experiencing financial difficulties, the owner ceased paying the general contractor and began paying the project’s bills directly. *Id.* at 300, 417 S.E.2d at 636. After the subcontractor sent a letter to both the general contractor and the owner demanding payment, the subcontractor filed and served a notice of mechanic’s lien. *Id.*

This Court noted that, under § 29-5-40, the owner’s liability to the subcontractor was limited to the balance due by the owner to the general contractor at the time the owner received notice. *Id.* at 302, 417 S.E.2d at 637. In determining the amount owed by the owner to the general contractor at the time of the subcontractor’s notice, the court provided the following formula:

This amount should be determined by the receipt of evidence of the value of the labor and materials by [the general contractor] to [the owner] on or

before [the day that the owner stopped paying the general contractor and started paying the project's bills directly²]. The court should then determine the amount paid to [the general contractor] by [the owner] on or before [the day that the owner stopped paying the general contractor and started paying the project's bills directly]. If the value of the labor and materials furnished by [the general contractor] exceeds the sum paid by [the owner] to [the general contractor], then [the subcontractor] is potentially entitled to a lien up to the amount of the excess.

Id. at 303, 417 S.E.2d at 637-38.

Thus, contrary to the lower court's holding in this case, a court should not look to the full amount of the contract in determining the amount the owner owes the general contractor for purposes of a payment defense. Instead, the subcontractor is potentially entitled to a lien only when the value of the labor and materials furnished by the general contractor at the time of notice exceeds the sum paid by the owner to the general contractor at the time of notice.

Here, at the time the Chappelears received notice of Action Concrete's lien, the evidence is that the value of Premier's furnished labor and materials *did not exceed* the sum paid by the Chappelears to Premier.³ (See Elvira Chappelear Dep. 185:7-11; Plaintiff's Ex. 8, 10.) In fact, the Chappelears had *overpaid* Premier. (See Elvira Chappelear Dep. 185:7-11; Plaintiff's Ex. 8, 10; Summary of Money Disbursed.) Thus, because the Chappelears had paid Premier in full (or overpaid) for the value Premier had

² The Court noted that the values on the day that the owner stopped paying the general contractor and started paying the project's 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.

³ As explained more fully in Section 2 of this brief, the value of Premier's labor and materials furnished at the time of notice is a disputed issue of material fact and was not proper for decision on summary judgment.

provided on the Project, the Chappelears are entitled to succeed on their payment defense. *See Stoudenmire* at 302, 417 S.E.2d at 637.

Because the clear statutory language and the case law of this Court provide for a payment defense based on a comparison of the labor and material furnished by the general contractor at the time notice is received and the sum paid by the owner to the general contractor at the time notice is received, the lower court committed error when it focused solely on the entire contract price due the general contractor if it properly completed the contract. Consequently, the lower court's decision should be reversed.

B. Because The Chappelears Suffered Damages As A Result Of Premier's Failure To Complete The Contract, The Chappelears Are Entitled To A Payment Defense

In addition to looking at whether the value of the labor and materials furnished by the general contractor at the time of notice exceeds the sum paid by the owner to the general contractor at the time of notice, this Court held in *Stoudenmire* that the trial court should also consider the amount of damages the owner suffered as a result of the failure of the general contractor to complete the contract. *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 303, 417 S.E.2d at 638; *see also Wood v. Hardy*, 235 S.C. 131, 147, 110 S.E.2d 157, 164 (1959) (in trying to determine the amount owed to the general contractor by the owner, the South Carolina Supreme Court recognized the owner potentially incurred damages as a result of the failure of the general contractor to erect the dwelling according to plans).

The lower court erroneously declined to consider damages suffered by the Chappelears as stated in *Stoudenmire* because in the *Stoudenmire* case "the breach by the general contractors occurred prior to the notice by the subcontractor" but in the present

case “the Chappelears received notice of Action Concrete’s lien prior to Premier’s breach and ultimate discharge.” (Order p. 7.) The lower court also stated that, before Premier was officially terminated, the Chappelears and Premier were “still operating under the Contract” because “payments to the other subcontractors on Premiers behalf were no different than payments directly to Premier.” (Order p. 7.) This reasoning directly contradicts the holding of *Stoudenmire* and the facts of this case.

As described above, in *Stoudenmire*, after the general contractor “became unable to pay its bills,” the owner ceased paying the general contractor and “***began paying bills directly for [the general contractor].***” *Id.* at 300, 417 S.E.2d at 636 (emphasis added). Evidence in the case at bar likewise shows that the Chappelears did the same thing when Premier became unable to pay its bills. According to *Stoudenmire*, when the owner stopped paying the general contractor and began paying the subcontractors directly, “[t]here is a reasonable inference that [the owner] took over the construction job and simply hired [the general contractor’s] employees to complete the job.” *Id.* at 301, 417 S.E.2d at 636–37.

It is also imperative to recognize that in *Stoudenmire*, as in the instant case, the breach that occurred was the general contractor’s failure to pay the subcontractors and not the owner’s firing of the general contractor. The firing of the general contractor, in point of fact, is the result of the breach, not the breach itself. In fact, the *Stoudenmire* opinion does not state that the owner ever fired the general contractor; instead, it merely states that “[the general contractor] became unable to pay its bills and [the owner] began paying bills directly for [the general contractor].” *Id.* at 300, 417 S.E.2d at 636.

On these facts, this Court made clear in *Stoudenmire* that, in calculating the amount the owner owed the general contractor for purposes of the payment defense, the court should consider the amount of damages the owner suffered as result of the general contractor's failure "*to complete the contract.*" See *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 303, 417 S.E.2d at 638 (emphasis added); see also *Pond Cove Millwork Co. v. Steeves*, 598 A.2d 1181, 1182-83 (Me. 1991) ("The amount of compensation to which a builder is entitled may be subject to deductions or setoffs in favor of the homeowner for expenses incurred or damages sustained, because the builder did not perform in accordance with the terms of the contract." (citing 17A C.J.S. Contracts § 368 (1963))). Therefore, contrary to the lower court's holding, consideration of the owner's damages is in **no way** conditioned on the ceasing of all payments on the project or the ultimate discharge of the general contractor.

In this case, the facts regarding the general contractor's breach and the relationship between the Chappelears and the subcontractors they paid directly are extremely similar to the facts in *Stoudenmire Heating & Air Conditioning Co.* Action Concrete breached the contract with the Chappelears by failing to properly pay the subcontractors. After that occurred, the Chappelears received notice of Action Concrete's lien, and it was obvious that Premier was having financial difficulties. As a result, the Chappelears ceased all payments to Premier and began to pay the subcontractors directly to continue work on the Project. As evidenced by *Stoudenmire*, these payments for work performed after notice was received were made as if the subcontractors were employees of the Chappelears. Even with continued work on the project, the house was not able to be completed for the contract price amount. These facts are parallel to those stated in

Stoudenmire and the Chappelears are entitled to have any damages related to Premier's breach considered in calculating the payment defense.

Therefore, because the trial court failed, as mandated by *Stoudenmire*, to consider the amount of damages the Chappelears suffered as a result of the failure of Premier to complete the contract and complete construction of the home for the contract price, the lower court's decision should be reversed.

II. BECAUSE MULTIPLE GENUINE ISSUES OF MATERIAL FACT EXIST, THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF ACTION CONCRETE WAS REVERSIBLE ERROR

In granting Action Concrete's Motion for Summary Judgment, the lower court relied upon numerous disputed issues of material fact. Consequently, the lower court must be reversed.

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Baugus v Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Id.* The awarding of summary judgment, although justified in some instances, is a somewhat anticipatory method of resolving a lawsuit, and thus, in reviewing a summary judgment, all evidence and reasonable inferences are construed in a light most favorable to the party opposing the motion. *Marchant v. Lorain Div. of Koehring*, 272 S.C. 243, 251 S.E.2d 189 (1979). When there is a dispute as to the conclusions or inferences to be drawn from evidentiary facts, summary judgment should not be granted, even though there is no dispute as to evidentiary facts themselves. *Hamilton v. Miller*, 301 S.C. 45, 389 S.E.2d 652 (1990).

A. Because The Amount Owed By The Owner To The General Contractor At The Time Of Notice Of A Subcontractor's Mechanic's Lien Is A Question Of Material Fact, The Lower Court's Grant of Summary Judgment Must Be Reversed

Whether the Chappelears owed anything to Premier at the time of notice and whether the Chappelears had suffered any damages as a result of Premier's breach are questions of material fact.

In *Wood v. Hardy*, the South Carolina Supreme Court attempted to determine whether the owner had a payment defense against the holder of a mechanic's lien. In making that determination, the court stated the following:

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

Wood v. Hardy, 235 S.C. 131, 147, 110 S.E.2d 157, 164 (1959) (emphases added). Thus, the court recognized that the calculation of the amount owed by the owner to the general contractor was a factual matter to be determined by the trier of fact on the evidence.

In *Stoudenmire Heating & Air Conditioning Co.*, the South Carolina Court of Appeals followed the *Wood v. Hardy* court's lead and remanded the case for consideration of the evidence when trying to determine whether an owner was entitled to payment defense. Specifically, the court stated the following:

[W]e remand this matter to the master for a determination of how much, if anything, [the owner] owed [the general contractor] on April 22, 1984. 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. The court should then determine the amount paid to [the general contractor] by [the owner] on or before March 16, 1988. If the value of the labor and materials furnished by [the 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.*

Stoudenmire Heating & Air Conditioning Co., 308 S.C. at 303, 417 S.E.2d at 637–38 (emphases added).

What *Stoudenmire* finds is that there needs to be two factual determinations made when considering an 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 the owner suffered as a result of the general contractor's failure to complete the contract. *See also Pond Cove Millwork Co. v. Steeves*, 598 A.2d 1181, 1182–83 (Me. 1991) ("Thus whether there is a balance due is a *question of fact* to be decided taking into account work done less the amount for not performing properly." (emphasis added)).

In the present case, neither of these determinations were made, and there exists a factual dispute as to whether any amount was owed on the contract between the Chappelears and Premier. As explained above, there is evidence that the Chappelears fully paid for the work completed at the time notice was given of Action Concrete's lien. This evidence should be considered in the light most favorable to the Chappelears as the non-moving party. The lower court failed to construe the evidence in such a light, which is reversible error, but also incorrectly found this factual issue was either undisputed or was an issue of law, which is also reversible error.

It is also a disputed fact as to whether the Chappelears suffered damage as a result of Premier's actions. The Court was presented with evidence that the subject home was being built at a discounted price because the general contractor planned to use it as a showcase home for a certain period of time. When the general contractor failed to complete the contract, the Chappelears were damaged in various ways, but one way was that they lost the value of having the home built at a discounted rate. (Elvira Chappelear Dep. 184:18-20.) That value was not determined by the Court, and, indeed, the Court was not presented sufficient evidence to make that determination.

Therefore, whether any amount was owed on the contract between the Chappelears and Premier and whether the Chappelears suffered any damages that should be considered when determining whether the Chappelears have a payment defense are disputed facts and are genuine issues of material fact not proper for decision on summary judgment.

B. Because Other Questions Of Material Fact Exist, The Lower Court's Grant of Summary Judgment Must Be Reversed

In addition to the above described issues of material fact, the lower court incorrectly considered and relied upon the following disputed facts in its decision:

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

It is a disputed fact as to whether the Chappelears were making payments "on behalf" of Premier and also whether the payments made by the Chappelears to the

subcontractors reduced the amount owed to Premier. The Chappelears clearly believed they did not owe anything to Premier when they stopped all payments to Premier. (Elvira Chappelear Dep. 123:10–12.) Likewise, Premier obviously felt it was not owed anything by the Chappelears, evidenced by the fact that it never objected to not being paid. (Elvira Chappelear Dep. 123:24–124:2.) And, again, Premier never received money after the Chappelears' were notified of Action Concrete's lien. (Elvira Chappelear Dep. 124:9–10.)

Whether the Chappelears thought they were paying the subcontractors on behalf of Premier and whether those payments reduced the amount owed to Premier are questions of disputed fact and raise genuine issues of material fact not proper for decision on summary judgment.

It is also a disputed fact as to whether the Chappelears and Premier were still operating under their contract once the Chappelears ceased making any payments to Premier. In short, all evidence points to the fact that the contract entered into between the Chappelear and Premier was no longer being followed after the Chappelears received notice of Action Concrete's lien. For example, under the contract, Premier was to be paid directly by the Chappelears, and, in turn, it was to pay subcontractors like Action Concrete directly for the work they contracted with Premier to perform. (See Construction Management Contract—Fixed Fee.) Premier was also, presumably, to be paid in an amount sufficient to cover overhead and to generate some amount of profit. After the Chappelears received notice of the lien, however, Premier was not paid at all. (Elvira Chappelear Dep. 124:9–10.) That is truly undisputed and requires no inference at all. Therefore, whether the parties continued operating under a contract, and

if so in what form and with what new conditions, is a question of fact and raises genuine issues of material fact not proper for decision on summary judgment.

In short, the foregoing represents multiple disputed questions of material fact upon which the lower court relied in issuing its ruling. This is contrary to the well-established standards for summary judgment in South Carolina and, as a result, this Court should reverse the lower court's ruling.

III. BECAUSE THE VALUE OF THE LABOR AND MATERIALS FURNISHED BY PREMIER DID NOT EXCEED THE SUM PAID BY THE CHAPPELEARS TO PREMIER AT THE TIME ACTION CONCRETE GAVE NOTICE TO THE CHAPPELEARS AND BECAUSE THE CHAPPELEARS PAID THE SUBCONTRACTORS DIRECTLY TO COMPLETE THEIR HOME, THE HOLDING OF THE LOWER COURT THAT THE CHAPPELEARS VIOLATED S.C. CODE ANN. § 29-5-50 WAS REVERSIBLE ERROR

S.C. Code Ann. § 29-5-50 states the following:

Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be paid in preference to the contractor at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.

S.C. Code Ann. § 29-5-50 (2009).

A. Because There Was No Balance Due By The Chappelears To Premier, Action Concrete Was Not Entitled To Be Paid In Preference To Anyone

The lower court erroneously held that payments made directly to the subcontractors were an attempt to avoid § 29-5-50. (Order p. 8.) However, because the Chappelears had paid in full for the work that Premier had performed, the contractor's preference statute does not apply.

In *Fulmer Bldg. Supplies, Inc. v. Martin*, the South Carolina Supreme Court stated that Section 45-255⁴ “clearly made the holder of the mechanic’s lien in [that] case entitled to be paid by the owner in preference to the contractor *to the extent of the balance due by the owner to the contractor.*” *Fulmer Bldg. Supplies, Inc. v. Martin*, 251 S.C. 353, 358, 162 S.E.2d 541, 544 (1968) (emphasis added). Thus, the holder of a mechanic’s lien is entitled to be paid in preference to a contractor only if there is a “balance due by the owner to the contractor.”

Here, as previously explained above, the value of Premier’s labor and materials furnished *did not exceed* the sum paid by the Chappelears to Premier. (At the very least whether the Chappelears had fully paid Premier for the value of its supplied material and labor is a question of disputed fact.) Further, the damages suffered by the Chappelears (a factual determination) as a result of Premier’s failure to complete the contract must be taken into consideration. Because there was no balance due to Premier, Action Concrete was not entitled to be paid in preference to any contractor. Therefore, this Court should reverse the lower court’s order granting Action Concrete summary judgment.

B. Because The Chappelears Paid Other Subcontracts Directly, The Chappelears Were Not In Violation Of S.C. Code Ann. § 29-5-50

Even after notice of a lien is received, § 29-5-50 does not prohibit further work to be done on a project or for further payments to be made in regards to a project.

S.C. Code Ann. § 29-5-50 states that any person claiming a mechanic’s lien who has given notice “shall be entitled to be paid in preference *to the contractor at whose instance the labor was performed.* . . .” S.C. Code Ann. § 29-5-50 (2009). Thus, by the

⁴ Section 45-255 was a precursor to Section 29-5-50 and says that any person claiming a mechanic’s lien who shall have given notice 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. *Fulmer Bldg. Supplies, Inc.*, 251 S.C. 353, 358, 162 S.E.2d 541, 544 (1968).

plain language of the statute, an owner is not prohibited from continuing work on the project under certain circumstances.

For example, in *Stoudenmire Heating & Air Conditioning Co.*, the court found that where an owner began directly paying the bills of the subcontractors, the owner had taken over the construction job and simply hired the general contractor's subcontractors to complete the work. *Stoudenmire Heating & Air Conditioning Co.*, 308 S.C. at 301, 417 S.E.2d at 636–37. In that case, when the general contractor began to have financial difficulties, the owner ceased all payments to the general contractor and began to directly pay the individuals who were working on the project. *Id.* at 300, 417 S.E.2d at 636. It is important to note that the opinion does not state that the owners fired the general contractor, but merely stopped all payments to the general contractor.

In *Stoudenmire*, when the issue arose regarding who the subcontractors were performing work for, the court found that the subcontractor's work was done directly for the owner because, at the time the work was performed, "[the general contractor] had encountered financial problems and [the owner] was paying the bills." *Id.*

In this case, the facts regarding the relationship between the Chappelears and the subcontractors they paid directly are extremely similar to the facts in *Stoudenmire Heating & Air Conditioning Co.* The Chappelears received notice of Action Concrete's lien, and it was obvious that Premier was having financial difficulties. As a result, the Chappelears ceased all payments to Premier and began to pay the subcontractors directly to continue work on the Project. Thus, as in *Stoudenmire*, the Chappelears' actions were proper and not a violation of S.C. Code Ann. § 29-5-50. As a result, this Court should reverse the lower court's Order.

CONCLUSION

Based on the foregoing reasons, Appellants respectfully requests that this Court reverse the decision of the trial court.

Respectfully submitted,



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July 19, 2012

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.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants propose the following be included in the Record on Appeal:

RECEIVED

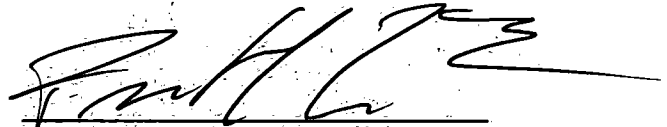
JUL 23 2012

SC Court of Appeals

1. Notice and Certificate of Mechanic's Lien
2. Complaint and Lis Pendens of Action Concrete
3. Answer of Elvira Chappellear and Craig Chappellear
4. Release of Lien Bond
5. Action Concrete's Motion for Summary Judgment
6. Chappellears' Memorandum in Opposition to Motion for Summary Judgment
7. Motion for Summary Judgment Hearing Transcript
8. Order of April 21, 2011
9. Chappellears' Motion to Alter or Amend
10. Chappellears' Memorandum of Law in Support of Motion to Alter or Amend
11. Chappellears' Reply to Action Concrete's Memorandum of Law in Reply
12. December 20, 2011 Order
13. Notice of Appeal
14. Construction Management Contract—Fixed Fee
15. Action Concrete Subcontract Agreement
16. Action Concrete Open Invoices

17. Termination Letter
18. Summary of Money Disbursed
19. Russ Vickery Estimate
20. Plaintiff's Exhibit Number 8
21. Plaintiff's Exhibit Number 10
22. Elvira Chappellear Dep. pp. 14-15; 111-12; 123-25; 163; 183-85.

I certify that this designation contains no matter which is irrelevant to this appeal.



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July 19, 2012

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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v.

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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 are, ... Appellants.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellants** in this case on Action Concrete Contractors, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2012 addressed to the attorney of record, John T. Crawford, Jr., Kenison, Dudley & Crawford, LLC, 704 East McBee Avenue, Greenville, S.C. 29601.

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SC Court of Appeals

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July 19, 2012

The Honorable Tanya A. Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et al.
Case No.: 2007-CP-04-4113
Case Tracking No.: 2012207526
RTT File No.: 13977.1

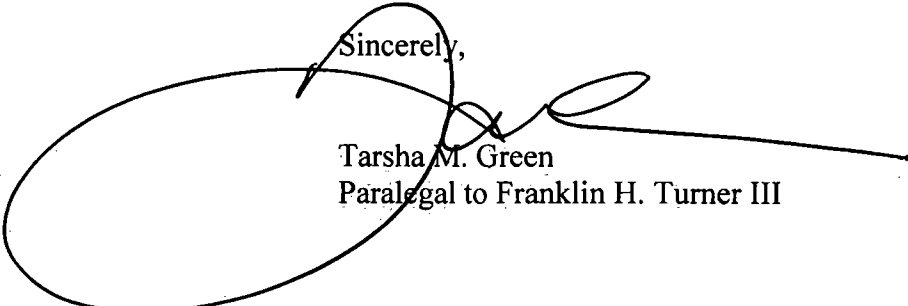
Dear Ms. Gee:

Enclosed for filing please find the original and one copy of the Appellants' Elvira Chappellear and Craig Chappellear Initial Brief, Designation of Matters to Be Included in the Record on Appeal and Proof of Service. Please file the originals and return the clocked copy to our firm in the self-addressed, stamped envelope enclosed.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact us.

By copy of this letter, I am serving a copy on all counsel of record.

Sincerely,


Tarsha M. Green
Paralegal to Franklin H. Turner III

/tmg

Enclosure(s)

cc: All counsel of record

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JUL 23 2012
SC Court of Appeals

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The South Carolina Court of Appeals

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February 16, 2012

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Joshua A. Bennett, Esquire
Rogers Townsend & Thomas, PC
P O Box 100200
Columbia, SC 29202

Re: Action Concrete v. Chappellear, Elvira
Case Tracking #: 2012207526

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within 10 days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee
CLERK

TAG/ec

cc: John T. Crawford, Jr, Esquire
The Honorable Richard A. Shirley

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TARSHA M. GREEN
LITIGATION PARALEGAL
TARSHA.GREEN@RTT-LAW.COM
Direct 803.744.5203



February 13, 2012

Robin S. Hild, Court Reporter
Post Office Box 9
Walhalla, South Carolina 29691

Re: *Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et al.*
Case No.: 2007-CP-04-4113
RTT File No.: 13977.1

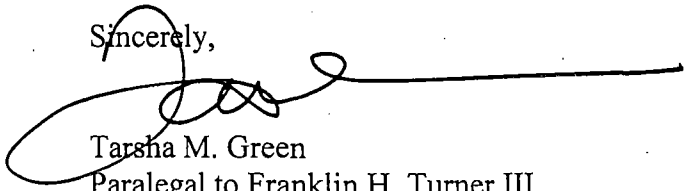
Dear Ms. Hild:

Please provide our office with the **hearing transcript** of the October 25, 2011 Motion to Alter or Amend Order hearing before the Honorable Alexander S. Macaulay, with regards to the above-captioned matter.

If you should have any questions, please feel free to contact our office.

Thank you for your assistance in this matter.

Sincerely,



Tarsha M. Green
Paralegal to Franklin H. Turner III

/tmg

cc: South Carolina Court of Appeals
Anderson County Clerk of Court
John T. Crawford, Jr., Esquire
Elizabeth S. Moise, Esquire
Reid T. Sherard, Esquire
Craig Chappellear

RECEIVED

FEB 14 2012

SC Court of Appeals

5442705-1

Ogletree Deakins

**OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.**

Attorneys at Law

The Ogletree Building
300 North Main Street, Suite 500 (29601)
Post Office Box 2757
Greenville, SC 29602
Telephone: 864.271.1300
Facsimile: 864.235.4754
www.ogletreedekins.com

W. Kyle Dillard
kyle.dillard@ogletreedekins.com

February 8, 2012

Franklin H. Turner, III
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

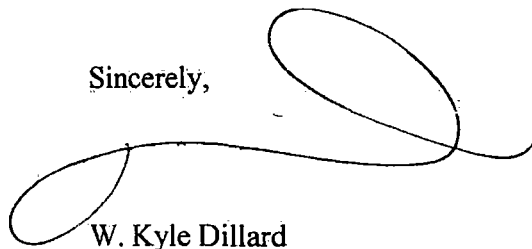
RE: *Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear, et
al.*
C.A. No. 2007-CP-04-4113

Dear Trey:

We are in receipt of correspondence from your office concerning your client's Notice of Appeal in the above-captioned matter. It appears that you have identified us on the Notice of Appeal as counsel of record for Premier Southern Homes, LLC and Henry Beal. Please once again be advised that I was relieved as counsel for Premier Southern Homes, LLC and Henry Beal by Order dated June 18, 2009. I would appreciate it if you would note this correction in your records and omit any reference to Ogletree, Deakins, Nash, Smoak & Stewart, P.C. or myself as counsels for any party in any further filings in this matter. Thank you for your attention to this request.

With kind regards,

Sincerely,



W. Kyle Dillard

WKD/gep

cc: South Carolina Court of Appeals
Anderson County Clerk of Court
John T. Crawford, Jr., Esq.
Elizabeth Scott Moise, Esq.
Reid T. Sherard, Esq.

RECEIVED

FEB 09 2012

SC Court of Appeals

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.

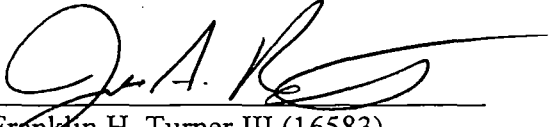
Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., of
Whom Elvira Chappellear and Craig Chappellear Appellants.

NOTICE OF APPEAL

Elvira Chappellear and Craig Chappellear appeal the Order of the Honorable Alexander S. Macaulay dated April 21, 2011. Appellants received written notice of entry of the April 21 Order on April 29, 2011. Appellants then timely filed a Motion to Alter or Amend which was denied by Order of the Honorable Alexander S. Macaulay dated December 20, 2011. Appellants received written notice of entry of the December 20, 2011 Order on January 10, 2012. A copy of the Orders are attached hereto.

February 3, 2012

RECEIVED
FEB 07 2012
SC Court of Appeals


Franklin H. Turner III (16583)
Joshua A. Bennett (100023)
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29202
Phone: (803) 771-7900
Fax: (803) 343-7017
Email: trey.turner@rtt-law.com
joshua.bennett@rtt-law.com
*Attorneys for Appellants, Elvira
Chappellear and Craig Chappellear*

Counsel for Respondent:

John T. Crawford, Jr.
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601

Other Counsel of Record:

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

***Attorneys for Premier Southern Homes, LLC
and Henry Beal***

Elizabeth Scott Moise
151 Meeting Street, Sixth Floor
Post Office Box 1806
Charleston, SC 29401-2239

and

Reid T. Sherard
104 S. Main Street, Ninth Floor
Post Office Box 10084
Greenville, SC 29601
Attorneys for Wells Fargo Bank, N.A.

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.

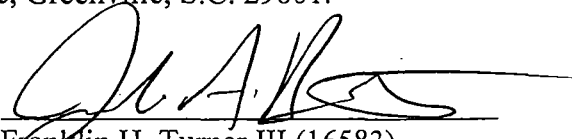
Elvira Chappellear, Craig Chappellear,
Premier Southern Homes, LLC, Henry
G. Beal, Jr., Wells Fargo Bank, N.A.,
First Citizens Bank and Trust Co., Inc., ... Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal in this case on Action Concrete Contractors, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February, 3, 2012 addressed to the attorney of record, John T. Crawford, Jr., Kenison, Dudley & Crawford, LLC, 704 East McBee Avenue, Greenville, S.C. 29601.

February 3, 2012

RECEIVED
FEB 07 2012
SC Court of Appeals


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joshua.bennett@rtt-law.com
*Attorneys for Appellants, Elvira
Chappellear and Craig Chappellear*

Counsel for Respondent:

John T. Crawford, Jr.
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601

Other Counsel of Record:

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

*Attorneys for Premier Southern Homes, LLC
and Henry Beal*

Elizabeth Scott Moise
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Post Office Box 1806
Charleston, SC 29401-2239

and

Reid T. Sherard
104 S. Main Street, Ninth Floor
Post Office Box 10084
Greenville, SC 29601
Attorneys for Wells Fargo Bank, N.A.

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FEB 07 2012
SC Court of Appeals

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TARSHA M. GREEN
LITIGATION PARALEGAL
TARSHA.GREEN@RTT-LAW.COM
Direct 803.744.5203



February 3, 2012

John T. Crawford, Jr.
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601

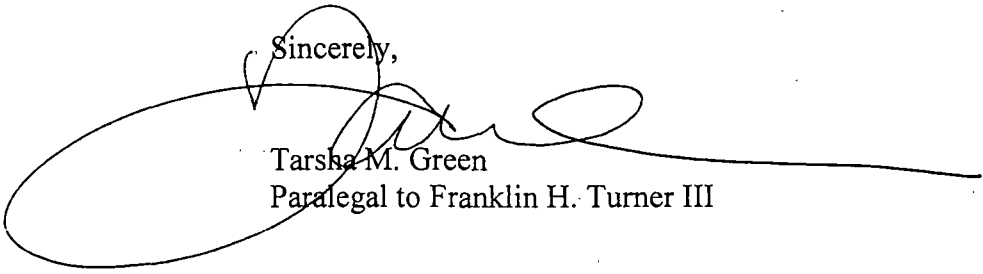
**Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear,
et al.
Case No.: 2007-CP-04-4113
RTT File No.: 13977.1**

Dear Mr. Crawford:

Enclosed for service upon you please find Elvira Chappellear's and Craig Chappellear's
NOTICE OF APPEAL in the above case. Also enclosed is the Proof of Service regarding same.

Thank you for your assistance in this matter.

Sincerely,


Tarsha M. Green
Paralegal to Franklin H. Turner III

/tmg

Enclosure(s)

cc: All counsel of record
SC Court of Appeals
Aiken County Clerk of Court

RECEIVED
FEB 07 2012
SC Court of Appeals

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ROGERS TOWNSEND & THOM.
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TARSHA M. GREEN
LITIGATION PARALEGAL
TARSHA.GREEN@RTT-LAW.COM
Direct 803.744.5203



3
February 2, 2012

The Honorable Martha Newton
Anderson County Clerk of Court
P.O. Box 8002
Anderson, SC 29622

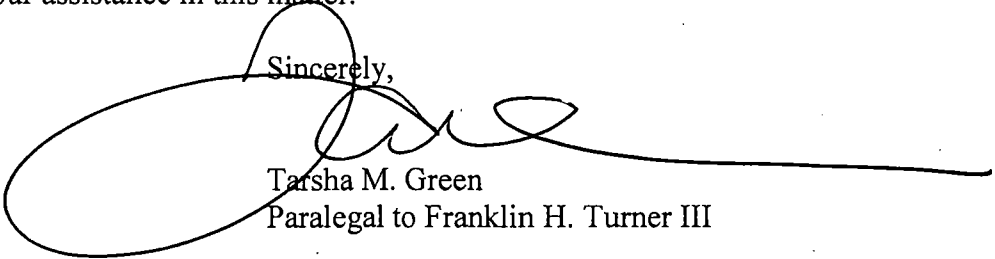
**Re: Action Concrete Contractors, Inc. v. Elvira Chappellear, Craig Chappellear,
et al.**
Case No.: 2007-CP-04-4113
RTT File No.: 13977.1

Dear Ms. Newton:

Enclosed for filing is a NOTICE OF APPEAL in the above case. Please return a file-stamped copy to me in the self-addressed, stamped envelope enclosed.

Thank you for your assistance in this matter.

Sincerely,



Tarsha M. Green
Paralegal to Franklin H. Turner III

/tmg

Enclosure(s)

cc: All counsel of record

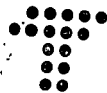
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SC Court of Appeals

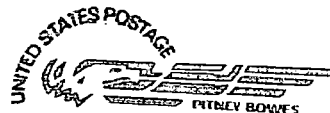
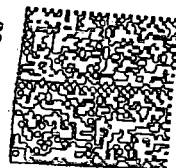
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ROGERS TOWNSEND
ATTORNEYS AT LAW

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FEB 03 2012

The South Carolina Court of Appeals
Kenneth A. Richstad, Clerk
Post Office Box 11629
Columbia, SC 29211

29211131629 E012



ROGERS TOWNSEND & THOMAS, PC | POST OFFICE BOX 100200 | COLUMBIA, SOUTH CAROLINA 29202 | RTT-LAW.COM

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007-CP-04-4113

Action Concrete Contractors, Inc.
PLAINTIFF(S)

Elvira Chappellear; et. al.
DEFENDANT(S)



CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

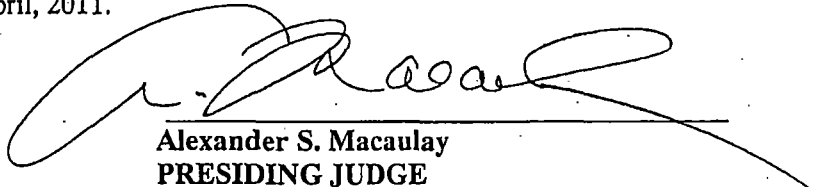
☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order.
☐ Statement of Judgment by the Court:

Dated at Walhalla, South Carolina this 21st day of April, 2011.


Alexander S. Macaulay
PRESIDING JUDGE

Court Reporter: Robin S. Hild

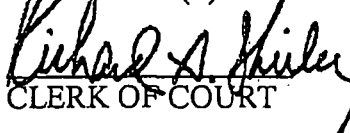
This judgment was entered on the 28th day of April, 2011, and a copy mailed first class this 28th day of April, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

John T. Crawford, Esquire

ATTORNEY(S) FOR PLAINTIFF

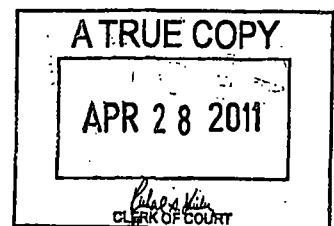
D. Ryan McCabe, Esquire

ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT

RECEIVED
FEB 07 2012

SC Court of Appeals



STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Action Concrete Contractors, Inc.,

Plaintiff,

v.

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

Defendant

CLERK'S OFFICE

APR 28 A 9:04

COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

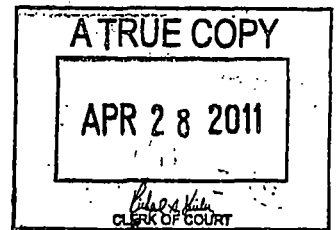
Civil Action # 2007-CP-04-4113

GENERAL PLEAS AND

GENERAL SESSIONS



ORDER OF JUDGMENT



This matter came before the Court upon Plaintiff's Notice of Motion and Motion for Summary Judgment as to Defendants Elvira and Craig Chappelear pursuant to Rule 56, SCRPC. A hearing on the Motion was held on December 1, 2010, at the Anderson County Courthouse. Action Concrete Contractors, Inc. was represented by John T. Crawford, Esquire, and Elvira and Craig Chappelear were represented by D. Ryan McCabe, Jr., Esquire.

STATEMENT OF THE FACTS

This case arises out of the construction of a home in Anderson, South Carolina. On April 31, 2007 Defendants Elvira and Craig Chappelear ("Chappelears") and Defendant Premier Southern Homes, LLC ("Premier") entered into a contract for the construction of a model home ("Contract") on real property referred to as Lot 129 Tuscany ("Tuscany"). Premier was the general contractor for the home and thus responsible for construction and improvements on the property. The contract was for a \$300,000 lump sum. Defendant Henry G. Beal, the owner of Premier, planned to use the house to showcase his work.

On May 9, 2007, Premier entered into a sub-contract agreement with the Plaintiff, Action Concrete Contractors, Inc. ("Action Concrete"). Action Concrete was hired for the construction of certain improvements to the Tuscany property, particularly a retaining wall, the foundation and walls for the home. Action Concrete was to provide material and labor for the project on an actual cost basis based on unit prices provided in an estimate. Premier failed to pay Action Concrete the final balance of \$66,862.63.

On September 25, 2007, within 90 days of Action Concrete's last day of work, Action Concrete filed and served a notice of mechanics' lien and statement of account on Defendant Chappelears. This lien was recorded on September 27, 2007. Action Concrete filed a *lis pendens* and complaint to foreclose its mechanics' lien on December 27, 2007. On August 18, 2008, the Chappelears bonded off Action Concrete's lien in the sum of \$89,128.00 pursuant to S.C. Code Ann. § 29-5-110, securing a Release of Bond by Liberty Mutual Surety, filed for record on September 4, 2008.

As of September 27, 2007 the Chappelears had an outstanding balance of \$164,260.00 on their Contract with Premier. The Chappelears had paid Premier \$135,740.00 of the \$300,000 due under the contract.

The Chappelears did not make any payments to Premier after Action Concrete gave notice of its mechanics' lien. The last payment to Premier was on September 10, 2007. From the time the mechanics' lien was noticed, on September 27, 2007, to the actual firing of Premier, on May 2, 2008, the Chappelears paid \$118,931.83 directly to other contractors hired by Premier. The Chappelears considered these payments to reduce the balance they owed Premiere under the Contract.

At the point the Chappelears fired Premier, on May 2, 2007, the Chappelears had paid a total of \$254,671.83 for the construction of the house and it was approximately 68% complete.

SUMMARY JUDGEMENT STANDARD

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Legette v. Piggly Wiggly*, 368 S.C. 576, 629 S.E.2d 375 (Ct. App. 2006). *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment should be granted when plain, palpable and indisputable facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993). To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party. *Legette*, 368 S.C. at 579, 629 S.E.2d at 377, *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). If there is no relevant competent evidence reasonably tending to establish the material elements of Plaintiffs' case, a motion for nonsuit must be granted. *Bullard v. Erhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984).

In this case it is undisputed that at the time the Chappelears received notice of Action Concrete's lien they owed Premier \$164,260 under the Contract. Furthermore, it is uncontested that the Chappelears paid other sub-contractors at least \$118,931.83 after they received notice of Action Concrete's lien. The only issue left in this case is whether or not the Chappelears are entitled to set-off the damages they incurred when Premier breached the Contract in March of 2008 against the \$164,260 they owed Premier under the Contract at the time they received notice in September 2007. This is a matter of law.



DISCUSSION

Interpretation of the Mechanics' Liens Statute is at issue in this motion for summary judgment. S.C. Code Ann. §§ 29-5-10, *et seq.* (2010). This case specifically deals with Section 29-5-20, Section 29-5-40, Section 29-5-50, and Section 29-5-110.

The interpretation of a statute is a question of law for the court. *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct.App.2005); see also *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

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

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

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). If a statute's language is unambiguous

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

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc.*, 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct.App.2008). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007); *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a 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).

Section 29-5-20 provides for liens for subcontractors and others who do not have a direct contract with the owners of the property. The companion to Section 29-5-20 is Section 29-5-40.

Soudenmire Heating and Air Conditioning Company, Inc v. Craig Building Partnership, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992). Section 29-5-40 provides the notice requirements for the attachment of a lien under Section 29-5-20 and provides that the amount recoverable by lien holders cannot exceed the amount owed by the owners on the contract for the improvements. S.C. Code Ann. §§ 29-5-40 (2010). Our Courts have held that these two sections have the twofold "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." *Soudenmire*, 308 S.C. at 302, 417 S.E.2d at 637(citing, *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956)).

The language of 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 gives rise to 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. .

Thus, there are three basic issues in cases involving subcontractor liens. First, does the subcontractor have a right to the lien under Section 29-5-20; second, was the lien properly noticed to the owner based on the provisions of Section 29-5-40; and third, what is the owners' liability to the prime contractor at the time the owner receives notice of the lien because that amount is the limit for what the subcontractor can receive.

In this case the Chappellears maintain that they are entitled to a payment defense under S.C. Code Ann. § 29-5-40. The Chappellears argue that because the home would have cost more

to complete than the amount they owed Premier under the Contract at the time of notice they are entitled to offset the amount owed under the Contract, \$164,260, by the amount it would cost to finish the home, which they maintain was between \$290,000 and \$320,000.

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, supra*. The Chappellears cite these cases for the proposition that damages incurred by an owner due to the breach of a general contractor can be used to off-set the amount owed to the contractor and thus reduce the amount that a subcontractor may recover. The Chappellears reliance on these cases is misplaced. In both *Wood* and *Stoudenmire*, the breach by the general contractors occurred prior to the notice by the subcontractor. *Stoudenmire*, 308 S.C. at 303, 417 S.E. 2d at 637; *Wood*, 235 S.C. at 147, 110 S.E.2d. at 164. In the present case the Chappellears received notice of Action Concrete's lien prior to Premier's breach and ultimate discharge.

The 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 Chappelears.

By paying the other subcontractors directly instead of through Premier, the Chappelears 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.

The Chappelear's argument and course of action would vitiate this section 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 Chappelear'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. Chappelear made it clear that the payments to the subcontracts were in fact treated as payments to Premier.

Moreover, S.C. Code Ann. § 29-5-110 (2007) provides for the discharge of the property from the mechanics' lien when, as did the Chappelears did here, by filling a secured undertaking in an amount equal to one and one-third the amount claimed. This provision allows for the protection of both the lien holder and the owner and allows construction to continue on a project while the lien is resolved. If actions like those taken by the Chappelears are allowed, then, the provisions of Chapter 29, particularly Sections 29-5-50 and 29-5-110, would be meaningless.

CONCLUSIONS OF LAW

Based on the forgoing, it is the conclusion of the Court that the Chappelears are not entitled to set-off the damages they incurred when Premier breached the Contract in March of 2008 against the \$164,260 they owed Premier under the Contract at the time they received notice of Action Concrete's lien in September 2007.

Therefore, Action Concrete is entitled to be paid by the Chappelears for the work and improvements it completed to the property of the Chappelears. Action Concrete had a right to, and perfected, its lien on the subject property of the Chappelears, the place of which is now taken by that surety bond which is filed for record in Book 00037 at Page 00201, Records of Anderson County. Action Concrete has met the requirements of Title 29, Chapter 5, Mechanics' Liens, and has asserted and perfected its rights lawfully. *Cohen's Drywall v. Sea Spray Homes*, 374 S.C. 195, 648 S.E.2d 598 (2007). The Chappelears' attempt to circumvent both the rights of Action Concrete and the provisions of our Mechanics' Lien law with respect to those rights are to no avail.

JUDGMENT

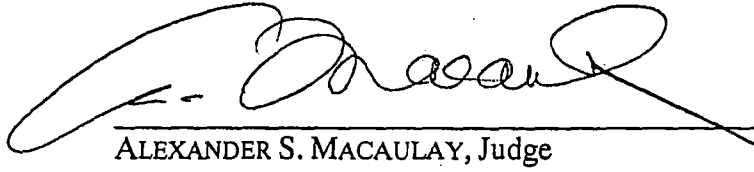
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff, Action Concrete Contractors, Inc., is entitled, as a matter of law, to a judgment against Elvira Chappelear and Craig Chappelear as follows:

- (1) In the amount of the unpaid balance, as of September 25, 2007, Sixty-Six Thousand Eight Hundred Sixty-Two Dollars and 63/100ths (\$66,862.63), of its mechanics' lien, together with
- (2) Interest thereon, according to law made and provided, and costs of the action and reasonable attorney's fee as provided by S.C. Code Ann § 29-5-20 (A).



AND, IT IS FURTHER ORDERED that this action is referred to the Master-in-Equity for the Tenth Judicial Circuit, pursuant Rule 53, SCRCP, to compute the total amounts due the Plaintiffs as the value of said mechanics' lien, including the costs and a reasonable attorney's fee, and to foreclose said lien pursuant to Rule 71, SCRCP.

AND IT IS SO ORDERED.


ALEXANDER S. MACAULAY, Judge

Signed this 21st day of April 2011
Anderson, South Carolina

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